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COORDINATED TRANSNATIONAL INTERACTION IN CIVIL LITIGATION AND ARBITRATION

Peter F. Schlosser*

INTRODUCTION

About fifteen years ago, an English shipowner chartered his vessel, the Mareva, to time charterers. After a while, the charterers discontinued payment on the charter and the shipowner instituted court proceedings against them. The plaintiff, concerned about the ability and willingness of the defendants to satisfy an expected judgment, simultaneously applied for a preliminary injunction restraining the defendants from disposing of a subcharter which had been paid into their London bank account. The injunction was granted.1 Since then, injunctions of this kind have been denominated "Mareva injunctions," although it was the second, rather than the first, case where such an injunction had been given.2

Lawyers on the continent initially reacted with an indulgent smile, which expressed the feeling that it had taken the English until the end of the twentieth century to establish a legal innovation that civil law countries, such as France, Germany and others, had maintained as a long-standing tradition under various names such as " Arrest" (Germany),3 " saisie conservatoire" (France)4 or " sequestro" (Italy).5

Common law countries have always been very reluctant to provide prejudgment relief, particularly when the defendant domiciliary or resident was personally subject to the jurisdiction of the court. Even the United States affords only limited possibilities of obtaining prejudgment attachment or garnishment, the primary aim of which has always been to establish quasi in rem jurisdiction rather than to protect

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3. ZIVILPROZESSORDNUNG [ZPO] §§ 916-945 (W. Ger.).
4. CODE DE PROCÉDURE CIVILE [C. PR. CIV.] arts. 48-58, 557-582 (Fr.).
5. See infra note 18. Even a recent English observer commented that "the Mareva jurisdiction brought the English common law (and those jurisdictions which follow it) into line with the practice of civil law countries . . . ." Collins, The Territorial Reach of Mareva Injunctions, 105 LAW Q. REV. 262, 263 (1989).
the plaintiff from the disappearance of assets subsequent to the institution of the proceedings. Occasionally, in fact, unlimited appearance of the defendant has constituted sufficient grounds to vacate the seizure because the seizure had become obsolete as a prerequisite to maintaining the jurisdiction of the court.

Soon, however, it became apparent that the legal nature and the practical usefulness of a Mareva injunction was quite different from the characteristics of an “Arrest” or a “saisie conservatoire.” The English Court of Appeal itself called the innovation “one of the most imaginative, important and, on the whole, most beneficial of modern times.”

A few months ago, the same English Court of Appeal granted a Mareva injunction against Haiti’s former president Jean-Claude Duvalier and some of his relatives at the request of the government of Haiti. At issue in the proceedings was the restitution of assets Duvalier was accused of having illegally acquired and removed from Haiti. The injunction ordered:

(1) that the defendants refrain from dealing with assets which represented the proceeds of the payments complained of in the main proceedings;
(2) that the defendants refrain from removing assets from the jurisdiction of the English court or dealing with those assets;
(3) that the defendants disclose information about the nature, location and value of defendants’ assets.

The court called this injunction “world-wide” for three reasons. First, it was unknown where the proceeds of the payments complained of in the main proceedings were located. The injunction was restraining the Duvaliers from dealing with them irrespective of the jurisdiction in which they were located. Second, the same was true with regard to the disclosure order. Most of the assets were not likely to be located in the United Kingdom. Third, and most important, the proceedings on the substance of the matter were being conducted in France. Why the government of Haiti sought preliminary protective relief in England,

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7. See, e.g., N.Y. CIV. PRAC. L. & R. 6223(a) (McKinney 1980). This was the presumption in Cargill, Inc. v. Sabine Trading & Shipping Co., 756 F. 2d 224 (2d Cir. 1985).
10. The precise wording of the injunction has not been reported.
11. In Ashtiani v. Kashi [1987] 1 Q.B. 888 (C.A.), the same court, though another panel, had still expressed its view to the contrary, limiting the restraining order to assets within the jurisdiction.
rather than France, might seem perplexing, but this kind of interim relief was unknown in French law, and the English judiciary was regarded as the only one providing an adequate remedy to find out where Duvalier held all the assets in question.

Hence, in no more than fifteen years between Mareva and Duvalier, the flexibility of interim protective measures under English law has surpassed that of the traditional standard of civil law countries. It has outdone it to such a degree that plaintiffs in continental courts now feel compelled to go before the English judiciary to borrow its recently developed magic curial arm. This did not happen because the territorial limits of the French jurisdiction would have been any obstacle to giving adequate protection. It happened because of the internal shortcomings of French civil procedure — even though the French "nouveau code de procédure civile" was enacted as recently as the early seventies.

Two phases in the short history of Mareva injunctions should be mentioned in order to facilitate subsequent discussion. Soon after their invention, Mareva injunctions, which were initially only prohibitive, came to be accompanied by supplements ordering the defendant to disclose what assets he had and where (within the jurisdiction) they were located. Because Mareva injunctions were judge-made law, judges had little scruple in finding implied or ancillary powers to order any activity necessary to achieve the goal of Mareva injunctions, including disclosure orders directed to third parties such as banks holding assets in account for defendants. This legal situation remained unaltered when in 1981 the courts' power to issue Mareva injunctions became incorporated into the Supreme Court Act. The definition given therein is:

"Injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court or otherwise dealing with assets . . ." (sec. 37 (3)).

This provision, by referring to assets "within the jurisdiction," makes it appropriate to turn to the second phase in the evolution of Mareva injunctions. This wording, which indicates that such a provisional measure was available only if the subject matter of the proceedings was also litigated in England, was aimed at excluding "world-wide" restraining orders. Only one year later, however, the provision was modified when the United Kingdom became a party to the Brussels

Coordinated Transnational Interaction

EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Pursuant to the Convention, provisional measures in one contracting State are available to litigants irrespective of where among contracting States the substance of the matter is litigated. Implementing legislation in the United Kingdom provided for an Order in Council to widen the scope of this provision, which would allow provisional measures to be granted also in support of litigation in other than European Community countries. So far no such order has been issued. Yet it is supposed that no obstacle exists to such issuance, in principle, since the continental Community States have an established tradition of allowing provisional protective measures in support of foreign proceedings.

