ARTICLES

Prejudgment Attachments: Securing International Loans or Other Claims for Money†

I. Introduction

A. The Importance of Prejudgment Attachments

When drafting international loan agreements, lenders usually do not introduce into negotiations with borrowers the subject of prejudgment attachments for which lenders might eventually have to file in order to secure payment of principal and interest. Prejudgment attachments are designed to be instruments of a surprise attack launched against the borrower. For this reason loan agreements normally do not expressly mention such attachments. One must assume that lenders, when drafting their agreements, do not even contemplate the necessity that they might be compelled to file for prejudgment attachments.

In fact, prejudgment attachments have been very rare in the field of international loans. The few cases in which such orders have been sought and granted cannot, however, be explained by certain clauses incorporated into almost all international loan agreements to preserve equality between creditors. Negative pledges¹ maintain the equal footing of all creditors by restricting the borrower from voluntarily and unilaterally granting special security interests in favor of certain creditors and to the

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exclusion of others. The clause does not prevent the creditor himself from seeking a preferential enjoyment of security interests conferred by an order of court, even if the equal ranking among all creditors is thereby disturbed. Likewise, pari-passu clauses\(^2\) oblige borrowers merely to refrain from granting certain creditors privileged positions as to the satisfaction of their claims for principal and interest; nothing in these clauses forestalls creditors from seeking attachment orders by which they obtain preferential security interests. Finally, sharing clauses,\(^3\) in syndicated loans hardly preclude creditors from applying for prejudgment attachments, for such clauses merely guarantee the enjoyment of equal benefits as between the members of a syndicate; if one of their number is able to obtain a security interest, this will benefit all of them, including the applicant.

The mechanisms of negative pledges, pari-passu clauses, and sharing clauses are not designed to alleviate the need for prejudgment attachments. That such attachments have been sought and granted in a few instances only seems to be attributable to the fact that borrowers of international loans, once insolvent, have usually been able to negotiate for more time with their creditors. Lenders have thereby escaped resort to judicial action to secure the payment of principal and interest.

B. INCIDENCES IN WHICH COURTS HAVE ORDERED PREJUDGMENT ATTACHMENTS

Courts have occasionally issued prejudgment attachments in favor of creditors in international loans. Those incidences illustrate the types of situations in which creditors might be tempted to seek injunctive relief by prejudgment attachments. Two of such incidences should be mentioned in the present context.

In the mid-seventies, under the rule of the Shah, the Government of Iran had received from a number of U.S. American, Canadian, and Swiss banks a series of syndicated loans. The borrower agreed to pay interest on these loans to the agents of the creditors in New York City. On November 6, 1979, in response to the taking of the personnel of the U.S. Embassy in Tehran as hostages, President Carter seized all the deposits of the Iranian state with U.S. American banks. The Iranian State was thereafter unable to pay in New York City, as stipulated, the interest due on the loans. The lenders thereupon declared all the loans immediately due and payable. To secure the payment of principal and interest some U.S. American banks filed motions in

\(^2\) See P. Wood, supra note 1, at 155–57.
\(^3\) See Walker & Buchheit, supra note 1.
German courts for prejudgment attachments. The German courts granted those motions and the shares owned by the government of Iran in some important German corporations were provisionally seized. In extraordinary situations, therefore, notably under the impact of wholly unexpected political events or governmental actions, prejudgment attachments can be a valuable means to secure the claims of creditors of international loans.

A second incidence demonstrates that prejudgment attachments may be useful to an international loan creditor even under less dramatic circumstances. In 1980 a corporation domiciled outside of the U.S. had issued two batches of promissory notes that a state agency of the borrowing corporation had guaranteed. Some of these notes were acquired by a New York bank. In April 1982 an installment of interest on one batch of notes became due and the other batch of notes was due for repayment; nevertheless, several telexes of the New York lender to the foreign borrower and to the state guarantor remained unanswered. The uncertainty continued for several months while the New York lender (and other New York lenders who held other promissory notes of the same batches that also had not been honored) further attempted to collect the sums outstanding. At last, the lender, upon motion to a New York court, was granted a secret order to attach some of the New York assets of the foreign state agency. In January 1983 sheriffs delivered copies of the attachment order to more than twenty multinational banks in New York. The effect of this move was overwhelming. The bad publicity, the embarrassment, and the pressure brought by the refusal of large creditor banks to finance other short-term debts of the guarantor state agency caused the borrower to pay not only the balance due on the promissory notes held by the New York lender, but also all principal and interest on the other promissory notes held by other New York banks.

Prejudgment attachments thus can be powerful instruments of constraint on borrowers who are caught in the extraordinary turmoil of political events, governmental restraints, or in other unusual situations. They can likewise provide a means to attack borrowers who just do not care, for one reason or another, about the timely payment of their debts.

4. For a rather slick report of this incidence that to the author's knowledge has not been reported elsewhere see J. Stewart, The Partners: Inside America's Most Powerful Law Firms 27-53 (1983); see also R. Assersohn, The Biggest Deal: Bankers, Politicis, and the Hostages of Iran 95 (1982).

C. The Purpose of This Article

1. Comparative Survey on the Most Important Jurisdictions with Respect to Prejudgment Attachments

First the article explores whether and to what extent the most important jurisdictions of the international business community provide a legal mechanism whereby a lender may attach property of a borrower before the lender obtains a final or provisional judgment against the borrower. Within the framework of that research this article clarifies which preconditions the lender would have to meet to petition successfully for prejudgment attachment of assets of the borrower. This research necessitates a comparative survey of the most important jurisdictions of the international business community with respect to prejudgment attachments. Particular attention is devoted, in this context, to questions of jurisdiction and venue: Do the different national legal systems require a court with which a petition for an attachment order has been filed to have jurisdiction not only over the assets situated within the territorial boundaries of such court but also over the subject-matter, in the eventuality that the lender institutes an action against the borrower for the payment of the principal and the interest?

2. The Drafting of an Appropriate Forum Selection Clause

With the background of such a comparative survey the article next addresses (i) whether the forum selection clauses currently in use between international lenders and borrowers satisfy the requirements established in the different national legal systems for the successful introduction of petitions for prejudgment attachments, or (ii) whether and to what extent the wording of such clauses could be ameliorated in order to facilitate the successful filing for prejudgment attachments. Included is counsel for those who draft international loan agreements. This section also examines whether it is advisable to incorporate into international loan agreements special clauses dealing with eventual motions for prejudgment attachments.

3. Modifications Caused by Foreign States as Borrowers

Finally, the article deals with the question whether the proposed forum selection clauses need to be modified when the borrower is a sovereign state. Delicate questions of state immunity are discussed in that context.
II. A Comparative Survey of the Most Important Jurisdictions with Respect to Prejudgment Attachments

Most international loan agreements are governed either by New York or by English law. Many international borrowers hold deposits either with New York banks or with English banks in London. The comparative survey over the different national regulations concerning prejudgment attachments begins, therefore, with the most important Anglo-American law jurisdictions: New York and England.

A. Anglo-American Law Jurisdictions

The New York regulations on prejudgment attachments are representative for the regulations in effect in the other common law states of the United States. English law will serve also as an illustration of the law prevailing in other common law countries of the British Commonwealth.

1. Prejudgment Attachments according to New York Law

a. The Statutory Framework

Attachments are the subject of article 62 of the New York Civil Practice Law and Rules. It follows from the plain language of section 6201, paragraphs (1) through (3),7 that an international lender could move for a prejudgment attachment against the assets of a borrower if (1) the borrower is a nondomiciliary of New York, or a foreign corporation not qualified to do business in New York; (2) the (eventually foreign) bor-
rrower resides and is domiciled in New York, but cannot be personally served in New York despite diligent efforts to do so; or (3) the borrower, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in the lender'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. Section 6211(a) provides that an order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment. The order of attachment shall be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the amount specified in the order of attachment.

Note, however, that by virtue of section 6211(b) an order of attachment granted without notice shall provide that within a period not to exceed five days after levy, the plaintiff shall move for an order confirming the order of attachment. If the plaintiff fails to make such motion within the required period, the order of attachment and any levy thereunder shall have no further effect and shall be vacated upon motion. Section 6213 further provides that an order of attachment granted before an action is commenced is valid only if, within sixty days after the order is granted, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed. Finally, by virtue of section 6223, an attachment may be vacated upon motion of the defendant if the defendant can show that the attachment is unnecessary for the security of plaintiff.8

Two aspects of the statutory framework of sections 6201, 6211, and 6213 need further clarification. First, the question arises of which jurisdictional requirements must be met before a court can issue an order of attachment against the property of a person domiciled either within or without the state of New York. In the field of international loans this question is tantamount to the problem of the in rem jurisdiction of a New York court over a domestic or foreign borrower. Following on this question is whether New York courts, in such cases, also need to have jurisdiction over the subject matter of the claim (the payment of the principal and interest) that the prejudgment attachment is designed to secure.

b. In Rem Jurisdiction over the
New York Assets of a Borrower

When a domestic or foreign lender applies to a New York court for an
order of a prejudgment attachment upon the assets of a domiciliary of
New York no problem of jurisdiction arises. The New York courts will
be vested with in personam jurisdiction over such borrower by virtue of
the New York domicile of the latter. Section 6201, paragraphs (2) and (3)
only prescribe a showing by the lender that drastic action is required for
security purposes.\textsuperscript{9} Jurisdiction is of no importance here.

