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Outgoing Chair's Report

by Edward M. Joffe

Thank you for the opportunity to serve as your chair this past year. In August 1997, the section held a retreat at the Ritz Carlton in West Palm Beach. That Friday night we hosted a reception for the Board of Governors who were also attending a retreat at the same hotel. Over 80 people attended the reception. The following day Dr. Gayle Carson, nationally prominent motivational speaker, addressed us on successful time management. That afternoon an introductory program on the Internet was well received. At lunch, Dr. Robert Jarvis of Nova Law School spoke on Ethics in International Law. The following day we held a section business meeting.

The section sponsored a number of successful seminars this year and was honored to co-host several programs with the ABA in November. The following were our seminar activities:

1. Estate Planning for the International Client, October 9, 1997.
2. Considerations in Selecting Off Shore Jurisdictions (in conjunction with Joint Meeting of the ABA International Law & Practice Section, IABA and TFB International Law), November 13, 1997.
3. Helms Burton and Other Related Trade Issues in Cuba, (in conjunction with Joint Meeting of the ABA/IABA/TFB), November 13, 1997.
4. 10th Annual Legal Aspects of Doing Business in Latin America, February 5-6, 1998.
5. 19th Annual Immigration Law

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Changes Under the Immigration Reform Act of 1996

by Larry S. Rifkin, Esq.

Introduction

The Illegal Immigration Reform and Immigrant Responsibility Act, Division C of the Omnibus Appropriations Bill ("the Immigration Reform Act of 1996" or "the 1996 Act") signed into law by President William J. Clinton on September 30, 1996,[1] brought wide sweeping changes to our immigration system with particular emphasis on creating disadvantages to those who ignore the law. Many of the new provisions affect those individuals who violate their immigration status by staying longer than permitted or engaging in unauthorized employment, often with harsh consequences. This supplement will focus on those changes which will have the greatest impact on aliens seeking entry as both nonimmigrants and as immigrants to the United States. As of April 1, 1997, all of the provisions of the new legislation are in effect, however, the Immigration & Naturalization Service (INS) has published regulations

See "Reform Act," page 24

INSIDE:

Terrific Tantalizing "Titanic" Tour Triumphs!!

by Drucilla E. Bell

"Cruising on Titanic on a freezing Sunday night.
The watch was in the cold crow's nest; no iceberg was in sight.
Below the Band was playing. Ships' lights were burning bright.
Cruising toward that iceberg on a freezing Sunday night.....

(Sung to the tune of "Sailing Down the River" — by Captain Edward Fink, US Navy Ret.)

The Travel Law Committee of the International Law Section has enjoyed another success with the transatlantic Titanic CLE cruise that also included visiting legal centers and seeing the sights of St. Martin, Madeira (Portugal), Malaga (Spain), Marseilles (France), and the French Riviera.

After leaving the port of Miami, a sea-day started the courses with introductions of faculty and staff to our thirty-some participants. The courses offered were "Travel Law for Travel Agents" (and attorneys) in the mornings and CLE ala "Memories of the Titanic" in the afternoons. The faculty for the trip consisted of Drucilla E. Bell, Captain Ed Fink and Laurence Gore, the organizer and creator of this imaginative adventure, for Seminars at Sea Travel. Presentations in the Travel Law field related to How a Travel Agent can Limit Liability , What to do when You get Sued, Health and International Considerations, Negotiating Sales Contracts - a guidebook for the travel agent in their legal minefield. The Continuing Legal Education portion was geared to the Titanic disaster of 1912: Changes in the Contract of Passage; Admiralty changes, the Ice Patrol and Saving of Lives at Sea Act that came out of the disaster (totally new concept of a "seat in a lifeboat for every passenger"!); Immigration Changes over the years entitled Steerage to Peerage; Suits, Claims and Investigations on Both Sides of the Ocean; and the most intriguing part of the presentations: The Conspiracy Theory - was it really the Titanic that sank? Why did J. P. Morgan and 55 of his best friends all of whom had booked passage on the Titanic cancel at the last minute? Morgan had the most spacious and luxurious "Owner's Cabin" ever in history, but canceled due to illness, and was discovered with his mistress a few days later - paintings he had planned to ship on the Titanic were not "packaged" in time for the leaving of the Titanic.

The SS Norway was built for Transatlantic crossings in 1960 as the SS France, one of the few ships not built solely for profit but as a showcase of French national pride. In the early 1970's with the fuel shortage and the prevalence of flights across the Atlantic, she was retired from service. In the early 1970's she was purchased by Norwegian Caribbean Lines and cruised the Caribbean, not returning to her home port until 1986, as the SS Norway. She was purchased at a cost of $18,000,000. After 5 years and $ 150,000,000 in construction and refurbishment, she crossed the ocean again. When she arrived in LeHavre in 1997, there were 100,000 people there to greet "their" SS France. Since that time she has cruised the Mediterranean in the summer and the Caribbean in the winter. She crosses beautifully, causing just a hint of the sea with her soft rolls.

For entertainment, there was the Jimmy Dorsey orchestra, a wonderful string quartet, a jazz band, Broadway shows, and even Edwin Neumann speaking on the use and misuse of English and whether the Media can be trusted. On the pool aft deck, there was a Caribbean Reggae band playing most afternoons. There were also theme nights with Italian food and Italian singing by the waiters, Caribbean night, Western night and each with the respective theme for the Midnight buffet. There were also currently released movies on the television, where you could also see tapes of Mr. Neuman's talks, shore trip guides and of course, shopping advice.

We stopped after the first sea-day at St. Martin's for swimming, snorkeling, shopping - but there was a postal strike so we couldn't mail any post cards from there. Then it was six days at sea, marked by setting your clocks ahead an hour each night. During this time, we had a couple of hours of class every morning and afternoon. Captain Fink had searched the Internet for everything he could find about the Titanic. Joe and I would almost always attend breakfast in the dining room and the midnight buffet, where there was open seating so we always met new people. When we told them about the seminars, especially the Titanic, they often asked to sit in on a session - a few attended the rest of the seminar even though they missed the first one or two.

On Saturday evening, we had a sample meal of the kind served aboard the Titanic - and of course, a

Titanic Party! At this function, participants were asked questions about the Titanic, myth or fact? We heard music from the SS Titanic, some wore costumes like the Titanic passengers would have worn (see photos) and then sang Captain Fink's tribute to the Titanic, an excerpt of which appears at the beginning of this article. With champagne as prizes for the contest, everyone had a glorious time.

After crossing the Atlantic, we toured the Island of Madeira which is part of Portugal. This is where Madeira wine comes from; Madeira means "wood" so the woody taste of the wine should be no surprise. In early times, the grapes were brought down the mountains in wicker baskets, slid down paths to the winery where the grapes were fermented into wine. These wicker baskets on runners are now used as bobsleds to ride the tourists down the hill, on a paved road, between walls around houses and gardens, guided by two fellows in straw hats guiding it with ropes. We then landed on Malaga (Spain) after crossing through the Straits of Gibraltar and seeing the silhouette of the Prudential Logo in the distance at 3:30 am (Rock of Gibraltar). Malaga is a beautiful woodsy terrain with Moorish forts and beautiful cathedrals. We also saw Toromolinos, a beautiful Mediterranean beach, with all that implies.

Disembarkation took place in Marseilles, France where the legal contingent was taken directly to the Headquarters of the Chamber of Commerce and Industry and hosted by the President. There we were shown audio visuals of the economic development and accomplishments of Marseille, the oldest city in France. At the City Hall, a wonderful reception with champagne, caviar, finger sandwiches, and fruit was served and Larry Gore, representing Fort Lauderdale, exchanged gifts with the Deputy Mayor of Marseille (developing a sister-city relationship). The Marseille Bar Association also greeted us and officially invited the Florida Bar to the opening of the French Bar next year, which is a ceremony of much pomp and circumstance. We then went to the balcony of City Hall and had a beautiful view of the Marseille harbor and the city scape. We proceeded to tour the French Riviera where some of the group stayed in Nice and the rest went on to Monaco, to try their hand in the casino in Monte Carlo.

Having enjoyed such a delightful trip and learning so much about law at the time of the Titanic, Seminars at Sea will be offering The Conspiracy Theory portion of this cruise with a costume dinner on shorter cruises: October 25 in the Western Carribean; December 6 in the Eastern Carribean; December 13 in the Western Carribean; December 6 in the Southern Caribbean; June 29 in Alaska; and New Year's Eve in the Caribbean. With so many questions left unanswered, there is an Encore cruise planned when the SS Norway returns from Barcelona on October 10, with even more information on the Titanic, questions, issues and ideas on its untimely demise in 1912. Prior to leaving on the transatlantic cruise, we will also be meeting and greeting the Barcelona Bar, with whom the Florida Bar International Law Section already has a signed agreement of participation and cooperation. There will also be a July 8 cruise covering the Shipyard in Ireland where the Titanic was built, and other historic Titanic sites. Contact Seminars at Sea at (800) 491-3567 or check the web site at *http://www.Seminarsatsea.com*.

Drucilla E. Bell *is a sole practitioner in Clearwater and Seminole, Florida, who emphasizes international law and business, immigration and travel law in her practice. In addition to having taught Comparative Legal Systems in Estonia in the first semester of a new private law school in the fall of 1996, she has also worked with various foreign groups and individuals on immigration and other legal problems and represents many foreign nationals in their quest for business immigration visas, and in the development of successful businesses in the United States. Her activities in the Florida Bar have included being past Chair of the Administrative Law Section, serving on the Foreign Legal Consultants Committee, being Vice Chair of the Travel Law Committee, being chair of the 1998 June Seminar and in 1998-*

International Law Section, American Bar Association, New York, April 29 - May 2, 1998

Choice of Law and Forum: Swift Justice in England Including Pre-Judgment Tactics & Relief and Enforcement throughout Europe

by George C. J. Moore

Attorney (Florida) and Barrister (England & Wales)

Introduction

"Justice delayed," is more than ever, "justice denied." Less tolerant than ever is today's business world of instantaneous communications and multi-million dollar transactions. Increasingly, there is zero business tolerance for slow-grinding justice and its systemically-flawed delivery of long-delayed relief and unnecessarily exacerbated damages. At the same time there is no abatement of the real world's need for swift, reliable, cost-efficient justice to give effect to business agreements. But where, if anywhere, is this to be found? Is this not an ever more elusive quest?

Well, sadly it is, except in a few arenas of the globe where the rule of law and common sense remain doggedly at work, countenancing little of the nonsense and dilatory tactics which law in action and litigators on the rampage all too often dump onto the real world's bottom line.

England is such a place, one of the world's steadfast providers of prompt, reliable, cost-efficient justice. And, drawn to this exceptional service, come a stream of adherents — such that in more than half of all suits brought before England's highly esteemed Commercial Court all parties are foreign. Knowledge of swift justice in England has brought them there, thousands of foreign business persons who have deliberately chosen both a foreign law and a foreign court — English law and the English Court — to uphold and address their international contracts.

And so it is that English law is the world's predominant, preeminent choice of law and choice of forum, rivaled only by New York, the jurisdiction which hosts this American Bar Association meeting today.

What, then, accounts for this paramount position of English law and the English forum? What does closer examination reveal of its workings and its enduringly steadfast attractiveness? Is it more than the history and allure of London? For sure. This paper aims to explain why this attraction is well-founded, addressing the following points of inquiry:

1. Why English Law is the preferred choice of law in international contracts.

2. Why the English Court is the preferred forum for international litigation.

3. Why justice is swift and predictable in England, including limited discovery, trials without jury, limitations on damages, the English rule on costs and fees, and constraints on trial publicity.

4. Special prejudgment tactics and relief under English Law: Mareva injunctions and Anton Pillar orders, and

5. Enforcement of English Court judgments in England and throughout the European Union.

1. Why English Law is the preferred choice of law in international contracts.

At least three reasons account for English law's being the preferred choice of law in international contracts: (A) Certainty that the choice of English law will itself be upheld in England, (B) Flexibility under English law in selection of contract structure and terms and certainty that English law will uphold whatever terms are agreed, and (C) Predictability of the outcome in the event of breach.

(A) Certainty that the choice of English Law will itself be upheld in England.

Unlike the contract laws of many U.S. states, English law does not require that the law chosen by the parties to govern a contract have any connection or association with the parties, the performance, or any other aspect of the contract. For nearly a century and a half, English law has left no doubt that it is the intent of the parties which dictates in contract and that an express selection of governing law will be upheld. This is true whatever the system chosen, even in the total absence of any connection or association between England and the contract short, of course, of furthering an illicit scheme.

Such freedom of choice extends to the law governing formal and material validity, interpretation, performance, extinguishment, and remedies. Selection of different systems of law to apply to various aspects of a contract will also be upheld in England.

In like manner, the European Union's Rome Convention, which determines the "applicable law" for contracts entering into force after April 1, 1991, accords primacy to the parties' intentions and, above all, to express choice of governing law. Implemented in England by The Contracts (Applicable Law) Act 1990, the principles of the Rome Convention and English common law do not differ in any fundamental way — only the nomenclature is changed, with the "proper law" under English common law becoming the "applicable law" under the Rome Convention and the corresponding provisions of the U.K. Act.

Articles 3(1) and 4(1) of the Act contain the basic rules for ascertain-

ment of the applicable law. Article 3(1) treats an express choice of law as conclusive and provides that a contract "shall be governed by the law chosen by the parties." The Convention takes the approach of English common law and expressly rejected notions advanced by writers that the principle of the parties' autonomy is limited by a doctrine forbidding parties to avoid the application of the rules of a system of law which they do not like by resorting to and selecting another system. Article 3(3) also confirms that the chosen law need have no connection with the contract.

Thus, in England, under both common law and the terms of the Rome Convention, as adopted in England and throughout the European Union, express choice of law to govern a contract is upheld as sacred and enforceable. In short, express choice of law is, in England, ironclad and inviolable.

(B) Flexibility under English law in selection of contract structure and terms and certainty that English law will uphold whatever terms are agreed

Freedom to choose the governing law is but one aspect of the primacy of freedom inherent throughout the *laissez faire* policy of English contract law. The priority attached to freedom of contract conveys great latitude for parties to customize a commercial agreement with virtually no formal or material prerequisites, short of bare embodiment of an offer, acceptance, and consideration. The parties are afforded maximum flexibility and unconstrained capacity to structure an agreement and construct its terms to suit their unique purposes and designs.