Therefore, in a transnational perspective, the surprising and innovative element of the British Duvalier decision is not so much the support which the British courts gave to foreign proceedings as the twofold nature of this support. First, the court of one State gives protective support to main proceedings pending in a foreign court by making orders of a kind which the latter court, by virtue of its own law, is prevented from making. International piecemeal litigation is favored in order to maximize the overall effectiveness of judicial relief. Second, information useful and even crucial to the main proceedings can be obtained without any request or leave of the court of the main proceedings, which would lack power to issue such a leave or such request under any circumstance. Both branches of the innovation, as well as the prospects for its transplantation into other legal orders, such as the United States or Germany, will be discussed in the two subsequent parts of this study.

15. Civil Jurisdiction and Judgments Act, 1982, ch. 27, § 25:

(1) The High Court in England and Wales or Northern Ireland shall have power to grant interim relief where —

(a) proceedings have been or are to be commenced in a Contracting State other than the United Kingdom or in a part of the United Kingdom other than that in which the High Court in question exercises jurisdiction; and

(b) they are or will be proceedings whose subject-matter is within the scope of the 1968 Convention as determined by Article 1 (whether or not the Convention has effect in relation to the proceedings).

(2) On an application for any interim relief under subsection (1) the court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it."

16. And soon also amongst six other European states (Austria, Finland, Iceland, Norway, Sweden and Switzerland), which decided (subject to parliamentary ratification) to adhere to the Brussels Convention.

17. See infra and accompanying text.
I. WORLDWIDE FREEZING OF PROPERTY IN AID OF DOMESTIC AND FOREIGN LITIGATION ON THE SUBSTANCE

In civil law countries such as France, Germany and Italy,\(^\text{18}\) it always has been beyond question that interim protective measures are available, regardless of the forum which has jurisdiction on the merits\(^\text{19}\) of the case. To give just one remarkable example\(^\text{20}\): when the Iranian revolution broke out, the new government publicly announced its decision to discontinue repayment of debts. It also ordered its nationals and corporate entities to do likewise, whereupon American and English banks obtained in a German court the garnishment of the Iranians' German bank accounts. The seizure of the 190 million German marks was of particular value to the banks because, unlike Mareva injunctions\(^\text{21}\) and American freezing injunctions, the attachment gave security to them. The German courts, however, did not have jurisdiction as to the merits of the case due to arbitration clauses included in the respective agreements.

The United States seems to have more problems with dissociating interim protective relief from proceedings on the merits. Before discussing this question, however, we must clarify the relationship between attachment and preliminary injunctions, which is a great problem in civil law countries and is well known in the United States.

A. (World-wide) freezing of assets injunctions in lieu of attachments (or pre-judgment garnishments)

Like Jean-Claude Duvalier in France, Ferdinand Marcos was sued in the United States by his successors in government. The claim was

\(^{18}\) As to Germany, see infra note 20.

\(^{19}\) See supra note 17 and accompanying text.

\(^{20}\) Judgment of May 11, 1981, Oberlandesgericht, W. Ger., Frankfurt, 34 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2650; Judgment of Apr. 12, 1983, BVerfGE, W. Ger., 36 NJW 2766. While the issue of jurisdiction as to the merits was not discussed there, it can be inferred from the normal practice of the National Iranian Oil Company that the usual dispute resolution provisions were included in the agreements it had entered into with the plaintiffs.

for restitution and damages (including $50 billion in punitive damages). The government of the Philippines sought a preliminary injunction restraining Marcos, his wife and some other persons close to the Marcoses from dealing with their assets (except for normal living expenses and legal fees), wherever located. While the district court granted the injunction, the Marcos family won the second round when the Ninth Circuit adopted the defendant’s theory that all that Marcos was blamed for was covered by act of state immunity principles. Nevertheless, the third and final round (with regard to interim protective measures) went to the Philippine government. After a rehearing, the Ninth Circuit en banc correctly decided that room for reviewing Marcos’ acts existed, since the government of the Philippines itself insisted on such review. This opened the way to decide whether a preliminary injunction can be given in lieu of attachments and garnishments — a problem with a general and a transnational aspect.

a) Fed. R. Civ. P. 64 specifies in very clear terms the availability of “seizure of property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action.” However, in the Marcos case, state law controlled. California, where the proceedings against Marcos were instituted, does not allow prejudgment attachment other than for the protection of contractual claims. Therefore, it is arguable that temporary restraining orders and preliminary injunctions aimed at freezing assets would amount to circumvention of the rules about non-availability of attachments in other than contract-based claims. Such an argument seems all the more plausible since, as the Ninth Circuit itself put it, “a freeze of assets has the effect of an attachment.”

Indeed, such a conclusion was what some courts had hitherto reached. These courts emphasized the “equitable nature” of a preliminary injunction and inferred that it could not issue where the underlying substance matter was a “legal” claim for damages, whether liquidated or not, and irrespective of the prospect of ultimate satis-

24. Id. at 1361.
25. Id.
faction of the judgment. Some found themselves driven to give a somewhat artificial "equitable" basis to the substance of the matter, such as rescission of a constructive trust to show that the underlying claim was not just for money.

All these kinds of problems apparently were not a major concern for the Ninth Circuit when ruling on the Marcos case. It simply said that "while a freeze of assets has the effect of an attachment, it is not an attachment. The court has power to preserve the status quo by equitable means. A preliminary injunction is such a means." Though this wording seems to favor the implication that the nature of the substance of the matter is irrelevant, the court nevertheless focused on the fact that the district court judge who granted the injunction had qualified one of the counts of the complaint as deriving from a constructive trust. Consequently, the preliminary injunction was for the protection of equitable remedies. The appellate judges framed their review in terms of abuse of discretion and so did not say whether the issuance of a preliminary freezing injunction was limited to the protection of equitable remedies. In a previous judgment, however, such a requirement was clearly stated.