The jurisdictional question differs, however, insofar as a lender seeks
to obtain a prejudgment attachment with respect to the New York assets
of a nondomiciliary of New York, be it the assets of a foreign state or
those of a foreign corporation. Over those entities, New York courts
cannot exercise personal jurisdiction unless special circumstances, for
example, doing business in New York, have established closer ties with
New York. In the absence of that kind of special circumstance a lender
could base his motion before a New York court for prejudgment attach-
ment over the assets of his foreign borrower only upon in rem jurisdiction.

Section 6201, paragraph (1) of the New York Civil Practice Law and
Rules provides that an order of attachment may also be granted when the
defendant is a nondomiciliary residing without New York or when it is a
foreign corporation not qualified to do business in New York. This pro-
vision might lead to the conclusion that the presence of tangible or in-
tangible property alone in any county or in the city of New York would
suffice to create in rem jurisdiction over a foreign respondent. This con-
clusion would, however, be wrong.

Important constitutional limitations have been placed upon statutory
provisions such as section 6201, paragraph (1) of the New York Civil
Practice Law and Rules. In \textit{Shaffer v. Heitner}\textsuperscript{10} the U.S. Supreme Court
ruled that the constitutional standards established in its \textit{International Shoe}
decision\textsuperscript{11} for the exercise of in personam jurisdiction must also be applied
to the exercise of in rem jurisdiction. The presence of property alone will
not support a state's jurisdiction over the owner of the property. The due
process clause requires other ties to exist between the defendant, the
state, and the litigation. If the property attached is wholly unrelated to
the underlying cause of action, there can be no in rem jurisdiction over
that property.\textsuperscript{12}

\textsuperscript{10} 433 U.S. 186 (1977). An abundance of literature discusses this decision. \textit{See, e.g.,}
Smit, \textit{The Importance of Shaffer v. Heitner: Seminal or Minimal?}, 45 \textit{Brooklyn L. Rev.}
519-32 (1979) and the references therein.
\textsuperscript{11} 326 U.S. 310 (1945).
\textsuperscript{12} 433 U.S. at 210.
The Supreme Court pointed out in *Shaffer v. Heitner*, however, that the primary rationale for treating the presence of property as a sufficient basis for jurisdiction to adjudicate claims over which a state would not have jurisdiction if only the in personam doctrine of *International Shoe* applied would be that a wrongdoer "should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit." This justification would "at most" suggest that a state in which property is located should have jurisdiction to attach that property as security for a judgment being sought in a forum where the litigation could be maintained consistently with *International Shoe*. The Supreme Court thus indicates that a court may be permitted to exercise in rem jurisdiction over a foreign borrower who seeks to avoid execution of its property for nonpayment of debts by removing its assets into the territory of a foreign state.

Later decisions of U.S. federal courts have strengthened this holding. *Carolina Power & Light Co. v. Uranex* held that circumstances might exist in which, without some form of jurisdiction to attach property, courts would be powerless to protect a litigant from the concealment or evacuation of his opponent's assets. The application of the *International Shoe* notions of "fair play and substantial justice" would include consideration of both the jeopardy to plaintiff's ultimate recovery and the limited nature of the jurisdiction sought, jurisdiction merely to order the attachment and not to adjudicate the underlying merits of the controversy. Where the facts show that the presence of defendant's property within the state is not merely fortuitous and that the attaching jurisdiction is not an inconvenient arena for defendant to litigate the limited issues arising from the attachment, assumption of limited jurisdiction to issue the attachment pending litigation in another forum would be constitutionally permissible.

In *Intermeat Inc. v. American Poultry, Inc.* the Court of Appeals for the Second Circuit further pointed out that the doctrine of "minimum contacts" established in *International Shoe* requires the presence of property of a defendant within New York to be viewed as only one contact of the defendant with the state. It 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." Hence, some attachments valid under New York law, and constituting valid bases under New York law for quasi rem jurisdiction, will no longer satisfy the due process requirement where the defendant has less than minimum contacts.

13. *Id.* at 211.
15. *Id.* at 1048.
16. 575 F.2d 1017 (2d Cir. 1978).
with New York. When jurisdiction is based upon an attachment the test is whether sufficient minimum contacts exist to make it fair and just that the foreign debtor be required to come to New York to defend the action begun by attachment. Thus the court decides in each case whether the relationship among the plaintiff, the defendant, and the forum state would make it fair and reasonable to compel the defendant to try the action in the forum state.\(^\text{17}\)

Whether the exercise of in rem jurisdiction would, however, be justified for the benefit of only lenders domiciled in New York remains at issue. Equally doubtful is whether the issuance of a prejudgment attachment would meet the constitutional standards if it were sought by a foreign lender who, in the absence of other contacts with New York, agreed with his foreign borrower in a forum selection clause that the New York court in question should be empowered to exercise jurisdiction. A strong presumption seems to exist, however, in favor of the constitutionality of such agreed-upon in rem jurisdiction.

Returning, then, to paragraph (1) of section 6201 of the New York Civil Practice Law and Rules, note that, contrary to the decree in that paragraph, prejudgment attachment against the assets of a foreign borrower cannot be based alone upon the presence of tangible or intangible assets of the borrower within a county or the city of New York. Further ties with New York are necessary to satisfy the minimum contacts test. The danger of the borrower's removing his property outside New York might constitute such a tie justifying the exercise of jurisdiction, at least if the lender were a domiciliary of New York. Similarly, a forum selection clause stipulating that the lender may file for prejudgment attachments in all jurisdictions where assets of the borrower are found might constitute such a tie.

c. Jurisdiction over the Subject Matter of the Action

United States federal courts have recognized that provisional jurisdiction to order a prejudgment attachment is not tantamount to final jurisdiction to adjudicate the underlying merits of the controversy, that is, jurisdiction over the subject matter. These two different categories of jurisdiction must therefore be carefully distinguished.\(^\text{18}\)

Jurisdiction over the subject matter is of importance also when a prejudgment attachment is sought in New York. As previously discussed, by virtue of section 6213 of the New York Civil Practice Law and Rules an

\(^{17}\)Id. at 1022-23; see also Drexel Burnham Lambert Inc. v. d'Angelo, 453 F. Supp. 1294, 1296 (S.D.N.Y. 1978) (dictum); Majique Fashions Ltd. v. Warwick & Co., 98 Misc. 2d 808, 409 N.Y.S. 2d 581, 583 (1978) (dictum).

order of attachment granted before an action is commenced is valid only if, within sixty days after the order has been issued, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order, and publication is subsequently completed.

The question arises, however, whether section 6213 requires the action supporting the attachment to be brought before a New York court, or whether the lender may introduce such action before any court of competent jurisdiction, domestic or foreign. The language in Shaffer v. Heitner indicates that in order to avoid the vacation of a prejudgment attachment in New York the subject matter does not necessarily have to be adjudicated in a New York court. It appears sufficient for the merits of the underlying controversy to be decided by a court sitting in New Jersey, England, France, Germany, or elsewhere provided that such court would have jurisdiction over the defendant on the basis of minimum contacts satisfying International Shoe standards.

d. Summary

In conclusion, it appears that domestic (and probably also foreign) lenders may file for the prejudgment attachment of the assets of a New York or foreign borrower before a New York court provided that, in the absence of in personam jurisdiction over the borrower, the lender can show sufficient minimum contacts tying the underlying controversy over the loan to such an extent to New York that it appears fair and reasonable to compel the borrower to defend in New York. If the borrower is a New York domiciliary, a prejudgment attachment order would only be permissible if drastic action were required to safeguard the lender’s interests. If the borrower is a foreign state or a foreign corporation not qualified to do business in New York, a lender may also assert that without prejudgment attachment the lender risks loss of the sums due to him because of the borrower’s removal of his assets and their transfer into another state or country. The validity of such prejudgment attachment would not be impaired, however, by the fact that a New York court would lack jurisdiction to adjudicate the underlying merits of the controversy; the fact

19. 433 U.S. at 210: “At most, it 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 consistently with International Shoe” (emphasis added).

that the subject matter—the repayment of principal plus interest—would have to be claimed before a court of a sister state or of a foreign country is irrelevant.

2. "Prejudgment Attachments" in English Law

Though English courts have stressed that it is not "a form of pretrial attachment," the so-called Mareva injunction developed by the English Court of Appeal in a famous decision of 1975 grants to certain plaintiffs injunctive relief very similar to a prejudgment attachment. In fact, when analyzed in a functional approach, the Mareva injunction under English law satisfies the same procedural needs as the prejudgment attachment under the laws of New York and its sister states.

a. The Statutory Basis and the 1975 Mareva Case

The statutory basis upon which the Mareva injunction may be grounded today is section 37(3) of the Supreme Court Act 1981, which reads:

The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.


[1] In 1979 applications were being made at the rate of 20 per month. Since 1979 that number has doubled. In the Commercial Court alone applications for Mareva injunctions are now running at the rate of 40 a month; in the Queen's Bench list the number of ex parte applications has increased from 785 in 1979 to double that figure in 1983. No doubt a large part of this increase is due to applications for Mareva relief.


25. Supreme Court Act, 1981, ch. 54, § 37(3). When the Court of Appeals rendered its decision in Mareva this 1981 Act was not yet in effect. The Court of Appeals therefore relied on Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, Ch. 49, § 45, which corresponded to § 37(3) of the 1981 Act. Section 45(1) of the 1925 Act read: "The High Court may grant a mandamus or an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient to do so."

