

**NOTE ON PROVISIONAL AND PROTECTIVE MEASURES  
IN PRIVATE INTERNATIONAL LAW AND COMPARATIVE LAW**

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*Preliminary Document No 10 of October 1998 for the attention of  
the Special Commission of November 1998 on the question of jurisdiction, recognition  
and enforcement of foreign judgments in civil and commercial matters*

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## INTRODUCTION

1 At the beginning of this survey of provisional and protective measures in international litigation, it may be of interest to recall the resolution adopted by the 20<sup>th</sup> Conference of European Ministers of Justice:<sup>1</sup> “Measures should be identified which seek to achieve a good cost-benefit ratio in order to speed up the pace of justice, without however adversely affecting the other guarantees of a fair trial”. From the same perspective, the Council of Europe has adopted several principles to improve civil proceedings. We will mention only the following:

- restricting the number of hearings and expediting the proceedings;
- the court to play an active role;
- special steps to be taken in some cases in order to speed up the settlement of disputes (for example, in an emergency, when a claim is not contested or there is a definite obligation, or if the subject matter of the litigation is of little value) and to speed up the administration of justice.<sup>2</sup>

This concern with speeding up civil proceedings is by no means confined to the countries of the “Large European Home”, and similar concerns underlie the work of intergovernmental organisations in Asia, Africa and the Americas, as well as that of non-governmental international organisations such as the International Law Association or the major international bar associations (the IBA or the UIA, for example).

2 Surely there is nothing better than provisional and protective measures to fulfil the aims and principles mentioned in the resolution and recommendation referred to here. These measures, in their protective aspect, are normally ordered in emergency cases in order to maintain the *status quo*, to ensure that certain rights are safeguarded, so that the parties can have a chance to argue their claims on the merits.<sup>3</sup> In essence, they are only meant to be temporary; the exact period for which they are valid and effective is defined in law or by the court which orders the measures, so as to maintain a balance between the rights of the parties. Having said that, the actual picture is extremely complex, as these measures are sought in the context of an international dispute, and will take effect wholly or partly on the territory of a State other than the one in which they were ordered. The complexity derives partly from the fact that legal systems diverge to a greater or lesser extent in this area, and that even within one and the same system, many measures may be described as protective without necessarily

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<sup>1</sup> Budapest meeting of 11 and 12 June 1996, Resolution No 1.

<sup>2</sup> Recommendation No R (84), reprinted in *L'Etat de droit et la Justice*, Réalisations du Conseil de l'Europe, Dir/Doc (97) 8, pp. 6 and 7.

<sup>3</sup> It is far from easy to give a clear and uniformly accepted definition of what constitutes a protective measure. The Court of Justice of the European Communities has decided that the purpose of these measures is to safeguard rights which the court dealing with the merits of a case is, in any event, requested to recognise, while preserving the status quo both in fact and in law (see Case C-261/90, *Reichert II*, ECJ 26 March 1992, Rec/ I, 2149). Again, it was on the basis of the objectives sought by protective measures that the Helsinki Resolution adopted by the International Law Association proposed a definition. There are two objectives: a) to preserve the status quo until the merits of the case are settled; b) to seize goods which can meet the demands of an order in the final judgment (see ILA, Report of the Sixty-Seventh Conference, Helsinki, 1996 p. 202; a French translation of the original English will be found in C. Kessedjian and P. Kinsch, *JDI* 1997, p. 110). In other words, as the author of a recent treatise says, the primary objective of a protective measure is to prevent the debtor from deliberately going bankrupt (see Gilles Cuniberti, *Les mesures conservatoires portant sur des biens situés à l'étranger*, Paris I thesis. 1998 No 10, p. 8).

having the attributes of the definition given here.<sup>4</sup> When dealing with the international system, it is impossible to review every element of this mosaic, so we have preferred to single out a few specific measures which fall within the definition we have given.<sup>5</sup>

3 For this reason, we have initially chosen two major categories. The first of these comprises all the measures which are by nature *in personam*, *i.e.*, they are addressed to the person of the debtor and enjoin him to do or not to do something or, as in the case of attachments, instruct somebody (who may be a third person extraneous to the main case) not to relinquish property for the benefit of the debtor, or perhaps to relinquish property for the benefit of the creditor. The second comprises all the measures *in rem*, the effects of which will be felt chiefly on the thing or asset which has been seized or sequestered. One may point to a further dichotomy, as between measures which establish a priority claim for the creditor, and those which are neutral in this respect. Finally, there is a third dichotomy as between measures which are intended to take extraterritorial effect and those which, by contrast, are limited in their effects to the territory of the State in which they were ordered.<sup>6</sup>

4 In the light of these differences, we have endeavoured to present the main principles which apply in a number of legal systems, chosen not only for their importance in this area, but also in view of the availability of the information needed to understand how they operate. These systems are those of the United Kingdom and certain Commonwealth countries, the United States, Germany, France, the Netherlands and Switzerland.<sup>7</sup>

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<sup>4</sup> In France, for instance, a study has shown that there are about thirty different measures of a protective kind available under domestic law (see C. Brenner, *L'Acte conservatoire*, typed thesis, Paris II, 1996).

