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## Cover Page Footnote

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# USING PREJUDGMENT ATTACHMENTS IN THE EUROPEAN COMMUNITY AND THE U.S.

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The global marketplace forces many governments to adopt legal policies facilitating international transactions. An essential element in promoting economic activity is the ability to enforce private agreements. Many aspects of enforcing private agreements create a legal conundrum of jurisdictional and sovereignty issues.

Today, the European Community ("E.C.") attempts to harmonize the diverse European legal systems in hope of encouraging smoother international transactions. Prejudgment attachment[1] is used by the E.C. to promote global transactional activity. The E.C. uses this legal remedy to preserve assets for enforcing final judgments, but the United States has no final judgment policy with any other nation. The U.S. does not have uniform access to attachment remedies between states, whereas E.C. judgments cross boundaries.

This Article compares the use of prejudgment attachment in the U.S. and the E.C. Part I examines the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[2] ("Brussels Convention") and its effect on the European Economic Community. Part II surveys the use of prejudgment attachment in the civil law countries of France and Germany. Part III surveys the

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1. Attachment is a remedy ancillary to an action by which a plaintiff can acquire a lien upon the property or the effects of a defendant for satisfaction of a judgment which the plaintiff may obtain. Lipscomb v. Rankin, 139 S.W.2d 367, 369 (Tex. Ct. App. 1940).

2. 1978 O.J. (L 304) 77. The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters was signed in Brussels on September 27, 1968. NICHOLAS ROSE, PRE-EMPTIVE REMEDIES IN EUROPE 1 (1992).

use of prejudgment attachment by the common law countries of England and the United States. Finally, Part IV discusses the shortcomings of prejudgment attachment in the United States and proposes changes.

## I. THE BRUSSELS CONVENTION OF 1968

The Brussels Convention requires the Member states to negotiate for the reciprocal recognition and enforcement of judgments.[3] The Brussels Convention eliminates many of the problems associated with enforcing judgments in foreign jurisdictions.[4] Brussels Convention members recognize judgments from other states without any special procedures.[5] As a result, judgments are more exportable between the EC member states,[6] and economic activity is promoted.

The Brussels Convention also addresses the use of interim relief, e.g. attachment. This is an important aspect of the Brussels Convention, because a judgment, even if recognized by another jurisdiction, would be of no use if the defendant can remove assets before the final judgment can be executed.[7] Interim relief prevents defendants from removing assets from the jurisdiction.[8] Article 24 of the Brussels Convention states that interim relief "may be available under the law of that State, even if . . . the courts of another Contracting State have jurisdiction as to the substance of the matter."[9] Article 24 allows a plaintiff or creditor to attach the assets of a defendant or debtor in one contracting state, even if the state does not have jurisdiction in the main proceeding.[10] For example, a plaintiff may petition a French court to attach property located in France, even though the main proceeding is being held in a German court.

### *A. Requirements Under Article 24 of the Brussels Convention*

Article 24 has four requirements for creditors seeking prejudgment attachments.[11] First, the measures required must be provisional and may be protective.[12] Second, the measures must be available

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3. ROSE, *supra* note 2, at 1.
4. Otto Sandrock, *Prejudgment Attachments: Securing International Loans or Other Claims for Money*, 21 INT'L LAW. 1, 16 (1987); *see also* ROSE, *supra* note 2, at 2.
5. *See* ROSE, *supra* note 2, at 2.
6. *See id.*
7. *Id.* at 20.
8. *Id.*
9. *See id* at 21.
10. *Id.*
11. *Id.*
12. *Id.*

as a remedy in the state in which they are being sought.[13] Third, the measures must fall within the scope of the Brussels Convention.[14] Lastly, the courts in one of the contracting states must have subject matter jurisdiction over the main proceeding from which the provisional relief is derived.[15]

In order to understand the scope of the first condition "provisional" relief must be defined. Provisional relief is temporary in nature and is directly related to the outcome of the proceedings in the main action.[16] In other words, "[i]f the relief granted under Article 24 would fully satisfy the plaintiff's cause of action, then [the relief] is not provisional."[17]

As well as provisional, the relief must be available as a remedy in the state where the assets are located.[18] A common problem occurs when a plaintiff wants to petition a European court for a remedy, and the main proceeding is being held in a different country. For example, the English court in *Republic of Haiti v. Duvalier*[19] addressed whether the remedy sought must exist in the nation adjudicating the main proceeding. *Duvalier* held that English courts do not require the existence of similar remedies.[20]

Article 24 also requires that all interim measures fall within the scope of the Brussels Convention.[21] Article 1 states that "[t]his convention shall apply in civil and commercial matters whatever the nature of the court or tribunal"[22] but does not apply in "revenue, customs or administrative matters."[23] The specific exclusions found in Article 1 imply that public law matters do not fall within the scope of the convention.[24] Therefore, if a contracting state is adjudicating a public matter, a plaintiff cannot obtain provisional relief associated with the matter in another contracting state.[25]

An issue arises as to whether provisional proceedings ancillary to the excluded main proceedings are *per se* excluded from the

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13. *Id.*
14. *See id.* at 21.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. [1989] 2 W.L.R. 261 (Eng. C.A. 1988); *see infra* note 161 and accompanying text.
20. *See id; see also* Peter F. Schlosser, *Coordinated Transnational Interaction In Civil Litigation and Arbitration*, 12 MICH. J. INT'L L. 150, 151-52 (1990).
21. CHESHIRE & NORTHS, PRIVATE INTERNATIONAL LAW 288 (11th ed. 1987) [hereinafter CHESHIRE].
22. *Id.* at 289.
23. *Id.*
24. *Id.*
25. *See id.* This still leaves us with the issue of distinguishing when a matter is either public or private. This article deals only with disputes relating to private matters.