26. Supreme Court Act, 1981, ch. 54, § 37(1) reads: "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

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In the 1975 *Mareva* case Lord Denning ruled that a court could, in a proper case, grant an injunction to protect the right of a creditor to be paid a debt owing to him even before he had established his right by getting a judgment. If there were a danger that the debtor might dispose of his assets so as to defeat the right of the creditor before judgment, the court would have authority to grant an interlocutory judgment so as to prevent the debtor from disposing of those assets. In the *Mareva* case, the court by injunction restrained the foreign defendant, who held no assets in England except a bank account, from disposing of any of the money in that account, or removing it from the jurisdiction. Lord Denning 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 their . . . [money, which was a charter hire for a ship the plaintiffs had chartered to defendants]. The ship is now on the high seas. It has passed Cape Town 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.

Since the *Mareva* injunction was first granted by the Court of Appeal in that case, English courts have issued many other injunctions of the same kind. To obtain such injunction, however, a creditor must clearly demonstrate to the court the likelihood that he will be able to recover a judgment against the defendant for a certain or approximate sum of money. The policy of this injunction first had been defined as to prevent foreign parties from removing assets from the jurisdiction to avoid the risk of having to satisfy any judgment entered against them in proceedings in England. A foreign defendant should not have the chance to preclude the plaintiff in advance from enjoying the fruits of a judgment which would


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appear irresistible on the evidence before the court.\textsuperscript{31} A foreign defendant should be inhibited from largely ignoring a plaintiff’s claim in the courts of England and from snapping his fingers at any judgment that might be given against him.\textsuperscript{32} It was therefore held necessary, in issuing such injunction, to proceed by stealth to preempt any action by the defendant to remove his assets from the jurisdiction.\textsuperscript{33}

b. Later Extensions of the \textit{Mareva} Doctrine

Later decisions, notably the judgment of the Court of Appeal in \textit{Z Ltd. v. A} of December 1981,\textsuperscript{34} have considerably enlarged the field of application of the new remedy and its underlying policy. It had already been held in 1980 by the Court of Appeal that a \textit{Mareva} injunction could not only be granted against a foreigner, but also

Against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied.\textsuperscript{35}

Along that doctrinal line section 37(3) of the Supreme Court Act 1981 provides that an interlocutory injunction may be issued in cases where the defendant is, as well as in cases where he is not, domiciled, resident, or present within that jurisdiction. In the before-mentioned case of \textit{Z Ltd. v. A} the Court of Appeal very explicitly ruled that a \textit{Mareva} injunction could not only be granted to prevent a foreigner from removing assets out of England, but also to inhibit an English domiciliary or a foreigner from dissipating his assets within England itself and thereby jeopardizing a future judgment against him.\textsuperscript{36} In the words of L.R. Kerr:

\textsuperscript{31} See \textit{Establishissement Esefka Int'l Anstalt v. Central Bank of Nigeria}, [1979] 1 Lloyd’s Rep. 445, 448, in which Lord Denning held that upon the particular circumstances of the case there was no danger that defendant would take his money out of the country. Doubts about the permissibility of a \textit{Mareva} injunction were also mentioned in \textit{Third Chandris Shipping Corp. v. Unimarine S.A.}, [1979] 2 All E.R. 972, 985 (Lord Denning).

\textsuperscript{32} This was the language of J. Kerr, quoted with approval by Lord Denning, again, in \textit{Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia}, [1977] 3 All E.R. 324, 334 (C.A.).


\textsuperscript{34} \textit{Z Ltd. v. A}, [1982] 1 All E.R. 556. \textit{See also} the recent decision of the Queen’s Bench Division in \textit{Al Nahkale for Contracting and Trading Ltd. v. Lowe}, [1986] 2 W.L.R. 317 (Q.B.), where a writ \textit{ne exeat regno} was issued in conjunction with a \textit{Mareva} injunction; the issuance of such writ under similar circumstances had formerly been denied by the Queen’s Bench Division in \textit{Felton v. Callis}, [1969] 1 Q.B. 200.


The danger of assets being removed from the jurisdiction is only one facet of the ‘ploy’ of a defendant to make himself ‘judgment-proof’ by taking steps to ensure that there are no available or traceable assets on the day of judgment; not as the result of using his assets in the ordinary course of his business or for living expenses, but to avoid execution by spiriting his assets away in the interim . . . It is therefore logical to extend the scope of this jurisdiction whenever there is a risk of a judgment which a plaintiff seems likely to obtain being defeated in this way.\textsuperscript{37}

c. Limitations Inherent in \textit{Mareva} Injunctions

The Court of Appeal, however, stressed in the \textit{Mareva} decision three limitations inherent either in the jurisdictions of the courts to order \textit{Mareva} injunctions or in the effects triggered by the injunctions. First, L.J. Kerr pointed out\textsuperscript{38} that a \textit{Mareva} injunction would not be properly exercisable against the majority of defendants who would be sued in English courts. In noninternational cases, and also in many international cases, the defendants would generally be persons or concerns established within the jurisdiction in the sense of having assets in England. The defendants could not, or would not wish to, dissipate such assets merely in order to avoid some judgment likely to be given against them. The assets would either be in the form of property in England, such as a house or a flat on which their ordinary way of life would depend, or in the form of an established business or other asset that they would be unlikely to liquidate simply in order to avoid a judgment. The \textit{Mareva} injunction thus should not be debased by allowing it to become a mechanism invoked simply to obtain security for a judgment in advance, and still less as a means of pressuring defendants into settlements.

The second limitation upon the \textit{Mareva} injunction was emphasized by L.J. Kerr when he ruled\textsuperscript{39} that it must never be abused by using it to exert pressure on the defendant to settle the action when there is no real danger of the defendant’s dissipating assets to make himself judgment-proof. Nor may it be used as a means of enabling a person to make a payment under a contract or intended contract to someone when demand for the payment appears unjustifiable or unlawful, and when obtaining a \textit{Mareva} injunction ex parte and immediately serving it in advance of the payment would have the effect of freezing the sum paid over.

Third, Lord Denning has pointed out\textsuperscript{40} that a \textit{Mareva} injunction is a method of attaching the asset itself. It operates in rem, just as the arrest of a ship does, and it enables the seizure of assets so as to preserve them for the benefit of the creditor, but not to give a charge in favor of any

\textsuperscript{37} Z Ltd. v. A, at 571 (L.J. Kerr).
\textsuperscript{38} Id. at 572.
\textsuperscript{39} Id. at 571, 572.
\textsuperscript{40} Id. at 562.
particular creditor. The plaintiff could, therefore, never gain any priority over the rights of other creditors of the defendant by obtaining a *Mareva* injunction.\(^\text{41}\)

d. Another Limitation: The Ancillary Nature of a *Mareva* Injunction

The House of Lords, in its *Siskina* decision of 1977,\(^\text{42}\) emphasized a fourth prerequisite that must be met before a *Mareva* injunction can be ordered, a prerequisite of utmost importance in the field of international loans. In the *Siskina* decision Lord Diplock very clearly stated that a *Mareva* injunction is ancillary only to a substantive pecuniary claim for debt or damages. Hence, there should be a substantive claim to pecuniary relief within the jurisdiction of the English courts upon which a *Mareva* injunction could be based. In the absence of such jurisdiction of an English court over a pecuniary cause of action, a *Mareva* injunction could not be granted.

e. Summary

The law of prejudgment attachments in England may be stated as follows: A *Mareva* injunction may be issued in favor of an English or a foreign lender against either an English or a foreign borrower. Several prerequisites must be met before a *Mareva* injunction can be ordered. First, it must appear likely that the plaintiff would recover judgment against the defendant for a certain or approximate sum of money. Second, there must be reasons to believe that the defendant has assets within England to meet the judgment, in whole or in part, but that there is a danger that the defendant may either remove them from, or dissipate them within England so as to jeopardize an eventual future execution upon the judgment.\(^\text{43}\) Third, in all cases English courts must have jurisdiction to adjudicate upon the underlying controversy, that is upon the repayment of principal or payment of interest. A *Mareva* injunction can never be ordered simply to create for plaintiff in advance security for a judgment in the absence of any danger that the assets of the defendant might be removed from England or dissipated within its borders. A *Mareva* injunction must never be used to pressure a defendant into a settlement or

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\(^{43}\) As to the effects of a *Mareva* injunction where it affects money or other assets of the defendant held by a bank or a third party, see Z Ltd. v. A, [1982] 1 All E.R. 556, 561–66 (Lord Denning).
a payment when such payment appears unjustifiable and the injunction would freeze his assets. Finally, a *Mareva* injunction only attaches, or temporarily seizes, the defendant's assets without creating for the plaintiff a priority over the rights of other creditors of the defendant.

Note within the present context that a *Mareva* injunction only lies against the assets of a debtor when English courts are vested with the jurisdiction to adjudicate the underlying merits of the controversy. Insofar, English law substantially differs from New York law. In New York a lender might successfully file for a prejudgment attachment against the assets of his borrower even though the courts having competent jurisdiction over the subject matter would be foreign. English law, by contrast, requires both that English courts be entrusted with jurisdiction to issue a *Mareva* injunction and that they possess jurisdiction over the subject matter.


The six original member states of the EEC on September 27, 1968, entered into a Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters which provides in article 24:

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

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45. English Civil Jurisdiction and Judgments Act, 1982, ch. 27.
It follows from article 246 and article 4, paragraph 47 of the Convention that article 24 applies only to defendants domiciled within one of the contracting states. Thus defendants domiciled outside of the EEC do not fall under the purview of that provision.