<sup>5</sup> In this study we will not therefore focus on measures which are purely provisional without being protective, as the legal regime they belong to a legal regime seems no different from immediately enforceable decisions, which follow the general system for foreign decisions.

<sup>6</sup> This third dichotomy follows almost automatically on the first.

<sup>7</sup> We are aware that this means leaving outside our study countries with very important legal systems. Unfortunately, if they are missing it is because the Permanent Bureau does not have enough information about them. We wish to thank here the people who have helped us to gather information about the systems selected: for the United Kingdom and Australia, Timothy McEvoy; for the United States, Timothy McEvoy; for the Netherlands, Roumyana Maria Rizov; for Switzerland, Christophe Bernasconi; and for the Brussels and Lugano Conventions, Cathalijne van der Plas. We also wish to thank the members of the Committee on international civil and commercial procedures of the International Law Association. The thesis by Gilles Cuniberti, cited above in note 3, has been very helpful. Any errors which may be identified in the text are strictly the responsibility of the author.

5 As we had occasion to state in the Preliminary Report on international jurisdiction and the effects of foreign judgments in civil and commercial cases,<sup>8</sup> the progress and the outcome of proceedings on the merits of a case will often depend on the availability of provisional or protective measures. This is why the Special Commission, discussing the question in June 1997, expressly requested the preparation of a Note on comparative law by way of preparation for the debates which would follow in forthcoming meetings about the clauses to be included in the future Convention.

6 For each of the legal systems which we have chosen, we will deal with three issues. First, a brief description of the measures used in the legal system concerned and how they operate; secondly, an explanation of the rules of direct international jurisdiction which the system applies in this area; and thirdly, the recognition or enforcement which that system affords on its own territory for measures ordered abroad. For France and Switzerland, a brief section on the applicable law completes this picture, bearing in mind that this is a controversial issue in both countries.

7 Finally, we thought the study would be incomplete without a brief description of how the Brussels and Lugano Conventions are applied in practice, as both contain a specific provision on the question with which we are concerned here. There is a proposal to amend the existing text, and we will also comment on this proposal, as it stands on the date of preparation of this study.

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<sup>8</sup> Preliminary Document No 7, April 1997, prepared for the Special Commission of June 1997, p. 27, No 51 and p. 73, No 126.

## CHAPTER I – THE UNITED KINGDOM AND COMMONWEALTH COUNTRIES

8 A London solicitor, at a recent conference,<sup>9</sup> concluded his presentation of the English law on protective measures by comparing the English judge to the chef in a high-class restaurant who puts on the menu: “We have taken great care with our menu, but if your favourite dish isn’t here, tell the chef and he will be happy to cook it for you.” The English courts<sup>10</sup> can be quite inventive, to say the least, when it is a question of helping litigants in their cases, whether at home or abroad.

### SECTION 1 – DESCRIPTION OF THE MEASURES<sup>11</sup>

#### § 1 *The Mareva injunction*

9 It was in 1975 that the High Court in London, under Lord Denning M.R., granted a *Mareva* injunction for the first time, in a decision in the case of *Nippon Yusen Kaisha v. Kara Georgis*.<sup>12</sup> One of the parties had asked it to award an injunction forbidding the other party to dispose of his property before the judgment on the merits was handed down. What the applicant was afraid of was that, during the proceedings on the merits, the defendant would transfer bank holdings belonging to him from London to a foreign country. Recognising that such an injunction had never been granted before, Lord Denning M.R. decided that it was very useful in practice, and therefore agreed to award it. A similar decision was afterwards made in another case, the case of *Mareva Companiera S.A. v. International Bulk Carriers Ltd.*,<sup>13</sup> the name of which finally became the generic name for this type of injunction. Only *a posteriori* did Lord Denning M.R.,

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<sup>9</sup> IBA, *Brussels and Lugano Revisited*, Lisbon, May 1998.

<sup>10</sup> The story does not say whether the Scottish courts have the same power!

