FREEZING ORDERS IN INTERNATIONAL COMMERCIAL LITIGATION

SINGAPORE ACADEMY OF LAW

DISTINGUISHED SPEAKER SERIES

INAUGURAL LECTURE

BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

SINGAPORE, 6 MAY 2010

The kernel of commercial law is an elementary, indeed simple, proposition. People should keep their promises. The rest of commercial law is just detail. This may appear a trite proposition. Sometimes it is necessary to be trite to keep in mind the fundamental. Making people keep their promises is the great contribution which the legal system makes to commercial certainty and therefore to economic prosperity.

Law and Commerce

All advanced economies have developed a sophisticated set of rules and mechanisms for the identification and enforcement of promises made in the course of commerce. Without a high level of assurance that such rules and mechanisms will operate effectively

and efficiently, the global market economy that has enhanced the economic welfare of so many people, would simply not be possible.

More than anything else, a successful market economy is the product of good government and of the law. In the Town Hall of Sienna there are two wonderful frescos by Lorenzetti: Allegories of Good Government and of Bad Government. Even a cursory glance of the latter, with its depiction of decay and chaos, would convince anyone that, without the law, there can be no market system.

In his great classic *The Wealth of Nations,* Adam Smith said:

> "Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay. Commerce and manufactures in short, can seldom flourish in any state

in which there is not a certain degree of confidence in the justice of government."[1]

All forms of economic interaction are impeded by the degree to which personal and property rights are subject to unpredictable and arbitrary incursion so that people act on the basis of fear and suspicion rather than on the basis that others will act in a foreseeable manner and honour their promises. What the law must deliver is a high level of predictability so that economic actors can proceed with confidence that their reasonable expectations will be met. It is only if individuals and corporations believe that they can transact business with a high degree of assurance that promises will be kept and debts paid, that a market economy can effectively operate. The legal profession, and its many different manifestations in roles, constitutes a legal infrastructure which is as sophisticated, and as necessary, as the physical infrastructure involved in economic activity.

One commentator has described business lawyers as "transaction cost engineers" who facilitate commercial intercourse by reducing future transaction costs.[2] Well drafted commercial agreements avoid conflict with regulatory regimes, anticipate and

therefore avoid disputes and create structures for dealing with the unknown or the unexpected. By their involvement, business lawyers add value to commercial transactions. Legal devices minimise transaction costs in the future, circumvent constraints on conduct, avoid liabilities, pursue strategic objectives and allocate the risks associated with commercial transactions.

All of this, of course, requires a facility with words. Indeed, we lawyers, both practitioners and judges, are traffickers in words. Words are the vehicle by which the law and legal relationships are necessarily conveyed. Words are our basic tools of trade.

All lawyers who draft texts attempt to be as clear and comprehensive as they can be. However, as Sir James Fitzjames Steven put it:

> "It is not enough to attain to a degree of precision which a person reading in good faith can understand. It is necessary to attain, if possible, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it."[3]

Of course, this objective can never be completely achieved. This leads to disputes and litigation about what words mean. Commercial lawyers would have little to do if everyone agreed on what they had promised and kept those promises.

In this address I will focus on one important aspect of the law of remedies – freezing orders – which is a surprisingly recent development in the common law.

Preserving Assets

Over the centuries in which the principal form of property was real estate and physical property, rather than services, dominated the economy, the ability to dissipate and hide assets from prospective creditors was less than it has become in comparatively recent times. Changes in the economy, in technology and in public policy, notably the easing of exchange controls, have transformed the ease and speed with which assets, particularly liquid assets and records, can be moved and hidden. In many cases, all that is now needed is the click of a mouse.

Driven by the needs of their commercial clients, English lawyers developed ideas, new to the common law system, which

they successfully urged on English judges in the mid-seventies by way of adaptation to these new challenges to the enforcement of commercial promises. They drew on other legal traditions to assist this development. Attachment of assets prior to the determination of legal proceedings on the part of unsecured creditors was well established in civil law jurisdictions. The Germans called it *arrest*. The Italians called it *sequestio*. The French called it *saisie conservatoire*. This was an international project from its commencement.

Originally the new commercial remedies were known by the names of the cases which first adopted them – Mareva injunctions and Anton Piller orders – but are now generally known as freezing and search orders, respectively. The need for this innovation was verified by the immediate proliferation of such cases throughout the common law world. Courts developed a range of criteria for the availability of these new remedies.

Combating international fraud and corruption is a multifaceted process. Of critical significance is the ability to enforce the disclosure of assets. Orders requiring disclosure are frequently a concomitant of applications for freezing orders.

Search orders are directed to discovery of documentation which is capable of disclosing fraudulent conduct and tracing of proceeds of fraud. The object of search orders is to preserve evidence for trial.

Transnational disclosure orders, directed to disclosing documentary evidence for the purposes of proceedings, involve a similar range of issues to those which arise in the context of freezing orders.[4] They are of growing importance because of the capacity to hold databases in safe jurisdictions and to transmit electronic databases almost as rapidly as cash.

There is, however, one application which caused difficulty: the extension of such orders beyond the territorial jurisdiction of the court requested to provide remedies. This has two dimensions. First, the making of orders which apply to assets held abroad and, secondly, the making of orders with respect to assets within the jurisdiction in aid of foreign judicial proceedings. In this address I will focus on the latter.