Under English law, formal requisites are absolutely minimal. So, too, are material requisites. Legislated requirements are virtually non-existent, whether express or implied. In the absence of dictates and stringent demands, the parties have maximum flexibility to craft an innovative exchange of bargains with full confidence that no court in England will, in retrospect, rewrite, recast, blueline, amend or otherwise emasculate the terms of the agreement. This makes English law a good friend to creative entrepreneurship and a trusted ally of bread-and-butter business which also likes the what you agree to is what you get approach of English contract law.

As described at an ABA seminar last year by Richard Field, whose presentation was a source of inspiration for the present panel, "The standard applied [in England] to attempts to imply contractual terms is a harsh one depending upon necessity to give business efficacy to the transaction. Reasonableness is not regarded as an appropriate standard to imply terms into a contractual bargain. The courts do not countenance the re-writing of contracts by the implication of terms designed by one party which the benefit of hindsight."

There is no counterpart, for example, in English law to the United States U.C.C. requirement, contained in section 1-203 and infused thereby throughout contractual relations, that obliges parties to duties of good faith in performance of all contractual obligations. Nor, to cite another example, is there any equivalent in English law to the U.S. "doctrine of validation" which comes to the rescue of usurious loan agreements, transplanting them from oblivion under the parties' chosen law into safe harbor under another system which is invoked and applied to uphold and enforce an otherwise void transaction.

The vast scope for creative contracting under English law is well evident in relation to international financial transactions which are very liberally facilitated by English laws governing security arrangements, trust mechanisms, assignments, debt transfers, set-offs, and liquidation schemes.

Underling this liberality, which permeates the spirit and much of the letter of English commercial law, is English understatement, a low key approach to control. Indeed, this often amounts to self-regulation, as contrasted to what many would describe in the U.S. as heavy-handed government regulation. In essence, the English tradition is to rely upon gentlemanly regulation by consensus and self-observance of informal but well-understood rules of the game.

In English law the primacy of freedom and the unconstrained flexibility of the parties to prescribe their own contractual terms and conditions carries a concomitant risk that anything that is overlooked or ignored may well come back to haunt. Thus, we have the notorious by-product of freedom in English contract law — the throw in everything including the Kitchen sink approach. Brevity goes out the window, contracts are long, and almost nothing, if that, is left to chance.

C. Predictability of the outcome in the event of breach

The final reason why English law is the preferred choice of law for international contracts lies is its practical efficacy when, in instances of breach, certainty of choice of law rolls into certainty and predictability of outcome, as recalcitrant parties wind up as defendants and are forced to face and meet their obligations. This is the true test of judicial efficacy. The courts of England are known worldwide for their efficiency in delivering prompt, predictable, cost-effective justice. We now turn to the second point of inquiry: Why the English Court is the preferred forum for international litigation.

2. Why the English Court is the preferred forum for international litigation.

With freedom comes responsibility. The primacy of freedom to contract under English law has its flipside, which is certainty in enforcement of obligation. Not without pain go those in England who indulge their whims in negotiating and thereafter neglect or default on their contractual obligations. English law is, first and foremost, business law.

With public policy strongly devoted to freedom of contract came an unwavering commitment on the part of the English Court to corresponding responsibility and the importance of upholding bargains freely entered into. To be sure, therefore, contracts are binding. Agreements are strictly enforced. Debts are to be paid. Forgiveness and grace cannot be presumed. True, penalties and unconscionable terms are not countenanced and all contracts are subject to equity, but business be done, pay as you go, and pay if you lose, including interest and payment of the victor's attorney fee — in accordance with "the English rule." Such is the historical approach of the

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English forum in addressing contractual irresponsibility or deviation. Not just buyer, but all parties, beware. And so it is still today. No nonsense, prompt, predictable, efficient justice.

For these reasons, the court of England is the preferred forum for international litigation, and this is why, in addition to providing for English law to govern the contract, many contracts also provide that the English Court shall have jurisdiction.

The Commercial Court

The specific magnet which accounts for the English Court's popularity as the preferred forum for international business disputes is the Commercial Court. Actually a separate list kept in London, Liverpool and Manchester to hear commercial actions, the Commercial Court is a sub-division of the Queen's Bench Division of the High Court. Founded in 1895 to specialize in commercial cases, the Commercial Court has a distinguished reputation for expertise and objectivity.

The Commercial Court's jurisdiction is defined by Order 72 of the Rules of the Supreme Court to include "any cause arising out of the ordinary transactions of merchants and traders . . ., the export or import of merchandise, affreightment, insurance, banking, mercantile agency and mercantile usage."

The judges of the Commercial Court are nominated by the Lord Chancellor from the judges of the Queen's Bench Division who have special experience in commercial matters. Prior to appointment as judges of the Queen's Bench Division and then subsequently as judges of the Commercial Court, they invariably ranked among the most distinguished barristers in commercial practice.

Except by consent, the powers of Commercial Court judges are no greater than those of any other judge. However, the procedure in the Court is more flexible than the normal procedure, and control over Commercial Court litigation clearly rests with the judge, not the parties. Moreover, the judges, who act singly, regard it as their duty to be available at short notice at any stage of an action on the initiative of either party, so that disputes before the Commercial Court are dealt with as quickly as possible.

Pleadings in the Commercial Court are in the form of points of claim and must be as brief as possible. Applications for particulars are not allowed unless deemed essential. By consent the strict rules of evidence are relaxed. Thus evidence is admitted which would generally be excluded, and the calling of live witnesses is often waived in favor of deciding cases on documentary evidence alone.

The Commercial Court's reputation for expertise and efficiency is further enhanced by the sophistication of London's specialist barristers, solicitors and expert witnesses whose work, focusing on commercial transactions and disputes, contributes to early identification of issues, rapid elimination of speculative cases, and quick trial, even in complex, multiparty litigation.

The Court is far more than a national or domestic court; it is an international commercial court the overwhelming majority of whose judgments are directed to foreign parties. The Court's popularity and expertise are evident in the numbers: three-quarters of all Commercial cases have either a foreign plaintiff or defendant, and over half of its cases consist of entirely foreign parties.

Invoking the jurisdiction of the Commercial Court is achieved by issuance in London, Liverpool or Manchester of a summons which is marked at the top with the words, "Commercial Court," and upon issue of the summons so marked, the action is entered immediately in the commercial list. Actions may also be transferred to the Commercial Court apart from this procedure and, indeed, actions commenced in the Commercial Court may be removed from the list. Any party who seeks the removal of an action from the Commer-

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Chair's Report

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Update, February 19-21, 1998.

Between October 22-25, 1998, the New York State Bar Association is meeting at the Biltmore Hotel in Miami. Our Section contemplates joining by participating in the CLE and social programs.

The most significant event on the horizon for the section is the enactment of a certification program for international lawyers. The section anticipates providing CLE for our members to permit them to qualify for this certification.

The International Law Certification Committee initially met on March 21, 1998, in West Palm Beach and has concentrated on preparing the application for certification. We anticipate the application being available for distribution between July 1st and August 31, 1998.

Certification requires an applicant to be: a member in good standing of a bar for no less than 5 years at the time of the application; demonstrate substantial involvement in the practice of International Law during the 3 years preceeding the application; as well as at least 75 hours of CLE for the same period, peer review; and obtaining a passing grade on the examination.

Because the 75 hour CLE requirement pre-requisite for this next year may have been unanticipated, we will permit applicants to submit their CLE qualifications on or before March 1, 1999. In addition to the regular course work, lecturing, teaching or attending a university course; writing; and individual study can qualify for CLE credits.

Applicants will be approved to sit for the examination by late fall. The International Law Section contemplates preparing a certification review course in February, 1999. The examination will be given in March, 1999.

Those who successfully pass the exam will be certified effective July 1, 1999. Certification is effective for five years. At that time, re-certification will require demonstration of substantial involvement, completion of the CLE requirement and peer review.

cial Court, when it has been set down in that list, must apply within seven days of giving notice of intention to defend.

Finally, it should be noted that special Mercantile Courts have been created in both the Midlands and the South-West of England to deal with commercial cases. These amount to new Queen's Bench lists in the district registries concerned and have the capacity to deal with a wide variety of commercial cases. Cases follow the rules of court relating to commercial practice before the Commercial Court.

3. Why justice is swift and predictable in England, including limited discovery, trials without jury, limitations on damages, the English rule on costs and fees, and constraints on trial publicity.

This section discusses long arm jurisdiction and service outside the U.K., limited discovery, summons for directions, trials without jury, limitations on damages and permissible claims, the English rule on costs and fees, and constraints on trial publicity.

Long arm jurisdiction and service outside the U.K.

No leave of court is required in respect of claims to which the Civil Jurisdiction and Judgments Act 1982 applies. This Act applies to proceedings against persons domiciled in the European Union under the Brussels Convention which requires that such actions be commenced in the courts of the defendant's domicile.To this general rule, there are exceptions, among which are two important ones relating to proceedings in contract. Suits in contract may be brought in a jurisdiction other than that of the defendant's domicile when (a) the parties have agreed in a contract in writing that the contract shall be subject to the jurisdiction of a specific court, such as the English Court, or (b) the performance of the contract is to occur in a different jurisdiction, such as in England. In other cases, leave of the court is required for service outside the jurisdiction. Leave is discretionary and requires a showing of "a good arguable case", which connotes actionability under English law and a good chance of succeeding, that is, more than a mere *prima facie* case.

With respect to contracts, the plaintiff seeking leave for service outside the jurisdiction must show a strong probability that at least one of the heads under Order 11, Rule 1(1) is satisfied. These include (a) a contract made within the U.K., (b) a contract made by an agent trading or residing within the U.K., (c) a contract which "is by its terms or implication to be governed by English law," (d) a contract which "contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action in respect of the contract," and (e) where the claim is brought in respect of a breach committed within the jurisdiction — irrespective of where the contract was made and irrespective of whether the breach within England was preceded or accompanied by a breach committed elsewhere.

Conveniently, it is for English law to determine whether English law is the agreed or proper law of the contract, whether the parties agreed to jurisdiction of the English Court, or the whereabouts of any alleged breach. Express choice of English law may itself be deemed sufficient to ground the jurisdiction of the English Court.

Forum shopping is highly unpopular with English judges, particularly where the parties have previously agreed to English jurisdiction, and parties who initiate or threaten proceedings elsewhere will very likely be enjoined.

Limited Discovery

There are enormous differences between American and English practices in relation to discovery. There is no counterpart to the U.S. deposition in England, certainly not the 'fishing-expedition' type of deposing which is aimed at developing further causes of action or turning up anything remotely relevant. In fact, in the late 1970's the British Parliament enacted the Protection of Trading Interests Act to block American litigators from deposing company officials in Britain, a practice sharply condemned as another form of United States extra-territoriality.

In England, discovery relates essentially to documents and to controlled use of interrogatories.

Another major difference is that in conducting discovery in England, each party impliedly undertakes not to use the documents which are disclosed for any ulterior or improper purpose. The use of such documents in breach of that implied undertaking will amount to a contempt of court. Thus in one case a solicitor who passed documents to a journalist to assist in the preparation of an article was held to be in contempt, even though the documents had been read in open court. Nor can a party generally rely upon such documents in other proceedings — only if such document has previously been read or referred to in open court. If there is a real risk of the plaintiff using documents for an improper collateral purpose, the court may restrict inspection, for example, to a party's counsel.

Under the Rules, discovery may take place in two ways, without order and by order. Since 1962, with the introduction of "automatic" discovery, parties must make discovery by exchanging lists within 14 days of the close of pleadings. The lists include relevant documents which the party has in his possession, custody or power and which he does not object to produce; relevant documents as above which he objects to produce; and relevant documents which previously were in the party's possession, custody or power. A party must also serve a notice of a place and time within seven days for inspection of the documents in the list, other than those which he objects to produce. The chief ground for objecting is privilege, which is very narrowly construed.

There are two important circumstances when discovery by order is required. The first is where the action is one to which the rule requiring automatic discovery is not applicable or where a party has failed to comply with that rule. In such a case there must be an application for an order for discovery of all relevant documents, if discovery is required. The second case arises where a party is dissatisfied with his opponent's list. He may then apply for discovery of particular documents.

A party who is served with a list of documents may believe that relevant documents which the maker of the list has, or has had, in his posses-

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sion are not included in his list. This may be due to a *bona fide* belief on the maker's part, that the document in question is not relevant to the action or to an omission, accidental or deliberate. In either case application may be made for an order for discovery of the documents in question. This application must be accompanied by an affidavit setting out the grounds for the deponent's belief and identifying the documents of which discovery is required. If the other party admits the existence of the documents in question but denies their relevance, the master assigned to the case may inspect them in order to decide whether they are in fact relevant. In addition, that party may be required to make an affidavit stating whether or not any particular document is, or has at any time been, in his possession, custody or power and, if it no longer is, what has become of it.

Another major difference between U.S. and English practice is that discovery and inspection against third parties is almost non-existent. There is, as a rule, no procedure for obtaining discovery against persons who are not parties to an action. They can, of course, be compelled to attend the trial and to produce at that stage documents in their possession by means of *subpoena duces tecum*. But there is a rule, sometimes known as the "mere witness" rule, whereby discovery cannot be obtained against a person against whom no relief is sought but who might be a witness in an action.

Interrogatories

Interrogatories are questions put to an opposing party for answer on oath in writing. They may relate to any matter relevant to the action. Broadly speaking, any question which could be asked of a witness at the trial may be asked of the opposing party in the form of an interrogatory, with the notable exception of questions as to the witness's credit or credibility. Interrogatories are usually aimed at discovering the facts and they cannot extend to asking a party to disclose his means of proof or to name his witnesses.

A party has an automatic right to serve interrogatories. Rules introduced in 1990 provide for service of interrogatories without order, and the party on whom they are served is obliged either to answer them or apply to the court for them to be varied or disallowed. "Fishing" to discover a fresh cause of action or defense is not permitted, nor are the interrogatories allowed if they are in any way oppressive or put an undue burden on the person being interrogated. Questions put, not for purposes of the present action, but with a view to future litigation, will also be disallowed.

If a party's answers are evasive or ambiguous, he may be ordered to make a further answer either on affidavit or by oral examination.

Summons for Directions

The intent of the Summons for Directions, which occurs after the close of pleadings and before the action is set down for trial, is to provide a thorough stocktaking of the action, with the court reviewing trial preparations, giving directions for any further preparations and directions on evidential matters and on the time, place and mode of trial. Other potential subjects include directions limiting the areas of dispute or number of expert witnesses, admission of evidence by affidavit, whether or not the parties have made all reasonable agreements and admissions and the recording of additional agreements so made — or recordal of refusal with a view toward subsequent award of costs and fees. Also, the court may consider consolidation of actions or trying certain issues before others, possibly resulting in a split trial, an increasingly frequent occurrence because of the enormous savings in costs which often results.