Convention, or whether their exclusion hinges on how closely related they are to subject matter that is excluded from the Convention.[26] The European Court seems to have resolved this issue by holding that for provisional proceedings to be omitted, they must be closely connected to the subject matter of the public adjudication.[27] For example, a plaintiff who is applying for a provisional remedy arising from the probate of a will in a foreign proceeding, is not *per se* excluded.[28] To determine whether the jurisdiction exists under Article 24, the court must determine whether the provisional remedy correlates with an issue closely connected to probate or with some other private dispute associated with the case.[29] For example, if the probate dispute is related to the ownership of property, and the parties prove that a contract dispute arose before the probate proceeding, the conflict could then be construed as an actual private disagreement which falls under the scope of the convention.[30]

The last element of Article 24 requires that one of the signatory states have jurisdiction over the main substantive proceeding.[31] Usually a state's national rules determine whether that state has jurisdiction over the main proceeding, but jurisdiction can also be determined by the Convention.[32] Additionally, the Convention does not require that the main proceeding in the foreign signatory state be underway.[33]

An exception exists to the last requirement of Article 24 regarding jurisdiction. If proceedings of substance are in a non-signatory state, like the United States, then Article 24 does not apply.[34] Article 24 does not apply in cases where the defendant is not summoned. In addition, if proceedings are held *ex parte* because the defendant was not served prior to the proceeding, then the interim relief is not enforceable.[35]

### *B. Purpose of the Brussels Convention*

The purpose of the Brussels Convention is to promote a universal system of judgment recognition. This purpose is frustrated if

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26. *See* ROSE, *supra* note 2, at 22.
27. *See id.* This court is the Court of Justice of the European Communities.
28. *See* CHESHIRE, *supra* note 21, at 291. Wills and successions are excluded from the convention by Article 1. *Id.*
29. *See* ROSE, *supra* note 2, at 22.
30. *See id.*
31. *See id.*
32. *See id.*
33. CHESHIRE, *supra* note 21, at 326.
34. *See* ROSE, *supra* note 2, at 22.
35. *Id.* at 22-23.

defendants are permitted to move their assets before a judgment can be executed. Therefore, the ability to freeze or attach a defendant's assets is critical for the success of the Brussels Convention. An analysis of the availability of attachment remedies in other countries follows. The discussion will focus on the manner in which these attachment remedies can be used, in conjunction with Article 24 of the Brussels Convention.

## II. PREJUDGMENT ATTACHMENTS IN TWO CIVIL LAW COUNTRIES

### A. France

France's New Code of Civil Procedure ("NCCP")[36] became effective in 1992.[37] The new code provides for the consolidation and concentration of enforcement procedures, thereby simplifying a system which divided disputes among various jurisdictions.[38] Though the NCCP affected many aspects of the French legal system, the code did not eliminate France's prejudgment attachment order. This attachment order is known as *Saisie Conservatoire.*[39]

#### 1. *Saisie Conservatoire*

*Saisie Conservatoire* is found in Article 48 of the Old Code of Civil Procedure[40] which states the following:

> In case of emergency and when the collection of a debt seems in danger, the president of the district court ("cour de grande instance") or the local judge sitting either at the domicile of the debtor or in the territory in which the assets to be attached are situated, may authorize any creditor showing a cause of action which appears to be justified, to provisionally attach the movables, tangibles or intangibles of the debtor.[41]

To obtain such a remedy in a non-litigious proceeding, the plaintiff must meet the urgency and danger criteria.[42] This criteria requires the plaintiff to prove that the defendant is attempting to make himself judgment-proof by removing his assets from the jurisdiction. The plaintiff must also provide documentation to "prove the principal of the debt and even its amount, as precisely as possible."[43]

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36. CODE DE PROCEDURE CIVILE (Fr.)[Code of Civil Procedure] [hereinafter C. PR. CIV.].
37. ROSE, *supra* note 2, at 101.
38. *Id.*
39. C. PR. CIV., *supra* note 36, art. 48(1)-(2)(Fr.); Sandrock, *supra* note 4, at 20.
40. *Id.* art. 48(1)-(2)(Fr.).
41. *Id.*; *see also* Sandrock, *supra* note 4, at 20.
42. ROSE, *supra* note 2, at 104.
43. *Id.*

The *saisie conservatoire* must be served on the defendant. If the order cannot be served personally, it may be served on the Town Hall (*mairie)* "or on a third party accepting the order, or even on the public prosecutor's office."[44] Service to the prosecutor's office may occur when no address is given for the defendant's counsel.[45] Once the attachment is served on a third party (such as a bank), the third party becomes *tiers saisi*[46] and must declare the amount of the defendant's assets currently in possession.[47] The *tiers saisi* is also liable to the plaintiff for allowing the release of any of these assets.[48]

France's NCCP provided for the appointment of a single judge of enforcement who has the power to issue attachment orders. In deciding from which court to request an order, one must consider the type of asset that will be attached.[49] The *saisie conservatoire* can freeze any asset whether the asset is moveable or immovable. One can attach a lien against a business or file a provisional mortgage which can be levied on a defendant's immovable asset.[50] Generally, when dealing with movables, one may go to the President of the *Tribunal de Grande Instance.*[51]

The *saisie conservatoire* is revocable[52] once the defendant proves that the plaintiff lied or that there is no danger that the assets will be dissipated.[53] The defendant may also appeal to a higher court to re-evaluate the judgment against him.[54] If the defendant is able to repeal the order, an action for damages against the plaintiff for any losses suffered may be brought.[55]

### 2. *Use of the* Saisie Conservatoire *in Actions outside the E.C.*

Since France is a signatory to the Brussels Convention, it would seem that Article 24 would allow plaintiffs from the E.C. to make use of the *saisie conservatoire.* In actuality, *saisie conservatoire* may be employed by non-E.C. plaintiffs as well. For at least a century before the Brussels Convention came into effect in 1973, French law did not

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44. *Id.* at 112.
45. *Id.*
46. *Id.* at 114. A *tiers saisi* is a seized third party. *Id.*
47. *Id.*
48. *Id.*
49. *See id.* For example, if one is trying to make a charge on a business they would go to the President of the Commercial Court. *Id.*
50. Sandrock, *supra* note 4, at 21.
51. *Id.; see also* ROSE, *supra* note 2, at 114.
52. *Id.* at 104-5, 107.
53. *See id.* at 107.
54. *Id.*
55. *Id.* at 113.

require that the French courts have concurrent jurisdiction over the subject matter underlying the *saisie conservatoire*.[56] Since this rule is not derived from Article 24, *saisie conservatoire* may be used by plaintiffs from any country regardless of their membership in the E.C.[57] Thus, a plaintiff who is adjudicating an action in the United States may ask a French court to attach a defendant's assets which are held in France. Before this attachment can occur, the plaintiff must show that "the foreign court which is vested with jurisdiction over the subject matter, must . . . be susceptible of recognition and enforcement in France."[58] The question as to what criteria will make foreign proceedings susceptible to recognition and enforcement in France is one which is still unanswered.