Whatever may be inferred from all this with regard to the actual position of the Ninth Circuit, such a requirement is not sound in policy, nor is it a compelling inference from the wording of the provision. Absent binding precedent, one should not state it. Attachments and preliminary injunctions are both subject to the more general and even constitutional principle that remedies necessary to the efficiency of court proceedings must be available, including protection of the plaintiff from his opponent's activities aimed at detracting from, or even obliterating, the implementation of the judgment ultimately to be entered. Temporary restraining orders and preliminary injunctions must, therefore, be regarded as subsidiary remedies to be granted in any case where legal remedies prove to be insufficient. This is pre-

28. Federal Savings & Loan Ins. Corp. v. Dixon, 835 F. 2d 554 (5th Cir. 1987); Federal Trade Comm'n v. N.H. Singer, Inc. 668 F. 2d 1107, 1112 (9th Cir. 1982), aff'g 534 F. Supp. 24 (N.D. Cal. 1981) ("Rescission is an old equitable remedy and the district court has power to issue a preliminary injunction to preserve the status quo in order to protect the possibility of that equitable remedy.").
29. Republic of the Philippines v. Marcos, 862 F.2d 1355, 1370 (9th Cir. 1988)(citations omitted).
30. Id. at 1362.
31. Singer, 668 F. 2d at 1112. See supra note 28.
32. See infra note 46.
cisely the line the District Court for the Southern District of New York has adopted, saying:

Where . . . the harm that may be inflicted during the pending of an action cannot be calculated with the certainty that would make damages an adequate remedy the "irreparable injury" aspect of the preliminary injunction standard is satisfied.33

A closer review of the reported cases reveals that many other courts which did not grant injunctive relief did not in principle exclude the availability of any equitable interim relief in order to protect "legal" claims. Rather, on the basis of their discretion (which would not exist, should preliminary injunctions be confined to permanent equitable remedies), they reserved the right to decide otherwise in extraordinary cases.34 The more state law limits the availability of attachments or garnishments, the more preliminary injunctions become available, subject, of course, to very prudent discretionary practice. Neither the Federal Rules of Civil Procedure nor general principles of curial law indicate restriction, in principle, of equitable interim relief to the protection of equitable claims.

Some courts have already disfavored such a restriction outright. Temporary restraining orders, undoubtedly also "equitable remedies," have been granted by some courts in order to secure the levy of a subsequent or concurrent attachment on individual assets.35 An "equitable" provisional measure has thus become some kind of second degree interim protection for a first degree "legal" prejudgment remedy. More than a decade ago, the Fifth Circuit decided that "even were [plaintiff's] remedy limited to damages, an injunction may issue to protect that remedy."36 Recently, the Sixth Circuit expressed its willingness to grant interim freezing orders whenever "the legal remedy provided by the state's attachment statutes . . . is inadequate."37

b) Liberal access to "equitable" interim relief, being generally sound in policy, is particularly compelling in a context where, on a matter of principle, attachments or garnishments cannot be ordered though the substance of the matter is clearly a claim for money. This is so whenever the court lacks power to order an attachment or a gar-

33. Milstead v. O Records & Visuals, Ltd. No. 84 Civ. 3657 (S.D.N.Y. June 5, 1984)(LEXIS, Genfed library, Cases file) (citing Ives Laboratories, Inc. v. Darby Drug Co., 601 F. 2d 631, 644 (2d Cir. 1979)("[W]e think it clear that Ives showed 'irreparable injury' at least in the sense of impracticability of establishing the amount of damages . . . ." Ives Laboratories, 601 F.2d at 635 n.4 (dictum)).
34. E.g., Jackson Dairy Inc. v. H. P. Hood & Sons, 576 F.2d 70 (2d Cir. 1979).
nishment because the respective assets are not located within its jurisdiction. Attachments require jurisdiction “in rem.” Assets located abroad can never be subjected to an attachment order, whether such a court can timely be identified (in the absence of information about the location of assets) and whether attachment proceedings can timely be commenced to secure the meaningful substance matter adjudication may be very doubtful. If, for example, Marcos had owned assets in the United Kingdom, the British courts would not have had power to order a Mareva injunction. The American court having personal jurisdiction over Marcos was prevented, pursuant to California law, from attaching Marcos’ assets within the jurisdiction. More important, because the court lacked jurisdiction in rem, it was also precluded from seizing the major part of the former president’s assets, which were located in a variety of foreign countries. Since, unlike attachments, temporary restraining orders and preliminary injunctions require personal jurisdiction, only these remedies are suitable for indirectly reaching assets abroad as well. Because it is permissible under international law to order a person, otherwise subject to personal jurisdiction, to maintain activities abroad or not to commit acts abroad, no reason exists for not allowing injunctions restraining him from dealing with assets abroad.

c) A small comparative survey reveals that some civil law States have similar problems, though in a slightly different formal context. Civil law States ignore the distinction between personal and in rem jurisdiction. “Arrest” or “sequestro” are in Germany or Italy, re-

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38. See supra text following note 16.