Trials without Jury

A huge contrast with American, including New York jurisprudence, is that, in trial of commercial matters in England, there are no juries. During the past century, jury trial in civil cases has virtually been superseded by trial by judge alone, the principal notable exception being trials for defamation. As a result, legal argument is far more refined and there is no pressure on the parties or the court to reduce complex cases down to a few simple issues or themes.

Limitations on Damages and Permissible Claims

A further consequence of non-jury trial of commercial, and indeed virtually all civil matters in England, is far greater predictability of award and level of damages, and a general non-predisposition to "deep pocket liability." This, within an overall culture of constrained litigiousness combined with the small size and familiarity of the commercial bar, results in an altogether different legal atmosphere which puts all parties at a greater advantage in evaluating the actual prospects of any proposed or pending action.

In England, there is usually no recovery for loss arising from adverse market movement and, quite different from U.S. practice, punitive damages have no place in English commercial law. Assessment of damages by judges acting alone without a jury makes for far more reliable, predictable and proportionate remedies — altogether a stark contrast to the relatively free-wheeling atmosphere and results which are obtained on this side of the Atlantic. Furthermore, there is no counterpart in the U.K. to the U.S. practices of triple damages or class actions.

The English Rule on Costs and Fees

In England, under the well-known "English rule," costs follow the event. The loser pays not only the victor's court costs but attorney fees as well. There are limits to this, of course, as where a party has conducted the litigation dishonestly or recovered only a small part of the claim. In an extreme case, a successful plaintiff may have to pay the costs of the defendant, and there is jurisdiction to order a successful defendant to pay the plaintiff's attorney fees but this would occur in only the most exceptional of circumstances. Ultimately, the award of "costs," which is defined in England to include attorney fees, is within the discretion of the court. The discretion is not absolute, but subject to certain statutory and practical limitations, including "reason and justice", especially in the case of multi-party litigation.

In like manner, costs may be awarded as to various stages in interlocutory proceedings, and both parties have the option during the course of litigation to make payment into court with the result that if the successful plaintiff recovers no more

than the amount paid in, he will be ordered to pay the defendant's costs of those causes of action from the date of the payment in.

Costs are assessed or "taxed" by the court and in the usual course of events, even a litigant who is completely successful will often have to pay some costs himself.

Contingency fees remain proscribed in England as unlawful on the grounds of public policy, it being considered inappropriate that an advocate should have a stake in the outcome of the case. Nevertheless, "conditional fees" are in the process of being approved. A White Paper published by the government in 1989 suggested concession in relation to cases where difficulties in financing litigation did exist, and a 1990 amendment to the Solicitors Act 1974 authorized the introduction of conditional fee agreements in circumstances prescribed by the Lord Chancellor. The effect of the Act is that a fee may be increased by a specified percentage, in accordance with regulations to be made by the Lord Chancellor, provided that is specified in the fee agreement. The percentage increase cannot be recovered under an order of costs against an unsuccessful party. The use of such agreements has yet to be authorized by the Lord Chancellor, but it is likely to involve some personal injury cases and, possibly, actions in defamation for which legal aid is not available. Such agreements will not be available for criminal cases and there appears to be no prospect for their application in commercial litigation.

Constraints on Trial Publicity

Another element of predictability in trials in England is absence of lawyer press-baiting. A barrister must not comment to or in any news or current affairs media concerning the facts or issues arising in a particular case.

4. Special Prejudgment Tactics and Relief under English Law: *Mareva* Injunctions and *Anton Pillar* Orders.

The English court is empowered with an array of interlocutory injunctive remedies to preserve endangered assets and evidence, including *Mareva* injunctions and *Anton Pillar* orders. The court may grant an injunction to restrain a party from moving assets overseas, or otherwise dealing with assets located in England, whether or not that party is domiciled or present there. The injunction can restrain a defendant from improperly disposing of assets, or concealing or moving them abroad, thereby making himself "judgment proof" and stultifying an action brought against him.

In many cases the grant or refusal or discharge of a *Mareva* injunction is determinative of the action. If the injunction is refused, or granted but later discharged, a plaintiff may perceive little point in continuing with the litigation. If the injunction is granted, and survives an *inter partes* hearing, the defendant may well concede defeat. The paralyzing effect the injunction has on business and the injury to its reputation may render futile any further opposition to the plaintiff's claim.

A *Mareva* injunction can be granted: (a) pre-trial or post-trial; (b) against any defendant whether foreign-based or English-based; and (c) in respect of assets in this country or, if English assets are insufficient to cover the claim, in other countries.

The application must be made to a judge and is usually made *ex parte*, possibly even before the action has commenced. If the defendant is domiciled in the U.K., or in another member state of the European Union, service overseas can be effected without leave of court. Otherwise, leave is necessary under Order 11, rule 1(2) of the Rules of the Supreme Court. In applying, there are in essence only three issues:

(a) whether the plaintiff has a good arguable case; (b) whether the plaintiff can adduce sufficient evidence as to the existence and location of assets which the injunction would affect; and (c) whether there is a real risk that the defendant may deal with those assets so as to render nugatory any judgment which the plaintiff may obtain.

The injunction can be extended to cover bank accounts standing in the name of another person, such as the defendant's spouse, if there is evidence that the money in the account belongs to the defendant. If the defendant is the majority shareholder of a company which has substantial assets, the injunction can also be made against that company, which should be added as a co-defendant in the action.

As to (c), a risk of dissipation may be shown in a variety of different ways, such as evidence of dishonest behavior by the defendant, unreliability in the past, evasiveness in the subject proceedings, such as a willingness to retract admissions and/or rely upon implausible defenses, statements of intent by the defendant, a lack of any established business reputation or possession of a poor reputation, a propensity to change domicile or move assets regularly or at short notice, having only weak or non-existent links with the U.K. except for assets invested there, or being based in a country in which it is difficult to enforce English judgments.

The plaintiff's undertakings will include, among others, undertaking as to damages and indemnification of any person upon whom notice of the order is served in respect of any expenses and liabilities incurred in

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Articles between 10 and 20 pages involving the various disciplines affecting international trade and commerce may be submitted on computer disk with accompanying hard copy, or on typewritten, double-spaced 8 1/2x11" paper (with the use of endnotes, rather than footnotes.) Please contact Jeremy Page if you have questions concerning the newsletter.

complying with the order.

The provisos and limitations of the injunction will allow the defendant to draw reasonable living expenses and to pay debts in the ordinary course of business. They will give the defendant, and anyone else affected by the order, liberty to apply to set aside or vary the order, or to seek further directions.

A worldwide *Mareva* injunction in standard form expressly states the extent to which the order operates unless and until it is recognized by the courts of the overseas country in question. The worldwide *Mareva* injunction is now available in aid of substantive proceedings of all types in other states, in accordance with the Civil Jurisdiction and Judgments Act (Interim Relief) Order 1997.

The *Mareva* injunction may also include various orders for discovery, as described under *Anton Pillar* orders below.

Anton Piller *orders*

These are orders compelling defendants to permit the plaintiff's agents to enter the defendant's premises, search for and, in most cases, seize certain documents or property. The order is a special form of mandatory injunction. It does not amount to a search warrant and therefore no forcible entry of premises can be made. However, a defendant who fails to comply with the order can be committed for contempt.

Orders in this form are uniquely British; they are unknown in the rest of Europe and in the U.S. The Civil Procedure Act 1997 places the courts' jurisdiction to make these orders on a statutory footing.

In practice, *Anton Piller* orders are most commonly sought against infringers of copyright, patents, trade marks and the like. An *Anton Piller* order in standard form requires the defendant to disclose immediately, and later verity by affidavit, the whereabouts of any infringing articles and the names and addresses of any persons known to be involved in the alleged wrongdoing.

Mareva *injunctions and* Anton Piller *orders in aid of discovery*

Mareva injunctions and *Anton Piller* orders often include a variety of discovery orders, such as to nature, location and value of assets wherever situated, details of bank and other accounts, nature and extent of shareholdings in specified companies, names and addresses of other alleged wrongdoers, the precise whereabouts of any document relating to transactions in respect of which the plaintiff claims, and orders to deliver up any documents such as share certificates, books of account, bank statements, etc. In several cases injunctions were granted restraining a defendant from leaving the country and requiring him to deliver up his passports, the modern equivalent of the ancient writ of *ne exeat regno*.

5. Enforcement of English Court Judgments in England.

The judgment creditor's rights in respect of which he brought the action are extinguished by the judgment. In their place he has a judgment debt which may consist of an award of damages and taxed costs, in addition to which may be included interest at a statutory rate from the date of judgment. The judgment creditor may proceed to enforce the judgment by any of the following methods prescribed by Order 45, rule 1:

(a) writ of *fieri facias*
(b) garnishee proceedings
(c) a charging order
(d) the appointment of a receiver
(e) writ of sequestration.

Writ of *fieri facias (fi-fa)* — This is directed to the sheriff of the county where property to be seized is located. Where the debtor has property in more than one county, concurrent writs may be issued. The writ commands the sheriff to cause to be made (*fieri facias*) a sum sufficient to satisfy the judgment debt and interest together with the costs of execution. The sheriff may enter the judgment debtor's land or the land of a third party if the debtor's goods are there. He may seize and sell property of all types, except that which is exempt from execution. Exempt property comprises freehold interests in land, equitable interests in land, fixtures attached to land, chattels, wearing apparel, bedding and "tools and implements of trade."

A writ of execution may be issued within the six years following the judgment or order, or later with leave, and may be executed within twelve months of issue. The sheriff arranges for sale of the property seized in execution, normally by public auction.

Garnishee proceedings — These proceedings enable the creditor to have assigned the benefit of any debt owed by a third party. The most common object of garnishee proceedings is the judgment debtor's bank account. Future earnings cannot be garnished.

Charging order — The judgment creditor may apply *ex parte* for an order imposing a charge or lien on certain property, including any interest held by the debtor in land, securities of various kinds, funds on deposit in court, and any interest under a trust. If the charge is registered, a purchaser takes the land subject to the charge. Registration amounts to notice and priority is obtained over subsequent chargees. A land charge may be enforced by an order for sale in the Chancery Division of the High Court.

Appointment of a receiver — This is a method of enforcement directed at the interception of certain income and profits, such as rents, before they reach the debtor to preclude his disposing of them to the detriment of the judgment creditor.

Enforcement of English Court Judgments throughout the European Union

The Civil Jurisdiction and Judgments Act 1982 incorporates into English law the provisions of the E.C. Convention on Jurisdiction and Judgments in Civil and Commercial Matters, 1968 (the Brussels Convention). The Lugano Convention, concluded in 1989 by the European Union member states and those of the European Free Trade Area (Austria, Finland, Iceland, Norway, Sweden and Switzerland) operates parallel to the Brussels Convention and was enacted into English law by the Civil Jurisdiction and Judgments Act 1991. Title III of the Brussels Convention deals with recognition and enforcement of judgments rendered by the courts of other states.

Under the Conventions, recognition is automatic. The Conventions covers all types of judgments and not merely those for sums of money. Thus, any decree, order, writ of execution, determination of costs and so forth is included. The judgment need

not be final or conclusive or *res judicata*. The judgment must be rendered in a case within the scope of the Conventions, that is, in a civil or commercial matter, and not within those matters specifically excluded from jurisdiction.

There are six possible defenses to recognition, and these apply also to enforcement of a judgment, as follows:

(a) Where recognition is contrary to public policy, including a judgment obtained by fraud.

(b) If the judgment was a default judgment given against a defendant who did not appear and the defendant was not duly served with notice of the proceedings in time for him to prepare his defense. The European Court has insisted repeatedly that the right of defense must be observed. The question whether the defendant was duly served is one to be answered by the court which is asked to recognize and enforce the judgment, even though the court which rendered it concluded that the right of defense had been observed.

(c) If the judgment is not reconcilable with a judgment given by the other European court in a dispute between the same parties.

(d) If, in order to arrive at its judgment, the foreign court had decided a preliminary question as to status, legal capacity, matrimonial property, wills or succession (which are matters not within the Conventions) in a way which conflicts with a rule of English private international law, unless the same result would follow from application of that rule.

(e) If the judgment is irreconcilable with an earlier judgment in a non-contracting state on the same cause of action and between the same parties, provided that the earlier judgment is entitled to recognition or enforcement in England by English law.

(f) If the jurisdiction on which the foreign court acted conflicted with any of the provisions of the Conventions on insurance or consumer contracts or with Article 16, which confers exclusive jurisdiction.

If none of the above defenses exist, Article 28 of the Brussels Convention states that the basis on which the foreign court took jurisdiction may not be reviewed even on the ground of public policy. Article 29 states that in no circumstances may a judgment be reviewed as to its substance or merits, and Article 34 repeats this as regards enforcement.

If an ordinary appeal is pending in the courts of the state where the judgment was given, or the time for such appeal has not expired, the English court may stay enforcement proceedings until determination of the appeal or expiry of that time. Or enforcement may be made conditional on the provision of security.

A judgment which is entitled to recognition can be enforced. In the European Union, judgments are enforced by registration in the enforcing state with the court of general jurisdiction.

International Tax Briefs

by Richard A. Jacobson

This column addresses selected international tax and business issues of interest to practitioners in the area of international business.

1. New "Check-the-Box" Regulations Explain Conversion Consequences

On October 28, 1997, the Treasury and the IRS published proposed regulations to explain the transactions that are deemed to occur when an entity's classification is changed under the Check-the-Box regime. Reg. 105162-97, 62 Fed. Reg. 55768. The Regulations are generally favorable and provide guidance on the treatment of conversions by election from partnership to corporation and from corporation to partnership status. Affected provisions include the list of entities that are not eligible to elect partnership or branch treatment (so-called "per se corporations"), and the procedural rules for making Check-the-Box elections in certain special timing of the transactions that are deemed to occur as a result of a Check-the-Box election. One of these rules provides that the deemed transactions are considered to occur on the day before the effective date of the Check-the-Box election.[1]

2. Exchange of Information Under the New U.S.-Swiss Income Tax Treaty

Article 26 of the U.S.-Switzerland Income Tax Treaty of 1996 governs exchange of information between the competent authorities of the contracting states. Unlike any other income tax treaty entered into by Switzerland and in defiance of Switzerland's constant treaty policy, under which the Article 26 provides for an extended exchange of information clause. The treaty language could lead to the erroneous understanding that the reservation of professional secrecy, including bank secrecy, prevents the exchange of information also in cases of tax fraud. The Swiss Supreme Court has made it clear that the reservation does not prevent the exchange of information in cases of tax fraud. The Court has stated, that the mentioning of professional secrecy in a tax treaty does not mean that there can be no exchange of information as a result of Swiss bank secrecy rules in the case of tax fraud. BGE 101 lb 212, 96 I 737. It is furthermore evident that according to the intention of the contracting states, tax fraud may not merely be committed through the use of forged or falsified documents but can also be committed in situations where the taxpayer uses a scheme of lies in order to deceive the tax authorities.[2]

Endnotes:

[1] Tax Management International Journal, Vol. 26, No. 12, December 12, 1997, "International Tax Planning Under "Check-the-Box" remains Viable as New Regulations Explain Conversion Consequences" by Bruce Davis, Esq.