### *B. Germany*

In Germany, the procedures for obtaining provisional protection in the civil courts can be found in the Code of Civil Procedure.[59] A plaintiff seeking provisional relief may choose seizure or a provisional injunction as a remedy.[60] Each remedy is used not to satisfy the creditor, but to preserve the creditor's rights.[61] A provisional injunction is used to preserve personal rights or to tentatively resolve a disputed legal relationship,[62] while seizures are used to ensure that property is preserved for execution.[63] This Section will concentrate on an analysis of seizures.

#### *1. Requirements for Seizure in Germany*

When a plaintiff applies for an order of seizure, the order may be applied either against assets, both movable and immovable, or against the person of the debtor.[64] An order against the person of the defendant may result in the defendant's detention or other restricion of his freedom.[65] This order is usually not granted due to its detrimental effect on an individual's liberty. The order against the

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56. Sandrock, *supra* note 4, at 21.

57. *Id.* This remedy has been available to plaintiffs since 1868. *Id.*

58. *Id.*

59. ZIVILPROZESSORDNUNG (F.R.G.) [Code of Civil Procedure] [hereinafter ZPO]; *see also* ROSE, *supra* note 2, at 117. The procedures for provisional protection before the civil courts may be found in §§ 916-45 of the German Code of Civil Procedure. ROSE, *supra* note 2, at 117.

60. *Id.* at 117.

61. *Id.*

62. *Id.* at 117, 119.

63. *Id.* at 117-19.

64. *Id.* at 118.

65. *Id.* One example of restraining the freedom of a defendant would be to seize his passport or possibly make him report to the local police station. *Id.*

person of the debtor will be granted only if an order against the assets of the defendant would not be sufficient to protect the plaintiff.[66]

For a German court to enter an order of seizure, Article 917 of the Code of Civil Procedure requires that the plaintiff prove that "the execution of a judgment would be frustrated or made substantially more difficult" without the order.[67] Implicit in this statement is a requirement that the deterioration of a defendant's financial position be imminent. Proof of deterioration would include a showing that the defendant is squandering any remaining assets, or that there are signs that the defendant intends to do so.[68] The application for the order of seizure must include the amount of the claim and an amount that a defendant may deposit to have the order removed.[69]

Another possible ground for a seizure order is a deliberate breach of a contract by the defendant which is detrimental to the plaintiff.[70] An example of such a detrimental breach would be a showing that the defendant committed a criminal offense by damaging the plaintiff's property.[71]

When a seizure order is granted, the order generally applies to all the assets belonging to the defendant.[72] Selection of assets does not take place until the order is executed.[73] The seizure order may be issued *ex parte*[74] and may even be executed before the defendant is served,[75] but the defendant must be served within one week.[76] Seizure and provisional orders "must be enforced within one month of pronouncement of the decision or service thereof on the applicant."[77]

A defendant may try to revoke the order by claiming the plaintiff has not instituted the seizure proceedings in the main action. The court, at its discretion, may then impose a time limit on the plaintiff to begin such proceedings. The plaintiff's failure to do so will cause the order to be revoked.[78] A defendant may also revoke the order on appeal[79] or by claiming changed circumstances.[80]

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66. *Id.*
67. ZPO, *supra* note 59, art. 917 (F.R.G.); *see also* ROSE, *supra* note 2, at 128.
68. *Id.* at 129.
69. *Id.* at 132.
70. *Id.* at 129.
71. *Id.*
72. *Id.* at 132.
73. *Id.*
74. *See id.* at 130.
75. *Id.* at 134.
76. *Id.*
77. *Id.*
78. *Id.* at 133.
79. *Id.* at 131.

Plaintiffs must also be aware of the liabilities which can arise from an unjustified seizure. When plaintiffs lose in a main proceeding, their orders are deemed unjustified, and they must pay damages to the defendant.[81] Plaintiffs are also liable for damages if they do not serve the defendant or begin the main proceedings within the time specified by the court.[82]

2. *The Availability of Seizure to a Plaintiff from Non-E.C. States*

Since Germany is one of the original signatories to the Brussels Convention, a plaintiff who has instituted or plans to institute a proceeding in a signatory state may utilize German attachment procedures to freeze the assets of the defendant. To freeze the assets of the defendant, a plaintiff must apply for an order of seizure. However, a plaintiff who begins proceedings in countries outside of the E.C. may have a problem obtaining an order of seizure from a German court.

*a. Basic Requirements under the Civil Code and Case Law*

One commentator addressing this issue has stated:

> The German Law of Civil Procedure well establishes, however, that a creditor who has been directed to introduce his pecuniary claim underlying the attachment within a certain time-limit may raise that action in a foreign court; provided that the judgment of such foreign court would be entitled to recognition and enforcement in Germany.[83]

Again, as in the case of France, the ultimate issue is whether Germany will recognize and enforce the judgment of a non-signatory state.[84] Unlike France, German courts have dealt with this issue in a prior proceeding.

In a case before the Court of Appeal in Frankfurt, an American creditor ("AC") was attempting to attach assets in Germany belonging to the National Iranian Oil Company (NIOC).[85] The AC had brought an action against NIOC in the United States District Court for certain sums owed.[86] While this action was pending, NIOC's U.S. assets were frozen by order of President Carter as a result of the taking of American hostages in Tehran. Lacking the ability to attach

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80. *Id.* at 133.
81. *Id.* at 135.
82. *Id.*
83. Sandrock, *supra* note 4, at 23.
84. *Id.*
85. *Id.* at 23-24 (citations omitted).
86. *Id.* (referring to the United States District Court for the Southern District of New York).

assets in the U.S., the AC obtained a seizure order from a German court. As a result of this order, "certain assets of NIOC situated in . . . Germany were frozen."[87]

The appellate court in Frankfurt applied a mirror image test to decide if Germany would recognize the final judgment of the foreign proceeding.[88] The gravamen of this test is whether a "foreign court would, by virtue of a mirror image application of the domestic German rules of jurisdiction, be vested with jurisdiction."[89] In applying this test to the AC, the Frankfurt court held that they were vested with jurisdiction to adjudicate the underlying subject matter of the case.[90]

Thus, the Frankfurt Court of Appeals developed the basic framework for determining the availability of seizure orders to plaintiffs who have cases pending in non-signatory states.[91] Availability in such cases exists when a mirror application of German rules vests the court of the non-signatory state with jurisdiction.[92]

*b. The Uncertainty in the German Position*

The nature of the mirror image test causes it to be applied on a case by case basis. Although the development of standards from cases interpreting the mirror image test is inevitable, civil law countries do not depend on case law.[93]

The civil law judge traditionally does not use case law, but interprets the code using judicial discretion.[94] Hence, the mirror image test is left to the discretion of each civil law judge. As a result of this broad discretion, the mirror image test is not as fixed as once perceived.