39. Courts of many nations have ordered acts to be committed abroad; none has ever expressed any doubt about being entitled to do so: e.g., Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984) (anti-suit injunction); Judgment of Apr. 9, 1986, Bundesgerichtshof, W. Ger., 7 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 176 (1987) (blood samples in paternity proceedings); id. at 153 note P. Schlosser; Babanaft Int’l Co. S.A. v. Bassatne, [1989] 2 W.L.R. 232, 252 (Neill, L.J.) (“There is abundant authority for the proposition that, where a defendant is personally subject to the jurisdiction of the court, an injunction may be granted in appropriate circumstances to control his activities abroad”); Judgment of Feb. 23, 1988, Oberster Gerichtshof, Aus., 110 Juristische Blätter 459 (construction of a nuclear power plant); contra Judgment of Apr. 29, 1989, No. 6 N/503/89, Oberster Gerichtshof, Aus. (not yet published) (based on grounds of state immunity, although the issue was not raised in very clear terms). See generally R. THOMPSON & J. SEBERT, REMEDIES: DAMAGES, EQUITY AND RESTITUTION 487 (2d ed. 1989); G. BORN & D. WESTIN, INTERNATIONAL LITIGATION IN U.S. COURTS 242 (1989); Messner, The Jurisdiction of a Court of Equity over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State, 14 MINN. L.REV. 494 (1930). In the context of extraterritorial discovery, many incorrect statements to the contrary were made; see supra note 71 and accompanying text.

40. The very concept of personal jurisdiction is unknown. The “competence” of the courts has never been derived from physical power over persons.
spectively, general orders relating to all the assets (or at least mov-
ables) of the defendant and allow levies on whatever objects or
garnishment of whatever funds payable to the debtor the creditor can
uncover. Within the framework of the Brussels Convention, an
"Arrest" and a "sequestro" are even extraterritorially enforceable,41
because the concept of jurisdiction in rem (or quasi in rem) has always
been unknown in civil law countries. Still, outside the scope of the
Brussels Convention, traditional concepts of international comity as
applied in this field have only allowed enforcement of final judgments
on the merits. Hence, as in common law countries, the effectiveness of
justice in civil law States requires that extraterritorial injunctions be-
come available and sanctioned, unlike attachment orders, by contempt
of court penalties.

To abide by such an imperative of curial justice seems to be impos-
sible in German law. Though not grounded in the dichotomy of law
and equity, German law has adopted the doctrine that the "Arrest" is
exclusive of preliminary injunctions and temporary restraining or-
ders.42 Thus "Arrest" is the only provisional protective measure avail-
able if the subject matter claim is for a money judgment only.43 Since
the law/equity dichotomy has always been lacking in German law,
one cannot find adequate relief even through the invention of some-
thing like a constructive trust. Claims for restitution (including unjust
enrichment) are claims for money if non-specified items are sought.
Even so, another legal device that overcomes the rigidity of the Ger-
man tradition exists with respect to provisional protective measures.
This device is found in the fact that civil law tradition does not require
courts to adhere to the doctrine of stare decisis. Any court may, at
any time, adopt legal opinions inconsistent with often reconfirmed
case law of the highest courts of the country. The court need only
state that codified law (and, in theory, all the law is supposed to be
derived from codified rules) has hitherto been misconceived. Such a
court may draw additional support by invoking constitutional
principles.

This is precisely what should be done in our field. Nowhere in the
German "Zivilprozessordnung," not even in the text relating to interim
protective relief, is there any indication that preliminary injunctions

41. See, e.g., Calzaturificio Brennero sas v. Wendel GmbH Schuhproduktion, 1984 E.C.R.
3971.

42. In German law, both are called "einstweilige Verfügungen," because the "temporary"
character of the latter becomes obsolete should the defendant abstain from applying for a
hearing.

43. This is uncontroversial. See, e.g., ZIVILPROZESSORDNUNG 2142-43 (§ 916) (R. Zöller ed.
1987).
should be available for the protection of monetary claims.\textsuperscript{44} As the constitutional court has emphasized time and again,\textsuperscript{45} constitutional principles of "Rechtsstaatlichkeit"\textsuperscript{46} require preliminary protective measures to be available "in time." When an attachment ("Arrest") proves inadequate or unsuitable, preliminary injunctions must fill the gap. An attachment order might, perhaps, be accompanied by a preliminary injunction ordering the debtor to disclose the existence and location of assets and to refrain from dealing with them. Though an attachment order entitles the creditor to interrogate the debtor about his assets, the latter may find plenty of time and opportunity to dissipate or reallocate them.

Regrettably enough, one ingenious component of the English Mareva injunction is only partially suited for reconsideration of the traditional understanding of German law. Under German law, third parties are not directly approachable through attachment or preliminary injunction. In the Duvalier case, entities, banks especially, were informed of the issuance of the world-wide injunction.\textsuperscript{47} Consequently, the third parties would have been subject to contempt of court penalties if they had chosen to follow the instructions of their customers given in disregard of the injunction. Indeed, aiding and abetting contempt is in itself contempt.\textsuperscript{48} However, under German law, only the defendant in proceedings and addressee of a court's order can be fined or imprisoned for contempt.\textsuperscript{49} Yet, a bank informed

\textsuperscript{44} Id. at 2184 (§ 935) ("Preliminary injunctions in view of the object in litigation are permissible, should there be reason to apprehend that, by an alteration of existing circumstances, the rights of one of the parties will become irreparably injured or more difficult to pursue"); Id. at 2192 (§ 940) ("Preliminary injunctions are also permissible for the purpose of temporarily settling the terms of a disputed legal relationship . . . should such a settlement become necessary, especially in order to avoid imminent hardship or force").

\textsuperscript{45} See the decisions discussed by Schmidt-Assman in GRUNDESETZ KOMMENTAR 149 (T. Maunz & G. Dürig eds. 1990).