Despite the manifest commercial imperative which lay behind the continuing stream of applications to preserve assets

from dissipation, some common law judges adopted the traditional reluctance of the common law to interfere with rights of property prior to a final judgment which determined who owed what to whom. There was longstanding authority which validated this position. However, this instinctive response no longer served the needs of contemporary commerce. It was quickly overcome with respect to domestic legal proceedings, although, it was reflected, entirely properly, in the detailed guidelines worked out in the authorities of many common law nations before such relief was granted.

However, there remained, and to some degree remains, reluctance to take such measures in support of foreign legal proceedings. Additional barriers of an inappropriately technical character were erected where the only link with the jurisdiction in which relief was sought was the presence of assets. Many of the cases in which this issue has arisen involved applications for freezing orders in support of a foreign commercial arbitration.

As this audience is well aware, there is in existence a coherent international system for the resolution of commercial disputes by arbitration which stands in marked contrast to the

complex incoherent and diverse provisions for what has been described as the "jungle" of international litigation in courts.[5] I refer, of course, to the UNCITRAL *Model Law*; the New York *Convention for Enforcement of Arbitral Awards* and the Washington *Convention for Investment Disputes*. These international instruments have been so widely adopted as to constitute a separate regime for dispute resolution in commercial matters.

Courts are called upon to support his regime, relevantly for this address, in two ways. First, courts may be called upon to enforce interim measures awarded by an arbitral tribunal. Secondly, courts may be asked to make such orders in support of an actual or prospective arbitration, often ex parte. This address will be concerned with the second matter.

The 1985 *Model Law,* authorised provisions for interim measures by arbitrators and for courts to order interim measures in support of an arbitration. National laws acted upon these provisions, including in Australia and Singapore. The issue of ex parte interim measures for a proposed Revision of the *Model Law* was so controversial that the procedure of the Working Group was

described as being “at times close to breaking point”.[6] By the 2006 Revision, the *Model Law* now provides for a comprehensive regime relating to interim measures.[7] In the event no international consensus could be reached to require the enforceability of interim measures ordered by an arbitrator on an ex parte basis, as distinct from such an order on notice. The courts will continue to be called on to act in support of an arbitration.

The *Law* enables ratifying nations to “opt out” of the provision allowing enforceability of ex parte interim measures made by an arbitrator. Amendments shortly to be enacted, I trust, to the Australian *International Arbitration Act* 1974 provide that interim measures made on notice by an arbitrator will be enforceable pursuant to the UNCITRAL regime. However, ex parte freezing orders will need to be made by a court. I note that the new s 12A of the *International Arbitration Act* of Singapore also expressly authorises the Court to grant interim measures in support of a foreign arbitration.

England

Throughout the common law world, the principal barrier to effective relief in a cross border case was the House of Lords

judgment in *The Siskina*.[8] Lord Denning, who described the development of the Mareva injunction as "the greatest piece of judicial reform in my time",[9] went on to describe *The Siskina* as the most disappointing reversal of his judgments.[10] This puts it at the top of a long list.

The Siskina involved a claim by cargo owners of a "one ship" company whose only asset was insurance monies payable by London underwriters for the loss of the ship. The foreign cargo owners were held not to be entitled to interim relief by way of a freezing order on a basis which significantly limited the ability of English courts to give such relief in aid of any foreign proceeding. Their Lordships treated the application solely through the prism of the law of injunctions. They concluded that, what had come to be called the "Mareva injunction" was simply a form of an interlocutory injunction. Their Lordships rejected Lord Denning MR's suggestion that an English court had an inherent jurisdiction to attach assets so that they could be available to satisfy a future judgment of a foreign court.

To some degree this was Lord Denning's own iconoclastic fault.[11] He brought to the task of statutory interpretation

techniques that were not merely unorthodox but plainly impermissible. However, the focus on statutory interpretation was, in my opinion, misplaced in two respects. First, by the failure to recognise that what was involved was not just an "injunction" as traditionally understood. Secondly, by rejecting the alternative that Mareva orders could be justified on the basis of the exercise of the inherent jurisdiction. This was not merely a task of statutory interpretation.

Subsequently, in the *Channel Tunnel* case Lord Mustill stated *The Siskina* principle in the following terms:[12]

> "The right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependent on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action. If the underlying right itself is not subject to the jurisdiction of the English court, then that court should never exercise its power under s 37(1) by way of interim relief."

The *Channel Tunnel* case modified *The Siskina* principle in one respect. Freezing orders in aid of a foreign proceeding can be

granted if the dispute could have been adjudicated in England, even if it would not be by reason, relevantly, of an arbitration agreement choosing a foreign venue. The principle in *The Siskina* has been further qualified in subsequent decisions.[13] However, as one author has put it, *The Siskina* is "listing not sunk".[14]

On appeal from Hong Kong, in *Mercedes Benz* the Privy Council applied *The Siskina* and affirmed the proposition that an application for a Mareva injunction is not a cause of action, nor is it available as a stand alone order.[15] Of particular note is the strong dissent of Lord Nichols in that case.

His Lordship commenced his judgment with the following observation:

> "The first defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable."[16]

Lord Nichols identified an alternative test for specifying the requisite territorial link. A freezing order could be granted by a Hong Kong court if the anticipated judgment of the foreign court would be recognised and enforceable in Hong Kong. This test would, in large measure albeit not entirely, ensure that the court could provide appropriate assistance, in order to maintain the integrity of the legal system of the foreign court.