1. General Remarks

Whereas the convention has created uniform rules of jurisdiction over all defendants domiciled within the EEC, its article 24 has carved out from this unification all rules pertaining to prejudgment attachments by referring insofar to the different national laws of its member states that shall remain in effect. Thus for a lender who intends to file for a prejudgment attachment against the assets of his borrower that are located within the EEC, the widely differing national rules of the six member states are still in effect. One very important uniform rule has been set up by the convention to facilitate the operation of provisional remedies. Article 24 clearly states that it does not matter whether the courts of the jurisdiction in which a prejudgment attachment has been filed for also have jurisdiction over the subject matter of the dispute. Consequently, the courts of an EEC member state may issue a prejudgment attachment even if, under the Convention, the courts of another EEC state have jurisdiction as to the underlying pecuniary claim.48

This rule of the EEC Convention is of great importance for international lenders. To obtain an order for a prejudgment attachment in any one of the original six member states lenders need not show that the courts in which their motions for an attachment have been filed also have jurisdiction over the subject matter of the loan and the interest to be paid thereon. That the courts of any other member state of the EEC be entrusted, under the Convention, with such jurisdiction suffices. It may even be asked whether such subject matter jurisdiction has to be vested with any court of a member state of the EEC or whether it suffices that a court sitting outside of the EEC have such jurisdiction. The answer to that question depends upon the national law of the member state where a creditor has asked for a prejudgment attachment. If that law permits the creditor to

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46. Id. art. 2 provides:
   Subject to the provision of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State. Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

47. Id. art. 4(1) provides: "If the defendant is not domiciled in a Contracting State, the jurisdiction of the Courts of each Contracting State shall . . . be determined by the law of that State."


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sue his borrower in a jurisdiction outside the EEC, a prejudgment attachment could be issued even though it would not be the court of a member state of the EEC which would be vested with that jurisdiction. German law, for example, thus permits a prejudgment attachment to be ordered against the German assets of a German or foreign borrower although the creditor could sue the borrower to collect principal and interest only before New York courts.

Article 24 of the Convention has immunized the different national laws against the impact of that convention as far as “provisional measures” are concerned. All problems of jurisdiction, therefore, have to be resolved according to the national laws in effect in the various national member states of the EEC. The only exception is the rule introduced by article 24 that the courts of one member state may order provisional measures notwithstanding that the courts of another member state would be vested with jurisdiction as to the substance of the matter.

2. The Convention on the Accession of Denmark, Ireland, and the United Kingdom

On October 9, 1978, a Convention of Accession was signed between the six original member states of the EEC and its three new member states: Denmark, Ireland, and the United Kingdom. This Convention left article 24 unchanged. On November 1, 1986, this Convention of Accession has entered into effect as between the six original member states and Denmark, which ratified the convention in August 1986. Ratification has not yet been reported from the United Kingdom and

49. See supra note 44.
50. The previous discussion of the English law of prejudgment attachments, supra text accompanying note 42, noted that according to a ruling of the House of Lords, a *Mareva* injunction may only be issued by an English court if it has jurisdiction also over the substance matter of the claim. In view of art. 24 of the EEC Convention, Lord Denning at a very early stage (in May 1977) had decided that comity would require the United Kingdom to follow suit to the six original members of the EEC even before the Convention of Accession had entered into effect for it. The Court of Appeal, following Lord Denning, ruled that the English High Court would be vested with jurisdiction to order the attachment of the assets of a foreign defendant notwithstanding that it had no jurisdiction to adjudicate upon the merits of the claim. See *Siskina v. Distos Compania Naviera S.A.*, [1977] 3 W.L.R. 532, 553 (C.A.). The House of Lords, however, reversed this decision in holding that it would be up to the British legislature to perform such a step: “It is not for the Court of Appeal or for your Lordships to exercise these legislative functions, however tempting this may be.” *Siskina v. Distos S.A.*, [1977] 3 W.L.R. 818, 828 (H.L.).

51. Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands have ratified the Convention.

Ireland;\textsuperscript{53} it is hoped that ratification by these two states will very soon follow.

3. The Convention of Accession with Greece of 1982

On October 25, 1982, a Convention of Accession was signed between the "old" nine member states of the EEC and its "new" member Greece. Ratification of this convention is reported from only a few of its signatories.\textsuperscript{54}

4. Summary

International lenders may apply for prejudgment attachments against the assets of their borrowers located in the six original member states of the EEC according to the different national rules in effect in those states. The 1968 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters entered into between the six original member states of the EEC has left the national rules pertaining to such attachments unchanged.\textsuperscript{55} Article 24 of the Convention provides, however, that a creditor may file for a prejudgment attachment against the assets of his borrower notwithstanding the fact that the court with which such application is filed is not vested with the jurisdiction to adjudicate the underlying subject matter, and that the court of another EEC state is entrusted with that jurisdiction.

The Convention further permits a prejudgment attachment to be ordered by a court of a member state of the EEC, even if a court sitting outside of the EEC possesses jurisdiction over the subject matter of the claim. It is thus feasible to apply to a French or a German court, for instance, for the order of a prejudgment attachment even though a court in New York, for example, is entrusted, perhaps on the basis of a forum selection clause, with the jurisdiction to rule upon the pecuniary claim at the protection of which the attachment aims. After the Conventions of Accession


\textsuperscript{54} Belgium, Denmark, France, Italy, Luxembourg, and the Netherlands report ratification. The Federal Republic of Germany is about to ratify. As of November 15, 1986, ratification had not been reported from Great Britain, Ireland, and Greece.

As to the new EEC members, Spain and Portugal, no steps have been taken yet to enable their accession to the Convention.

\textsuperscript{55} In its judgment of May 21, 1980, In re Bernhard Denilhauber v. Couchet Frères, the European Court has ruled that an order of attachment issued by a court of one member state against the assets of a debtor situated in another member state, is susceptible of being recognized and enforced, on the basis of the Convention, in that other member state only if such order had been rendered after a fair hearing of the debtor. See matter of law no. 125/1979, reported in 1980 Reports of the Decisions of the European Court 1553.
with Denmark, Ireland, and the United Kingdom, and with Greece will have been ratified by all of these states, the same rules will prevail with respect to prejudgment attachments applied for with the courts of these new EEC member states.

C. TWO CIVIL LAW JURISDICTIONS

Article 24 of the EEC Convention of 1968 has thus clarified one of the crucial problems arising when an international lender seeks a prejudgment attachment against his borrower by providing that a concurrent jurisdiction over the underlying claim is not necessary. Therefore, the jurisdictional issues will only in a few respects have to be debated. The following materials give a few elementary indications about how an international lender can apply for prejudgment attachments in some European civil law jurisdictions.

1. France

Article 48(1) and (2) of the Code of Civil Procedure provide:

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 his debtor. The order is issued upon motion and has to mention the sum for which the attachment has been authorized. It will fix, for the creditor, a time limit within which he will have to introduce, before the court of competent jurisdiction, either an action for validation of the provisional attachment or for specific performance of the underlying claim, while a failure to meet this time-limit will void the attachment.

This prejudgment attachment is called, in France, "saisie conservatoire;" if it is aimed at the garnishment of a claim of the debtor against a third party, "saisie arrêt." A court may issue an order of attachment without a previous notification or hearing of the defendant. The action introduced by the creditor against the debtor for the validation of the attachment or for the specific performance of the claim must contain a

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57. Translation by the author of this article.
copy of the attachment order. 58 The debtor may apply for vacation of the attachment showing "serious and legitimate grounds." 59

The court issuing the order of attachment may require the creditor to show his solvency or to pay a security deposit into an escrow account with the clerk of the court.60 The debtor, on the other hand, may be granted a vacation of the attachment upon his payment into the hands of a sequester of sums sufficient to satisfy the claim of the creditor.61 Not only movables and claims against third parties are subject to such an attachment. The court may also authorize a creditor to attach the business of a debtor by lodging a lien upon the commercial registry wherein such business is entered.62 A provisional mortgage may also be levied upon an immovable of the debtor.63

The previous section has stressed that French law does not require French courts to have a concurrent jurisdiction also over the subject matter underlying the attachment. This is not a new rule introduced into French law by article 24 of the EEC Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 1968. On the contrary, this rule prevailed in French law about a century before the convention entered into effect in 1973. The rule had first been clearly enunciated by the French Cour de Cassation in 1868;64 it had then been reaffirmed by the Cour de Cassation65 and also by French Courts of Appeal,66 and for the last time by the Cour de Cassation in a famous decision rendered in 1970.67 The judgment of the foreign court which is vested with jurisdiction over the subject matter must, however, be susceptible of recognition and enforcement in France. Otherwise, the attachment could not be validated.68

58. See Code du Procédure Civile art. 49.
59. See id. art. 50, para. (2). If the debtor is solvent or if there is no danger that he will abscond or dissipate his assets, such serious and legitimate ground may be given.
60. See id. art. 48, para. (3).
61. See id. art. 50, para. (1).
62. See id. art. 53.
63. See id. art. 54.
66. See the decisions cited by P. Francescakis, Saisie arrêt, in Répertoire Du Droit International (vol. II, no. 60, Dalloz ed. 1969).

In Judgment of Nov. 6, 1979, Cass. Civ. Ire, 69 R.C.D.I.P. 588 (1980), the Cour de Cassation even ruled that the in rem jurisdiction exercised with a prejudgment attachment over an immovable necessarily creates also in personam jurisdiction over the defendant.
2. Federal Republic of Germany

The German law of prejudgment attachments is not very different from its French counterpart.

a. General Rules

Section 916 paragraph (1) of the Code of Civil Procedure provides that a court may order a prejudgment attachment upon the movables, tangibles or intangibles, and immovables of the debtor in order to secure a claim for a liquidated sum of money or to secure a claim that is convertible into a liquidated sum of money. According to section 917 of the Code of Civil Procedure, an order for a prejudgment attachment may be issued only if without such attachment the execution of the final judgment would be in danger of being jeopardized or substantially impeded. The necessity to enforce the judgment abroad has to be regarded as such jeopardy or substantial impediment.