## III. PREJUDGMENT ATTACHMENTS IN COMMON LAW COUNTRIES

### *A. England*

Unlike its civil law neighbors, English case law plays a substantial role in judicial decisions. England's prejudgment attachment

87. *Id.* at 24.
88. Sandrock, *supra* note 4, at 24.
89. *Id.*
90. *Id.* at 25 n.83.
91. *See id.*
92. *Id.* at 24.
93. *See* ROSE, *supra* note 2, at 126-27.
94. *See id.* at 127.

remedy, the *Mareva* Injunction ("*Mareva*"),[95] arises from English case law.

The *Mareva* takes its name from the second case to apply this remedy, *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*[96] In *Mareva Compania Naviera S.A.*, the plaintiffs owned the ship Mareva. The plaintiffs leased the ship to International Bulkcarriers, who in turn, sublet the ship to the Indian government.[97] The Indian government paid International Bulkcarriers for services rendered, but International Bulkcarriers failed to pay the ship owners a portion of the contract price.[98] As a result, the ship owners brought a cause of action against International Bulkcarriers for the unpaid portion.[99] When the ship owners realized that the defendants had assets available in a London Bank which could satisfy their claim,[100] they applied for an injunction to restrain the defendant from disposing of the assets.[101]

In granting the injunction, the court held:

> There is money in a bank in London which stands in the name of these [defendants]. [They] . . . have control of it. They may at any time dispose of it or remove it out of this country. If they do so, the [plaintiffs] may never get [the amount due to them for having charted the ship to the defendants]. The ship is now on the high seas. It . . . [is] on its way to India. It will complete the voyage and the cargo [will be] discharged. And the [plaintiffs] may not get their [money] at all. In face of this danger, I think this Court ought to grant an injunction to restrain the defendants from disposing of these moneys now in the bank in London until the trial or judgment in this action.[102]

Statutory support for the *Mareva* injunction first came from section 45(1) of the Supreme Court of Judicature (Consolidation) Act, 1925,[103] but was more recently approved by the Parliament in section 37(3) of the Supreme Court Act 1981.[104] The section states:

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95. The *Mareva* was first applied in *Nippon Yusen Kaisha v. Karageorgis* in 1093. *See infra* note 103.

96. 2 Lloyd's Rep. 509, 509 (Eng. C.A. 1975).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 510.

101. *Id.*

102. *Id.* at 511.

103. Supreme Court of Judicature Act, 1925, § 45(1) (Eng.); *see also* Nippon Yusen Kaisha v. Karageorgis, 1 W.L.R. 1093, 1093 n.1 (Eng. C.A. 1975).

104. Supreme Court Act, 1981, § 37(3) (Eng.); *see also* ROSE, *supra* note 2, at 305.

> The power of the high court . . . to grant an interlocutory injunction restraining a party to any proceeding from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where the party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.[105]

Therefore, the case law has now been codified and has become a permanent fixture in England's judicial landscape.

*1. England's Requirements for Obtaining a* Mareva *Injunction*

The first case to give a comprehensive set of guidelines for obtaining a *Mareva* injunction was *Third Chandris Shipping Corporation v. Unimarine S.A.*[106] Under the guidelines established, the court requires the plaintiff to make a full disclosure to the court of all material matters.[107] The plaintiff must also specifically identify all claims against the defendant, including the grounds for the claim, the amount of the claim, and the defendant's affirmative defenses against the claim.[108] A third guideline forces the plaintiff to state why the defendant is believed to have assets within the United Kingdom[109] and why assets are at risk of being dissipated.[110] Lastly, the plaintiff must undertake the responsibility of paying damages in the event that the claim falters or the injunction proves to be unjustified.[111] Once the plaintiff meets these five steps, an order will be pronounced and the *Mareva* will take effect.

*2. The Effect of a* Mareva *Injunction on Property*

*Mareva's* may also be applied to a variety of assets such as bank accounts, ships, aircraft, automobiles, real property, chattel, and even goodwill.[112] When a *Mareva* is entered by the court against the asset(s) of a defendant, the plaintiff does not receive a security in the asset(s).[113] However, if the defendant posts a bond discharging a *Mareva,* the plaintiff will receive a security interest in that bond.[114]

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105. Supreme Court Act, 1981, § 37(3)(Eng.).

106. 1 Q.B. 645, 668-69 (Eng. C.A. 1979); *see also* Peter S. O'Driscoll, *Performance Bonds Bankers Guarantees and the Mareva Injunction,* 7 NW. J. INT'L. L. & BUS. 380, 402 (1985).

107. *Third Chandris Shipping Corp.,* 1 Q.B. at 688.

108. *Id.* at 668.

109. *Id.*

110. *Id.* at 669.

111. *Id.* at 688.

112. MARK S.W. HOYLE, THE MAREVA INJUNCTION AND RELATED ORDERS 44 (1989).

113. *Id.* at 20; *see* ROSE, *supra* note 2, at 305 (stating that there is no priority given over other creditors).

114. HOYLE, *supra* note 112, at 83-84.

Unlike its civil law counterparts, a *Mareva* injunction against real property is not registered with the land office.[115] Thus, it is possible that a bona fide purchaser can take for value the property without notice of the injunction.[116] In the case of chattels, one may apply for a *Mareva* and a delivery order.[117] A delivery order calls for the chattels to be delivered to someone who will not attempt to dissipate the asset.[118]

### 3. *How a* Mareva *Injunction can Affect the Rights of Third Parties*

In the majority of cases, *Marevas* affect banks and creditors. Since the *Mareva* does not give a plaintiff any priority over other creditors, the security interests of creditors are unaffected.[119] However, creditors are affected when the defendant's assets are frozen because debts are left unpaid.[120] A creditor may apply for a variation to the *Mareva* by proving that prior to the *Mareva*, a right to be paid from that particular source existed.[121]

When seeking to impose a *Mareva* injunction on a defendant's funds held by either a bank or a third party, there are ten requirements that must be met by the plaintiff.[122] These requirements range from indemnifying the bank for any expenses it may incur from freezing the assets, to setting a maximum amount in some cases so that a defendant is not unfairly denied access to any excess funds.[123]

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115. *Id.* at 89.