The position with respect to what the basic English text refers to as "freestanding Mareva relief"[17] is now determined by statutory reform. Such relief is available:

- Since 1982 in aid of proceedings brought in a contracting state to the Brussels Convention and Lugarno Convention (s 25 of the *Civil Jurisdiction and Judgments Act* 1982).
- Since 1997 in relation to "proceedings", regardless of where they are commenced and whether their "subject matter" comes within the Brussels Convention (pursuant to the *Civil Jurisdiction and Judgments Act* 1982 (Interim Relief) Order 1997).
- Pursuant to Rules of Court which permit service out of the jurisdiction in aid of s 25(c) (LCPR r 6.20(4)).

- In relation to arbitral proceedings, wherever the seat of the arbitration is or even if no seat has been designated (s 44 of the *Arbitration Act* 1996). (Not extending, subject to a Ministerial Order, to proceedings under the ICSID Convention.[18])

Australia

In 1996, the Australia Law Reform Commission in a comprehensive report on *Legal Risks in International Transactions*[19] recommended that consideration be given to fixing *The Siskina* problem by legislation equivalent to that adopted in England. Like the rest of this farsighted report, it was ignored. However, Australian courts have developed the common law of Australia in a way which bypasses *The Siskina* principle and which has rendered legislation unnecessary.[20]

Although *The Siskina* was sometimes applied at first instance in the early years, Australian courts did not force freezing order relief into the mould of the injunction traditionally given by a court of equity and relied on the court's inherent jurisdiction to protect the integrity and efficacy of the court's processes.

In New South Wales, the earliest authoritative decision invoked the court's inherent jurisdiction, including the manifestation of that traditional jurisdiction in s 23 of the *Supreme Court Act* which provides that: "The court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales". The court focused on preventing the abuse inherent in any attempt to dispose of property which was intended to, or would have the necessary effect of, frustrating the plaintiff in proposed proceedings.[21]

This approach was affirmed by the High Court of Australia in a number of judgments which established that a Mareva order or an asset preservation order, now called a freezing order, was not an injunction.[22] This different perspective has permitted a more flexible approach to the availability of such relief, without the statutory intervention that was needed in England.

The High Court has affirmed that interlocutory *injunctive* relief, of the kind historically given by the Court of Chancery, cannot be granted unless there is an underlying cause of action. However, it has expressly distinguished the position with respect to freezing orders (and also anti-suit injunctions).[23] The juridical

basis of a freezing order is the court's inherent power to prevent the frustration of its process.[24] I note that reliance on the inherent jurisdiction was precisely the approach Lord Denning took in *The Siskina* in the Court of Appeal, which the House of Lords rejected.[25]

In Australia, this alternative foundation led to the conclusion that the terminology of "injunction" is inappropriate for a freezing order. I reiterate that the critical difference between the Australian case law and English case law turns on the fact that in England freezing orders are regarded as a species of injunction, whereas in Australia they are expressly not regarded as such.[26]

There is a distinction between interim relief directed to assets which are the subject matter of proceedings and interim relief directed to ensuring the efficacy of the judicial determination of actual or prospective proceedings. Plainly, freezing orders are sought because they serve the interests of plaintiffs. In this respect they do not differ from injunctions. However, any attempt by a defendant to make itself judgment proof also raises public policy considerations, namely, to protect the integrity of the

administration of justice. For this function, a different jurisdictional foundation is appropriate.

As Justices Gummow and Hayne observed, with reference to the Australian line of authority:

> "The distinctions drawn in the above decisions are not readily to be perceived in judgments in English cases which preceded them."[27]

The reliance on the "interlocutory injunction", in the traditional sense, in the line of authority stemming from *The Siskina,* was manifest in the House of Lords refusal to allow a liquidator to preserve the assets of the former directors of a South African company who allegedly had stripped those assets but did not identify the precise substantive relief which the plaintiff would ultimately seek.

The position in Australia is different. The Supreme Court of New South Wales has issued injunctions to ensure the availability of property acquired by the controllers of a company in the Bahamas, whom it was alleged had stolen its assets.[28] Justice Campbell was satisfied, on the balance of probabilities, that

proceedings would be begun by the plaintiff, although there was no express undertaking to do so. His Honour's orders are a clear case of freestanding relief.

His Honour observed:

> "The administration of justice in New South Wales is not confined to the orderly disposition of litigation which is begun here, tried here and ends here. In circumstances where international commerce and international monetary transactions are a daily reality, and where money can be transferred overseas with sometimes as little as a click on a computer mouse, the administration of justice in this State includes the enforcement in this State of rights established elsewhere."[29]

Jurisdiction of this character is more readily assumed by a court, such as the Supreme Court of New South Wales, which has an inherent jurisdiction. The High Court has also held that a superior statutory court, which has an implied but not inherent jurisdiction, has equivalent powers.[30]

Australian superior courts have restated the Australian case law in a form which offers clear guidance and certainty to commercial litigants. This has been done by means of harmonised Rules of Court and a harmonised Practice Note, which have been adopted by all superior jurisdictions in Australia.

The Council of Chief Justices of Australia and New Zealand has a standing Harmonisation Committee which attempts, not always successfully, to ensure that important aspects of procedure are uniform throughout the Australian jurisdictions. This has proven to be successful in the case of freezing orders and search orders.