<sup>11</sup> We were uncertain whether to include in the description which follows a note on the “anti-suit injunction”, *i.e.*, the injunction by which a court forbids a party to enter his suit before a foreign court or, if proceedings have already started, to continue them. On the one hand, it could be said that this is a protective measure, in the sense that it enables the party awarded it to preserve his rights in his chosen forum. But in fact, this measure applies in cases of contested jurisdictional competence, and does not relate to the merits of a case, so that in our opinion it cannot be regarded as falling within the definition given above. We also note that, in the United States, there is no uniform approach among the courts to this question. The standard principle is that where there are two parallel sets of proceedings they should be continued, and that the authority of *res judicata* of the first judgment to be rendered should be argued in the ongoing proceedings (*Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F2d 909, 926.27 (DC Cir 1984)). An anti-suit injunction will only be granted in exceptional circumstances. But the fifth and ninth circuit courts have been more willing to award these injunctions. See for instance *Kaepa Inc. v. Achilles Corp.* 76 F3d 624, 632 (5th Cir. 1996). As for the Restatement (Third) Foreign Relations Law, it states as follows: “All the courts agreed that anti-suit injunctions are exceptional remedies inconsistent with normal relations between States, and that challenges to the application of a State’s law to a transnational controversy should ordinarily be raised before the courts of that State” (403, *Reporter’s Notes* No 7, p. 252). In our view, all these reasons militate in favour of excluding anti-suit injunctions from the category of protective measures. See also Prel. Doc. No 7, p. 33, No 59 and notes 74 and 75, and A. Lowenfeld, *Forum Shopping, Anti-Suit Injunctions, Negative Declarations and Related Tools in International Litigation*, IBA, 26th Biennial Conference, Berlin, 20-25 October 1996; and “Forum non conveniens and Anti-suit Injunctions: an update”, *AJIL*, 1998, pp. 41-43.

<sup>12</sup> [1975] I *WLR* 1093.

<sup>13</sup> [1975] II *Lloyd’s Rep.* 509.

in a decision in *Rasu Maritima S.A. v. Perisahaan*<sup>14</sup> justify the measure he took in 1975. He replied to the criticism he encountered by referring to the custom of the City of London, through which plaintiffs had been able to obtain a “foreign attachment” order since about the 15th century. Admittedly, this custom disappeared after 1881 with the abolition of the “Mayor's Court”, but Lord Denning M.R. believed that far from indulging in pure invention, all he had done was to revive an ancient institution.<sup>15</sup> Seeking an anchor in the past for his creation of three years before, he founded the direct international jurisdiction of the English courts to award an injunction of this kind upon the situation of the assets to be seized on English territory. Hence what Lord Denning M.R. initially had in mind was an injunction *in rem*. In fact it was only later on that the true foundation of direct international jurisdiction *in personam* was re-established, by Lord Ackner in the case of *Attorney General v. Times Newspapers Ltd.*<sup>16</sup>

10 The controversy in English law lasted for quite a long time, so that in 1979, when the *Mareva* injunction came to the House of Lords in the case of *The Siskina*,<sup>17</sup> the Supreme Court was careful not to pronounce a verdict on the legitimacy and lawfulness of an injunction of this kind, since the institution seemed to be so useful and necessary in practice. It should be pointed out that since the abandonment of the “foreign attachment” order, English law had lacked any means of preventing the debtor from dissipating all of his assets while awaiting a judgment on the merits, and many English lawyers envied the protective attachment order available under French law. One may in fact speculate that Lord Denning M.R., who was a great student of both English and Continental legal history, saw it as a very useful additional device. It was the legislature, at the end of the day, which gave its blessing *a priori* to Lord Denning M.R. by adding to section 37 of the 1981 Supreme Court Act a third paragraph reading as follows: “The power of the High Court under sub-section (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 case where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction”.

11 Since the end of the 1980's, virtually all legal court systems which derive to a greater or lesser extent from English law have adopted the *Mareva* injunction. We need only mention the Republic of Ireland, the Isle of Man, Jersey, Hong Kong, Singapore, Malaysia, Australia, New Zealand, the Canadian common law provinces, the Barbados, Trinidad and Tobago, the Cayman Islands, Bermuda, Gibraltar, the Bahamas, and the Turks and Caicos islands.<sup>18</sup>

12 The legal regime of the *Mareva* injunction is the same as for all other injunctions in equity. They are discretionary awards, granted to the applicant when he would not obtain justice merely through an award of damages, which is the only remedy available under common law. The court assesses the advantages which an injunction of this kind would have for the plaintiff, and the disadvantages which would arise for the defendant. It can be ordered *ex parte*. It is sanctioned by contempt of court, *i.e.*, imprisonment, a

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<sup>14</sup> [1978] QB 644, on p. 658.

<sup>15</sup> See Pulling, *The laws, customs, usages and regulations of the city and port of London*, 2nd ed. 1842, pp. 187-192; L. Collins, “Provisional and protective measures in international jurisdiction”, *CADI* 1992 III Vol. 234, para. 9 on p. 108; G. Cuniberti, *op. cit. supra* note 3, paras. 59 *et seq.*

<sup>16</sup> [1992] I AC 191.

<sup>17</sup> *Siskina v. Distos S.A.* [1979] AC 210.