[2] Tax Management International Journal, Vol. 26, No. 12, December 12, 1997, by Walter H. Boss, Esq.

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The Mareva Injunction and Anton Piller Order:
The Nuclear Weapons of English Commercial Litigation

by Kern Alexander

The Mareva injunction and Anton Piller Order are interlocutory orders which are generally made *ex parte* and before proceedings have been commenced, but may also be issued at any stage of the proceedings and in aid of execution. The Mareva Injunction basically imposes a temporary 'freezing' order against the assets of a defendant or potential defendant which may later be required to satisfy a judgment in the plaintiff's favor. The purpose of the Mareva order is to prevent the defendant from dissipating or disposing of assets by removing them from or within the jurisdiction in a manner which would frustrate a potential judgment. The Anton Piller Order is an extraordinary form of presuit or prejudgment discovery which allows the plaintiff to search the defendant's premises and seize items or documents which might become evidence in any later action brought by the plaintiff against the defendant. Such a search may only be made by solicitors appointed by the court, and typically the judge will permit the plaintiffs solicitors to engage the search, supervised in some instances by an independent solicitor experienced in the application of Anton Piller orders.[1] The purpose behind the Anton Piller order is to prevent the defendant from destroying evidence or documents before a writ is issued or before trial.

Although the Mareva Injunction and Anton Piller Order are ancillary to the main action, they are extraordinary remedies which often have a decisive effect on a case. Indeed, the title of this paper borrows a phrase from Judge John Donaldson MR who stated in *Bank Mellat v. Nikpour* that the Mareva Injunction "is in effect, together with the Anton Piller Order, one of the law's two nuclear weapons."[2] For the plaintiff seeking swift justice or security in anticipation of obtaining a future judgment, the Mareva Injunction and Anton Piller Order offer effective preliminary remedies against defendants based in the United Kingdom or abroad which have assets located in the UK or in foreign jurisdictions. The swift nature in which these remedies may be obtained accounts for their frequent use amongst commercial litigation practitioners in England and Wales, especially in cases involving defendants with transnational business operations and property located in several jurisdictions. This paper comprises three parts: Part I describes the background and need for Mareva and Anton Piller orders. Part II discusses the considerations and procedural requirements for obtaining a Mareva Injunction. Part III analyzes the use of Anton Piller orders and discusses some of the tactical, procedural and legal issues involved in their execution. Part IV analyzes both orders together and explains how they have become popular tactics for pre-writ and prejudgment relief for plaintiffs seeking to enforce various remedies in English civil litigation.

I. The Necessity for Mareva

The globalization of the world economy has not only brought increased wealth and economic opportunity to many but has also resulted in more complexity and anonymity in international business transactions which, coupled with increased competitive pressures, has increased the willingness of many parties to breach contracts and leave debts unpaid. The growing potential for profits to be made in carefully constructed international deals has presented more opportunities for contracts to be broken. Further, the increasing sophistication of technology in the global economy has made it possible for financial assets and other resources to be transferred between jurisdictions in a very short time. As the forces of liberalization and deregulation sweep the global economy, there will be an increasing number of judgment debtors who try to evade their debts for the basic reason that a judgment *per se* will have little effect against a debtor in one country who can easily transfer assets and operations to other jurisdictions. Moreover, the recovery of damages and debts has been made more difficult by improved technology and deregulation of financial services which has made it easier for unscrupulous litigants to transfer funds illicitly from country to country in an effort to frustrate potential judgments. At the international level, there is little protection

for a party seeking to protect itself on a claim against a debtor who has breached its obligations and poses a serious risk of transfer or dissipation of assets. The English courts have responded to the increased risks posed by globalization and improved technology by crafting judicial remedies that allow parties to act with speed and secrecy in protecting their interests in assets which would otherwise be disposed of or dissipated.

The single most effective reason for granting a Mareva injunction is to prevent a defendant from escaping its obligations by disposing or transferring assets from the jurisdiction with the intent of preventing plaintiff from executing an eventual judgment against assets. As will be discussed later, the applicant for a Mareva, whether a plaintiff or counterclaiming defendant, has to show a good arguable case that it will succeed at trial, and that the refusal of an injunction would involve a real risk that an eventual judgment or arbitral award in its favor would remain unsatisfied.[3] Similarly, the Anton Piller order allows the plaintiff, or a counterclaiming defendant, to serve an order on a party authorizing entry onto premises controlled by the party to search and seize certain documents and other evidence which may be used later in a lawsuit or trial. To maintain the element of surprise, speed and secrecy are required in applying for both Mareva and Anton Piller orders. An *ex parte* order is therefore necessary otherwise the defendant will have notice of the action and have the opportunity to dissipate assets if not restrained. After the *ex parte* order has been issued, subsequent applications by either party generally will be made *inter partes* if at all possible. However, it should be emphasized that an application to discharge a Mareva or Anton Piller order is relatively rare, which suggests that these orders are successful tools in convincing defendants to settle.

Although English courts have only allowed Mareva and Anton Piller orders to be used since the 1970s, their effectiveness has led to their increasing use and popularity among commercial litigators, thereby strengthening the appeal of English courts as forums to resolve international commercial disputes. The use of these orders provides effective pre-judgment relief for plaintiffs seeking to preserve financial assets and other property to which they can later attach judgments. Accordingly, many global companies and traders prefer English law as the choice of law and especially English courts as the preferred forum for resolving international commercial disputes. The effectiveness of Mareva and Anton Piller orders in obtaining pre-judgment relief against disreputable defendants has made the use of the English courts a popular forum for plaintiffs to pursue their claims in international commercial disputes.

Early Cases

The Mareva Injunction and Anton Piller Orders are relatively recent phenomenon in English civil litigation. Before 1975, it had not been the practice of the English courts to grant an injunction in circumstances where the order was sought to restrain a defendant from disposing of its property on the grounds of a likely recovery by plaintiff in a civil action. This changed in 1975 when the English Court of Appeal overruled a High Court judge and issued an interlocutory order in favor of the appellants, Japanese shipowners, who had leased their ships to Greek charterers who had failed to pay certain sums for use of the ships. In this case, *Nippon Yusen Kaisha v. Karageorgis*,[4] plaintiffs issued a writ against the charterers for the amount past due and, when they became convinced that the charterers would take steps to remove their funds from the jurisdiction of English courts, they applied *ex parte* to the High Court for an interim injunction restraining the defendants from transferring their assets outside of English jurisdiction. The circumstances of the case were such that the money was clearly owing, and there was little question of an arguable defense, so that summary judgment was likely. The purpose behind this application therefore was to ensure that some finds would remain available, against which execution could be made of the judgment the plaintiffs were almost certain to obtain.

At the time, there was no case law supporting plaintiff's application for such an emergency injunction, and in keeping with established practice, Donaldson J denied the shipowner's application. No previous plaintiff had appealed against such a denial, most probably because many practitioners considered a reversal of the rigid rule to be unlikely in the absence of statutory intervention. However, plaintiffs filed an immediate appeal, which came before the Court of Appeal for judgment on 22 May 1975.[5] The appeal was granted, and an injunction was ordered restraining the defendant charterers from disposing of their assets in England or outside the jurisdiction. As authority, the Court of Appeal relied on section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925, which provided:

> The High Court may grant a mandamus or an injunction or appoint a receiver, by an interlocutory order, in all cases in which it appears to the court to be just and convenient to do so.[6]

Lord Denning expressed the view that if no restraint were imposed the funds would be sent overseas and would be difficult to recover and that "there was a strong *prima facie* case that the hire is owing and unpaid" and without an injunction "these monies may be removed out of the jurisdiction and the shipowners will have the greatest difficulty in recovering anything."[7]

Nearly a month later, before commercial practitioners had sufficient time to digest the impact of this ruling, the same issue was considered again by the Court of Appeal in the case which gave its name to this particular type of order. *Mareva Compania Naviera SA v. International Bulkcarriers SA*[8] also involved shippers and charterers wherein the shipowners had leased the vessel Mareva on a time charter-party for a trip to India in which the charterers had contracted with the Indian government to deliver phosphate to India in return for payment which was scheduled to be made in London. After making two installment payments, the charterers defaulted on the third payment to the shipowners, even though they had received full payment by the Indian High Commission. The proceeds of the Indian government's payment was in a London account and plaintiffs made an *ex parte* application on 20 June 1975

continued...

to freeze the proceeds as part of their claim for the amount due of $30,800 plus damages.

As in the *Nippon Yusen Kaisha* case, the shipowners feared that the charterers would dispose of their funds before execution of the judgment, and an application was made *ex parte* for an injunction restraining defendants. Again, Donaldson J reviewed the application and granted it temporarily only until 23 June 1975 in deference to the Court of Appeal's recent decision and to give the plaintiffs time to appeal, but he denied the order beyond that time based on the grounds that he had no jurisdiction to make such an order. Plaintiffs made an *ex parte* appeal, and Lord Denning again stated his view unequivocally and relied for authority on section 45 of the Supreme Judicature Act of 1925.[9]

> If it appears that [a] debt is due and owing — and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment — the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.[10]

These two cases provided a radical change in the direction of English civil litigation, the principles of which would be applied in a wide range of actions[11] with the intent of preventing defendants from making themselves judgment-proof. Accordingly, a new practice has developed in English commercial litigation which has become undoubtedly one of the most useful to a party faced with an opponent who is likely to arrange its affairs in a manner that would frustrate a court judgment or arbitral award.

Following *Nippon Yusen Kaisha* and *Mareva* and other cases, the British Parliament codified the Mareva Injunction in section 37 of the Supreme Court Act 1981 and extended its scope to be used in respect of any dispute which is to be referred to or is in the course of domestic arbitration. Later, in 1990, the English Court of Appeal upheld the use of the Mareva injunction and Anton Piller order on a worldwide basis so that a defendant's assets may be attached in a foreign jurisdiction and possible evidence examined with permission of the foreign government.[12]

Since the late 1970s, the grant of Mareva Injunctions and Anton Piller Orders have become relatively common. Both remedies are popular pretrial tactics for plaintiffs seeking to preserve financial assets and other property to satisfy an eventual judgment and to preserve evidence that would buttress plaintiff's claim at trial. Indeed, by 1986, as Bingham J acknowledged in *Siporex Trade SA v. Comdel Commodities Ltd.*,[13] the use of the Mareva Injunction and other *ex parte* orders had become quite common, as hundreds were being made each year with few applications being rejected. In recent years, there have been an increasing number of cases reported concerning Mareva Injunctions and Anton Piller orders.

II. The Mareva Injunction: Basic Considerations

The English courts power to issue a Mareva order derives from its inherent power to grant an injunction in support of *only* a legal or equitable right, within the jurisdiction of the English courts. This essential twin test means that a Mareva is completely ancillary to a claim, regardless of the fact that in practice it is the Mareva order, and not the writ, which often ends the dispute between the parties because of its effect, and because no appearance is entered by the defendant to oppose either the writ or the injunction, and judgment is enforced against the injuncted property to satisfy the judgment debt. This was confirmed in the *Veracruz* case[14] when the Court of Appeal held that the law is as stated by Lord Diplock in *The Siskina* case:

> A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on there being a preexisitng cause of action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.[15]

The party seeking a Mareva therefore must not confuse the issues surrounding its operation with the issue of whether there is a legal right, within the jurisdiction of the English courts, that can be assisted by the Mareva or other interlocutory injunction.

Procedure

A Mareva injunction is sought because the plaintiff fears the consequences of not restraining a rogue defendant from disposing of or dissipating assets. The application may be made in the Chancery, Queen's Bench, or Commercial Divisions of the High Court. It is suggested that applicant make an *ex parte* application because if notice is provided for an *inter partes* hearing, the defendant will have sufficient notice to remove assets or to destroy evidence. In the Queen's Bench Division, the applicant should prepare a writ which contains the following documents: (1) a statement of claim, (2) an affidavit in support, and (3) two copies of the draft of the order which the plaintiff requests the court to issue.[16] This draft order is known as a "draft minute of order." These papers should ordinarily be filed in chambers with the clerk to the Judge at the Royal Courts of Justice in London at 3 p.m. on the day before the application is to be heard. The *ex parte* application is made in chambers. In the case of a "worldwide Mareva," it is strongly suggested that the applicant submit the filing four to five days before the scheduled presentation in chambers to allow the judge sufficient time to consider the impact, if any, of the order on the law of the foreign jurisdiction.[17]

In the Chancery Division, a similar process is followed with the crucial exception that the arguments in support of the order are not made in chambers but in a public motions hearing. Although most Mareva applications used to be in the Commercial Court, they are now made in all divisions and sub-divisions of the High Court.[18] In the Commercial Court, an applicant must submit the writ or draft before the court, together with an affidavit (in draft form in an emergency) setting out the claim, the amount, and the points, if any, made against it by the actual or proposed defendant. The addition of a statement or points of claim is helpful because it outlines in proper

pleadings the plaintiff's case, even if it is in draft.[19] If necessary, counsel should remind his solicitor to ensure that the undertakings that, in practical terms, are for the solicitor to carry out are completed. Unless stated otherwise, all undertakings given to the court by plaintiff are his personally, even if it is anticipated that the solicitor will carry them out on plaintiff's behalf. If there is a breach, liability and/or costs and legal fees will be imposed on plaintiff; however, in some instances where the solicitor's actions have been especially egregious, the solicitor may incur liability.

For all divisions, the affidavit in support must also show that it is reasonable to believe that there are assets of the defendant within the jurisdiction, and that there is a real risk that the defendant will insulate itself from judgment by deliberately dealing such assets unless restrained. Moreover, full and frank disclosure of all material matters must be made; for instance, plaintiff should put more information in than is necessary to avoid omissions which could lead to the judge rejecting the application.[20] The affidavit can be sworn by an individual plaintiff a senior officer or director of a plaintiff corporation, or the plaintiff's solicitor in control of the action.