116. *See id.*

117. *Id.* at 139.

118. *Id.* The court generally appoints the plaintiff's solicitor or a receiver who will not deplete the assets. *Id.*

119. *See* ROSE, *supra* note 2, at 305.

120. *Id.* at 310.

121. *Id.* at 311 (stating that a contract right would also suffice for obtaining a variation on a *Mareva*); *see also* HOYLE, *supra* note 112, at 68 (showing that when an injunction causes an unwarrantable interference with the trading activity of third parties, the rights of the third party will overcome the plaintiff's right to a *Mareva*).

122. Z Ltd. v. A-Z and AA-LL, 1 Q.B. 558, 574-78 (Eng. C.A. 1982). The court has held that the *Mareva* does not only require that a bank freeze accounts, but also relates to other forms of assets such as jewelry or stamps. *Id.* at 574.

123. *Id.* at 577-78. *See also* O'Driscoll, *supra* note 106, at 402-03. O'Driscoll states:

> First, to the extent that a bank is asked or required to take action, incurs expenses, or is exposed to liability on account of the injunction, the plaintiff is required to recoup all expenses and indemnify the bank against liability. Second, the plaintiff must inform the bank or other third party with as much precision as possible what to do or not to do with regard to the assets in question, identifying, if possible, by branch and heading the bank account and any other asset subject to the injunction. Third, in the event the plaintiff is unable to identify the bank account or other asset with any degree of precision, the plaintiff may request the bank or other third party to conduct a search for any assets of the defendant currently being held, if the plaintiff promises to pay the cost of the search. Fourth, the plaintiff should tell

Besides establishing the ten requirements a plaintiff must meet in imposing a *Mareva* injunction, the case of *Z Ltd. v. A-Z and AA-LL* also dealt with the precarious position in which a bank is placed when given notice of a *Mareva*.[124] Since banks can be rather large institutions which are usually composed of many departments and a large number of employees, it is possible that the assets of a defendant may be released even though the bank may have already received notice of a *Mareva*. The bank would be in contempt of court in this situation.[125] The court citing this problem laid out specific guidelines for when a bank may be found in contempt of court.[126]

The court in *Z Ltd.* also added guidelines for obtaining *Mareva* injunctions *ex parte*.[127] In *ex parte* proceedings, the court retains the right to grant an injunction until the bank or other innocent third party is heard.[128] The plaintiff must specifically identify the funds intended to be frozen.[129] If the plaintiff is unable to identify the funds, then the plaintiff may request the bank to search for any of the defendant's assets held by the bank.[130] The plaintiff must reimburse the bank for any expenses incurred in the search.[131] Additionally, the plaintiff must indemnify the bank against any liability arising

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> the judge in his application for a *Mareva* injunction the names of the banks and other third parties the plaintiff proposes to give notice of the injunction.
>
> The fifth requirement . . . states that, depending upon the facts and circumstances of the case, the plaintiff should insert a maximum amount of funds to be restrained in order to avoid unfairly preventing the defendant from dealing with any excess funds. Sixth, also depending upon the facts and circumstances of the case, the defendant should be allowed to use a specified amount for 'normal living expenses.' Seventh, if the defendant's funds are believed to be in joint account, the injunction may be issued in terms wide enough to include the joint account. Eighth, in the event that a *Mareva* injunction is granted *ex parte*, the court retains the right to grant it only for a few days or until the defendant and the bank or other third party can be heard. Ninth, the plaintiff seeking a *Mareva* injunction should undertake to pay the defendant for any damages incurred as a result of the injunction and, as previously mentioned, pay the bank or other third party for any expenses reasonably incurred by them as a result of the injunction. Tenth, the defendant may be required by the court on the return date to specifically disclose the existence of assets sufficient to meet the claim . . . .

*Id.*

124. *See* HOYLE, *supra* note 112, at 163-64.

125. *Id.*; *see also*, Z Ltd. 1 Q.B. at 581-84.

126. *See* HOYLE, *supra* note 112, at 163-64; *see also* Z Ltd., 1 Q.B. at 581-84.

127. Z Ltd., 1 Q.B. at 575-77.

128. *Id.* at 577.

129. *Id.* at 575.

130. *Id.* (stating further that the bank may not tell the plaintiff the result of the search "lest it breaks the confidence of the customer," but the bank will freeze the account for its own protection against being found in contempt of court).

131. *Id.*

from the injunction.[132] Finally, the plaintiff must identify a maximum sum to be restrained, allowing the defendant to gain access to any funds that exceed the plaintiff's claim.[133]

Banks may also ask that the injunction be varied to offset amounts owed by the defendant.[134] Thus, banks are put in a position to meet any liabilities which may arise if a confirmed letter of credit had been opened by the defendant before the bank received notice of the *Mareva*.[135]

### 4. *Defenses Against a* Mareva *Injunction*

In some situations, a *Mareva* injunction may be discharged after being levied.[136] The defendant may argue that the plaintiff does not have a good, arguable claim.[137] The defendant may also try to claim a set-off against the sum frozen by the *Mareva* order.[138] To set-off the frozen funds, the defendant could argue that the plaintiff was not fully candid with the court when he applied for the injunction.[139] The defendant may also try to set-off frozen funds by claiming that there is no evidence of risk.[140] For example, the defendant may prove that the assets lack liquidity, thereby preventing their dissipation or removal.[141]

Problems may arise when the defendant is permitted to retain control of the attached assets.[142] The defendant may dissipate the assets to the detriment of the plaintiff. However, failure to comply with the *Mareva* is contempt,[143] which carries a possible penalty.[144] The penalty is usually an effective deterrent, but violations of injunctions may still occur.[145]

Ancillary orders are one of the inherent shortcomings of the *Mareva*.[146] In some instances, ancillary orders permit the

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132. Z Ltd., 1 Q.B. at 575.