<sup>18</sup> S. Gee, *Mareva Injunctions and Anton Piller Relief*, 3rd edition, 1995.

fine or even the sequestration of assets. We also know that contempt places an offender on a special legal footing, by denying him access to the courts. But this is not an automatic sanction. It can be lifted by a special application, through an appeal against the decision which placed him in contempt, relying on the defence evidence submitted in other proceedings.<sup>19</sup>

13 An injunction is not merely permission to proceed to a protective measure, as for instance in French law. On the contrary, the court orders the injunction directly, and it is not therefore necessary to add any measure of execution *a posteriori*. All that need be done is to inform the person affected by the injunction that it exists. The information may be conveyed by any method.<sup>20</sup> Information about the measure, due to third parties who may detain assets belonging to the debtor, must be made by the debtor.

14 An injunction has no substantial effects. It does not alter the legal status of the assets belonging to the addressee. It does not confer on its beneficiary any real rights, of any kind, over the assets in question. It does not grant any preferential right in case of bankruptcy of the debtor. The addressee of the injunction may therefore continue to contract with third parties, and the validity of such contracts will only be placed in question if the third parties are in bad faith.

15 The *Mareva* injunction is of its nature a provisional measure. This means that, in order to persuade the court, the party seeking the injunction must prove that he has a chance of winning his case on the merits. The proof required is less exacting than the proof which must be brought on the merits. The applicant has simply to convince the court that he has sound arguments on his side (a good arguable case).<sup>21</sup> This is a very important condition, since the applicant has to bring suit on the merits in order to retain the benefit of the injunction. Although English law does not set any specific time limit for starting the proceedings on the merits, the court is free to order the injunction to be lifted if proceedings on the merits are not started, whether in the United Kingdom or in a foreign country if there is no international jurisdictional competence on United

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<sup>19</sup> S. Gee cites a decision in *Fakih Brothers v. A.P. Moller Ltd.* [1994] 1 Lloyd's Rep. 103. In this case, the defendants were barred from suing the plaintiffs (an anti-suit injunction) for a breach of both a choice of forum clause and a *Mareva* injunction. In spite of this ban, the defendants instituted proceedings in the courts of Sierra Leone. As a result, the English court made a distraint order on their assets in the UK, and refused them a hearing on their application to modify the terms of the injunction.

<sup>20</sup> RSC Order 45, rule 7 (6 a) and b)). It should also be noted that if the defendant was present when the decision was made, the view taken is that he is thereby immediately aware of the order and no further action is needed by the claimant.

<sup>21</sup> This condition is reflected in the Helsinki Principles adopted by the International Law Association, *op. cit. supra* note 3. Principle No 4 reads as follows: "The grant of such relief should be discretionary. It should be available: a) on a showing of a case on the merits on a standard of proof which is less than that required for the merits under the applicable law..."



Kingdom territory.<sup>22</sup> If the applicant does not proceed on the merits, and does not come back to the court which ordered the injunction, it will remain in force until the defendant takes some action. If neither of the parties takes action, there is no specific expiry date set for the *Mareva* injunction.

16 The applicant must also give an undertaking to the court to repair any damage which the injunction may involve for the defendant or a third party. However, as when the injunction is actually awarded, the court's decision is discretionary. Cases may therefore occur in which the applicant does not have to give any specific undertaking.<sup>23</sup>

17 This system is of course based on the broad principles of procedure which apply in English courts. In particular, the applicant must come before the court with “clean hands” and must give the court full information about all the points which have to be considered before the injunction can be ordered. In the case of *ex parte* proceedings, it is essential that the applicant does not hide any significant part of the defence evidence which the defendant might submit if he were present. Moreover, the court's role does not come to an end once the order has been made. Normally, every new factor or development has to be reported to the court, so that it can update the measure or even cancel it if it sees fit to do so.

18 However, the proceedings soon become adversarial again. What normally happens is that as soon as the defendant has been informed, he will call for a court hearing, and this can take place very quickly.<sup>24</sup>

19 Finally, we note that, in its most recent evolution, the *Mareva* injunction applies to the whole of the defendant's assets, whether located in the United Kingdom or in a foreign country.<sup>25</sup> This evolution is the direct consequence of the *in personam* jurisdiction upon which the courts have the power to order such a measure.<sup>26</sup>

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<sup>22</sup> In the Helsinki Principles, *op. cit. supra* note 3, no specific time limit is set for starting proceedings on the merits. Principle No 12 simply states: “It should be a condition for the court exercising jurisdiction to grant provisional and protective measures that a substantive action is filed within a reasonable time ...”

<sup>23</sup> This is the principle adopted in the Helsinki Principles, *op. cit. supra* note 3. Principle No 8 reads as follows: “The court should have authority to require security or other conditions from the plaintiff for the injury to the defendant or to third parties which may result from the granting of the order. In determining whether to order security, the court should consider the availability of the plaintiff to respond to a claim for damages for such injury.”