The Rules refer to the purpose of a freezing order as being to prevent: "the frustration or inhibition of the court's process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied".[31] The Rules also expressly state that they apply "if there is a sufficient prospect" that another court will give judgment and that the Australian court will register or enforce that judgment.[32]

The accompanying Practice Note to the Rules states:

> "15 The Rules of Court confirm that certain restrictions expressed in *The Siskina* (1979) AC 210 do not apply in this jurisdiction. First, the court may make a freezing order before a course of action has accrued (a "prospective" cause of action). Secondly, the court may make a freestanding freezing order in aid of foreign proceedings in prescribed circumstances. Thirdly, where there are assets in Australia, service out of Australia is permitted under a new 'long arm' service rule."

The last sentence is a reference to a rule which provides that a freezing order may be served on a person outside Australia if any of the assets to which the order relates are within the jurisdiction of the court.[33]

The circumstances in which the court will register and enforce a foreign judgment is itself a large subject. It is sufficient for present purposes to say that it is not universally available.[34] Furthermore, reliance on the inherent jurisdiction suggests that the ability to act in support of foreign proceedings will not be limited to such a situation with respect to stand alone freezing orders.

However, that is a step which is not yet clearly taken, although the reasoning of Justice Campbell in the case to which I have referred could support such a development. I will return to this issue below.

Canada

The case law of Canada initially followed *The Siskina.* However, an expansion of the jurisdiction to grant stand alone freezing orders occurred in 1996 when McLachlan J (as the Chief Justice then was) upheld the jurisdiction to grant such relief pursuant to what her Honour described as the "residual discretionary power" found in s 36 of the British Columbia *Law and Equity Act* which empowered the Court to grant interlocutory relief where "just and convenient".[35]

As in England, the jurisdictional foundation of the Canadian exercise of the jurisdiction remained the concept of an interlocutory injunction. Subsequently numerous courts in Canada have granted stand alone freezing orders. The Canadian position is that a justiciable right must exist in the court asked to order such relief. This arises by reason of the focus on the traditional concept of an injunction as contained in the statutory provisions.

Although there does not appear to have been any reliance on the inherent jurisdiction, a detailed analysis of the Canadian case law suggests that the decisive consideration is the probability of eventual enforcement of a foreign judgment in Canada. In substance, this is a recognition of a broader basis for stand alone relief of the kind advanced by Lord Nicholls in *Mercedes Benz* and expressly recognised in the Australian Rules and Practice Note to which I have referred.[36]

Malaysia

Malaysian courts have exercised the jurisdiction to make freezing orders and search orders on a regular basis since the 1980s.[37] This jurisdiction was based on statutory provision in the traditional form empowering the making of an injunction. However, a first instance court has determined that the court's inherent jurisdiction also supports such orders. The case in which that was accepted referred to the then recent New South Wales decision to which I have referred.[38]

The inherent jurisdiction, if any, is based on Order 92 of the *Rules of the High Court* and Order 137 of the *Rules of the Federal Court* which provide:

> "For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court."

The Court of Appeal has given some support to the existence of such a basis for a freezing order, albeit not definitively deciding the issue.[39]

It would appear that it is open, on the basis of this legislative structure and case law, for a Malaysian court to grant freezing orders in circumstances which would be denied by *The Siskina* principle. Nevertheless, the Court of Appeal recently stated, in relation to an injunction to prevent a party commencing an arbitration in Singapore:

> "In our judgment the injunction applied for should have not been granted because there was no pleading against the appellant on which the injunction could

issue. It is settled law that the right to obtain an interlocutory injunction is not a cause of action. There must be a cause of action pleaded in the usual fashion before an interlocutory injunction may be applied for and obtained."[40]

The court went on to refer to the relevant passage from Lord Diplock in *The Siskina,* which had been applied in other cases.[41] The focus of this authority is on the concept of the injunction in a traditional sense, as reflected in the legislation of both England and Malaysia. *The Siskina* principle has been applied to refuse relief in support of an arbitration.[42]

The principal line of authority does not give consideration to the exercise of the inherent jurisdiction to grant orders of a character that do not fall within the traditional concept of the injunction. The possibility that this could broaden the circumstances in which relief can be given in support of an arbitration or other foreign proceedings has not been further considered.

Hong Kong

The position in Hong Kong has been that *The Siskina* line of authority was accepted. Indeed, as I mentioned, *Mercedes Benz* was a Privy Council appeal from Hong Kong. Subsequent case law in Hong Kong expressed doubt as to whether or not that line of authority applied to arbitrations.[43]

The matter has now been put beyond doubt in that jurisdiction by legislative reform.[44] The *High Court Ordinance (Cap 4)* has been amended to make it clear that the Court is able to order interim remedies in relation to proceedings that have been or are to be commenced in a place outside Hong Kong.[45] One clause of the ordinance expressly states that the relevant power is conferred: "for the purpose of facilitating the process of a court outside Hong Kong that has primary jurisdiction over such proceedings".[46]

At the same time the *Arbitration Ordinance (Cap 341)* was amended to expressly state that the orders that could be made in support of an arbitration occurring outside of Hong Kong, include freezing orders. The section expressly abolishes the requirement

that a claimant must establish a cause of action and that orders sought should be ancillary to arbitration proceedings in Hong Kong.[47]

Singapore

The English line of authority on this issue has been influential in Singapore. *The Siskina* was adopted as the law of Singapore by the Court of Appeal in *Karaha Bodas* (2006).[48] Shortly thereafter two High Court judges reached different conclusions with respect to the continuing effect of *The Siskina* in cases in which a freezing order was sought in support of a foreign arbitration. Each case addressed the general power to issue Mareva orders under s 4(10) of the *Civil Law Act*.