A draft order, usually drafted by counsel, and based on the standard forms, must include all the terms of the injunction applied for, together with the undertakings, and should be attached to the writ and affidavit, which are generally delivered to the court before the hearing.[21] Oral arguments based on the submitted documents can then take place, and if the judge approves the application, he will initial the draft order, with any amendments, and it will become immediately operative.[22] Plaintiff can then provide notice to defendant and to third parties in control of assets, by telephone if necessary, and the written order will be sent on. The notice should also contain a penal notice warning of the consequences of a breach of the injunction. The award of costs on a *ex parte* application are usually reserved for a later hearing.

The Mareva order must contain a provision authorizing a defendant within the jurisdiction to draw a certain amount of money as reasonable living expenses to avoid both undue hardship with permission to make subsequent applications to the court to vary the order only to allow the amount for living expenses to be adjusted. Moreover, the Mareva may state a specific amount which is to be frozen, or may simply be a general order covering all the defendant's assets. Either party may apply later to have this amount altered or discharged. The purpose of a specific maximum amount is to permit the defendant to have use of the balance of the assets; but the application of a maximum amount to third parties who have no knowledge of what other assets are held by or for the defendant can cause problems, because of the danger that any release of funds or assets in the belief that other assets are frozen will possibly be in breach of the order. The solution is for an order for discovery to be made, as part of the Mareva application, to identify and determine exactly all the defendant's assets, so that those above the claim can be released. Plaintiff's counsel should calculate that the maximum amount to be frozen should not only cover the amount claimed, but costs, legal fees, and interest, and the likely damages and costs incurred for third parties, such as banks or custodians of property.

The order should freeze the assets until a fixed date, but variations to the practice occur regularly as the circumstances of a case may demand. Most judges will rarely accept an order freezing assets "until judgment or later execution." The usual course is to apply to extend the Mareva after judgment, even in cases involving default judgment if the writ includes a claim for an injunction.[23] The most recent amendment to the procedures governing Mareva and other interlocutory applications became effective in 1995 and is found in Order 29 of the Rules of the Supreme Court ("RSC"). It provides:

> (1) an application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.
> (2) Where the case is one of urgency such application may be made *ex parte* on affidavit but, except as aforesaid, such application must be made by motion or summons.
> (3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, the Court thinks fit.

The amended Order 29 codifies, in a procedural sense, the court's authority to issue such emergency *ex parte* orders based on both section 37 of the Supreme Court Act 1981 and Mareva case law.

Legal Costs

A party which obtains a Mareva or Anton Piller order is entitled to recover legal fees and costs by filing a motion with the court with attached affidavit of attorneys' fees and costs. The hearing to determine legal costs almost invariably occurs at a later date, or after trial if there is no settlement. A successful party may be deprived of its legal fees and costs if it can be shown, for example, that it knew the defendants were likely to be prepared to remedy the matters of which the complaint was made.[24] Moreover, there are situations when the court, even though it initially approved plaintiff's *ex parte* application, will later decide that plaintiff must pay not only its own legal costs, but also, in rare cases, the legal costs or damages of defendant if it later turns out that the Mareva was without foundation. The usual consequence where a plaintiff is justified in law in applying but arguably should not have done so on the facts of the case is that the plaintiff who so acted precipitatively loses its own legal costs. Moreover, a solicitor can be ordered to pay his client for wasted costs so as to indemnify the client against a costs order in favor of the other side, if the solicitor incurred the costs as a result of seeking a hasty injunction when other alternatives would have been more appropriate.[25] In awarding costs, the courts are increasingly looking to the time immediately before the applica-

continued ...

tion for the injunction to see whether or not there was scope for a reasonable compromise, or whether one side acted too quickly.

Scope of the Injunction

The assets to which the injunction attaches may be tangible or intangible, realty or personalty. In addition to bank accounts and choses in action, they include chattels such as motor vehicles, jewelry, objets d'art and other valuables.[26] Where money is held in a bank account in foreign currency, the bank may convert sufficient sums into the currency stated in the order to meet the requirements of the order.[27] Unless the plaintiff seeks a worldwide Mareva, there must be some grounds for showing that the defendant has assets within the jurisdiction.[28] The Mareva will apply to assets which are acquired after it has been granted, but before the eventual execution of any judgment obtained in the action.[29]

Worldwide Mareva

In most cases involving Mareva orders, the assets which are the subject of the order are not those which are the subject matter of the underlying cause of action, but are assets out of which the plaintiffs will seek, if they obtain judgment, to recoup the judgment debt. It was therefore considered for a long time that the Mareva injunction, originally based on a blend of judicial discretion, inherent jurisdiction, and statute, could not affect property abroad except in limited instances, even if the form of the order was to bind the defendant, rather than the property.[30] Until 1988, the English courts generally refused to make orders concerning assets outside of the jurisdiction except in those limited cases where, on the basis of statute or the Rules of the Supreme Court, they felt authorized to do so.[31] This all changed in the summer of 1988 when the English Court of Appeal decided three cases within weeks of each other in which it extended the Mareva jurisdiction to include orders regulating the behavior of parties in foreign jurisdictions. This so-called "Worldwide Mareva" was established in *Babanaft International Co. SA v. Bassatne*,[32] *Republic of Haiti v. Duvalier*,[33] and *Derby & Co. Ltd. v. Weldon (No. 1)*.[34] In these cases, the English courts were authorized, in certain circumstances, to grant an order against a defendant otherwise within its jurisdiction relating to assets held by the defendant overseas.

In deciding whether to apply for a worldwide Mareva, however, counsel should consider the substantial costs involved in obtaining it. In each of the three cases above, the claims were worth more than £10 million each. In each case, the court emphasized that, although it had jurisdiction to grant the requested order, the granting of such orders should only occur in extraordinary circumstances. The application for the order in England, and the steps necessary to attempt enforcement abroad, will be expensive, and should be considered only in exceptional cases where large sums are at stake and the risk of incurring substantial costs is justified.

In all three cases, it was acknowledged that English courts may not grant a Mareva injunction over foreign assets in precisely the same manner as they would over assets within England and Wales.[35] Where foreign assets are involved, the court will insert a proviso within the order, known as the 'Babanaft proviso.' Since the actual Babanaft case, the proviso has been modified by subsequent rulings. Today, courts accept the version of it that was stated by Lord Donaldson in *Derby & Co. Ltd. v. Weldon (Nos. 3 & 4)*:

> "Provided that, in so far as this order purports to have any extraterritorial effect, no person shall be affected thereby or concerned with the terms thereof until it shall be declared enforceable or be enforced by a foreign court and then it shall only affect them to the extent of such declaration or enforcement unless they are: (a) a person to whom this order is addressed or an officer of or an agent appointed by a power of attorney of such a person or (b) persons who are subject to the jurisdiction of this court and (i) have been given written notice of this order at their residence or place of business within the jurisdiction, and (ii) are able to prevent acts or omissions outside the jurisdiction of this court which assist in the breach of the terms of the order."

The parties affected by the proviso are generally classified in three groups. (1) the defendant, or other party to proceedings in which the order is granted and who have property within England and Wales; (2) persons who are subject to the jurisdiction of the English court, have been given notice of the order, and are able to prevent breaches of the order outside of England and Wales; and (3) other persons, for instance, foreign nationals or institutions not subject to the jurisdiction of' the English court, or persons who are subject to the jurisdiction of the English court but have not been notified. In the first group, the Mareva would apply to all activities and property belonging to the defendant within England and Wales. In the second group, the courts have ruled that, so long as the defendant is a proper party to the proceedings brought in England and Wales, the English court has jurisdiction to order the defendant to do anything outside England and Wales which it would be able to order him to do inside England and Wales. The jurisdiction is essentially *in personam* and not *in rem*.[36] The English courts therefore have jurisdiction to issue a worldwide Mareva to order a defendant who has been properly joined as a defendant to transfer assets from one foreign jurisdiction to another, if this will prevent him from taking action to render any future judgment or award of the court unsatisfied.[37] This discretion, however, should be exercised with great care. Accordingly, the first issue will be whether a party is properly joined to proceedings in England. This depends on the Rules of Court and whether the court can obtain personal jurisdiction over someone who is outside of the territorial jurisdiction.

In the third group, defendants who are foreign nationals and not subject to the jurisdiction of the English courts are not bound to obey the order unless or until there is an order of the foreign court which has jurisdiction over them. Even then, they are bound only to the extent of the order of the foreign court. Essentially, once the plaintiff obtains the English Mareva, it must then apply to the foreign court to have the Mareva recognized and enforced against the foreign defendant. The proviso makes clear that the English court does not

claim jurisdiction over such persons. So the plaintiff will need to make a further application in the foreign jurisdiction where he believes the defendant's assets are located. Plaintiff will need to consider whether such country has a procedure equivalent to the Mareva jurisdiction, and whether it is likely to exercise it in support of the order of the English court. But before application can be made in the foreign court, leave must be granted by the English court.

Requirements for Worldwide Mareva

The court has jurisdiction to grant a worldwide Mareva in support of proceedings brought in England, both before and after judgment. All such orders must contain a 'Babanaft provisio.' In addition, the following requirements are common to pre and post judgment applications. The plaintiff must have a good arguable case on the merits. He must show that there are insufficient assets in England to meet his judgment, that the defendant has foreign assets, and that there is a real risk of disposal of assets so as to frustrate enforcement of the plaintiff"s judgment if one is obtained.[38] Even then, the court will rarely issue a worldwide Mareva, but, as Kerr LJ said in famous passage which has been cited in other cases:

> . . . some situations . . . cry out — as a matter of justice to the plaintiffs — for disclosure orders and Mareva type injunctions covering foreign assets of defendants even before judgment.[39]

The type of case which "cry out" for justice are large claim cases in which the defendant's conduct has been most egregious and underhanded in trying to frustrate the legitimate claims of plaintiffs in English courts. A case in point was *Republic of Haiti v. Duvalier*,[40] in which the Government of Haiti had a claim against former President Duvalier and his family for $120 million for embezzlement. This was a good case because the defendants had admitted that they had been moving their assets around the world in an attempt to evade the efforts of the plaintiff to freeze them. Staughton LJ stated: "if ever there was a case for the exercise of the court's powers, this must be it.[41] Moreover, in *Derby & Co. Ltd. v. Weldon*, the claim was for £25 million. The defendants included a Panamanian and a Luxembourg company. The trial judge had found that the plaintiffs had a "highly arguable" case, and that there was a high risk that the defendants would dissipate their assets, as they were "well used to moving funds worldwide." In summary, the worldwide Mareva appears to be appropriate only where large sums are involved and there is evidence that the defendants are used to moving assets around the world through sophisticated means so that enforcement of the judgment or orders would cause considerable difficulty.

III. The Anton Piller Order: Basic Considerations

In some cases it is vital for a plaintiff to ensure that the defendant does not destroy or dispose of evidence in its possession so as to make it difficult, if not impossible, to prove his case. In this situation, the Anton Piller order permits plaintiff to demand entry to defendant's premises, business or residential, to inspect and photograph documents and chattels on the premises, and to remove documents or other items for a short time if such items might form evidence in its action, or proposed action, against defendants. Generally, the order will provide that it must be served by an independent solicitor in the presence of plaintiff's solicitor. The plaintiff's solicitor then executes the order, supervised by the independent solicitor. In some situations, the order may provide for service and execution by the plaintiff's own solicitor without supervision. The order must be clear and concise, and based on fill disclosure to the court. The court's power to issue the order derives from its inherent jurisdiction to prevent a defendant from frustrating judgment, for instance by destroying or disposing of either the evidence or the subject matter of the dispute before the proceedings have begun. The injunction often includes an order to give details on affidavit of assets and other premises, or to deliver up goods, and is often considered a complementary tool to be used ancillary to a Mareva.

The order's name is derived from the case, *Anton Piller KG v. Manufacturing Processes Ltd.*,[42] in which Lord Denning stated:

> Let me say at once that no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature, whether libels or infringements of copyright or anything else of the kind. No constable or bailiff can knock at the door and demand entry so as to inspect papers or documents. The householder can shut the door in his face and say "Get out."[43]

But later stated:

> It seems to me that such an order can be made by a judge ex parte, but it should only be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties: and when, if the defendant were forewarned, there is a grave danger that vital evidence will be destroyed, that papers will be

continued...

> burnt or lost or hidden, or taken beyond the jurisdiction, and so the ends of justice be defeated: and when the inspection would do no real harm to the defendant or his case.[44]

There are three essential pre-conditions for this order: First, plaintiff must show a strong *prima facie* case. Second, the damage, potential or actual, must be very serious for the applicant. Third, there must be clear evidence that the defendants have in their possession incriminating documents or things and that there is a real possibility that they may destroy such material before any application *inter partes* can be made. The overriding consideration in issuing this order is that it is to be resorted to only in circumstances where the normal processes of the law would be rendered nugatory if some effective and immediate measure was not available.

The scope of an Anton Piller order is as broad as a Mareva injunction and involves many potential difficulties, not only because of consequent interference with the rights of individuals and companies, but also because of its effect on third parties. The Anton Piller order is a powerful tool to preserve evidence and prevent empty judgments. There are three principal areas of law where the order is used. First, cases involving intellectual property rights, such as trade marks, copyrights patents, and trade secrets. Second, cases involving industrial espionage or anticompetition claims brought by ex-employers against ex-employees. Third, matrimonial proceedings where it is thought that a spouse has failed to make truthful statements of his/her assets. There is a distinctive difference between the practice in the first two types of cases and the third, namely, that in intellectual property and anti-competition cases, there is likely to be a preemptive strike by the plaintiff in which the application is made before or at the time the writ is issued and before it is served. In matrimonial cases, the order is likely to be made as a last resort, when other measures are considered not to have resulted in truthful disclosure. Anton Piller orders may also be used in other types of cases as well, but recent cases have cast doubt on the use of Anton Piller orders in cases involving criminal conduct because of the privilege against self-incrimination.[45]

Procedure

The Anton Piller order may be granted at any stage of litigation from the period before the writ was issued until after judgment while in aid of execution. It may be granted in all divisions of the High Court and in the Court of Appeal. It may also be granted in the Patents County Court, but not in any other county court. Cases within the jurisdiction of the county court should be transferred to the High Court for such application. The order is most often heard in the Chancery Division where requests for injunctions are heard in open court; therefore, a request for the court to review the application *in camera* is essential to minimize publicity and maintain complete surprise.[46]

The order is not a "civil" search warrant. The only recourse a plaintiff has if the defendant denies the Supervising Solicitor entry to the premises is to apply to the court for a contempt order. Force cannot be used and, though the defendant risks being penalized for contempt, his desire to take legal advice before permitting entry has been recognized as reasonable, and must be stated in the standard order form.[47] The order cannot be used to discover evidence on which to base a later claim,[48] but it can probably extend to overseas premises so long as the defendant is within the jurisdiction of the English courts.[49] However, this will not extend to Scotland based on internal comity within the United Kingdom.[50]

The application for an Anton Piller order must include an undertaking to the court by the Solicitors that they will not use documents and goods seized on the execution of the order for any purpose other than in the action in which they were seized, without leave of court or consent of the party from whom they were taken.[51] If a solicitor negligently fails to provide accurate information to the court based on its undertakings, the court may issue a contempt order against the solicitor.[52]

Tactics

The successful execution of an Anton Piller order depends on good planning and logistical tactics. Many firms of solicitors employ extra staff or consultants to handle the logistics of enforcement, which include having adequate numbers on or near the site over and above those permitted to enter the premises. It is especially necessary to watch all exits and check if observation can be kept on rooms where shredding machines or other disposal units are kept. Staff may want to have hand-held tape-recorders, video cameras and light cameras.