<sup>24</sup> In the Queen's Bench Division, a hearing can be organised within 48 hours. In the Chancery Division, the court can reconvene about one week after the award of an injunction.

<sup>25</sup> *Babanaft International Co. S.A. v. Bassatne* [1990] Ch. 13; *Derby & Co. Ltd v. Weldon* (No 1) [1990] Ch. 48; (Nos 3 & 4) [1990] Ch. 65; (No 6) [1990] 1 WLR 1139; *Republic of Haiti v. Duvalier* [1990] 1 QB 202; *Credit Suisse Fides Trust SA v. Cuoghi*, [1997] 3 All ER 724, A.C. 238 (P.C.).

<sup>26</sup> See *infra* No 27 *et seq.*

## § 2 *Obligation of the debtor to disclose his assets (disclosure orders)*

20 *Mareva* injunctions, like attachment orders or sequestration measures, are useful only if the creditor is aware of the composition of the debtor's assets and knows where the assets are. However, in practice it is rare for the creditor to be unaware of these facts. The English courts have therefore devised a highly effective protective measure which compels the debtor to disclose to the creditor the composition of his assets (disclosure orders). Since it is an injunction, this order is addressed to the debtor himself. Because of the principle in English legal proceedings that there must be a hearing, proof is given by means of a deposition on oath by the debtor before the court. The debtor may also have to answer questions by the creditor in the course of this hearing. However, in spite of this oral procedure the court may require the debtor to furnish documentary proof of the statements he has made in court. The court may also appoint an expert to appraise the composition of the debtor's assets. These decisions carry the same sanctions as those provided for *Mareva* injunctions.

21 Several interesting developments are worthy of comment. First, a number of Commonwealth countries have adopted this measure, as we see for instance from the case of *Brannigan et al v. Davison*,<sup>27</sup> decided on appeal from New Zealand by the Judicial Committee of the Privy Council. Secondly, this measure may in future be taken in support of foreign proceedings without the need for a *Mareva* injunction in England.

22 However, a significant restriction has been recognised on the debtor's obligation to disclose the composition and location of his assets. This is the application of the privilege whereby the defendant has the right not to incriminate himself. Consequently, if the information sought by the applicant may lead to possible criminal proceedings against the defendant, the application will not be granted.<sup>28</sup>

## § 3 *Repatriation of the debtor's assets*

23 Nowadays, English courts can require a debtor to repatriate to England assets which he holds abroad (repatriation orders). From the viewpoint of the forum, this measure has the advantage of changing an international case into a purely domestic one, since the measure will be much more effective once the assets are finally located on the territory of the court which made the *Mareva* order. However, we note that this measure necessarily involves an extraterritorial effect, because it is directed, from the outset and by definition, against assets located abroad. We must therefore ask whether a treaty mechanism, introducing a method of international cooperation, would avoid the need for ordering repatriation of the debtor's assets.

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<sup>27</sup> This decision is cited by C. McLachlan, "The Jurisdictional Limits of Disclosure Orders in Transnational Fraud Litigation", 47 *I.C.L.Q.* 3 (1998).

<sup>28</sup> *Sociedade Nacional de Combustiveis de Angola OEE et al. v. Lundqvist et al.* [1991] 2 *Q.B.*, 310.

#### § 4 Anton Piller orders

24 The *Anton Piller* order takes its name from the case in which it was made for the first time.<sup>29</sup> This order compels the debtor to give access to his premises to enable the claimant's representative to look for any documents, property, evidence, information or other materials, in whatever form, and to sequester them, if necessary by moving them out of the premises concerned. This requirement is often accompanied by additional obligations: to hand over the keys of the premises concerned, to print out any information held on computer, and to give any assistance required for the purposes of the investigation.

25 This measure has been described as one of the two nuclear weapons which the law possesses,<sup>30</sup> the other of course being the *Mareva* injunction. The reason why the *Anton Piller* order is so effective is that it is ordered *ex parte*. The extremely serious consequences which the enforcement of the order may have for the defendant, combined with the fact that he cannot be heard in court before the order becomes final, has raised the question whether it complies with the principles of the European Convention on Human Rights.<sup>31</sup> However, in the case known as *Chappell v. United Kingdom*,<sup>32</sup> the Commission on Human Rights in Strasbourg eventually decided, with the unanimous endorsement of the Court, that enforcement of the order had not violated Article 8 of the Convention. Lawrence Collins, in his brief note on this case, vigorously criticises the inflationary tendencies of these *ex parte* measures, saying that they are often abused in practice.<sup>33</sup> It has to be said that in this case the appeal court, which Chappell had asked to set aside the order, admitted that it had been applied in practice in an “unfortunate and regrettable” manner.<sup>34</sup> However, the Strasbourg court was persuaded that English law itself provides the safeguards needed to protect human rights, because the *Anton Piller* order normally carries an obligation on the part of the plaintiff's representative to warn the defendant of the exact meaning of the order served on him, and of his right to seek advice, as long as this is done immediately.