In the first case, *Swift-Fortune,* Justice Judith Prakash set aside a Mareva injunction.[49] Shortly thereafter Justice Belinda Ang Saw Ean reached a different conclusion in *Front Carriers*. Her Honour's reasoning included observations that the *Channel Tunnel* case had modified *The Siskina* doctrine in a relevant manner.[50]

On appeal from the judgment in *Swift-Fortune,* the Court of Appeal discussed both judgments. As Chief Justice Chan Sek Keong pointed out, with reference to the difference of approach of Justice Judith Prakash in that case and Justice Belinda Ang Saw Ean in *Front Carriers*:

> "That two cases on the same legal issues relating to international arbitrations have come before the courts within such a short span of time may be indicative of the potentially high incidence of similar cases in the future. That two experienced commercial judges have expressed different views on the applicability of the relevant statutory provisions relating to Mareva injunctions also indicates the need for clarity, certainty and predictability in an important area of Singapore commercial law, viz, the statutory power of the court to grant interim orders or relief to assist international arbitrations …"[51]

The Court left open the possibility that the *Channel Tunnel* approach would be adopted and stated that Justice Belinda Ang Saw Ean was correct in granting a Mareva injunction on the basis that the plaintiff had a cause of action in Singapore.

The position with respect to commercial arbitrations has been clarified, both by the judgment in *Swift-Fortune* and subsequent statutory amendment inserting s 12A into the *International Arbitration Act* that came into force in January this year. I am not aware whether or not similar amendments are under consideration for other forms of commercial disputes.

The position with respect to such other disputes appears to depend on the continued applicability of the analysis of the Court of Appeal in *Karaha Bodas* and *Swift-Fortune* itself. In the subsequent case of *Wu Yang Construction Group,* the Court of Appeal returned to the issue and Chief Justice Chan Sek Keong reaffirmed the basic proposition for the law of Singapore in this respect. [52]

These authorities were subject to a detailed analysis by Justice Chan Seng Onn in *Multi-Code Electronics Industries*. His Honour adopted the reasoning in *Channel Tunnel* and the approach of Justice Belinda Ang Saw Ean.[53] Another first instance judgment has relied on the applicability of *The Siskina* principle.[54]

It is noteworthy that the analysis in the Singapore courts focuses on the English case law from *The Siskina*.[55] In *Swift-Fortune,* Chief Justice Chan Sek Keong set out the different legislative history of the provisions in England and in Singapore and the differences in the way the law has developed in the two jurisdictions. The Chief Justice left open the possibility of interpreting s 4(10) in a more expansive manner.[56]

I would not pretend to address an audience of the Singapore Academy of Law on what, if any, scope there is for the exercise of an inherent or implied jurisdiction. However, I note that Justice Chan Seng Onn in *Multi-Code Electronics* refers to the exercise of inherent powers to grant a stay.[57] Perhaps in the future, the Court of Appeal will be asked to consider the Australian line of authority on freezing orders.

In the closely analogous field of cross border insolvency there is a body of authority in support of the proposition that a court will assist a foreign insolvency even in the absence of express statutory authority.[58] A number of cases support the existence of such a jurisdiction.[59] However, the most recent treatment of this issue in the House of Lords involved recognition

in England of the primacy of liquidation of HIH, a major Australian insurance group being conducted in the Supreme Court of New South Wales. Two of their Lordships affirmed that there was such an inherent jurisdiction. Two concluded that there was not and the fifth found it unnecessary to decide.[60]

Judicial Assistance

Intervention by means of a freezing order in order to support the integrity of the administration of justice by a foreign court is only one sphere in which judicial assistance between courts is of significance, indeed of growing significance, in many areas of the law, particularly in the commercial context. These problems are not new.[61] However they are of a qualitatively different order by reason of the multifaceted process known as globalisation. A range of international conventions and model laws provide for judicial assistance. However they are not comprehensive and each has limitations. I have addressed these matters, particularly the limitations, on a number of occasions.[62]

The disparate fields in which judicial assistance are required include:

- Service of process: The *Hague Service Convention*, whilst widely adopted, is not universal and in any event has some difficulties arising from the cumbersome process of making requests through a Central Authority.
- Assistance with evidence: Similarly, the *Hague Evidence Convention* is widely but not universally accepted and has the same procedural problems.
- Cross border insolvency: The UNCITRAL *Model Law* has been adopted by a number of major economies. However it is not universal. A number of alternative mechanisms exist for communication between courts, particularly through the mechanism of protocols agreed by the parties.
- Enforcement of judgments: There are a wide variety of approaches to the enforcement of judgments. The Hague Conference's attempt to formulate a general Convention proved impossible by reason of this diversity. The *Hague Choice of Court Convention* is a step in the right direction but is not yet in force.

The significance in all of these fields of co-operation between courts, particularly with respect to court to court communications, is a subject capable of development in the

various ways in which international collaboration has occurred in the past:

- A treaty basis
- A model law basis
- A regional or a bilateral arrangement..