\textsuperscript{46} The proper translation in the present context would probably be "equal protection" and "due process." So far, American courts have not ruled on the issue in a straightforward way. Nevertheless, they have emphasized that the right to be heard in court "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965), accord, Little v. Strater, 452 U.S. 1, 6 (1981); Boddie v. Connecticut, 401 U.S. 371, 378 (1971). The rulings were given in view of defendants, or even persons not informed about the pendency of proceedings involving their rights. No "meaningful" opportunity to be heard had been given to these persons. The inverse issue of a plaintiff whose suit risks becoming "meaningless" absent interim relief can hardly be decided otherwise. In a case where an administrative authority had already taken action, the District Court of Delaware did raise the issue, though it finally did not grant interim relief, saying "due process merely requires, in cases of this sort, that the plaintiff have an opportunity to test the challenged action without suffering irreparable injury." Amoco Prod. Co. v. United States Dept't of Energy, No. 78-463 (D. Del. Apr. 3, 1979)(LEXIS, Genfed library, Cases file).

\textsuperscript{47} Collins, supra note 5, at 282.


\textsuperscript{49} This is so evident to commentators on the relevant provision of the ZPO (§ 890) that they
about a preliminary freezing order, which nonetheless allows disposal of frozen assets of its client, is liable to the creditor.\textsuperscript{50}

\section*{B. Freezing of assets, within and outside the jurisdiction, in support of foreign litigation}

Unlike the English court in the Duvalier matter, the United States court had both subject matter jurisdiction and personal jurisdiction over Marcos. The power to issue a preliminary injunction was based on "pendent" jurisdiction which led the dissenter to oppose the world-wide reach of the injunction.\textsuperscript{51}

As far as an attachment is concerned, the jurisdiction of the issuing court, though qualified in rem, and traditionally giving rise to quasi in rem jurisdiction, is strictly dependent on the same court's having acquired personal jurisdiction.\textsuperscript{52} The court of the Southern District of New York has found particularly telling words to express this principle: \textsuperscript{53} "So far as we know, there is no provision of New York law which would authorize holding an attachment 'in limbo' pending the outcome of litigation going forward in some other jurisdiction." The Federal Rules of Civil Procedure (Rule 64) also seem to be clear in this respect. An attachment can only be granted in such a way that the subject matter litigation "shall be commenced and prosecuted pursuant to these rules." Following such reasoning, the Second Circuit also refused to grant a preliminary injunction in a case where it only had quasi in rem jurisdiction "over" the defendant.\textsuperscript{54}

But is this kind of reasoning really compelling? Should American courts, once addressed like the British courts in the Duvalier case, really be prevented from freezing assets in the United States, let alone assets world-wide? As the following discussion demonstrates, such a conclusion cannot be inferred from overriding principles and, furthermore, would be inconsistent with case law and statutes relating to similar issues.

\textsuperscript{50} do not even raise the issue. \textit{See, e.g.} \textit{Zivilprozessordnung}, supra note 43, at 2110 (discussing whether the "debtor" is punishable for acts committed by third persons).


\textsuperscript{52} As distinct from being (under quasi in rem principles) obtainable.


\textsuperscript{54} \textit{Cargill, Inc. v. Sabine Trading & Shipping Co.}, 756 F.2d 224, 227, 230 (2d Cir. 1985).
1. Lacking powers to freeze assets regardless of personal jurisdiction on the merits — an inference from overriding legal principles?

In this context, one should be particularly concerned not to confound subject matter (diversity of citizenship) and personal jurisdiction. Courts have often said that the jurisdiction to grant preliminary injunctions is ancillary or auxiliary to the jurisdiction "over" the substance of the matter.\(^5\) Those courts all refer expressly or impliedly to Title 28 § 1651(a) U.S.C., which reads:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ."

This, however, relates only to subject matter jurisdiction. The personal jurisdiction of the federal courts has never been the concern of Congress and is established pursuant to the Supreme Court's minimum contacts doctrine. After Shaffer v. Heitner,\(^5\) the mere fact that assets of the defendant are located within the jurisdiction no longer justifies the exercise of quasi in rem jurisdiction — let alone personal jurisdiction — over the substance of the matter, i.e., over the claim giving rise to attachment or other prejudgment common law relief. Yet, legal writers and courts alike\(^5\) draw the attention of Shaffer's readers to a very telling passage in the judgment, which says\(^5\) that the traditional justification given for quasi in rem jurisdiction at most suggests "that a State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained . . . ." In describing its holding thus, the Supreme Court itself dissociated personal jurisdiction on provisional protective measures from personal jurisdiction on the subject matter. The former may be based merely on the presence of assets within the jurisdiction or a situation of urgency somehow located therein. While the court certainly focused on state court jurisdiction problems, no reason exists why one should argue otherwise when foreign courts have jurisdiction as to the merits. If it is a jurisdiction whose judgments are subject to comity-based recognition and enforcement within the United States, it

\(^{55}\) E.g., Federal Trade Comm'n v. H.N. Singer, Inc., 668 F. 2d 1107, 1109 (9th Cir. 1982), aff'd 796 F.2d 534 F.Supp. 24 (N.D. Cal. 1981) ("The substantive basis and the jurisdictional authority for use of this procedure must be sought elsewhere"); Anthony v. Texaco, Inc., 803 F.2d 593, 596 (10th Cir. 1986), all referring to MOORE's FEDERAL PRACTICE para. 65.03 (2d ed. 1948).


\(^{57}\) S. Riesenfeld, supra note 6, at 413; Carolina Power & Light Co. v. URANEX, 457 F. Supp. 1044, 1047 (N.D. Cal. 1977); E. SCOLES & P. HAY, CONFLICT OF LAWS 244 (1982).

\(^{58}\) Shaffer, 433 U.S. at 210.
is all the more imperative to assist such courts as much as possible. The doctrine of international comity, normally applied to restrict the jurisdiction of domestic courts in internationally linked cases,\textsuperscript{59} is well capable of also inciting, if transnational justice so requires, the opposite inference that domestic courts' jurisdiction can be broadened.