133. *Id.* at 576.

134. ROSE, *supra* note 2, at 311. A third party may have a set-off if they can prove that prior to the injunction there was an existing right to be paid from the particular source. *Id.*

135. *Id.*

136. *See* HOYLE, *supra* note 112, at 62-63.

137. *Id.*

138. *Id.* at 64-67.

139. *Id.*

140. *Id.* at 67.

141. *Id.*

142. *See generally id.* at 155-60 (discussing the problems that may result in a *Mareva* situation).

143. *See id.*

144. *Id.* at 155. The penalty may be an unlimited fine and/or two years of imprisonment. *Id.*

145. *Id.* at 159.

146. *See id.* at 124.

sophisticated defendant to sell his assets and travel to another jurisdiction while the plaintiff's judgment remains unsatisfied.[147] Fortunately, the English courts are aware of these problems and have created a limited remedy.[148] The *writ ne exeat regno* is a remedy that subjects plaintiffs to arrest unless security can be posted.[149] Since there are many different ancillary orders, ranging from discovery orders to delivery of goods,[150] a plaintiff should always consider these orders when applying for a *Mareva.*

*5. Exterritorial Application of the Worldwide* Mareva *Injunction – The "Nuclear Weapon of Law"*

The effects of a *Mareva* injunction reach far beyond British borders, affecting international litigation.[151] In *Siskina v. Distos Compania Naviera S.A.*,[152] the court rejected the use of a *Mareva* injunction as an independent cause of action and held that *Mareva* injunctions may not aid proceedings in foreign jurisdictions.[153] In 1978, the United Kingdom became a signatory to the Brussels Convention. As a result, Article 24 was adopted by England in Section 25 of the Civil Jurisdiction and Judgments Act 1982,[154] effectively nullifying the *Siskina* decision.[155]

The nullification of the *Siskina* opinion allows plaintiffs with proceedings in a contracting state to use the *Mareva* in helping to

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147. *Id.*

148. *See id.*

149. *Id.* at 136-39.

150. *See generally id.* at 118-53 (outlining the various orders that may be issued by the court to assist a plaintiff).

151. *Id.*

152. Siskina v. Distos Compania Naviera S.A., 1979 App. Cas. 210 (Eng.)(appeal taken from H.L.).

153. *See id.*

154. LAWRENCE COLLINS, THE CIVIL JURISDICTION AND JUDGMENTS ACT 167, 168 (1983). Section 25 paragraphs (1) & (2) of the Civil Jurisdiction and Judgments Act 1982 states:

> (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 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 makes it inappropriate for the court to grant it
>
> ....

*Id.*

155. Gerard Hogan, *The Judgments Convention and Mareva*, 192 EUR. L. REV. 191, 192 (1989). The *Siskina* holding was superseded because the "application for a *Mareva* injunction in aid of foreign convention proceedings is in itself a statutory cause of action." *Id.*

preserve assets for execution. This use has made the *Mareva* one of the most innovative and flexible interim protective remedies available in international litigation.[156] One judge has called the *Mareva* the "nuclear weapon" of law.[157] Cases that have applied the *Mareva* as a world-wide injunction reveal why the *Mareva* has become so powerful.

*6. Case Law and the* Mareva *as a World-Wide Injunction*

The first case to allow the use of the *Mareva* beyond English borders was *Babanaft International S.A. v. Bassante.*[158] The *Bassante* court held that an English tribunal could grant a *Mareva* that affects assets held abroad.[159] The court also determined that a *Mareva* injunction does not extend to assets owned by non-parties and held abroad. However, the *Mareva* injunction could extend to non-parties' assets abroad if the *Mareva* injunction is enforceable by local courts.[160]

*Republic of Haiti v. Duvalier*[161] and *Derby & Co. Ltd. v. Weldon* stand as two of the most important cases regarding third party assets.[162] In *Republic of Haiti,* the Haitian government wanted to freeze assets which had been illegally removed from Haiti by Duvalier.[163] In addition to the standards set out in *Bassante,* the *Republic of Haiti* court issued the following standards for plaintiffs seeking a *Mareva* injunction: (1) English assets must be wholly insufficient to afford protection; (2) a high risk of disposal of foreign assets must be present; (3) the defendants should be sophisticated operators, with the ability to render assets untraceable; (4) there must be no oppression of the defendant by allowing them to be subjected to a multiplicity of proceedings; (5) the defendants must be protected from the misuse of any information obtained pursuant to this order; and (6) a world-wide tracing order must be receivable, which would require the defendant to reveal the location of all his foreign

156. *See* Schlosser, *supra* note 20, at 152.
157. ROSE, *supra* note 2, at 305.
158. 2 W.L.R. 232 (Eng. C.A. 1988).
159. ROSE, *supra* note 2, at 313.
160. *Id.* at 313-14.
161. [1989] 1 All E.R. 456 (Eng. C.A. 1988).
162. [1989] 2 W.L.R. 276 (Eng. C.A. 1988).
163. Jean Claude-Duvalier was known as the "despotic" ruler of the country of Haiti. He had been in power since his father, Francois "Papa Doc" Duvalier, passed away in 1971. Jean Claude-Duvalier fled Haiti in February of 1985 after being accused of appropriating public money for private purposes. Roger Lowenstein, *Looking for Loot: Haiti Presses Search World-Wide for Assets Duvalier Appropriated,* WALL ST. J., Dec. 2, 1986, *available in* NPPLUS, 1986 WL-WSJ 242251.

assets.[164] The *Derby* court added that a *Mareva* injunction can apply world-wide, without having assets within the jurisdiction of the United Kingdom.[165]

The factors present in *Republic of Haiti* deserve special attention. The main proceedings of *Republic of Haiti* occurred in France and the plaintiffs did not know whether Duvalier had any assets in England. Thus, the plaintiffs sought an injunction in England simply because the *Mareva* offered the remedy needed by the plaintiffs.[166] The plaintiffs needed to find and to freeze Duvalier's assets. This type of interim relief or remedy was foreign to French law. [167] Thus, the plaintiffs were forced to use the *Mareva* due to the inflexibility of France's attachment remedy.[168]

The plaintiffs utilized England's *Mareva* injunction since both England and France are signatories to the Brussels Convention. The English court satisfied the plaintiffs' needs by ordering the defendants to refrain from dealing with their assets regardless of the location of the assets. In addition, the English court required that the defendants divulge the nature, location, and value of their assets.[169] The court accomplished this because the *Mareva* injunction, unlike its French counterpart, is an order *in personam* and is against a person rather than an asset. *Republic of Haiti*[170] exemplifies how *in personam* jurisdiction makes the remedy more flexible.