The position with respect to judicial co-operation may be distinctively different in common law jurisdictions than it is in civil law jurisdictions. The latter have a quite different approach to the status of courts. The concept of an inherent jurisdiction in the way that common lawyers understand it would be unacceptable. Common law judges have an inheritance of judge-made law and, despite the considerable expansion and significance of statutes, judicial authority is not entirely derived from other legislative acts.[63]

The critical significance of cross border judicial co-operation for the preservation of assets and of records was identified by Lord Millett when he said:

> "In other areas of law, such as cross border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international

convention. International fraud requires a similar response. It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."[64]

Subsequently Lord Millett said, with particular reference to freezing orders:

"The commercial necessity resulting from the increasing globalisation of traders encourage the adoption of measures to enable national courts to provide assistance to one another, thereby overcoming difficulties occasioned by the territorial limits of their respective jurisdictions. But judicial comity requires restraint, based on mutual respect not only for the integrity of one another's process, but also for one another's procedural and substantive laws. "[65]

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

In my earlier addresses on this subject I advocated the recognition of the barriers to effective international commercial litigation as a form of non tariff barrier to trade and investment. This arises because dispute resolution in international commerce or investment is subject to inhibitions and transaction costs to which domestic commerce and investment is not subject including:

- uncertainty about the ability to enforce legal rights;
- additional layers of complexity;
- additional costs of enforcement;

- risks arising from unfamiliarity with foreign legal process;
- risks arising from unknown and unpredictable legal exposure;
- risks arising from lower levels of professional competence, including judicial competence;
- risks arising from inefficiencies in the administration of justice and, in some cases, of corruption.

These additional transactions costs of international trade and investment are of a character which do not operate, or operate to a lesser degree, with respect to intra-national trade and investment. They impede mutually beneficial exchange by means of trade and investment.

I advocated the inclusion of such matters in the negotiations for bilateral free trade agreements. That appeared to me to be logical. I have not yet been able to interest the Australian Government in doing so.

It appears that the only way forward may be from within the legal community itself. Any of the models above could be

developed, ie, treaties, model laws or bilateral arrangements. The significance of such co-operation was recognised many years in ago in the 1999 Seoul Statement on Mutual Judicial Assistance in the Asia Pacific Region by virtually all the Chief Justices of the region. By reason of the enthusiasm of the then Chief Justice of South Korea, a treaty between South Korea and Australia has been entered into with respect to the provision of mutual judicial assistance. There seems to me to be no reason why a similar treaty could not be entered into between Australia and Singapore.

In the absence of any such formal treaty, there are spheres in which the courts are masters of their own destiny, at least in most common law nations, eg, in the making of Rules of Court. Pursuant to such powers, important mechanisms for judicial assistance can be developed following discussions between courts or amongst regional groupings of courts.

The objectives to be served by co-operation between courts and the provision of judicial assistance in various contexts, including freezing orders, has been well stated by one author who identified three objectives of the law of international commercial litigation as follows:

(i) To provide functional responses to the modern international commercial context in which cross border problems arise;

(ii) To provide effective and fair remedies in civil disputes when those disputes cross national borders; and

(iii) To resolve the otherwise irreconcilable conflicts between national legal systems in order to do substantial justice between the parties.[66]

I endorse these objectives and believe that they can be pursued by courts acting in collaboration with respect to the matters that I have addressed in this paper.

The success of the globalised market economy, together with the greater facility for communication amongst lawyers and judges, has transformed the attitudes of judges throughout the world about acting in support of each other's jurisdiction. It has also transformed knowledge of each other's jurisdictions and practices. There is now a definite sense of international collegiality amongst judges of different nations of a character that simply did not exist a few decades ago. This is part of the phenomenon that has been called "judicial globalisation",[67] or the creation of a

"global community of courts".[68] The recognition of mutual interdependence between courts for the preservation of the jurisdiction of each may evolve in this context.

[1] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (1952) Encyclopaedia Britannica Inc, at 403.

[2] R Gilson, "Value Creation by Business Lawyers: Legal Skills and Asset Pricing" (1984) 94 *Yale Law Journal* 239; see also L Berstein, "The Silicon Valley Lawyer as a Transaction Cost Engineer" (1995) 74 *University of Oregon Law Review* 239 and D Driesen and S Ghoshem, "The Functions of Transaction Costs: Rethinking Transaction Cost Minimisation in a World of Friction" (2005) 47 *Arizona Law Review* 61.

[3] *In Re Castioni* (1891) 1 QB 149 at 167-8. I have developed this theme in J J Spigelman, "Words, Words, Words" (2007) 81 *Australian Law Journal* 601.

[4] See Campbell McLachlan "The Jurisdictional Limits of Disclosure Orders in Transnational Fraud Litigation" (1998) 47 *ICLQ* 3.

[5] See *Airbus Industry GIE v Patel* (1999) 1 AC 199 at 132 per Lord Goff.

[6] Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd ed, 2010) Sweet & Maxwell, at 232.

[7] For a comparison of the 1985 and 2006 Revisions see Justice Clyde Croft and Bronwyn Lincoln, "The Role of Courts: Enforcement of Arbitration Awards and Anti-Arbitration Injunctions" in K E Lindgren (ed), *International Commercial Litigation and Dispute Resolution* (2010) Ross Parsons Centre, Sydney Law School.

[8] *Siskina v Distos Compania Naviera SA ("The Siskina")* [1979] AC 210.