Consequently, at least in those states where jurisdiction is as broad as permitted under constitutional minimum contacts standards,\textsuperscript{60} preliminary injunctions may be granted regardless of whether the respective contacts provide a proper head of jurisdiction as to the merits of the case.\textsuperscript{61}

One should even venture the next and last step and admit worldwide freezing orders, if evidence of the likelihood that at least some assets are held within the jurisdiction is produced. Justice is severely hindered if the victims of harm done by transnationally operating wrongdoers would have to address a large variety of national courts to get adequate interim protection. Location of assets within the jurisdiction justifies general (as opposed to specific) personal jurisdiction for interim relief.

This justification exists all the more since a court, having granted (world-wide) interim relief, remains free to readjust its measures to the further development of the main proceedings, to remove its orders should the court of the latter proceedings have been able to grant adequate interim relief in the meantime, or otherwise to express its view about the desirability of support given to its work by foreign courts.

Such power of a "domestic court" exists even if the parties have, by mutual agreement, derogated from its jurisdiction. Parties to jurisdiction agreements are not normally thought to have extended their agreement to include provisional measures. One can easily refer to the customary practice in the context of arbitration agreements.

2. Similar fields where intensive relief may be granted though jurisdiction as to the merits is lacking

Arbitration indeed is one of the three fields where American law is willing to grant interim protective relief even though neither federal nor state courts have jurisdiction as to the substance of the matter. In


\textsuperscript{61} This was indeed the conclusion reached by the Court in Carolina Power & Light Co. v. URANEX, 451 F. Supp. 1044, 1048 (N.D. Cal. 1977).
the case underlying the leading decision, $85 million owed to the French defendant corporation had been attached ex parte in California even though the plaintiff and defendant had entered into an agreement providing for arbitration in New York. The case is particularly telling since, even absent arbitration agreement, the court would not have had jurisdiction over the defendant. Some courts temporarily opposed this view in cases where the U.N. Convention on Recognition and Enforcement of Arbitral Awards of 1958 was applicable to the arbitration agreement. The New York courts even excluded, as a matter of principle, interim relief in aid of arbitration. But New York lawmakers reacted promptly. The relevant provision of the New York Civil Practice Law and Rules (§ 7502(c)) now reads as follows:

(c) Provisional remedies. The supreme court in the county in which an arbitration is pending, or, if not yet commenced, in a county specified in subdivision (a), may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application including those relating to undertakings and to the time of commencement of an action (arbitration shall be deemed an action for this purpose) if the arbitration is made before commencement.

Apparently, the issue has been settled. It may be that judicial interim support of arbitration has been provided for because very often concurrent litigation is only stayed. In another field, a similar kind of independent ancillary proceeding has been developed, although, unlike in arbitration, no residuary jurisdiction for the substance of the matter is involved. Pursuant to § 304 of the Bankruptcy Code, proceedings

62. Id. at 1045.
63. The court maintained the attachment for 30 days, during which time the plaintiff was to file "an action directed to the underlying merits in a jurisdiction that [had] in personam jurisdiction over defendant." Id. at 1049. One wonders what this jurisdiction could be. Given the fact that arbitral proceedings pursuant to a valid arbitration agreement had already been initiated, an action aiming at compelling arbitration would be meaningless. Possibly the court had in mind an action to be stayed immediately after its commencement pending arbitration. Yet, probably no court having personal jurisdiction existed within the United States.
66. N.Y. CIV. PRAC. L. & R. § 7502 (1) (McKinney 1980 & Supp. 1990). The words "in the country which an arbitration is pending" seem to indicate that provisional remedies would not be available should arbitration be pending outside the jurisdiction. This conclusion, however, seems unconvincing since "a court in any county" has power to issue such orders as long as arbitration has not yet started and no arbitration locale has been stipulated by the parties.
ancillary to foreign bankruptcy proceedings are available in the United States. The powers given in this context to the United States bankruptcy courts are rather broad and not exhaustively enumerated: "The court may . . . order other appropriate relief" (§ 304(b)(3)). This enables a court to grant a kind of relief which may be unavailable in the court where the main bankruptcy proceedings are pending. In most foreign bankruptcy laws, American-style discharge, for example, is unknown. The United States court can, however, grant it in ancillary proceedings. It can even appoint an independent administrator for the assets located within the United States.67 It is well justified to see a general principle of American law embodied in § 304 of the Bankruptcy Code, since it certainly "represents a codified common law principle of comity."68

Finally, there exists a third field where proceedings ancillary to foreign "main" proceedings are permissible and even favored by statutes. It is the field of transnational disclosure and discovery, the subject of the last part of this study.

II. WORLD-WIDE DISCLOSURE AND DISCOVERY

In the field of transnational fact- and evidence-gathering, codification efforts by means of international treaties have been much more advanced than those regarding interim relief, in which they are lacking save for the Brussels Convention. Since the beginning of this century, "Hague Conventions" have dealt with transnational "taking of evidence." Nowadays the most important countries, including the United States, are Member States of the Convention of Oct. 26, 1968 on the Taking of Evidence Abroad in Civil and Commercial Matters.69

No obstacle exists in principle to the application of this convention to provisional protective measures, since article 1 of the Convention says that "a judicial authority of a Contracting State . . . may request the competent authority of another Contracting State . . . to obtain evidence or to perform other judicial acts."

There can be no doubt that an attachment or a preliminary injunction is a judicial act distinguishable from a decision on the merits of the case. Therefore, at first glance, it may seem surprising that no court has requested that any other court issue such an order. In civil

law countries, the explanation should probably lie in the Hague Convention's specification that assistance should be requested in accordance with the provisions "of the law of (the requesting) state." No such provision relating to interim relief exists in civil law countries. In common law countries, however, the lawmaking and equitable powers of the courts would be available to request protective assistance from foreign authorities. In view of the general policy underlying the Hague Evidence (and "other judicial acts") Convention, it would be worth trying to encourage courts mutually to request such international collaboration, though a couple of problems would arise in this context. Yet, as has been pointed out, no such attempts have ever been made. Hence, the practical impact of the Convention is limited to what it was primarily made for: to provide for access to evidentiary materials and testimony not under the control of either party nor obtainable within the jurisdiction. For the rest, the Convention seems to have appeared unsuitable.