26 Moreover, an *Anton Piller* order may only be made if the applicant can persuasively show that he has a genuine case on the merits, that he would suffer significant damage if the order were not granted, clear proof that the defendant holds documents or evidence constituting the offence and, finally, that there is a real and admitted possibility that if the order is not executed, the defendant can destroy the evidence before proceedings can be brought on the merits. In view of these conditions,

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<sup>29</sup> *Anton Piller K.G. v. Manufacturing Process Ltd.*, [1976] Ch. 55 (C.A.).

<sup>30</sup> *Bank Mellat v. Nikpour* [1985] FSR 87, p. 92.

<sup>31</sup> See L. Collins, “Anton Piller Orders and Fundamental Rights”, 106 *The Law Quarterly Review* (1990), p. 173.

<sup>32</sup> [1989] *Series A*, Vol. 152.

<sup>33</sup> *Op. cit. supra* note 30 on p. 176.

<sup>34</sup> In this case, in fact no fewer than 16 or 17 people had arrived at the premises belonging to Mr Chappell, which were also his home. Of these 16 or 17 people, more than half were police officers endeavouring to enforce search warrants as well as the *Anton Piller* order.

this type of order has been most frequently granted in the area of intellectual property, forgery, and the unlawful copying of video films or software.<sup>35</sup>

## SECTION 2 – DIRECT INTERNATIONAL JURISDICTION

27 It was in its 1979 decision in the case of *The Siskina*<sup>36</sup> that the House of Lords framed the principle that jurisdiction to order a *Mareva* injunction must be jurisdiction *in personam* and that accordingly, the ordinary rules of jurisdictional competence have to be followed. According to these principles, either the defendant is physically present within the jurisdiction, and can accept service of the order there, in which case jurisdiction is compulsory; or the defendant is outside the jurisdiction, in which case Order XI of the Rules of the Supreme Court provides for certain instances in which the English courts will nonetheless have jurisdiction, provided the case has a connection with the English legal system and the court accepts discretionary jurisdiction, as opposed to jurisdiction based on the presence of the defendant. In the case of *The Siskina*, the dispute had no connection with England. The defendant had never been there, it was not his home and he had never lived there. No substantive act had taken place on English territory; the contract, which had been concluded in Italy, contained a choice of forum clause in favour of the courts of Genoa, and was not governed by English law. However, the ship was insured by Lloyd's, so that the insurance money could be regarded as being "located" on English territory. But Order XI does not provide any ground of jurisdiction based on the presence of assets on English territory. Consequently, the *Mareva* injunction could not be ordered. This decision was confirmed in 1995 in the case of *Mercedes Benz AG v. Leiduck*.<sup>37</sup> In this case, the Privy Council had to decide an appeal from a Hong Kong decision. The defendant was in Monaco, a State in which the court had declined to order a provisional measure in favour of Mercedes Benz, because defendant's assets against which the measure had to be taken were not on Monegasque territory. Yet in spite of the impossibility of obtaining a provisional measure in the place where the defendant was living, the Privy Council confirmed the decision in *The Siskina* and refused to order a *Mareva* injunction, since the only connection with Hong Kong territory was the presence of assets there.

28 We note that when the Brussels and Lugano Conventions had to be implemented in Britain, the jurisdictional rule was altered by the Civil Jurisdiction and Judgments Act 1982, so that article 24 of the Convention could be applied.<sup>38</sup> But under non-conventional law, the decision in *The Siskina* continued to apply. In 1997 the UK legislature acted to extend the jurisdictional rule peculiar to the Brussels and Lugano Conventions to all other cases and actions begun, even abroad, independently of the Conventions.<sup>39</sup> Consequently, for UK territory and only for UK territory, the precedent of the *Siskina* and *Mercedes Benz* cases does not apply. It does however continue to apply in all territories covered by the authority of precedents by the Privy Council.

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<sup>35</sup> See *Waardle Fabrics Ltd. v. G. Myristis Ltd.* [1984] F.S.R. 263; *Columbia Picture Industries v. Robinson* [1987] Ch. 38. But, see also *W.E.A. Records v. Visions Channel 4* [1983] 1 WLR 721 (C.A.).

<sup>36</sup> *Cf. supra* note 17.

<sup>37</sup> [1995] III WLR 718.

<sup>38</sup> On this provision, see *infra* No 147 *et seq.*

<sup>39</sup> This amendment to the Civil Jurisdiction and Judgments Act of 1982 came into force on 1 April 1997.