If more than one address is within the order, it is important that staff and consultants coordinate their execution of the order. For example, if defendants work from or have control of other addresses, a watch must be kept on those other premises to see if service of the order at the main address causes any reaction elsewhere. If the defendants do have something to conceal, they will likely have efficient means of alerting their colleagues; therefore, plaintiff can prevent the loss of much important evidence by keeping a close watch on appropriate locations. Moreover, the courts disapprove of the police being asked to stand by unless there is a real risk of a breach of the peace. In such a case, the use of the police should only be made with leave of court.

Plaintiffs must ensure that when serving Anton Piller orders, they observe the procedural requirements in the order. Before 1986, Anton Piller orders were regularly being granted in all divisions of the High Court, and their popularity was due primarily to their effectiveness in forcing defendants to settle plaintiff's claims once they were served with these orders. Needless to say the broad scope of these orders was prone to abuse. Abusive execution of an Anton Piller order was the subject of a trial in *Columbia Picture Industries Inc. & others v. Robinson & others.*[53] Because the hundreds of previous Anton Piller cases had settled, this case gave Scott J the opportunity to consider the development and operation of these orders. He delivered a devastating critique. He observed that one of the immediate effects of an Anton Piller order was to close down defendant's business. He also stated:

> What is to be said of the Anton Piller procedure which, on a regular and institutionalized basis, is depriving citizens of their property and closing down their businesses by orders made ex parte, on applications of which they know nothing and at which they cannot be heard, by orders which they are forced, on pain of committal, to obey, even if wrongly made?[54]

Moreover, Scott J in *lock International plc in Beswick* stated:

> the practice of the court has allowed the balance to swing much too far in favour of plaintiffs and that Anton Piller orders have been too readily granted and with insufficient safeguards for respondents.[55]

Anton Piller orders had been granted in a wide variety of circumstances, but their use has dramatically declined since *Universal Thermosensors Ltd. v. Hibben & others*.[56] *Universal Thermosensors* was a very important case because it was the first step by the courts in adopting an agreed uniform approach to Anton Piller orders; this made it easier also to adopt a uniform approach to Mareva injunctions and, eventually, to standard form injunctions. The Vice Chancellor's ruling in *Universal Thermosensors* is now the basis for the standard form Anton Piller order. The standard form shows a clear emphasis on the rights of the defendant by underlining the original safeguards required when Anton Piller orders were first developed, and, second, by providing additional safeguards such as: strict scrutiny of the evidence produced by plaintiff; emphasis upon less draconian orders which the court may grant; further developments of the undertakings which the plaintiff must give before the order is granted; new safeguards for the defendant in execution of the order; and specific standards of when and to what extent the plaintiff or its solicitors may be liable to the defendant for non-disclosure at the ex parte application or errors in execution of the order. In particular, it appears that courts will approve of exemplary damages against plaintiff or its solicitors for wrongful or oppressive execution of the order.[57]

IV. Strategic Considerations

Because Mareva Injunctions and Anton Piller Orders are ordinarily granted *ex parte*, the defendant has no opportunity to address the court and object to applicant's request for the order. To the American lawyer, this is striking because such an order issued by a U.S. court would violate the basic principles of due process requiring notice and a hearing before a defendant may be deprived of its property. An English court's review of a party's *ex parte* request to freeze a potential defendant's assets and to invade its property to search for evidence creates a substantial risk that such an order will be issued without knowledge of arguments which might be properly made on behalf of the defendant. To protect against this, the plaintiff must provide certain information and guarantees as part of making an *ex parte* application including the following: (1) full and frank disclosure of any points which the defendant might raise if he were present to oppose the application; (2) indemnify the defendant in compensation for damages if the order later proves to be without merit; and (3) to serve the evidence on the defendant as soon as practicable and to notify the defendant of his right to apply to have the order discharged. As will be shown, Mareva Injunctions must contain provisions which protect the security interests of banks and their right to setoff. Similar undertakings must be made by plaintiff's solicitors in executing an Anton Piller order including returning originals of all documents obtained as a result of the order within two days of seizure.

Today, both orders remain extremely useful weapons in a claimant's legal arsenal. A company, for instance, which suspects that a competitor has misappropriated confidential trade secrets may obtain and execute an Anton Piller Order to search the premises of the competitor and obtain any documents relevant to the demand in the order. While the Anton Piller Order is being executed, the plaintiff may also obtain a Mareva Injunction which temporarily freezes the assets of the defendant while the search of the defendant's premises and the copying of all relevant documents are being conducted. One of the likely effects of the Anton Piller Order is to close down the business of the defendant which, based on the applicant's evidence, operates in violation of the plaintiff's rights. The use of the Anton Piller Order may effectively deprive citizens of their property and terminate their business operations by orders obtained *ex parte* based on applications against which the defendants were not permitted to be heard and which they must obey.

In recent cases involving Anton Piller Orders, Courts have been more vigilant in ensuring that procedural safeguards are maintained for defendants by enforcing a strict interpretation of the requirements placed on the plaintiff.[58] For example, in *Universal Thermosensors Ltd. v. Hibben*, the court addressed serious irregularities in the execution of orders by plaintiff's solicitors by requiring adherence to a new set of guidelines when serving Anton Piller Orders. Before *Hibben*, English courts were reluctant to impose damages against plaintiffs or their solicitors when failing to observe procedural safeguards to protect the defendant. In *Hibben*, the plaintiff's solicitors obtained *ex parte* orders against defendant's business property without revealing to the court certain material evidence which, if known to the court, may have dissuaded it from issuing the order. The solicitors were held to have acted so egregiously that the court ordered them to pay £34,000 in damages as compensation to the defendants. The *Hibben* case reflects the tendency of courts to scrutinize more thoroughly applications for Anton Piller orders.

Unlike Anton Piller orders, the recent cases on Mareva Injunctions have not been so concerned with protecting the defendant's rights. Instead, these cases emphasize a broadened scope of application of freeze orders, such as the worldwide Mareva, against assets not only located within the United Kingdom but also in foreign jurisdictions. The courts will also, in some circumstances, permit plaintiffs to pierce the corporate veil in order to prevent individuals from escaping the effect of Mareva Injunctions by the use of companies which they wholly control. Notwithstanding the broadened

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scope and power of Mareva Injunctions in recent case law, courts have developed certain protections for defendants, namely, imposing damages against plaintiffs for failing to disclose all material information related to the strength of their claim and for not disclosing evidence that would show the defendant to be no threat to the dissipation or transfer of assets sought by plaintiffs.

The Civil Jurisdiction and Judgment Act 1982

The harmonization of the procedures of the European Economic Community, the Convention on the jurisdiction of courts, and the recognition and enforcement of judgments in civil and commercial cases were agreed to by the States of the European Community in 1968 and went into force in 1973. The United Kingdom, Denmark and Ireland signed an accession agreement to cover their new membership in 1978. The Civil Jurisdiction and Judgments Act 1982 provided the law necessary to make sense of the Conventions, and for purposes of this discussion the broadest and most far-reaching provisions allow protective measures to be taken by any contracting country even if proceedings have already begun in another Contracting State. Article 24 sets out the basis of this power:

> Application may be made to the Courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.

In addition, section 25 of the Civil Jurisdiction and Judgment Act 1982 clarifies the position as to interim relief pending the trial or appeal, and allows English court jurisdiction to grant relief even if the subject matter of the continuing proceedings is a question of jurisdiction, or a reference to the European Court under the 1971 Protocol to the 1968 Convention. Section 25 reverses the effect of the Siskina case where the Privy Council had decided that a plaintiff could not obtain a Mareva from an English court against Defendant's property in England when the plaintiff had brought the action in a foreign jurisdiction and the legal or equitable right on which the Mareva was based arose under foreign law. At present, with the standard provisions of the Act now in force, a plaintiff suing, for example, in France, can apply to the English courts to freeze the defendant's assets in England, provided the Convention applies to the original claim.[59] Once a foreign judgment has been given in France, the party can enforce the judgment debt against defendant's assets in England, under the recognition and enforcement procedures of the Convention.[60] Therefore, there is now complete interaction between the member States on the principle of that a party's assets may be frozen in one way or another pending the outcome of a trial. As these extended powers only apply to matters listed in Articles 1-3 of the Convention, however, interim relief in other cases will still depend, for now on those parallel provisions of English law as are unaffected by the Conventions themselves.

Conclusion

Although English courts have only allowed Mareva and Anton Piller orders to be used since the 1970s, their effectiveness has led to their increasing use and popularity among commercial litigators, thereby strengthening the attractiveness of English courts as forums to resolve international commercial disputes. The use of these orders provides in many cases swift justice and effective prejudgment relief for plaintiffs seeking to preserve financial assets and other property to which they can later attach judgments. Accordingly, many global companies and traders prefer English law as the choice of law and especially English courts as the preferred forum for resolving international commercial disputes. Although the liability risks of using Anton Piller orders has increased significantly in recent years, many litigants are finding the use of both orders in tandem to be a particularly effective way of minimizing risk when pursuing a claim against a questionable debtor. The Mareva and Anton Piller orders are valuable pre-trial tactics to the litigant, and will continue to be utilized in all divisions of the High Court. Moreover, the international scope of such orders will become more pronounced in the future as more and more international transactions persons and property in the United Kingdom.

Endnotes:

[1] *Universal Thermosensors Ltd. v. Hibben* [1992] 1 WLR 840 per J. Nicholls at 861.

[2] *Bank Mellat v. Nikpour* [1985] FSR 87 at 92.

[3] *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft mbh und Co. KG (The Niedersachsen*) [1983] 1 WLR 1412, CA (29 July 1983), Eveleigh, Kerr and Dillon LJJ.

[4] [1975] 1 WLR 1093, CA (22 May 1975).

[5] *Nippon Yusen v. Karageoris and another* [1975] 1 WLR 1093, CA (22 May 1975); Lord Denning MR, Browne, and Geoffrey Lane LJJ.

[6] Supreme Court of Judicature (Consolidation) Act of 1925, section 45.

[7] Nippon Yusen, at 1095.

[8] [1975] 2 Lloyd's Rep. 509, CA (23 June 1975); Lord Denning MR, Roskill and Omrod LJJ.

[9] [1975] 2 Lloyd's rep. 509, at p. 510.

[10] *Ibid.*

[11] *Ibid.*

[12] *See discussion at pp. 16-18.*

[13] *Siporex Trade SA v. Comdel Commodities Ltd.*, [1986] 2 Lloyd's Rep. 428.

[14] *Veracruz v. Transportation Inc. v. V C Shipping Co. Inc. and Den Norske Bank A/S, (The Veracruz I),* [1992] 1 Lloyd's Rep 353, CA. See also *Zucker v. Tyndall Holdings plc* [1992] 1 WLR 1127, CA.

[15] *Siskina (owners of cargo lately laden on board) and others v. Distos Compania Naviera SA (The Siskina)* [1979] AC 210, HL (Kerr LJ, 20 December 1976; CA 1 June 1977 — Lord Denning MR, Lawton and Bridge LJJ; HL 26 October 1977 — Lord Diplock, Lord Hailsham, Lord Simon of Glaisdale, Lord Russell of Killowen, Lord Keith of Kinkel); the decision will now be different because of the 1968 Brussels Convention, but the principles remain valid.

[16] *See* The Practice Direction (Judge in Chambers: Procedure) [1983] 1 WLR 433 as amended, in Appendix G.

[17] *ALG Inc. v. Uganda Airlines Corp.*, (1992) Times, 31 July, per Richard Southwell QC, sitting as Deputy High Court Judge.

[18] *See* Colman, *The Practice and Procedure of the Commercial Court* (London: Lloyd's of London Press, Ltd., 4th ed., 1995).

[19] *See Practice Direction (Interlocutory Injunction: Forms),* [1996] 1 WLR 1551.

[20] *The Assios* [1979] 1 Lloyd's Rep. 337.

[21] See *Practice Direction (Mareva Injunctions and Anton Piller Orders)* [1994] 1 WLR 1233.

[22] Note the requirements to produce a disk with the order: see paragraph 4 of Practice Direction (Interlocutory Injunctions: Forms) [1996] 1 WLR 1551.

[23] *Stewart v. Chartering Ltd. v. C & O Managements SA and another* [1980] 1 WLR 460; RSC Order 13.

[24] *See Bluebell Inc. v. Falmer Interna-*

tional Ltd. (1980) 130 NLJ 5948, CA.

[25] *See* generally Rules of the Supreme Court Order 62, r.11. Because this rule has been cited for different orders in different cases, reference should be made to the *Supreme Court Practice and Supplements.*

[26] *CBS UK Ltd. v. Lambert,* [1983].

[27] The conversion may be made at the bank's current rate of exchange. The converted sum should then be held subject to the order. *Z. Ltd. v. AZ and AA-LL* [1982] 2 WLR 288 at 314 per Kerr LJ.

[28] *Third Chandris Shipping Corp. v. Unimarine SA* [1979] QB 645 per Lord Denning MR at 668.

[29] *TDK Tape Distributor (UK) Ltd. v. Videochoice Ltd.* [1986] 1 WLR 141 at 145.

[30] *Ashtiani and another v. Kashi* [1986] 2 All ER 970, CA (25 June 1986), Dillon, Neill and Nicholls LJJ.