The creditor must furnish prima facie evidence not only as to the existence of his claim, but also as to the danger of jeopardy or substantial impediment of its enforcement.\(^69\) The court may require the creditor to furnish security.\(^70\) The order of attachment may be issued without prior notification or hearing of the debtor.\(^71\) Upon notification, the debtor may file for the vacation of the attachment.\(^72\) Each order of attachment has to specify a security whose remittance entitles the debtor to its vacation.\(^73\)

The application for the prejudgment attachment may be filed either with the court vested with jurisdiction over the subject matter or with the court in the territory in which the assets to be attached are situated.\(^74\) Under normal circumstances, motions for a prejudgment attachment are brought in the court of the situs of the assets, since the enforcement of an attachment seems easier there than from the district of a remote court having jurisdiction over the underlying claim.

Section 926 of the Code of Civil Procedure commands the court from which the order of attachment emanates to direct the creditor to introduce, within a specific time-limit fixed by the court, an action against the debtor for specific performance of the underlying pecuniary claim. Failure to comply with such direction obliges the court to vacate the attachment. Such action for specific performance will sometimes be brought before the court that issued the order of attachment. One characteristic of the German law of jurisdiction is the recognition by section 23 of the Code

\(^{69}\) See Zivilprozessordnung [ZPO] § 920(2).
\(^{70}\) See ZPO § 921 para. (2).
\(^{71}\) See ZPO § 921 para. (1).
\(^{72}\) See ZPO § 924.
\(^{73}\) See ZPO § 926.
\(^{74}\) See ZPO § 919.
of Civil Procedure of exorbitant in personam jurisdiction over the defendant by all courts in the territories of which a defendant holds his assets. A creditor, therefore, is usually tempted to introduce his action for specific performance of his underlying claim with the same court that granted the attachment.

Such a concurrent forum for the action over the subject matter has often been ruled out, however, in one of two ways. First, a forum selection clause may point to a different forum. Second, article 2 of the before-mentioned EEC Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 1968 has, within the purview to which it applies, suppressed the exorbitant jurisdiction of section 23 of the German Code of Civil Procedure. Then the court that ordered the attachment will differ from the court vested with the power to decide the underlying claim. 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. Insofar, German law resembles the laws of New York and of France. For a German court to exercise its jurisdiction to order a prejudgment attachment, that court need not also be vested with jurisdiction to adjudicate the subject matter for the protection of which the attachment had been ordered.

b. A Specific Case

In this context, the Court of Appeal of Frankfurt several years ago decided a rather complicated question. An American corporation was

75. This section, translated into English, would read as follows:

(1) If the subject matter is not yet pending in court, the court having ordered the attachment has, upon motion, to direct the creditor to introduce, within a time-limit to be fixed by the Court, an action for the specific performance of the underlying claim. (2) If that direction is not complied with, the attachment has, upon motion, to be vacated by a final judgment.


77. See supra text accompanying notes 7–20.

78. Id.


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the creditor of the National Iranian Oil Company (NIOC). This creditor had introduced an action, against NIOC, for the payment of certain sums of money in the United States District Court for the Southern District of New York. In those proceedings NIOC claimed to be an Iranian state enterprise and therefore immune from suit in a New York court.

While this action was pending, the United States assets of the NIOC were frozen in November 1981, by order of President Carter following the taking of the personnel of the United States embassy in Tehran as hostages. In view of this, the American creditor applied for and obtained a prejudgment attachment with respect to certain assets of the NIOC situated in the Federal Republic of Germany, i.e., in the district of the Frankfurt District Court. After the Frankfurt District Court had ordered the attachment, the NIOC filed a motion asking the court to direct the American creditor to introduce an action for the subject-matter of the claim. This motion was denied on account of the action pending in the District Court of Southern New York.

The appeal of the NIOC against this denial was rejected by the Frankfurt Court of Appeal. That court held that the court ordering the prejudgment attachment could direct the creditor to introduce an action for the specific performance of the claim underlying the attachment only if such action was not yet pending in a court of competent jurisdiction. If the creditor had instituted such proceedings against his debtor in a foreign rather than a German court, those foreign proceedings could also induce litispendence and would then render such direction of the attachment court inadmissible. Litispendence and inadmissibility would ensue if the future judgment of the foreign court would have to be recognized and enforced in the Federal Republic of Germany. Such recognition and enforcement of the eventual foreign judgment would, on its turn, depend upon whether the respective foreign court would, by virtue of a mirror image application of the domestic German rules of jurisdiction, be vested with jurisdiction.

80. The amount of the claim underlying the attachment was about six million United States dollars.
81. The American creditor had already obtained, in New York, prejudgment attachments amounting to about twelve million United States dollars.
82. In the wake of that freeze American courts also granted prejudgment attachments upon the motions of other creditors, causing NIOC assets to the amount of $596 million to be attached in the United States.
83. Section 328 of the German Code of Civil Procedure lists the prerequisites which a foreign judgment must meet for its recognition and enforcement in the Federal Republic of Germany. Section 328, para 1, no. 1 requires the foreign judgment court to have had jurisdiction by virtue of a mirror image application of the German rules of jurisdiction. Pursuant to § 328, para. 1, no. 5, reciprocity in the recognition and enforcement of German judgments by the respective foreign state must also be guaranteed. These two requirements, the most important ones for the recognition and enforcement of foreign judgments in the Federal Republic of Germany, were met in the NIOC case.
The question whether the defendant was immune from jurisdiction in the foreign court also had to be answered by German law.

The Frankfurt Court of Appeal ruled that according to domestic German law the NIOC was immune from jurisdiction neither in German nor in American courts. By virtue of a mirror image application of the domestic German rules on jurisdiction, the District Court for the Southern District of New York was vested with jurisdiction to adjudicate the subject matter of the underlying litigation. The eventual judgment of the New York Court therefore would have to be recognized and enforced in the Federal Republic of Germany. With respect to the subject matter of the litigation, litispendence would ensue for the Frankfurt District Court and the Frankfurt Court of Appeal. Hence, the Frankfurt District Court which had ordered the attachment was precluded from directing the American creditor to introduce into any court an action for specific performance of the pecuniary claim underlying the attachment. As a result the prejudgment attachment of the German assets of the NIOC was maintained by the Frankfurt courts while the proceedings on the subject matter of the claim were pending before the District Court for the Southern District of New York.\footnote{On January 19, 1981, an agreement was reached between the United States and the Islamic Republic of Iran. That agreement was embodied into a Declaration of the Government of Algeria of January 20, 1981 concerning the settlement of claims by the Government of the United States of America and the Government of the Islamic Republic of Iran. See Dames & Moore v. Regan, 453 U.S. 654 (1981). Pursuant to that agreement, the proceedings on the subject matter pending before the District Court for the Southern District of New York were removed to the United States-Iranian Claims Settlement Tribunal in the Hague.}

c. Summary

The Frankfurt case permits some general conclusions to be drawn from the German law of prejudgment attachments. International lenders may very well attach property of their German or foreign borrowers situated in the Federal Republic of Germany in advance of a judgment. It does not matter whether the creditors introduce their actions for the specific performance of their claims underlying their attachments before a German or a foreign court. But if international lenders institute proceedings on the subject matter in a foreign, non-German court, they should ensure that such court, by virtue either of the EEC Convention of 1968 or of a mirror image application of the domestic German rules of jurisdiction, is vested with jurisdiction over the subject matter of their loan. Lenders thereby assure the recognition and enforcement of their eventual judgments in the Federal Republic of Germany. Actions introduced in courts which are not vested with such jurisdiction will expose the lenders to the risk of the vacation of the attachments they obtain.
3. Other Civil Law Jurisdictions

The provisional remedy of the prejudgment attachment is known to many, if not all civil law jurisdictions. Whether a prejudgment attachment can only be ordered when and insofar as jurisdiction over the subject matter underlying the attachment also is vested with the courts of that country varies with the law of each country.

D. Results

Our comparative survey has led to the conclusions that follow. First, in the absence of any contractual stipulation with respect to prejudgment attachments, international lenders will be successful in filing for such an attachment with the courts of the following countries irrespective of whether those courts are vested with jurisdiction over the underlying pecuniary claim: New York, by virtue of sections 6201, 6211, and 6213 of the New York Civil Practice Law and Rules; France, by virtue of article 48 of the French Code of Civil Procedure; the Federal Republic of Germany, by virtue of sections 916 through 926 of the German Code of Civil Procedure; and a number of other common law states or civil law countries. Thus, forum selection clauses dealing solely with jurisdiction over the underlying claim would be of no importance whatsoever for the obtaining of prejudgment attachments in those countries. The courts of those countries would have to order attachments though they would not be vested with jurisdiction over the underlying claims.

Second, in the absence of any contractual stipulation with respect to prejudgment attachments and in addition to the conclusions expressed in the preceding paragraph, the courts of the six original member states of the EEC and of Denmark will order, by virtue of article 24 of the EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968, prejudgment attachments insofar as their national laws provide. Such orders are granted, however, only on the condition that the courts of any other of the six original EEC member states or of Denmark have jurisdiction over the substance matter of the claim.