[9] Lord Denning, *The Due Process of Law* (2010) Butterworths, at 134. See also John Stevens, "Equity's Manhattan Project: The Creation and Evolution of the Mareva Injunction" (1999) 14 *Denning Law Journal* 25.

[10] *The Siskina* supra at 149.

[11] Ibid at 258 G-H and 260 B per Lord Diplock.

[12] *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* (1993) AC 334 at 362.

[13] See, eg, *British Airways Board v Lakers Airways Ltd* (1985) AC 58 at 81; *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" N.V.* (1987) AC 24 esp at 40 and cf at 44-45.

[14] See Peter Devonshire, "Listing not Sunk: The Siskina in the House of Lords" (2007) 123 *LQR* 361 and see Peter Devonshire "Freezing Orders Disappearing Assets and the Problem of Enjoining Non Parties" (2002) 118 *LQR* 124 at 127.

[15] *Mercedes Benz A.G v Leiduck* (1996) AC 284.

[16] Ibid at 305B.

[17] See Stephen Gee, *Commercial Injunctions* (5h ed) London, Sweet & Maxwell, 2004 at [1.025].

[18] See *ETI Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880; (2009) 1 WLR 665.

[19] Australian Law Reform Commission *Report No 80*.

[20] The fullest treatment of Australian law is Peter Bisco, *Freezing and Search Orders: Mareva and Anton Piller Orders* (2nd ed) LexisNexis Butterworths, Australia 2008 esp Ch 5. See also John Tarrant, "Mareva Orders: Assisting Foreign Litigants" (2006) 27 *Aust Bar Rev* 314 and Devonshire supra 118 *LQR* esp at 136-139. The Australian approach has been criticised. See A Wyvill "Law of Fraudulent Conveyance as the Jurisdiction Foundation for Mareva Injunctions" (1999) 73 *ALJ* 672; Pitel & Valentine supra at 362-364.

[21] See *Riley McKay Pty Ltd v McKay* (1982) 1 NSWLR 264 esp at 276.

[22] See, eg, *Patrick Stevedore Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1; *Pelechowski v Registrar, Court of Appeal, NSW* [1999] HCA 19; (1999) 198 CLR 435 at [45] and [52]; *Cardile v LED Builders Pty Ltd* [1999] HCA 18; (1999) 198 CLR 380 at [41]-[42]; *Australian Broadcasting Corporation v Lenah Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199. In *Cardile* the Court preferred reference to "Mareva Orders" in lieu of "Injunctions" at [42].

[23] See *Lena Meats* supra esp at [12], [94]-[95].

[24] See, eg, *Cardille* supra at [41]-[42]; *Lenah Meats* supra at [94].

[25] *The Siskina* supra at 233-234, 236.

[26] See the detailed analysis by Campbell JA in *Davis v Turning Properties Pty Ltd* [2005] NSWSC 742 at [22]-[34]. See also the Honourable Justice Peter Biscoe *Freezing and Search Orders: Mareva and Anton Piller Orders* LexisNexis Butterworths, Australia, 2008 esp at [1.17]-[1.18]. [2.28], [1.28], [2.58]-[2.62].

[27] *Lenah Meats* supra at [95].

[28] See *Davis v Turning Properties* [2005] NSWSC 742; (2005) 222 ALR 676 and see J Tarrant "Mareva Orders: Assisting Foreign Litigants" (2007) 27 *Australian Bar Review* 314; Lee Aitken "Jurisdiction, Substantive Relief and the Asset Preservation Order" (2007) 81 *ALJ* 453.

[29] *Davis v Turning Properties* supra at [35]. See also the similar position taken by the Supreme Court of Western Australia in *Celtic Resources Holdings PLC v Arduina Holdings BB* [2006] WASC 68; (2006) 32 WAR 276.

[30] See *Jackson v Sterling Industries Ltd* (1987) CLR 612.

[31] Uniform Civil Procedural Rules 2005 (NSW) r 25.11(1).

[32] Ibid r 25.14(2) and (3).

[33] Ibid r 25.16.

[34] I have discussed this in J J Spigelman, "Transaction Costs and International Litigation" (2006) *ALJ* 438 at 449-451.

[35] See *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v Canadian Pacific Limited* (1996) 2 SCR 485; 136 DLR (4th) 289.

[36] See Stephen G A Pitel and Andrew Valentine, "The Evolution of the Extraterritorial Mareva Injunction in Canada: Free Issues" (2006) 2 *Journal of Private International Law* 339 esp at 353-358.

[37] See generally Mark S W Hoyle, *Freezing and Search Orders*, Informa, London, 2006 at pars [11.74]-[11.82].

[38] See *Pacific Santo SDN Bhd v United Engineers (Malaysia) Bhd* (1984) 2 MLJ 143 citing *Riley Mackay* supra. As to search orders see *Bank Bumiputra Malaysia v Lorraine Osmond* (1985) 2 MLJ 236.

[39] See *Aspartra SDN Bhd v Bank Bumiputra Malaysia* [1988] 1 MLJ 97.

[40] *Nishimatus Construction Pty Ltd v Kecom Sdn Bhd* [2009] 2 MLJ 404.

[41] *Dial Kaw A/P Tafa Singh v Mana Foong Realty SDN Bhd* [2000] 3 MLJ 153; *Khoo Soo Teong v Khoo Siew Ghim* [1991] 3 MLJ 158.

[42] *Eternal Construction v Balfour Beatty Cementation* (2004) 7 MLJ 537.