This is particularly true with regard to interrogatories and depositions of the litigating parties, as opposed to witnesses and other third parties, and disclosure and inspection of documents under the control of the parties. Two years ago, the United States Supreme Court very convincingly stated in its "Aerospatiale" decision that public international law does not require the use of the official channels of international legal assistance in order to gain access to evidentiary materials and testimony which, though located abroad, is under the control of the defendant. Whether or not the defendant has his residence within the jurisdiction is irrelevant. International law allows the ordering of litigants to produce whatever they control, provided it can be transported. Furthermore, though with only a 5 to 4 vote, the court rejected the proposition that a plaintiff must first resort to the methods of the Hague Convention. Rather, the court held that an analysis in terms of international comity is due in each individual case. In some circumstances, this might result in the imposition upon the party seeking extraterritorial discovery of a first effort within the framework of the Convention. There is sufficient evidence, however, to believe that in practice the direct approach prevails almost to the exclusion of the Convention.

The decision of the Supreme Court has given rise to an abundance

70. For example, the problem of damages due to the defendant should the interim protection subsequently prove to have been unjustified because the claim as to the merits is invalid.
of commentary. It is not the purpose of this study to lengthen this list. Only one point must be made. The court was particularly attentive to the special concerns of foreigners:

American Courts . . . should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. . . . When it is necessary to seek evidence abroad . . . the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses. . . . Objections to "abusive" discovery that foreign litigants advance should therefore receive the most careful consideration.

These anti-parochial remarks, however, are not suitable for any broad generalization. Foreigners should, of course, not be discriminated against in court proceedings. But no reason exists to privilege them.

Instead of further commenting on the Supreme Court’s decision, this study is primarily aimed at focusing on the inverse issue. In Aerospatiale, the issue was to what extent parties litigating in an American court have access to evidence located abroad under American standards. The new issue, which has been little discussed so far, is whether parties litigating abroad have access, under domestic standards, to evidence located or to be disclosed within the domestic jurisdiction. The United States has a very liberal tradition in this respect in not objecting to attorneys, as commissioners of foreign courts, or even to foreign judges questioning people, subject, of course, to the latter’s willingness to cooperate voluntarily. Regrettably, most of the European states would see an unacceptable intrusion into their national sovereignty if they should tolerate the same.

The crucial question, however, is whether fact-gathering in a foreign country, e.g. the United States, can be enforced there against recalcitrant persons. It can, of course, by means of the Hague Evidence Convention. Yet these ways are burdensome and time-consuming.


74. Société Nationale, 482 U.S. at 546.

75. 28 U.S.C. § 1782(b) (1988) ("This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him").

76. With regard to Germany, see, e.g., A. Junker, DISCOVERY IM DEUTSCH-AMERIKANISCHEN RECHTSVERKEHR 347 (Abhandlungen zum Recht der Internationalen Wirtschaft No. 4, 1987).
More important, fact-gathering abroad under the Hague Evidence Convention is dependent upon a request made by "a judicial authority." A party to a lawsuit pending outside the United States is not very likely to obtain such an official request if he is aiming at American-style discovery, since many, if not all, American discovery devices are unknown in European countries and do not have any counterpart there to serve a similar purpose.

Two new devices are worth contemplating:
A. A preliminary injunction granted at the request of one of the parties and ordering disclosure of facts or documents;
B. A discovery order, issued at the request of one of the parties.

A. Party-requested preliminary injunctions ordering disclosure.

As has been shown, the English Court of Appeal, in its decision concerning Jean-Claude Duvalier, ordered that the location even of those assets which might not be located within the jurisdiction be disclosed. The English judges found a particularly effective form for their order. In the words of the appellate judges: "[T]he defendants were ordered, acting by [their solicitors], to disclose to the plaintiffs' solicitors . . . information known to [the defendants' solicitors] as to the nature, location and value of those defendants' assets.[]"

The freezing injunction issued by the American court against Marcos did not order any disclosure, probably because the government of the Philippines was glad to have gotten the freezing order at all. Nevertheless, no obstacle exists to supplementing a preliminary freezing injunction with such a disclosure component. In one case involving the Federal Trade Commission as a claimant, the judges, without giving any comment on their power to do so, ordered that "[the] defendants . . . shall file . . . all current accountants' reports, bank statements, documents indicating title to real or personal property, and other indicia of ownership or interest in property of any of the defendants which indicia of ownership or interest are now in any of the aforenamed defendants' actual or constructive possession."78

Once freezing orders in lieu of attachments, particularly worldwide ones, have become a well-accepted remedy, courts will certainly not refuse to have them supplemented, in proper circumstances, by disclosure orders. Though it is established practice that courts should grant mandatory preliminary injunctions with extreme caution, it is,

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nonetheless, equally clear that nothing in the law precludes them from ordering disclosure. Among all forms of possible mandatory injunctive relief, disclosure orders are the least likely to produce illegitimate harm to the person so ordered. Furthermore, nothing forbids the courts from dissociating disclosure from freezing and issuing isolated preliminary disclosure injunctions only.

It is to be anticipated that the English courts will not refuse to issue isolated Mareva disclosure orders, if so requested, because, for example, the claimant does not see any prospect of any assets effectively being frozen by an English order. Nevertheless, circumstances justifying only disclosure, but not freezing, and yet permitting exercise in the United States of personal jurisdiction (if for interim relief only) are not likely to be found. Furthermore, if discovery under Fed. R. Civ. P. 26 et seq. is available, the claimant must, of course, proceed under the Federal Rules. Thus, in a "tracing case," because the disclosure of the existence and location of certain assets was held to relate to the substance of the matter, the court refused to grant a protective order on the grounds that the information sought did not relate to the subject matter of the dispute.