Third, after Great Britain, Ireland, and Greece have effectively acceded to the before-mentioned EEC Convention, the same rule enunciated in

85. Tait & Rossel, How to Gain Prejudgment Attachment, INT'L FIN. L. REV., OCT. 1983, at 29, discussing the attachment procedures in Belgium, Denmark, Finland, France, Italy, the Netherlands, Norway, Spain, Sweden, and Switzerland.
86. See supra text accompanying notes 7–20.
87. See supra text accompanying notes 56–68.
88. See supra text accompanying notes 69–84.
89. See supra text accompanying note 85.
90. See supra text accompanying notes 44–52.
the preceding paragraph will also prevail in those countries.91 Until the accession of Great Britain to the EEC Convention becomes effective, British courts will not order a *Mareva* injunction that is more or less tantamount in effect to a prejudgment attachment unless British courts also have jurisdiction over the subject matter of the underlying claim.92

Finally, the parties to the loan agreement may have stipulated that a prejudgment attachment must not be brought in any one of the jurisdictions mentioned in the preceding three paragraphs. Such stipulation will prevail over the before-mentioned statutory regulations. The courts precluded by that stipulation will not be vested with jurisdiction to order an attachment.

**III. The Drafting of Forum Selection Clauses**

**A. Two Categories of Forum Selection Clauses**93

Under the angle of their purview, two categories of forum selection clauses may be distinguished: (i) forum selection clauses which provide for both jurisdiction over the subject matter of the underlying claim and for jurisdiction to order a prejudgment attachment (double-functional forum selection clauses); and (ii) forum selection clauses which refer only to the jurisdiction over the subject matter and omit any provision as to the jurisdiction over attachment proceedings (simple forum selection clauses).

Both categories may again be subdivided into exclusive and nonexclusive forum selection clauses.94 Exclusive forum selection clauses simultaneously are of prorogative and of derogative nature. They are of prorogative nature insofar as they assert a jurisdiction which under common law or statutory law might already exist, and also insofar as they create a new jurisdiction. They are of derogative nature insofar as they preclude the party from filing an action or a petition for an attachment in courts which otherwise, by common law or by statutory law, would be vested with such jurisdiction. Nonexclusive forum selection clauses are of prorogative nature only. Discussion of the advantages and disadvantages of these categories and subcategories of forum selection clauses in view of the needs of international lenders and borrowers who consider the necessity or possibility of eventual prejudgment attachments follows.

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91. See supra text accompanying notes 53–54.
92. See supra text accompanying notes 21–43.
94. See Gruson, supra note 93, 1982 U. ILL. L. REV. 133.

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B. **DOUBLE-FUNCTIONAL FORUM SELECTION CLAUSES**

Double-functional forum selection clauses provide for both jurisdiction over the subject matter of the underlying claim and for jurisdiction to order a prejudgment attachment. They may be of prorogative or of derogative nature or simultaneously of both natures. Insofar as they are of prorogative kind and assert or confer jurisdiction to order prejudgment attachments, they assist the international lender by entitling him to file for prejudgment attachments in all jurisdictions covered by the clause. By contrast, they disadvantage the borrower, whose assets are subject to an eventual attachment in all jurisdictions included in the clause. Insofar as double-functional forum selection clauses are of derogative nature in precluding the lender from bringing an action or filing for a prejudgment attachment, they aid the borrower, whose assets would otherwise be subject to eventual attachments. Vice versa, they are of disadvantage to the lender for the same reason.

It is important, therefore, to classify a forum selection clause as double-functional or simple; and if it is double-functional, as prorogative or derogative in nature. The distinction between double-functional and simple forum selection clauses is easy when these clauses expressly dispose of prejudgment attachments. This distinction becomes more difficult, however, when their nature as double-functional or simple has to be surmised from a tacit or presumed intention of the parties to the loan agreement.

Legions of different forum selection clauses are used in international loan agreements. This article, therefore, cannot review all of the clauses. The author has at his disposal only a limited number of samples. Review of these samples nevertheless shows that many of them give rise to serious problems of construction better avoided.

1. **Express Double-Functional Forum Selection Clauses**

Although these clauses are very rare, Delaume has proposed the use of one clause of this kind. His clause will greatly enhance the position of the lender and weaken that of the borrower by entitling the lender to file for prejudgment attachments in any jurisdiction where assets of the borrower are situated. His clause reads:

The parties hereby submit to the exclusive jurisdiction of (e.g., the High Court of Justice in England) as regards all matters arising out of, or in connection with, this contract; provided, however, that such submission shall not preclude any party to this contract from taking any provisional measure or pursuing any provisional remedies, such as attachment or similar proceedings, which may

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95. Because many of these samples have only confidentially been given to him by private banks the author is not entitled to publish them.
be available to such party under the laws of any jurisdiction (including without limitation the courts of and any courts of the United States or the State of (e.g., New York) against the assets of the other party.\textsuperscript{96}

This clause is advantageously clear, unambiguous, and leaves no room for any construction whatsoever.

2. Tacit or Implied-in-Fact Double-Functional Forum Selection Clauses

Some forum selection clauses in international loan agreements do not expressly mention prejudgment attachments. Nevertheless, the wording of such clauses leaves no doubt that they are meant to confer jurisdiction not only over the subject matter of the underlying loan, but also over eventual prejudgment proceedings. The following forum selection clause exemplifies this subcategory in which the tacit intention of the parties can with certainty be inferred that their clause should embrace both jurisdiction over the subject matter and jurisdiction over eventual prejudgment attachments:

The borrower hereby consents generally in respect of any legal action or proceedings arising out of or in connection with this Agreement to the giving of any relief or the issue of any process in connection with such action or proceedings including, without limitation, the making, enforcement or execution against any property whatsoever . . . of any order or judgment.\textsuperscript{97} (Emphasis added.)

3. Presumed or Implied-in-Law Double-Functional Forum Selection Clauses

Many forum selection clauses are not as unambiguous, unequivocal, and clear as the clauses quoted in the preceding two paragraphs. On the contrary, some clauses leave doubts as to whether they are of a double-functional nature in that they also confer jurisdiction over prejudgment attachments. It is impossible, therefore, to derive from them with any degree of certainty a tacit understanding of the parties that their forum selection clause was intended to embrace prejudgment attachments.

Ambiguous forum selection clauses need to be carefully construed. Before tackling such construction, one must determine which national rules of construction apply to the clause. A forum selection clause is an integral part of the loan agreement, and is governed, therefore, by the

\textsuperscript{96} See Delaume, \textit{supra} note 56, at 58.
\textsuperscript{97} Samples of this clause have been confidentially given to the author by two German banks.
proper law to which the entire loan agreement is subject. The proper law of a loan agreement may be New York law, English law, French law, German law, the law of another state of the United States, or the national law of any other country. Differences may exist between these federal or national laws as to their rules of construction. All these laws concur, however, in providing that in the absence of an express or tacit intention of the parties their agreement must be construed according to their presumed intention. That intention is tantamount to an implication, by law, of the respective forum selection clause.

Wherever it is impossible, therefore, to derive from the wording of a forum selection clause a tacit understanding of the parties as to the purview of their forum selection clause, the clause must be construed according to their presumed intention. The construction is uncertain, unpredictable, and gives rise to many doubts. The use of such ambiguous selection clauses should be avoided. Nevertheless, as mentioned above, many forum selection clauses need such construction because it is unclear whether or not they embrace prejudgment attachments.

A few samples follow:

The Borrower agrees that any legal action or proceedings arising out of or in connection with this agreement may be brought in the Courts of . . . or . . . . (Emphasis added.)

The submission to the said jurisdictions shall not (and shall not be construed so as to) limit the right of the Agent, the Managers and the Bank or any of

98. As to the proper law of the loan agreement, see P. Wood, supra note 1, at 1–19; Gruson, Controlling Choice of Law, in SOVEREIGN LENDING: MANAGING LEGAL RISK 51–67 (M. Gruson & R. Reisner eds. 1984).


[1]t is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the Court may deem fitting for completing the intentions of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligations by which the parties have bound themselves, and is of course quite unauthorized. . . . (Emphasis added.)

A few years later, with the decision in The Moorcock, 14 P.D. 64, (1889), the so-called Moorcock doctrine came into existence when L.J. Bowen held:

Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. . . . [A]nd I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have.

Id. at 68 (emphasis added).

Since then, this doctrine has been well established in English law. See 37 HALSBURY'S LAWS OF ENGLAND § 362 (4th ed. 1982).

100. German banks have confidentially given samples of this clause to the author of this article.
them to take proceedings against the Borrower in whatsoever jurisdiction shall to it or to them seem fit nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdiction whether concurrently or not. (Emphasis added.)

The Borrower hereby irrevocably accepts, for itself and in respect of its assets, generally and unconditionally the (nonexclusive) jurisdiction of the aforesaid Courts. (Emphasis added.)

The Borrower hereby irrevocably:

(a) submits to the non-exclusive jurisdiction of the courts of England and the State courts of and the Federal Courts in the State of New York in respect of any legal proceedings in connection with this Agreement. (Emphasis added.)

The Borrower agrees that any legal action or proceedings arising out of or in connection with this Agreement against the Borrower or its assets may be brought in the English courts, in the State courts or the Federal courts in the State of . . . or elsewhere as any Bank or the Agent may elect. . . . (Emphasis added.)

The Borrower agrees that any legal action or proceedings arising out of or in connection with this Agreement against the Borrower or its assets may be brought in the . . . English courts or the courts of (country of Borrower). . . . (Emphasis added.)