29 Jurisdictional competence *in personam* brings with it the possibility of giving effect to a *Mareva* injunction, not only for assets located in the United Kingdom, but also for assets located abroad. This is what the Court of Appeal decided in three 1988 decisions.<sup>40</sup> In recent years, several more decisions have been handed down and extended to the common law countries which follow the UK example. Thus similar decisions have been made in Ireland,<sup>41</sup> Jersey,<sup>42</sup> the Isle of Man<sup>43</sup> and Canada.<sup>44</sup> An identical solution had already been reached by the courts in Australia and Hong Kong.

30 Moreover, the same rules of direct international jurisdiction apply to disclosure orders and repatriation orders as those explained above for *Mareva* injunctions. In fact, these are also measures *in personam*; they may affect the whole of the debtor's property anywhere in the world, not only assets located on UK territory.

31 One writer takes the view that *Anton Piller* orders are only justified if the court is able to enforce them.<sup>45</sup> Thus the orders should only be made for places on the territory of the court granting them. However, for the moment at least, the English courts do not seem to be taking this line. In the case of *Cook Industries Inc. v. Galliher*,<sup>46</sup> Judge Templeman agreed to make an *Anton Piller* order although the articles in question were in a flat in Paris. In a later case,<sup>47</sup> Judge Scott declined to go as far as this, but did not disclaim the finding in the *Cook* case. The difference between the two cases lies in the factual circumstances. In *Cook Industries*, the defendant was living in Britain for part of the year, and the English courts probably had jurisdiction as far as he was concerned. In *Altertext*, no claim was made that the English courts had jurisdiction *in personam*, and the judge preferred to refrain from a decision. However, as C. McLachlan rightly points out,<sup>48</sup> even if the court had jurisdiction over the defendant, that did not mean it had the power to make a decision about premises located abroad.

32 Finally, we must look at the impact of a choice of forum clause on the right of the parties to obtain protective measures from a court other than the one with jurisdiction for the merits. The English courts had to rule on this question in a very old case, *Law v. Garrett*.<sup>49</sup> In this case, the court decided that despite the existence of a choice of forum clause in favour of the Commercial Court of St Petersburg, which had exclusive

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<sup>40</sup> *Babanaft Co. S.A. v. Bassatne* [1990] Ch 13; *Rep of Haiti v. Duvalier*, [1990] QB 202; *Derby and Co. Ltd. v. Weldon*, [1990] Ch 48 and 65.

<sup>41</sup> *Deutsche Bank AG v. Murtagh* [1995] I ILRL 381 (HC).

<sup>42</sup> *Maugher v. VHM* [1989] JLR 295.

<sup>43</sup> *In Re Acet Management Ltd.* [1993-1995] I MLR 185.

<sup>44</sup> *Mooney v. Orr* [1995] I WWR 517 (BSSC). See also Epp "Worldwide Mareva Injunctions in Common Law Canada", LQR 460 (1996).

<sup>45</sup> Cf. C. McLachlan, *op. cit. supra* note 27 on pp. 20 and 21.

<sup>46</sup> [1979] Ch. 439.

<sup>47</sup> *Altertext v. Advanced Data*, [1985] 1 WLR 457.

<sup>48</sup> *Op. cit. supra* note 27, p. 20.

<sup>49</sup> [1878] 8 Ch. D. 26.

jurisdiction for any disputes arising out of the contract, the English courts remained free to order protective measures, provided they were not available in Russia.<sup>50</sup> We will see that in France, the trend of the jurisprudence has been rather in the opposite direction.<sup>51</sup>

### SECTION 3 – RECOGNITION AND ENFORCEMENT

33 Legal writings virtually ignore this question.<sup>52</sup>

34 In English law, the traditional principle is that a foreign decision, in order to be recognised or enforced, must be final, in the sense that it brings an end to the dispute between the parties. But traditionally, provisional or protective measures do not fall into this category.<sup>53</sup> It therefore seems that in non-conventional law there is as yet no way of recognising or enforcing a foreign protective measure on British territory.<sup>54</sup> However, a very recent decision by the Court of Appeal may herald a change of attitude. This is the case of *Credit Suisse Fides Trust v. Cuoghi*.<sup>55</sup> Of course, in this case the court did not have to decide on the effect of a foreign decision. But it points out that if the Swiss court (which was dealing with the merits) had made a decision on the application for a protective measure (a *Mareva* order and an obligation on the debtor's part to disclose the composition of his assets), it would have held back from making a ruling. Lord Millett puts it this way: “*It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.*” Thus, it is not impossible that English law evolve again and admit recognition and enforcement of protective measures rendered in a foreign country.

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<sup>50</sup> A similar solution was adopted about a century later in the case of *Mike Trading & Transport Ltd. v. C.R. Pagnan & Tratelli (The Lisboa)*, [1980] 2 *Lloyd's Rep.* 546.

<sup>51</sup> *Infra* No 104.