B. Party-requested discovery in aid of foreign proceedings

Just as under the Federal Rules of Civil Procedure, interim protection discovery may also be sought in aid of foreign proceedings. The practical interest of the issue derives from the fact that the American legal system provides for discovery to an extent far beyond any other country, including common law countries.80

The relevant legal provision in the United States is 28 U.S.C. § 1782(a), which reads:

The district court of the district in which a person resides or is found may order him to give his testimony or to produce a document or other thing for use in a proceeding in a foreign or in an international tribunal. The order may be made... upon the application of any interested person. To the extent that the order does not prescribe otherwise the testimony or statement shall be taken and the document or other thing be produced in accordance with the Federal Rules of Civil Procedure.81

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Four points may be of particular interest for parties litigating abroad:

a) The testimony of third parties may be sought. For English proceedings, the interest exists in the unavailability in England of any "pre-trial" discovery from third parties.\(^2\) This does not seem reason enough for an American court not to use its discretionary powers to compel a witness. Instead, the American magistrate should use his discretion and give assistance to the parties as the English judiciary assisted the French courts by making orders which the French courts could not make due to the shortcomings of the French legal order. Of course, this does not preclude the American magistrate from scrutinizing with "special vigilance" to determine whether seeking American style discovery in aid of British or otherwise foreign proceedings is reasonable in the circumstances.

b) Under German law, as under all other civil law systems, the pre-trial phase is not distinguishable from the trial. Hence, no discovery is available at all. The judge, sometimes one of the members of the judicial panel, is responsible for the fact- and evidence-gathering subject to the allegations and requests of the parties. Fictitiously, parties are invariably supposed to have acquired, by informal investigation, as much knowledge of the facts as may be necessary to formulate specific allegations about all the issues involved.\(^3\) This acquisition, in principle, must already be complete in the complaint initiating the proceedings. Hence, does 28 U.S.C. § 1782(a) require that the "proceeding in a foreign court" be instituted? Not in an absolute sense. If the applicant explains to the satisfaction of the court that under the rules of the foreign court it would be unreasonable to bring proceedings prior to the discovery sought, the court should grant the order, thus bridging the differences in the two procedural systems.

c) English and continental law do not allow fishing expeditions. In an unpublished case recently decided by one of the Florida district courts,\(^4\) a French claimant had sued a German corporation for breach of contract by selling an unidentified quantity of merchandise

\(^2\) South Carolina Ins. Co. v. Assurantie Maatschappij "de Zeven Provincien" N.V., [1988] 3 W.L.R 398, 404 (H.L. 1986) (per Lord Brandon) ("[T]here is no way in which a party to an action in the High Court in England can compel pre-trial discovery as against a person who is not a party to such action, either by way of the disclosure and inspection of documents in his possession or power, or by way of giving oral or written testimony").

\(^3\) Very accurately described in Gerber, Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States, 34 AM. J. COMP. L. 745 (1986).

\(^4\) The main proceedings were arbitral ones conducted under the International Chamber of Commerce system and certainly not governed by American law. The magistrate who ordered discovery apparently included arbitral tribunals into "international tribunals," such as appear in 28 U.S.C. § 1782(a). This broad reading should be favored, though the term "tribunal" has been used to include "quasi-judicial" proceedings. In re Letter Rogatory from the Justice Ct., District of Montreal, Can., 523 F. 2d 562, 565 (6th Cir. 1975) (quoting Senate report).
into the American market. The French had only a vague suspicion about this breach and the possible wholesale purchaser. The plaintiff obtained an order compelling the defendant to be deposed, and thus found that the defendant had indeed purchased from the vendor a large quantity of goods.

If the purchaser had resided in Germany or France, it would have been difficult to conduct such a fishing expedition against him. Under American standards, if the French plaintiff had had no information other than newspaper advertising, he would have been entitled to discovery of the newspaper. Under European standards, he certainly would not have been allowed to do so because of the "fishing" nature of the expedition. Nevertheless, the magistrate in Florida was correct in ordering the deposition and would have been correct in ordering the deposition of the newspaper people. He would have helped supplement the shortcomings of German and French law, which do not provide for access to all information "reasonably calculated to lead to the discovery of admissible evidence."

d) The most delicate issue is discovery from parties. The issue has never been approached so far: assuming one litigant in English or German proceedings has an opponent residing or to be found in the United States, it is possible to compel him to depose there under oath, subject him to fishing expeditions or have him produce documents of any kind "set forth... by categories" — in the extreme broadness of the term as customarily used in the United States. Under neither German nor English standards could such an order be obtained. The American court should not, in principle, refrain from assisting litigants in such a way. As the government of Haiti, absent the English "judiciary's" generous assistance, would not have gained access to Duvalier's assets, a litigant in a German or English court might be deprived of crucial information if American courts reacted in a parochial way to his requests.

**FINAL REMARKS**

It cannot be forgotten that the type of assistance I have suggested a court of one country should give to the courts in another or, more precisely, to the parties litigating there, may not be appreciated. Whether or not interim protective measures will be granted, comity-based recognition and enforcement is doubtful. In some legal orders, enforcement of non-final foreign judgments would be excluded. Even the English Court of Appeal could only express its hope that its "world-wide" Mareva injunction would be recognized and enforced abroad. Additional problems may be raised in the context of third
parties to be bound by extraterritorial protective orders. However, it is unlikely that "world-wide" interim protection would be met with fundamental distrust.

The same is true with extraterritorial discovery and disclosure orders. Information obtained abroad may not be admissible due to privilege standards of the forum not being observed where the information was obtained. It is unlikely, however, that information legally obtained in a foreign country would be met with fundamental distrust just because its discovery would have been incapable of enforcement in the forum's state. This includes information obtained by fishing expeditions. The very success of the expedition is evidence enough that it was not oppressive.