When the *Republic of Haiti* court decided that a plaintiff could use a remedy in a contracting state which was not available in the jurisdiction of the main proceeding, the English courts made the *Mareva* injunction and its ancillary orders available in every country in the EC.[171] This was done despite the possibility that such an order might contradict the judicial procedures and policies of that contracting state.

Despite the *Mareva's* flexibility as an injunctive order, English courts only apply *Mareva* injunctions in special circumstances. How exceptional the circumstances must be in order for a world-wide order to be granted is an issue that is still unresolved.

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164. ROSE, *supra* note 2, at 314.
165. *Id.*
166. Schlosser, *supra* note 20, at 151.
167. *See id.* at 152.
168. *See id.*
169. *Id.* at 151.
170. [1989] 1 All E.R. 456 (Eng. C.A. 1988).
171. *See supra* part II.

### B. *United States and Prejudgment Attachment*

In the United States, the most commonly used remedy for freezing assets is attachment. Attachment is a purely statutory remedy that varies between states. Generally, if a hearing determines that a plaintiff qualifies under the attachment statute, the plaintiff may direct a writ of attachment to the sheriff in the county were the property is located. This action of levying on the property creates a security interest in the property, which unlike the Mareva, protects the plaintiff from other unsecured creditors.

#### 1. *Analysis of an Attachment Statute: New York*

Since many international borrowers hold deposits with New York banks, this section examines Article 62 of the New York Civil Practice Laws and Rules,[172] governing attachment. Section 6201 paragraphs one through three state:

> An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:
>
> 1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in state; or
> 2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or
> 3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts . . . .[173]

To evaluate whether an Article 62 remedy is available to a foreign plaintiff, this section will examine the jurisdictional requirements of this statute.

In interpreting Section 6201, paragraphs two and three appear to give New York courts *in personam* jurisdiction over the defendants because the statute requires the defendant to be domiciled in New York.[174] Moreover, upon analyzing paragraph one, New York courts may have jurisdiction over defendants not domiciled in New

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172. N.Y. Civ. Prac. L. & R. § 6201 (McKinney 1995).

173. *Id.*

174. Paragraph 3 of Section 6201 is actually more concerned with the ability of the plaintiff to show that the defendant is avoiding final adjudication and really has nothing to do with personal jurisdiction.

York.[175] This provision incorrectly implies that the presence of property in New York would create *in rem* jurisdiction over a foreign defendant.[176]

### 2. *The Effect of* Shaffer v. Heitner: *The Doctrine of Minimum Contacts*

Although interpreting Section 6201 implies that *in personam* jurisdiction is unnecessary, *Shaffer v. Heitner*[177] invalidates this interpretation. Article 62 employs *in rem* jurisdiction based on the presence of the nondomiciled defendant's property in New York. The Supreme Court in *Shaffer* eliminated *in rem* jurisdiction.[178] *Neplovitz v. Boatwright*[179] illustrated *Shaffer's* holding by stating that, to comply with the due process clause, *in rem* jurisdiction must meet the minimum contacts standard of *International Shoe Co. v. Washington.*[180] Thus, the use of attachment proceedings as a basis for personal jurisdiction was overruled by *Neplovitz.*[181] Before New York can apply Section 6201 to a nondomiciled defendant, *Shaffer* requires that New York prove the defendant's "minimum contacts" with the forum and the presence of assets within the state.[182] In contrast, *Shaffer* contains contradictory language implying that attachment statutes are not invalid *per se.*[183] Confusing the attachment analysis further, *Shaffer* held "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" sought in another forum having jurisdiction over the main proceeding.[184] Fortunately, the federal courts have developed standards to assist with the evaluation of attachment statutes. In *Intermeat, Inc. v. American Poultry Inc,*[185] the court ruled that the presence of property within a state is one contact with the

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175. *See* Sandrock, *supra* note 4, at 7.
176. *Id.*
177. 433 U.S. 186 (1977).
178. *Id.* at 208-09.

> [A]lthough the presence of the defendant's property in a state might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of property alone would not support the state's jurisdiction. If those other ties did not exist, cases over which the state is now thought to have jurisdiction could not be brought in that forum.

*Id.*
179. 442 F. Supp. 1336, 1339 (D.S.C. 1977).
180. 326 U.S. 310 (1945).
181. *Neplovitz,* 442 F. Supp. at 1339 n.6.
182. *Shaffer,* 433 U.S. at 207-12.
183. *Id.*
184. *Id.* at 210.
185. 575 F.2d 1017 (2d Cir. 1978).

state.[186] This one contact—property ownership within the state, should "be considered along with other contacts in deciding whether the assertion of jurisdiction is consistent with 'traditional notions of fair play and substantial justice.'"[187] Property presence is one factor that should be evaluated along with other contacts to determine whether or not jurisdiction would be fair.[188] This fact requires the court to determine whether the relationship between the plaintiff, the defendant, and the attaching state is sufficient to make attachment fair. The court must also determine whether it is reasonable to compel the defendant to try the action in the attaching state.[189]

The United States Supreme Court in *Shaffer* addressed the issue of whether New York must have jurisdiction over the main proceeding in order to employ the New York attachment statute to aid a proceeding in a foreign jurisdiction. The Supreme Court held that a state could attach property which is present within the jurisdiction "as security for a judgment being sought in a forum where the litigation can be consistently maintained with *International Shoe*."[190] Thus, the test is whether the foreign country entertaining the proceeding would have proper jurisdiction under the standards of *International Shoe*. For example, suppose the main proceeding was taking place in Paris and the parties were two corporations who conducted substantial amounts of their business in Paris. The plaintiff corporation wants to use the New York attachment statute to attach a defendant's assets located in a New York bank. Before a New York court could grant such a remedy to the plaintiff, the court would first need to evaluate whether the court in Paris had proper jurisdiction over the main proceeding. The New York court would base their evaluation on the principles of *International Shoe*. The New York court would more than likely find that the contact requirements of *International Shoe* are met since the court hearing the proceeding is located where both of these parties perform a substantial amount of their business. On the other hand, if the sole basis for jurisdiction in the main proceeding in Paris is that the defendant has a bank account there, then the New York court would not allow the plaintiff to avail himself of the New York attachment statute. This is because