[43] See, eg, *Laviathin Shipping Co Ltd v Sky Sailing Overseas Co Ltd* (1998) 4 HKC 347.

[44] These reforms were based on a detailed consideration of the issue by the Chief Justices *Working Party on Civil Justice Reform Final Report* s 12. For a consideration of the background to these proposals see Henry Suen and Sai On Cheung "The Power to Grant Mareva Injunctions in Aid of Foreign Proceedings, Principles, Recent Developments and the Civil Justice (Miscellaneous Amendments) Bill 2007 in Hong Kong" (2008) *International Construction Law Review* 232.

[45] Sections 21L, 21M and 21N.

[46] Section 21N(1)(d).

[47] Section 2GC, esp s 51B.

[48] *Karaha Bodas LLC v Pertomina Energy Trading* (2006) 1 SLR 112 at [31]-[43].

[49] See *Swift-Fortune Limited v Magnifica Marine SA* (2006) 2 SLR 323.

[50] See *Front Carriers Limited v Atlantic and Orient Shipping Corp* (2006) 3 SLR 854.

[51] *Swift-Fortune* supra (2007) 1 SLR 69 at [6].

[52] *Wu Yang Construction Group Limited v Mau Yong Hui* (2008) 2 SLR 350 at [28].

[53] *Multi-Code Electronics Industries v Toh Chun Toh Gordon* (2009) 1 SLR 1000 at [55] et seq.

[54] See *Petrovil v Staindy Overseas Limited* (2008) 3 SLR 856 esp at [16].

[55] See, eg, *Swift-Fortune* (2007) 1 SLR 69 supra at [72]-[85].

[56] See ibid [92]-[94]. I note that there was reference to a decision from the Court of Appeal of the Bahamas as well as English authority.

[57] *Multi-Code Electronics* supra at 1041.

[58] See *Dicey, Morris and Collins on the Conflict of Laws* (14th ed) vol 2, London, Sweet & Maxwell, 2006 at par [30-103] p 1389; J J Spigelman "Cross Border Insolvency: Co-operation or Conflict?" (2009) 83 *ALJ* 44 at 49-50; John Martin "Cross Border Insolvency and the Common Law" in K E Lindgren *International Commercial Litigation and Dispute Resolution*, Ross Parsons Centre, Sydney Law School, Sydney, 2010 esp at pp 221-223. See also Ian F Fletcher *Insolvency and Private International Law: National and International Approaches* (2nd ed), Oxford University Press, Oxford, 2005 Ch 4 esp at [4.01]-[4.03]

[59] See *Al Sabah v Groupo Torras SA* (2005) UKPC 1; (2005) 2 AC 333 at [35]; *R v Cavell Insurance Co* (2005) 25 CCLI (4th) 230, esp at [20] and on appeal (2006) 39 CCLI (4th) 159; 269 DLR (4th) 679 at [34]-[38], [48]-[54], [60].

[60] See *Re HIH General Insurance Limited McGrath v Riddel* (2008) UKHL 21; (2008) 1 WLR 852.

[61] See, eg., H L Jones "International Judicial Assistance: Procedural Chaos and a Program for Reform" (1953) 62 *Yale Law Journal* 517; Dean Maclean *International Judicial Assistance* Clarendon Press, Oxford (1992); B A Ristau *International Judicial Assistance (Civil and Commercial)* International Law Institute (1984) 2 Vols.

[62] J J Spigelman, "Transaction Costs and International Litigation" (2006) 80 *ALJ* 435 at 453; J J Spigelman, "International Commercial Litigation: An Asian Perspective" (2007) 37 *Hong Kong Law Journal* 859 at 866-867; (2007) *Australian Business Law Review* 318 reprinted in Tim Castle (ed) *Speeches of a Chief Justice: James Spigelman 1998-2008*, Sydney, 2008; J J Spigelman "Cross Border Insolvency: Co-operation or Conflict" (2009) 83 *Australian Law Journal* 44; J J Spigelman "The Hague Choice of Court Convention and International Commercial Litigation" (2009) 83 *ALJ* 386. See also J J Spigelman "Cross Border Issues for Commercial Courts", 13 January 2010, accessible (as are all the other papers) at www.lawlink.nsw.gov.au/sc under "Speeches" (Spigelman CJ).

[63] For an analysis of the different approaches of the two systems in this respect see P Schlosser "Jurisdiction and International Judicial Administrative Co-operation" (2000), 284 *Recueil Des Cours* (Collected Courses of Hague Academy of International Law) 9.

[64] See *Credit Suisse Fides Trust SA v Cuoghi* (1998) QB 818 at 827.

[65] *Refco Inc v East Trading Co* (1999) 1 Lloyd's Rep 159 at 175.

[66] See Campbell McLachlan "The Jurisdictional Limits of Disclosure Orders in Transnational Fraud Litigation" (1998) 47 *ICLQ* 3 at 3; Campbell McLachlan "International Litigation and the Reworking of the Conflict of Laws" (2004) 120 *LQR* 580 at 581-582.

[67] Anne-Marie Slaughter, "Judicial Globalisation" (2000) 40 *Va J. Int'l L* 1103.

[68] Anne-Marie Slaughter, "A Global Community of Courts" (2003) 44 *Har Int'l LJ* 191; see generally Anne-Marie Slaughter, *A New World Order* Princeton University Press, Princeton (2004) esp Ch 2.