The Borrower hereby irrevocably submits to the nonexclusive jurisdiction of the High Court of Justice in . . . , the Courts of the State of . . . and the Courts of the . . . in relation to any claim, dispute or difference which may arise hereunder or any document entered into pursuant hereto or in connection herewith but without prejudice to the rights of the Agent or the Banks to commence any legal action or proceeding in the courts of any other competent jurisdiction. . . . (Emphasis added.)

The clauses give rise to doubt as to whether they contemplate jurisdiction over prejudgment attachments. Such clauses may cause other doubts. Some of the clauses cited are ambiguous within themselves: they do not indicate with reasonable certainty whether they are meant to be of exclusive or of nonexclusive nature. Such ambiguity then confuses the jurisdiction over attachment proceedings: it remains equally doubtful whether such eventual jurisdiction over prejudgment attachments will be of exclusive or of nonexclusive nature.

The abovementioned attachments by some American, Canadian, and Swiss banks of shares that the Government of Iran held in some important German corporations serve as an example. The forum selection clause

101. This example is taken from P. Wood, supra note 1, at 87.
102. This example is taken from Chronnell & Watson, Selected Specimen Clauses for Syndicated Loans, in SOVEREIGN BORROWERS 243 (L. Kalderén & Q. Siddiqi eds. 1984).
103. Id. at 244.
104. This example is taken from Cates and Isern-Feliu, Governing Law and Jurisdiction Clauses in Euroloan Agreements, INT’L FIN. L. REV., July 1983, at 31.
105. See supra text accompanying notes 4–5.
which was embodied in the respective loan agreement\textsuperscript{106} did not clearly indicate whether it was meant to cover prejudgment attachments. In addition, that clause did not mention anything as to whether it was exclusive or nonexclusive in nature. The consequence was an intense battle before the German attachment court as to the legality of the order of the prejudgment attachments. The Iranian respondent alleged that the forum selection clause was double-functional in nature, that it did embrace jurisdiction over the subject matter as well as jurisdiction over prejudgment attachments; but that such jurisdiction was meant to be exclusive. Respondent asserted that jurisdiction vested only with the non-German courts expressly mentioned in the clause and that the forum selection clause did not provide for any jurisdiction of German courts. For that reason respondent argued that the orders of attachment should be vacated by the German attachment court.

C. SIMPLE FORUM SELECTION CLAUSES

Simple forum selection clauses refer only to the jurisdiction over the subject matter of the loan and omit any provision as to the jurisdiction over attachment proceedings. Such clauses have several effects. The international lender can avail himself of any attachment jurisdiction established either by common law or by statutory law of any country where assets of his borrower are situated. The comparative survey demonstrated that international lenders may file for prejudgment attachments in many countries even though the courts of these countries would not be vested with jurisdiction over the subject matter of the loan. This situation therefore benefits the lender and places the borrower at a disadvantage.

Simple forum selection clauses do not give rise to any problems of construction. Although they leave open the issue of prejudgment attachments, they will not create problems all by themselves. Their use therefore does not raise serious objections.

D. CONCLUSION

Double-functional forum selection clauses provide for both jurisdiction over the subject matter of the underlying claim and jurisdiction to order

\textsuperscript{106} This clause was worded as follows:

\textit{Any legal action or proceedings} with respect to this Agreement by the Borrower may be brought at the option of the Borrower in any court of competent jurisdiction in Iran or elsewhere and against the Borrower may be brought at the option of any Bank or the Agent in the courts of England or Iran or in courts of competent jurisdiction located in the state of New York, and, by execution and delivery of this Agreement, the Borrower hereby accepts, for itself and \textit{in respect of its assets}, generally and unconditionally the jurisdiction of the aforesaid courts. . . . (Emphasis added.)
prejudgment attachments. Their use can be recommended if they unequivocally extend to prejudgment attachments and when their exclusive or nonexclusive nature is unambiguous. Simple forum selection clauses refer only to the jurisdiction over the subject matter of the loan and omit any provision as to jurisdiction over attachment proceedings. Their use does not raise serious objections.

IV. Prejudgment Attachments against Foreign Sovereigns

Many borrowers of international loans are foreign sovereigns. When their assets are seized by way of a prejudgment attachment they may claim the privilege of sovereign immunity. It is important, therefore, to know how far this privilege extends and how a waiver must be worded by which the operation of such defense can successfully be avoided.

A. The Assets of Foreign Sovereigns and the Defense of Immunity

This discussion will be governed by three basic tenets. First, we need not inquire into the rules of immunity from suit, but into the rules of immunity from attachment; the latter differ from the former. Second, with respect to immunity from attachment, only a very few concise, common rules in the law of nations exist providing, for example, that the premises of a foreign embassy or consulate must not be seized by a court of the lex fori. Apart from these few explicit rules the law of nations has not yet been able to further develop detailed rules on immunity from attachment, which would give clear guidance as to which assets of a foreign sovereign would be subject to attachment and which would be immune therefrom. For this reason, third, this discussion cannot report on uniform rules of immunity but must give a short comparative survey on the different rules of immunity prevalent in some of the commercially and financially important countries.

1. United States

Section 1610(d) of the Federal Sovereign Immunities Act (FSIA) of October 21, 1976 provides:

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of


the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if
(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and
(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

Whereas section 1610(d) FSIA thus allows the assets of a foreign sovereign to be attached under certain conditions, section 1611 removes certain types of property from any attachment ordered by the courts of the lex fori.

The very clear wording of section 1610(d) indicates that the assets of a foreign state can, by way of exception, only be attached if "the foreign state has explicitly waived its immunity from attachment prior to judgment." It is crucial, therefore, for any lender who files for the pre-judgment attachment of the assets of his foreign sovereign borrower to be able to present to the court an "explicit" waiver of "immunity from attachment prior to judgment."

109. Subsection (c) reads:
No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.


110. Section 1611 reads:
Certain types of property immune from execution.

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver, or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

Id. § 1611.

111. Id. § 1610(d)(1).

112. See also Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383, 393 (D.N.J. 1979) where it was held that "Congress did not intend to allow implied waivers of immunity from attachment prior to judgment" under the FSIA. See also E-Systems, Inc. v. Islamic Republic of Iran, 491 F. Supp. 1294, 1301–02 (N.D. Tex. 1980).
In this respect the Court of Appeal for the Second Circuit held in 1982 that to be effective under the Act a waiver need not recite the words "prejudgment attachment" in haec verbae or otherwise contain an express reference to this form of legal proceeding.\textsuperscript{113} Section 1610(d)(1) would not require recitation of the word "prejudgment attachment" as an operative formula because the purpose of this provision would be to preclude inadvertent, implied, or constructive waivers where the intent of the foreign state is equivocal or ambiguous. A clause providing that the debtor "waives any right or immunity from legal proceedings including suit judgment and execution on grounds of sovereignty which it or its property may now or hereafter enjoy"\textsuperscript{114} was therefore held to constitute a valid waiver under section 1610(d)(1).

The same Court ruled a year later that a waiver clause contained in an international trade agreement between the United States and Rumania providing that nationals, firms, companies, and economic organizations of either party "shall not . . . enjoy immunities from suit or execution of judgment or other liability in the territory of the other party"\textsuperscript{115} is not a sufficient waiver under section 1610(d)(1), since waivers of immunity from suit or from execution of judgment have no bearing upon the question of immunity from prejudgment attachment.\textsuperscript{116} The only clause that might be construed as a waiver of immunity from prejudgment attachment, the words reading "immunities from . . . other liability in the territory of the other party," did not explicitly include waivers of immunity from prejudgment attachments. This clause was therefore held not to meet the requirement of explicitness established by section 1610(d)(1).

Finally, the District Court for the Southern District of New York rendered an opinion in 1984 holding that a clause providing that debtors would "hereby waive any right or immunity barring claims" and that debtors "submit to the non-exclusive jurisdiction of any State or Federal Court of New York, sitting in New York, relative to any action or proceeding deriving from this promissory note or related to same" also does not constitute a sufficient waiver under section 1610(d)(1).\textsuperscript{117} This clause would not evince a clear and unambiguous intent to waive immunity from prejudgment attachments. The "relative to any action or proceeding" language would appear to relate only to personal jurisdiction, as opposed to the sovereign immunity waiver. Had the phrase "relative to any action

\textsuperscript{113} Libra Bank Ltd. v. Banco Nacional de Costa Rica, 676 F. 2d 47, 48 (2d Cir. 1982).
\textsuperscript{114} Id. at 48.
\textsuperscript{116} Id. at 416–18.
or proceeding” appeared in the immunity clause, the solution of this problem might, however, have been different.118

2. Great Britain

Section 13 paragraphs (2) to (5) of the State Immunity Act of 1978 provide:

(2) Subject to subsection (3) and (4) below

(a) . . .

(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.

(4) Subsection (2) (b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; but, in a case not falling within section 10 above119 this subsection applies to property of a State party to the European Convention on State Immunity only if

(a) the process is for enforcing a judgment which is final within the meaning of section 18(1)(b) below and the State has made a declaration under Article 24 of the Convention; or

(b) the process is for enforcing an arbitration award.

(5) The head of a State’s diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) above and, for the purposes of subsection (4) above, his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.

Mareva injunctions may thus be obtained, in Great Britain, with respect to the assets of a foreign sovereign in two situations only: if such assets are presently used or intended to be used for commercial purposes (sub-
section (4)); or if “written consent” of the debtor state has been given (subsection (3)). The first-mentioned exception of the “use for commercial purposes” is subject to many limitations and exceptions. The only reliable instrument, therefore, for ruling out a foreign sovereign’s defense of immunity, is his prior written consent. Hence, it is important to know whether this consent must be express or whether it may be implied in fact or in law. Though this question cannot be answered with much certainty, an implication in fact or in law hardly seems permissible. The Act embodies the principle of immunity from “arrest” as the common rule. The “written consent” only derogates that rule by way of an exception, thereby entailing the application of the old rule of interpretation that exceptions must be strictly construed.