[31] *Interpool v. Galani* [1988] QB 738, CA (23 June 1987), Lloyd and Balcombe LJJ; *see also, Maclaine Watson & Co. Ltd. v. ITC* [1988] 1 Ch. 1. These cases involve judgment creditors relying on Order 48 1(1) using post-judgment discovery orders to make inquiries concerning a judgment debtor's assets outside of the jurisdiction.

[32] [1990] see chap 13 of Ough

[33] [1990] 1 QB 202.

[34] [1990] ch 48.

[35] *Derby & Co. Ltd. v. Weldon (Nos. 3 & 4)* [1990] Ch 65 at 84D-84E.

[36] *Derby & Co. Ltd. v Weldon (No. 6)* [1990] 1 WLR 1139, CA, per Dillon LJ at 1149.

[37] *Ibid.*

[38] *Derby & Co. Ltd. v. Weldon (No. 1)* [1990] Ch. 48.

[39] *Babanaft,* at 33D-33E. Cited also by Staughton LJ in *Republic of Haiti v Duvalier* [1990] 1 QB 202 at 217.

[40] [1990] 1 QB 202.

[41] *ibid* at 217A.

[42] [1976] 1 Ch 55, CA (8 December 1975), Lord Denning MR, Ormrod and Shaw LJJ.

[43] *Ibid* at p. 60C.

[44] *Ibid* at 6B, 62A.

[45] *See* "Anton Piller Orders — A Consultation Paper," published by the Lord Chancellor's Department, November 1992, and authored by Scott and Staughton LJJ and Hollings, Hirst and Simon and Brown.

[46] *See Vapormatic Co. Ltd. v. Sporex Ltd.* [1976] 1 WLR 939. Orders may also be granted in the Family Division. *See Emanuel v. Emanuel* [1982] 1 WLR 669, Wood J.

[47] *Hallmark Card Inc. in. Image Arts Ltd.* [1977] FSR 150.

[48] *Hytrac Conveyors Ltd. v. Conveyors International Ltd.* [1983] FSR 63, CA.

[49] *Cook Industries v. Galliher* [1979] Ch 439, Templeman J.

[50] *Altertext Inc. v. Advanced Data Communications Ltd.* [1985] 1 WLR 457, Ch D, Scott J.

[51] *See EMI Records Ltd. v. Spillane and others* [1986] 2 Ch. 1, Ch D Sir Nicholas Browne-Wilkinson V-C.

[52] *VDU Installations Ltd. v. Integrated Computer Systems and Cybernetics Ltd. and others* [1989] FSR 378, Ch D, Knox J.

[53] [1987] 1 Ch 38.

[54] *Ibid* at 73-74.

[55] [1989] 1 WLR 1268 at 1279.

[56] [1992] 1 WLR 840, Ch. D, Sir David Nicholls, V-C.

[57] *See* Scott J. in Columbia Picture Industries Inc. v. Robinson [1987] Ch 38 at 87.

[58] *Lock International plc v. Beswick.*

[59] See art(s) 1,2, & 3 of the Convention.

[60] Section 4, Civil Jurisdiction and Civil Judgment Act 1982; see Article 31 (2) of the Convention.

6-21. Standards for Certification of a Board Certified International Lawyer

RULE 6-21.1 GENERALLY

A lawyer who is a member in good standing of The Florida Bar and who meets the standards prescribed below may be issued an appropriate certificate identifying the lawyer as a "Board Certified International Lawyer." The purpose of the standards is to identify those lawyers who practice in the area of international law and have the special knowledge, skills, and proficiency to be properly identified to the public as certified international lawyers.

RULE 6-21.2 DEFINITIONS

(a) International Law. "International law" is the practice of law dealing with issues, problems, or disputes arising from any and all aspects of the relations between or among states and international organizations as well as the relations between or among nationals of different countries, or between a state and a national of another state, including transnational business transactions, multinational taxation, customs, and trade. The term "international law" includes foreign and comparative law.

(b) Practice of Law. The "practice of law" for this area is defined as set out in rule 6-3.5(c)(1). Practice of law that otherwise satisfies these requirements but that is on a part-time basis will satisfy the requirement if the balance of the applicant's activity is spent as a teacher of international law subjects in an accredited law school.

RULE 6-21.3 MINIMUM STANDARDS

(a) Minimum Period of Practice. The applicant shall have been engaged in the practice of law, either in the United States or abroad, and shall have been a member in good standing of the bar of any state of the United States or the District of Columbia, for a period of not less than 5 years as of the date of application. The years of law practice need not be consecutive. Receipt of an LL.M. degree in international law, as defined in rule 6-21.2(a), or in such other field as may be approved by the international law certification committee, shall be deemed to constitute 1 year of the practice of law requirement, but not the 5-year bar membership requirement, specified in this subdivision.

(b) Substantial Involvement. The applicant shall demonstrate substantial involvement in the practice of international law during each of the 3 years immediately preceding the date of application. Except for the 2 years immediately preceding application, receipt of an LL.M. degree, as defined in rule 6-21.2(a), may substitute for 1 year of substantial involvement. Substantial involvement shall mean that the applicant has devoted 50 percent or more of the applicant's practice to matters in which issues of international law played a significant role and in which the applicant had substantial and direct participation. For purposes of this subdivision, time devoted to lecturing on or writing about international law may be included. Although demonstration of compliance with this requirement shall be made initially through a form approved by the international law certification committee, the international law certification committee may at its option require written or oral supplementation.

(c) Education. The applicant shall demonstrate that during the 3-year period immediately preceding the date of application, the applicant has completed at least 75 hours of continuing legal education in the field of international law. This requirement can be met through: attendance at continuing legal education seminars on international law; satisfactory completion of graduate level law school courses while enrolled in an LL.M. program in international law or comparative law; satisfactory completion of graduate level law school courses involving international law aspects while enrolled in a graduate law program; lecturing at continuing legal education seminars on international law; authoring articles or books on international law; or teaching courses on international law at an accredited law school. The international law certification committee shall promulgate uniform regulations for the operation of the subdivision.

(d) Peer Review. The applicant shall submit the names and addresses of 5 other attorneys or judges who are familiar with the applicant's practice, excluding individuals who currently are employed by the same employer as the applicant, and who can attest to the applicant's special competence and substantial involvement in international law. The international law certification committee may at its option send reference forms to other attorneys and judges.

(e) Examination. The applicant shall take and pass an examination designed to demonstrate sufficient knowledge, skills, and proficiency in international law to justify the representation of special competence to the legal profession and the public.

RULE 6-21.4 RECERTIFICATION

Recertification shall be pursuant to the following standards:

(a) Substantial Involvement. The applicant shall demonstrate continuous and substantial involvement in the practice of international law throughout the period since the last date of certification. The demonstration of substantial involvement shall be made in accordance with the standards set forth in rule 6-21.3(b).

(b) Education. The applicant shall show completion of at least 75 hours of continuing legal education in international law since the filing of the last application for certification. In determining whether an applicant has satisfied this requirement, the standards set forth in rule 6-21.3(c) shall be followed.

(c) Peer Review. The applicant shall submit the names and addresses of 5 other attorneys or judges who are familiar with the applicant's practice, excluding individuals who currently are employed by the same employer as the applicant, and who can attest to the applicant's special competence and substantial involvement in international law. The international law certification committee may at its option send reference forms to other attorneys and judges.

(d) Examination. If, after reviewing the material submitted for recertification, the international law certification committee determines that the applicant may not meet the standards established by this chapter, it may require, as a condition of recertification, that the applicant take and pass the examination specified in rule 6-21.3(e).

Become a Board Certified International Law Attorney

The 1998 certification application filing period for International Law Certification is July 1 through August 31, 1998. The requirements for international law certification are summarized below.

If you would like to receive this year's application, please complete the form below and mail it to The Florida Bar. Applications will be available in July and must be returned no later than August 31, 1998. All requirements for certification must be met by the August 31 filing deadline, with the exception of the CLE requirement which must completed by March 1, 1999. You may request a complete copy of the Standards from, or direct any questions regarding the certification process to Taressa Langford at (850)561-5600, ext. 6795.

To become board certified in international law, Bar members must:

- Have actively practiced law during the five years preceding application and been substantially involved in international law (at least 50% of your practice) in the three years immediately preceding application.
- Earned at least 75 hours of international law certification credits in the three years preceding application; the time period for this year is July 1, 1995 through August 31, 1998 (extended for the first year to March 1, 1999).
- Submit the names of five lawyers or judges as references to attest to the applicant's involvement and competence in international law practice.
- Pass a written examination prepared by the International Law Certification Committee (after approval of the application).
- Pay a non-refundable application fee of $200; and additional $150 examination fee will be required of those eligible to take the exam.

INTERNATIONAL LAW CERTIFICATION APPLICATION REQUEST

Name _____ Attorney Number _____

Address _____

City/State/Zip _____

Return to: The Florida Bar
Department of Legal Specialization and Education
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

implementing only portions of the new law. The State Department (which has authority over U.S. Embassies and Consulates) has issued more than twenty policy memoranda and the INS General Counsel has published several opinions interpreting various provisions of the 1996 Act. As new regulations are issued and judicial challenges to the law are decided, the implementation of the 1996 Act and its applicability will continue to evolve.

Prior to the 1996 Act, foreign nationals who came to the United States and remained longer than permitted by the INS (sometimes remaining for years) but who were never detected by the INS, really suffered no consequence. Likewise, those individuals who entered without INS inspection (crossing the border or entering from shore undetected) were not really subjected to serious penalty if they were never apprehended by the INS. This new legislation contains changes which severely punish anyone who violates these new immigration provisions. More than ever before, it is extremely important that foreign nationals pay very careful attention to maintaining their immigration status in the United States, in particular never remaining beyond the expiration date of their entry card (form I-94) unless they have filed an extension application with the INS.

Inadmissibility to the United States

Several new grounds for inadmissibility have been added by the 1996 Act.[2] They will be discussed in more detail later in this supplement. These new grounds provide that you may be excluded from entering the U.S. if, after April 1, 1997 you:

- were unlawfully present in the U.S. for more than 180 days but less than one year and you left the U.S. voluntarily before removal proceedings (deportation) began and it has been less than three (3) years since you departed the U.S.[3]
- were unlawfully present in the U.S. for one year or more and you left the U.S. voluntarily before removal proceedings (deportation) began and it has been less than ten (10) years since you departed the U. S.[4]
- are an F-1 student who has abandoned a course of study at a private elementary or secondary school or in a language training program that is not publicly funded, and you are undertaking a new course of study at a *public* elementary or secondary school, or in an adult language training program. This ground of inadmissibility does not apply if the public secondary school is reimbursed for the cost of your education and you remain there for no more than one year. If you are deemed a student visa abuser, you must remain outside the U.S. for a five year period.[5]
- incited terrorist activity with an intention to cause serious bodily harm or death[6]
- are an *immigrant* who cannot document that you have been vaccinated against vaccine-preventable diseases.[7] (This may be waived if an authorized civil surgeon certifies that such vaccination would not be medically appropriate or if such vaccination is against your religious beliefs.)[8]
- are a family-sponsored *immigrant* whose relative has not executed a legally-binding affidavit of support. The relative that sponsored you is bound to provide support until you become a U.S. citizen or until you (or your spouse) have worked in the U.S. for 40 qualifying quarters of employment [ten (10) years][9]
- are coming to the U.S. to work as a health care worker (other than a physician), unless you hold certification from the Commission on Graduates of Foreign Nursing Schools (CGFNS) or an INS approved credentialing service[10]
- unlawfully voted in any U.S. election[11]
- are a former U.S. citizen who renounced U.S. citizenship to avoid U.S. taxation[12]

Additionally, you are inadmissible for a period of five (5) years if you:

- were summarily removed at a port of entry (excluded and deported)
- ordered removed upon your arrival in the U.S.
  This bar expands to twenty years after a second removal and becomes permanent if you are convicted of an aggravated felony.[13]

You are inadmissible for a period of ten (10) years if you:

- are ordered removed after your admission to the U.S.
- departed the U.S. while an order of removal was outstanding
  This bar also expands to twenty years after a second removal and becomes permanent if you are convicted of an aggravated felony.[14]

Further, under the 1996 Act, you are permanently inadmissible if you:

- were unlawfully present in the U.S. for an aggregate period of more than one year and reentered or attempted to reenter the U.S. without inspection[15]
- were ordered removed and reentered or attempted to reenter the U.S. without inspection[16]

This permanent bar may be waived if you are immigrating to the United States but such waiver cannot be granted until ten (10) years after your last departure from the U.S.[17]

Expedited Removal (Deportation)

The 1996 Act included a streamlined removal procedure for certain classes of aliens. Under expedited removal there is no hearing nor any administrative review of the immigration officer's determination at the port of entry.[18] You are subject to expedited removal if you:

- fail to possess valid travel and/or visa documents[19]
- possessing false travel and/or visa documents[20]
- illegally entered into the U.S. without inspection and have resided in the U.S. for a period of less than two years[21]

There are two exemptions to expedited removal proceedings:

- Cuban citizens arriving at a port of entry by aircraft only,[22] and
- aliens claiming fear of persecution and/or an intention to apply for asylum.[23]

Overstays & Cancellation of Visas

Immigration officers at ports of entry are authorized to cancel your nonimmigrant visa where they make a determination that you previously entered the United States using the same nonimmigrant visa ***and*** re-

mained in the United States beyond the period of stay allowed by the INS as indicated on your form I-94.[24]

If you are refused admission but are allowed to withdraw your application for admission to the U.S. because in the past you "overstayed," and your nonimmigrant visa is canceled, you must apply for and obtain a new nonimmigrant visa at the American Embassy or Consulate in your country of nationality.[25] You may apply at an American Embassy or Consulate located in a country other than your home country (known as "third country processing") only under extraordinary circumstances. A cancellation of your visa will not necessarily result in the denial of any subsequent visa application, but it will alert the consular officer that a problem occurred and, if you are applying in a third country, that you must show *extraordinary circumstances*.[26] Examples of extraordinary circumstances include:

- aliens with a residence in a third country
- aliens considered homeless, stateless or dual nationals
- aliens who overstayed in the past who were issued a new visa after the overstay but prior to September 30, 1996

Students

You can no longer be issued a student visa (F-1) to:

- study at a public elementary school[27]
- study at an adult education program that has been publicly funded[28]
- study at a public secondary school *unless* the school is reimbursed for the cost of your education and you remain for no more than one year[29]

Note: If you were studying in the United States in F-1 status prior to November 30, 1996, you may continue attendance, however the new provisions of the law will apply if you:

- file for an extension of F-1 status
- leave the U.S. and apply for a new F-l visa
- apply for reinstatement to F-1 status[30]

The new rules governing F- 1 students do not apply to you if you are studying in the U.S. as the spouse or child of someone authorized to work in the U.S. on an H, L or E nonimmigrant visa.