186. *Id.* at 1022.
187. *Id.*
188. *Id.* at 1022-23.
189. *Id.* at 1023.
190. *Shaffer*, 433 U.S. at 212.

the *in rem* jurisdiction would most likely not meet the contact requirements of *International Shoe*.[191]

*3. Alternatives to Attachment*

Plaintiffs unable to secure assets through the use of an attachment statute may file either a temporary restraining order ("TRO") or a preliminary injunction. Either remedy is adequate, but TROs are only for a specified time period, usually not more than ten days. A plaintiff who petitions a court for a preliminary injunction must first prove the state attachment leaves no remedy at law.[192] The plaintiff may request that the court freeze all the assets belonging to the defendant. Courts rarely issue preliminary injunctions for ordinary tort or debt claims if the plaintiff is unable to prove that the attachment statute is an inadequate remedy.[193]

There have been cases which have allowed an injunction to freeze assets. In *Republic of the Philippines v. Marcos*,[194] the court granted an injunction which effectively froze the Marcos' assets.[195] The court took this action even though attachment in this type of proceeding was not permitted in California. The court reasoned that, "[w]hile 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."[196] This type of holding has lead one commentator to conclude that, "the more state law limits the availability of attachments or garnishments, the more preliminary injunctions become available."[197]

For an injunction to be granted, the assets being frozen must be the same assets which are at issue in the main proceeding.[198] The

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191. Schlosser, *supra* note 20, at 155. Another difficulty inherent in the attachment statute is that they vary by state. Therefore, the availability of the remedy could depend on the state in which the assets are located. For instance, in California prejudgment attachment is available only for the protection of contractual claims. Therefore, one cannot use the attachment statute in California for a tort suit. *Id.*

192. 2 DAN B. DOBBS, LAW OF REMEDIES § 6.1(5) at 27 (2d ed. 1993).

193. *Id.*

194. 862 F.2d 1355 (9th Cir. 1988)(en banc), *cert denied*, 490 U.S. 1035 (1989).

195. *Id.* at 1364. Ferdinand Marcos was the dictator of the Philippines. He also appropriated public money for private purposes. However, unlike Jean Claude-Duvalier, who took cash directly, Marcos gained his fortune from Philippine industry. Roger Lowenstein, *Looking for Loot: Haiti Presses Search World-Wide for Assets Duvalier Appropriated*, WALL ST. J., Dec. 2, 1986 (available in NPPLUS, 1986 WL-WSJ 242251). As of July 2, 1987, the Philippine government sought $1 billion in Marcos' assets. *Swiss Rebuff Marcos*, WASH. POST, July 2, 1987, at A36.

196. 862 F.2d at 1361 (citations omitted).

197. Schlosser, *supra* note 20, at 157.

198. De Beers Mines v. United States, 325 U.S. 212, 220 (1945). One commentator has suggested that for a court to grant such an injunction, the plaintiff must not only claim that the

Supreme Court held that without such proof, the use of an injunction to sequester the assets of the defendant could not be justified in equity jurisprudence.[199] However, in *Ebsco Industries, Inc. v. Lilly*,[200] the Sixth Circuit never addressed this rule and granted the injunction based solely on the inadequacy of the attachment statute.[201] The holding of *Ebsco* implies that there may be some uncertainty in the federal courts as to what relationship a defendant's assets must have to the main proceeding in order to be subject to a preliminary injunction.

The ability to use injunctions in federal court to attach assets before trial appears to be filled with many unresolved jurisdictional issues. In light of this uncertainty, there seems to be some argument as to whether injunctions are a viable alternative to state attachment statutes.

## VI. CONCLUSION

This Comment has illustrated that there are many difficulties in attempting to freeze a defendant's assets, particularly when assets are the defendant's sole contact with the forum. In terms of international commerce, the U.S. system of prejudgment attachment seems antiquated and confusing when compared to the nations of the European Community. With the economic growth of developed economies centering on the global market, the ethnocentric view expressed by the U.S. judiciary runs counter to this policy. This is especially true since the U.S. has one of the most open economies in the world.

In contrast, other European nations are attempting to harmonize their laws with other nations within the European Community. This is an essential step which helps to further unify the European nations and promote economic growth. To become a part of this global economy and create a North American trading zone similar to the European Community, the United States must initiate a change in its attachment procedures.

The most efficient way for the U.S. to reform attachment procedures would involve amending the Federal Rules of Civil Procedure or adopting a federal law to unify attachment procedures. Rule 64 of the Federal Rules of Civil Procedure states that all remedies providing for seizure of property are subject to the laws of the state in

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defendant owes him money and may dissipate his assets, but that the plaintiff equitably owns the funds through a constructive trust or otherwise. 2 DOBBS, *supra* note 192, § 6.1(5) at 609.

199. *De Beers*, 325 U.S. at 222-23.

200. 840 F.2d 333 (6th Cir. 1988).

201. *Id.*

which the district court trial is held.[202] However, Rule 64 of the Federal Rules of Civil Procedure also states that the remedy is subject to any existing statute of the United States governing the remedy. Thus, Congress could pass legislation to deal specifically with the problem of attachments.

Alternatively, Congress could draft a law that would allow a foreign defendant's assets to be seized when the defendant's only contact with the forum are the assets themselves. Additionally, this statute could be qualified by requiring the plaintiff to show that the defendant might avoid an adverse judgment by transferring or encumbering assets. A federal statute would save a plaintiff time and money as well as lighten the load of an already over-burdened judicial system. Such a statute would encourage uniformity and bring clarity to the ambiguous U.S. system.

The United States could also improve its attachment remedies by entering into treaties with other nations, similar to the Brussels Convention. Additional treaties would clear many jurisdictional issues by giving countries the ability to base jurisdiction on the treaty itself.

The United States must recognize that a problem with its attachment procedures exist. The European Community has already recognized and started rectifying attachment procedures, and only time will tell when the U.S. will do likewise.

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202. FED. R. CIV. P. 64. At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.