Taking into consideration, on the other hand, the rules of in dubio pro immunitate advocated in the law of nations, it can hardly be assumed that English courts would issue a Mareva injunction against the assets of a foreign sovereign without its express written prior consent. Thus, if an international lender intends to preserve his option to file, for the order of a Mareva injunction against the assets of his sovereign borrower within Great Britain, he should avail himself in the loan agreement of the express written consent of his borrower with respect to such injunction.


121. As to the meaning of this exception, see Alcom Ltd. v. Columbia, 22 INT’L LEG. MAT. 1307 (1984) (C. A. 1982).

122. It is true that English authors dealing with immunity in the law of nations have not expressly endorsed this principle. It has, however, been widely recognized in treatises on international law written in other nations, e.g. by German writers (see, e.g., F. BERBER, LEHRBUCH DES VOLKERRECHTS 223 (2d ed. 1975). In substance, however, British courts seem implicitly to follow the rationale embodied in this rule when dealing with problems of immunity.


(1) Subject to subsections (2) and (3), property of a foreign state that is located in Canada is immune from attachment and execution and, in the case of an action in rem, from arrest, detention, seizure and forfeiture except where

(a) the state has, either explicitly or by implication, waived its immunity from attachment, execution, arrest, detention, seizure or forfeiture, unless the foreign state has withdrawn the waiver of immunity in accordance with any term thereof that permits such withdrawal;

(b) the property is used or is intended for a commercial activity; or

(c) the execution relates to a judgment establishing rights in property that has been acquired by succession or gift or in immovable property located in Canada.

(2) Subject to subsection (3), property of an agency of a foreign state is not immune from attachment and execution and, in the case of an action in rem, from arrest, detention, seizure and forfeiture, for the purpose of satisfying a judgment of a court in any proceedings in respect of which the agency is not immune from the jurisdiction

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3. France

France does not have a statute that defines the boundaries of the immunities enjoyed by foreign sovereigns. In a famous landmark decision rendered in March 1984, however, the French Supreme Court redefined the position of French law vis-à-vis the immunities enjoyed by foreign sovereigns with respect to their assets located in France by way of some very fundamental principles.

The French Supreme Court enunciated three basic principles which will henceforth control the operation of the defense of immunity in cases involving prejudgment attachments in France of the assets of foreign sovereigns. First, not the law of nations, but the domestic rules of French conflict of laws define the limits of any immunity enjoyed by foreign sovereigns with respect to their assets in France. Second, a firmly established general principle of French conflict of laws holds that the assets of a foreign sovereign located in France are not subject to prejudgment attachments ordered by French courts. Third, this general principle of immunity from attachment is derogated by a rule of exception stating that such assets may be seized by way of a prejudgment attachment provided they have been used for the same commercial activity from which the underlying cause of action has arisen.
The assets seized not only must be in commercial use or intended to be used for commercial purposes; but also there must be a substantive coherence or a material tie between those assets and the subject matter of the claim for the protection of which the attachment is sought. Obviously in practice it will be very difficult to carry out the distinctions between commercial and noncommercial (sovereign) use, and between material relationship linking the seized assets with the underlying claim and nonmaterial or nonexisting relationship without sufficient links between the two. The way of the international lender to that exception will, therefore, often be paved with insurmountable difficulties.\textsuperscript{129}

In view of the foregoing discussion, the question must again be asked whether another exception is available to the international lender: the prior consent of the sovereign borrower to an eventual prejudgment attachment of his assets in France. True, the French Supreme Court has not mentioned such waiver of immunity by a sovereign borrower in its landmark decision. Almost certainly, however, the prior consent of the borrower to an eventual attachment of his assets in France constitutes another exception derogating the principle of immunity from attachment.\textsuperscript{130} The rules in effect in this respect before the French Supreme Court decision came into existence still apply. Those rules provide that an express waiver of immunity is not required for the attachment of the assets of a sovereign in France. French courts have always rules, however, that the consent of the respective sovereign must have been given unequivocally and unambiguously to the exclusion of all implications either in fact or in law.

It has thus been held,\textsuperscript{131} for example, that when a sovereign signed an arbitration clause the signature did not, by itself, imply a waiver of immunity from attachment or execution. Such implication was even denied in a case\textsuperscript{132} where a sovereign had adhered to an arbitration under the Rules of the Court of Arbitration of the International Chamber of Commerce in Paris. Those rules provide in article 24 paragraph (2): "By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out...."
the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made."

4. Federal Republic of Germany

The Federal Republic has no statute on state immunity either. Nevertheless, the Federal Constitutional Court has rendered two important decisions defining the rules on immunity from attachment and execution, one in 1977 and another one in 1983. In 1977 the Federal Constitutional Court held that there would be no general rule in the law of nations which would prohibit the attachment of the property of a foreign sovereign located within the confines of the attaching jurisdiction. On the contrary, public international law would, in principle, permit such attachment. With respect to certain objects in the possession of the debtor state, however, an exception would have to be made to the principle of the general permissibility of attachments. The seizure of objects, for example, which, while in the possession of the foreign state, would be used by it for the performance of its sovereign functions would thus violate the laws of nations. The old principle of ne impediatur legatio would preclude all attachments jeopardizing any sovereign action of the debtor state. A bank account held in the name of a foreign embassy and destined to finance its diplomatic activities, would therefore be immune from attachment.

In 1983 the Federal Constitutional Court further specified the exceptions permitting the attachment of the assets of a foreign sovereign. The court ruled that bank accounts established in the name of foreign state-owned enterprises would have to be considered as the property of such enterprises and not as the property of the foreign states controlling those enterprises. The attachment of such bank accounts would therefore be permissible notwithstanding the assignment of these accounts for the transmission to and for the use by the central banks of the foreign con-

133. See also Brandon, Immunity from Attachment and Execution, INT'L FIN. L. REV., July 1982, at 34–35; de Smedt, Sovereign Immunity in Switzerland and Germany, INT'L FIN. L. REV., at 34–35.

134. Pursuant to art. 25 of the Basic Law of the Federal Republic of Germany, the general rules of international law are a constituent part of German law and enjoy precedence over the domestic laws of Germany in directly creating rights and duties for the inhabitants of the federal territory. This is why the Federal Court had to carefully query, in its decisions, whether there was any rule of public international law relating to the attachment of assets of a foreign sovereign.


trolling states in the performance of their sovereign functions. The attachment of such bank accounts was therefore held not to be in violation of public international or of domestic German law.

Both decisions also allow any attachment that is grounded upon prior consent of the debtor state. The Federal Constitutional Court is silent as to whether such consent would have to be made in express terms or whether it could be implied, in fact or in law, from the documents originating the debt or from the circumstances. Articles and treatises on the law of nations have stressed, however, that such consent would have to be unequivocal and unambiguous.\(^\text{137}\)

### 5. Other Countries

In its two decisions the German Federal Constitutional Court has given a concise comparative survey over the laws regarding immunity from attachment of many other Western countries.\(^\text{138}\) Scrutiny of those other national laws often reveals that doubts as to the limits of sovereign immunity exist and that an unequivocal and unambiguous waiver of immunity is the only means to escape those uncertainties.

In the European Convention on State Immunity of May 16, 1972\(^\text{139}\) a similar policy commends itself. This Convention has been ratified by Austria,\(^\text{140}\) Belgium,\(^\text{141}\) Cyprus,\(^\text{142}\) Great Britain,\(^\text{143}\) Switzerland,\(^\text{144}\) and the Netherlands.\(^\text{145}\) The Federal Republic of Germany,\(^\text{146}\) Luxembourg, and Portugal have signed it. Its article 23 provides: “No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case.” (Emphasis added.)

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\(^{140}\) In 1974.

\(^{141}\) In 1975.

\(^{142}\) In 1976.

\(^{143}\) In 1979.

\(^{144}\) In 1982.

\(^{145}\) In 1985.

\(^{146}\) Where its ratification is imminent.

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B. Conclusion: A Strong Recommendation for an Express Waiver; Obstacles to Its Declaration and Its Validity

The foregoing survey strongly compels the lender in an international loan to require an express waiver of immunity from his foreign sovereign borrower. Otherwise, a lender may never be assured that he can avail himself of a prejudgment attachment or of similar injunctive relief. Proposals have been made for the wording of such waiver clauses. One of those proposals that has been drafted particularly carefully provides:

The Borrower hereby irrevocably and unconditionally waives any right to claim immunity (whether characterized as sovereign immunity or otherwise) in respect of itself or any of its property or assets, including immunity from jurisdiction, immunity from attachment prior to entry of judgment, immunity from attachment in aid of execution of judgment, and immunity from execution of judgment, all in respect of any legal suit, action, or proceeding arising out of or relating to this Agreement. In addition, the Borrower hereby agrees that any such suit, action, or proceeding may be instituted in the courts of the State of New York or the United States District Court for the Southern District of New York, and irrevocably and unconditionally submits to the jurisdiction of any such court for such purpose.

Serious obstacles on the part of the sovereign borrower might prevent him from issuing any declaration of this kind. Likewise he eventually might argue the nullity of such declaration if he enunciated it in contravention to such bar. The Calvo doctrine, of widespread importance in Latin America, is the most famous of such bars. The legal implications arising from constitutional prescriptions of that kind also deserve the careful attention of the parties to an international loan agreement.