Unlawful presence in the United States

Only unlawful presence in the U.S. on or after April 1, 1997 may be counted to determine inadmissibility. Unlawful presence encompasses overstaying an authorized period of admission (as indicated on your form I-94); or being present in the U.S. without being admitted or paroled (entering without inspection).[31] The INS interpretation of violations that may constitute unlawful presence is evolving. For example, under current INS policy, if you engage in unauthorized employment while in the U.S. as a tourist (B-2), unlawful presence may begin to accrue prior to the expiration date of your form I-94 if: (1) the INS makes a determination that you violated your status during the adjudication of an application for benefits, such as an *extension of stay or change of status*; or (2) an immigration judge makes a determination that you violated your status.[32]

The 1996 Act does, however, provide that unlawful presence does not accrue if:

- you are a minor (under the age of 18 years)[33]
- you have a bona fide application for asylum pending and you have not engaged in unauthorized employment[34]
- you are a "family unity" beneficiary[35]
- you meet the definition of certain battered women or children[36]

The 120-day Rule

If you are lawfully in the United States and you apply timely to change or extend your nonimmigrant status before your authorized period of stay expires, you will not be considered unlawfully present in the U.S. while the application is pending for a period not to exceed 120 days.[37] If the 120 day period ends and your application for change or extension of status is still pending, you will begin to accrue days in unlawful presence.

Three and ten year bars for unlawful presence

The 1996 Act also aims to improve records of entry and departure, with an automated entry and exit control system to be in place by September 30, 1998. This data will then assist the INS and American Embassies/ Consulates to enforce the three and ten year bars for readmission to the United States.

Commencing on April 1, 1997, you will be barred from reentering the United States for a period of three years if you were unlawfully present in the U.S. for more than 180 days but less than one year and you left the U.S. voluntarily before removal proceedings (deportation) began.[38]

Commencing on April 1, 1997, you will be barred from reentering the United State for a period of ten years if you were unlawfully present in the U.S. for one year or more.[39]

The three or ten year period is measured from your date of departure or removal from the United States to the date of your application for admission. Although you must *depart* the United States for the bars to become effective, most aliens will be unable to apply for lawful permanent residence (green card) without departing the U.S. to attend an interview at an American Embassy or Consulate in their home country. There are some exceptions, for instance if you are the spouse, parent or minor child of a U.S. citizen, you remain eligible to apply for adjustment of status to lawful permanent residence in the U.S.[40] or if you are already in the U.S. and an application for alien employment certification or an immigrant visa petition was filed on your behalf on or before January 14, 1998, you may remain eligible to apply for adjustment of status in the U.S. under Section 245(i).[41]

Immigrant Visa Issuance and Adjustment of Status

Normally, aliens wishing to immigrate to the United States are interviewed at the American Embassy or Consulate in their home country where they are interviewed and issued an immigrant visa to come to the U.S.

Aliens who are already in the United States may apply to immigrate by filing an application for "adjustment of status" to lawful permanent residence with their local INS office if they meet certain requirements for eligibility.[42] Adjustment of

continued...

status is considered a privilege and those who are not eligible must go abroad for immigrant visa issuance.

Section 245 Adjustment of Status

The 1996 Act renders you ineligible for adjustment of status under Section 245(a) if you:

- violated the terms of your nonimmigrant visa
- engaged in unauthorized employment *at any time* in the past
- are an employment-based immigrant in an unlawful status[43]

Section 245(i) Adjustment of Status

A special adjustment provision was enacted in 1994 which allowed aliens who were ineligible to apply for adjustment of status under Section 245(a) to pay a penalty of $1,000.00 in addition to the normal filing fee and apply for adjustment of status in the U.S.[44] This provision, commonly referred to as 245(i), was set to expire on September 30, 1997 but was extended until, January 14, 1998 with the following proviso: aliens in the U.S. who had an application for alien employment labor certification filed on their behalf with the Department of Labor on or prior to January 14, 1998 or aliens who had an immigrant visa petition filed on their behalf on or prior to January 14, 1998 may still apply for adjustment of status under Section 245(i).

As a result, if you want to immigrate to the United States and an application for alien employment labor certification or an immigrant visa petition was *not* filed on your behalf on or before January 14, 1998, you must qualify for adjustment of status under the provisions of Section 245(a). If you cannot meet the eligibility requirements for adjustment of status under Section 245(a), you must apply for your immigrant visa at an American Embassy or Consulate in your home country. If you have been unlawfully present in the U.S. for more than 180 days, your departure from the U.S., to go abroad for immigrant visa issuance will trigger the three or ten year bar to your readmission to the U.S.

Immigrant visa issuance

Formerly, if you were physically present in the U.S. and not in lawful status on the date you departed the U.S. to go abroad for immigrant visa issuance, you had to wait ninety days from the date of your departure from the U.S., before an immigrant visa could be issued to you.[45] This provision expired on September 30, 1997.

Vaccination

Under the 1996 Act, all immigrant visa applicants and all applicants for adjustment of status must prove that they have been vaccinated against vaccine-preventable diseases, which include polio, rubella, mumps, measles, hepatitis B, influenza type B, pertussis, diphtheria, and tetanus.[46]. This may be waived if an authorized civil surgeon certifies that such vaccination would not be medically appropriate or if such vaccination is against your religious beliefs.[47] These provisions took effect on July 1, 1997.

Affidavit of Support

The 1996 Act significantly changed the criteria for family sponsored immigrants to demonstrate that they will not become a public charge. The relative that sponsored you must execute an affidavit binding them to provide support until you become a U.S. citizen or until you (or your spouse) have worked in the U.S. for ten (10) years [40 qualifying quarters of employment].[48] The relative executing the affidavit must demonstrate an annual income at a level of at least 125% of the federal poverty guidelines.

Health care workers

You are inadmissible under the 1996 Act if you are coming to the U.S. to work as a health care worker (other than a physician), unless you hold certification from the Commission on Graduates of Foreign Nursing Schools (CGFNS) or an INS approved credentialing service.[49] Such an organization must verify that you are competent in oral and written English; that your education and training are comparable to that of U.S. healthcare workers holding the same type of position; and, that you have passed a licensing exam recognized by your intended state of employment, if such licensing requirement/examination exists.

This provision which took effect on September 30, 1996 applies to both nonimmigrant and immigrant health care workers (other than physicians). This includes nurses, physician assistants, physical and occupational therapists and medical technicians among others.

Cancellation of Removal (Non-LPR)

The 1996 Act made many changes to the form of relief from deportation formally known as suspension of deportation. Now called "cancellation of removal for non-lawful permanent resident", it requires ten (10) years of continuous physical presence in the U.S., demonstration of good moral character and a showing that exceptional and extremely unusual hardship would occur to the alien's U.S. citizen or lawful permanent resident spouse, parent or child.[50] Hardship to the alien is no longer a consideration. These changes have resulted in replacing the old standards with much more restrictive requirements as well as the institution of an annual cap of 4,000 visas per fiscal year for the grant of cancellation of removal.

Criminal Grounds

The 1996 Act created new immigration related crimes and increased the scope and penalty for existing immigration related crimes. One of the most important of these changes

included revision to the definition of aggravated felony as amended the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) as noted below.[51]

Aggravated felony now includes a conviction for:

- rape or sexual abuse of a minor regardless of the sentence[52]
- fraud deceit and tax evasion in which the loss to the victim or government exceeds $10,000[53]
- money laundering where the amount of funds exceeds $10,000[54]
- a crime of violence or theft if the sentence imposed is at least one year regardless of any suspension of the imprisonment[55]
- owning, controlling, managing, or supervising a prostitution business[56]
- alien smuggling where the sentence imposed was one year regardless of any suspension of the imprisonment[57] (an exemption is provided where the offense is committed for the purpose of smuggling your spouse, child or parent)
- illegal entry or illegal reentry after deportation if previously deported on the basis of a conviction for an aggravated felony[58]
- document fraud/false passports where the sentence imposed is one year or more regardless of any suspension of the imprisonment[59] (an exemption is again provided for a first offense committed for the purpose of assisting your spouse, child or parent and no other individual)
- commercial bribery, counterfeiting, forgery, trafficking in vehicle identification numbers, obstruction of justice, perjury or bribery of a witness[60] and failure to appear where the sentence imposed is one year or more regardless of any suspension of the imprisonment[61]
- failure to appear where the sentence imposed is two years or more regardless of any suspension of the imprisonment[62]

The 1996 Act also provides for removal of aliens convicted of a crime involving moral turpitude committed within five years after admission if a possible sentence of one year or more may be imposed.[63] In addition, new crimes including high speed flight from an INS check point,[64] female genital mutilation on a person under the age of 18 years old[65] and the inclusion of aliens who departed the U.S. while under an order of exclusion or deportation was outstanding as subject to the penalties for reentry ranging from two years to twenty years depending upon the ground for the order.[66]

Waivers of inadmissibility for criminal immigration violations are available in some instances.[67] It is important that you seek the advise of competent immigration counsel in these circumstances.

Endnotes:

1 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ["IIRIRA"]. Passed by the House on September 25, 1996; passed by the Senate on September 28, 1996; signed by the President on September 30, 1996; contained in Division C of the 1007 Omnibus Appropriations Bill, H.R. 3610, Pub.L.No. 104-208, 110 Stat. 3009, printed in the Congressional Record September 28, 1996 starting at H11787.

2 INA §212(a), 8 USC §1182(a).

3 INA §212(a)(9)(b)(i)(I), 8 USC §1182(a)(9)(b)(i)(I).

4 INA §212(a)(9)(b)(i)(II), 8 USC §1182(a)(9)(b)(i)(II).

5 INA §212(a)(6)(G) as added by §346 of IIRIRA.

6 INA §212(a)(3)(B), 8 USC §1182(a)(3)(B).

7 INA §212(a)(1)(A)(ii), 8 USC §1182(a)(1)(A)(ii).

8 INA §212(g)(2)(B)&(C), 8 USC §1182(g)(2)(B)&(C).

9 INA §212(a)(4)(C)(ii), 8 USC §1182(a)(4)(C)(ii).

10 INA §212(a)(5)(C), 8 USC §1182(a)(5)(C).

11 INA §212(a)(10)(D), 8 USC §1182(a)(10)(D).

12 INA §212(a)(10)(E), 8 USC §1182(a)(10)(E).

13 INA §212(a)(9)(A)(i), 8 USC §1182(a)(9)(A)(i).

14 INA §212(a)(9)(A)(ii), 8 USC §1182(a)(9)(A)(ii).

15 INA §212(a)(9)(C), 8 USC §1182(a)(9)(C).

16 *id.*

17 INA §212(a)(9)(C)(ii), 8 USC §1182(a)(9)(C)(ii).

18 INA §235(b)(1)(A)(i), 8 USC §1125(b)(1)(A)(i).

19 INA §212(a)(7), 8 USC §1182(a)(7).

20 INA §212(a)(c)(C), 8 USC §1182(a)(6)(c).

21 INA §235(b)(1)(A)(iii)(II), 8 USC §1225(b)(1)(A)(iii)(II).

22 INA §235(b)(1)(F), 8 USC §1225(b)(1)(F).

23 INA §235(b)(1)(A)(ii), 8 USC §1225(b)(1)(A)(ii).

24 INA §222(g)(1), 8 USC §1203(g)(1).

25 INA §222(g)(2)(A), 8 USC §1203(g)(2)(A).

26 INA §222(g)(2)(B), 8 USC §1203(g)(2)(B).

27 INA §214(l)(1)(A), 8 USC §1184(l)(1)(A).

28 *id.*

29 INA §214(l)(1)(B)(i) and (ii), 8 USC §1184(l)(1)(B)(i) and (ii).

30 INA §214(l)(2), 8 USC §1184(l)(2).

31 INA §212(a)(9)(B), 8 USC §1182(a)(9)(B).

32 Ins Memorandum HQIRT 50/5.12, 96 Act.058, September 19, 1997.

33 INA §212(a)(9)(B)(iii)(I), 8 USC §1182(a)(9)(B)(iii)(I).

34 INA §212(a)(9)(B)(iii)(II), 8 USC §1182(a)(9)(B)(iii)(II).

35 INA §212(a)(9)(B)(iii)(III), 8 USC §1182(a)(9)(B)(iii)(III).

36 INA §212(a)(9)(B)(iii)(IV), 8 USC §1182(a)(9)(B)(iii)(IV).

37 INA §212(a)(9)(B)(iv), 8 USC §1182(a)(9)(B)(iv).

38 INA §212(a)(9)(b)(i)(I), *supra*.

39 INA §212(a)(9)(b)(i)(II), *supra*.

40 INA §245, 8 USC §1255.

41 INA §245(i), 8 USC §1225(i).

42 INA §245, *supra*.

43 INA §245(c), 8 USC §1255(c).

44 INA §245(i), as amended by §506 Pub.L.No. 103-317.

45 INA §202(o), Pub.L.No., *expired September 30, 1997*.

46 INA §212(a)(1)(A)(ii), *supra*.

47 INA §212(g)(2)(B)&(C, 8 USC §1182(g)(2)(B)&(C).

48 INA §212(a)(4)(C)(ii), *supra*.

49 INA §212(a)(5)(C), *supra*.

50 INA §240(A)(b), 8 USC §1230(a)(B).

51 Anti-Terrorism and Effective Death Penalty Act of 1996, (AEDPA), Pub.L.No. 104-132,110 Stat. 1214.

52 AEDPA §440(e)(A).

53 AEDPA §440(e)(M).

54 AEDPA §440(e)(D).

55 AEDPA §440(e)(F) and (G).

56 AEDPA §440(e)(K).

57 AEDPA §440(e)(N).

58 AEDPA §440(e)(O).

59 AEDPA §440(e)(P).

60 AEDPA §440(e)(R).

61 AEDPA §440(e)(S).

62 AEDPA §440(e)(T).

63 INA §212(a)(2)(i)(I), 8 USC §1182(a)(2)(i)(I).

64 IIRIRA §108, 18 USC §758.

65 IIRIRA §645, 18 USC §116.

66 IIRIRA §334 and §324.

67 INA §212(a)(2)(F) and INA §212(h).

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