<sup>52</sup> There is an exception: L. Collins *op. cit. supra* note 15. There is no doubt that before measures were invented against the person of the defendant, as opposed to just his property, the question might have seemed irrelevant. There was already a direct and necessary connection between the court's jurisdiction to grant the order and the place of enforcement. As soon as the order is not merely one against property, the question arises of its effects abroad, or in this instance, the effect in the United Kingdom of an order granted abroad.

<sup>53</sup> L. Collins, *op. cit. supra* note 15, on p. 121. See *Nouvion v. Freeman* (1989) 15 App Case 1,9; *Blohn v. Desser* [1962] 2QB 116; *Carl Zeiss Stiftung v. Rayner and Keeler Ltd.* [1967] 1 AC 853.

<sup>54</sup> The question is governed differently by the Brussels and Lugano Conventions. *Cf. infra* No 116 *et seq.*

<sup>55</sup> [1997] 3 *All ER* 74.

## CHAPTER II – UNITED STATES

35 There is remarkably little American case law<sup>56</sup> on provisional and protective measures in international relations of a private character. The same few judgments are constantly cited by all the writers. The 3rd Restatement on the foreign relations law of the United States hardly touches upon the question.<sup>57</sup>

### SECTION 1 – DESCRIPTION OF THE MEASURES

36 In essence, there are two kinds of measures: injunctions and seizures (called attachment or garnishment).

#### § 1 *Injunctions*

37 Injunctions are essentially of two kinds: “preliminary injunctions” and “temporary restraining orders”. There is a Federal rule (Rule 65 of the Federal rules of civil procedure) which provides that injunctions must be ordered following a hearing *inter partes*. However, an exception is made for temporary restraining orders, which may be ordered *ex parte* on condition the applicant is able to show the requisite degree of urgency for making such an order. Rule 65 applies in all cases where the Federal courts have jurisdiction.<sup>58</sup> As for the States of the federation, they fall into three categories.<sup>59</sup> In the first are the States whose laws specifically mention injunctions to prevent the disposal of property by the party against whom the measure is ordered.<sup>60</sup> The second consists of States which refer in general terms to an injunction intended to prevent the defendant from acting to undermine the effects of a judgment yet to be made.<sup>61</sup> As for the third, it comprises those States which either leave the matter basically to be decided through case law, and provide very few legislative pointers,<sup>62</sup> or which mention injunctions but do not spell out what they are supposed to achieve.<sup>63</sup>

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<sup>56</sup> Some of the comments found in US case law and legal writings indicate that the US courts sometimes take the view that they are required to order provisional or protective measures not only to assist one of the parties to a case being settled abroad, but also to assist the courts of the country concerned. For an echo of this approach, one may consult G.A. Bermann, “Transnational Provisional Relief in the Courts”, in J.L.Goldsmith *ed.*, *International Dispute Resolution - The Regulation of Forum Selection*, Transnational Publishers Inc., New York, 1997, p. 99 *et seq.*

<sup>57</sup> Unless we are mistaken, the Restatement refers only to the *Laker* case and the saga of anti-suit injunctions and counter anti-suit injunctions awarded by English and US courts (*cf.* Vol. 1, p. 252 No 7) and the bans against transferring assets abroad in the case of *United States v. First National City Bank (Omar)*, 379 US 378 (1965), a decision rendered on the application of the US tax authorities (*cf.* Vol. 1, p. 326, No 4).

<sup>58</sup> The Federal courts have jurisdiction, notably, when the litigation involves certain subject-matters which are regulated by federal law (for example, bankruptcy or securities law), or when there is diversity of citizenship, *i.e.* when parties to the case are of different “nationality” and the amount at stake is more than 50,000 US dollars.

<sup>59</sup> These are the categories suggested by T. McEvoy, *The Preliminary Injunction as a Prejudgment Security Device in the United States*, Chapter 5 of a thesis on protective measures in preparation for the University of Virginia.

<sup>60</sup> Alaska, California, Idaho, Indiana, Montana, Minnesota, North Dakota, South Dakota, Washington.

<sup>61</sup> Arizona, California, Kansas, Kentucky, Missouri, Nevada, New York, North Carolina, Oklahoma, Oregon, Texas, Wisconsin.

<sup>62</sup> This applies to West Virginia.

<sup>63</sup> Most States have provisions of this kind in their codes of civil procedure.

38 One author notes that contrary to what one might expect, the parties do not seem to make much use of these possibilities when the case is being heard abroad, as few decisions are published containing injunctions of this kind.<sup>64</sup> The same author gives the example of judgments given to compel a party who has consented to a choice of forum clause or an arbitration clause to defend himself in the country of the chosen court or before the arbitration tribunal. But in view of what has been said above, we will not consider this type of injunction in our study.<sup>65</sup>

39 One explanation for this lack of enthusiasm could be the special nature of the injunction in Anglo-American law. In fact, this is a measure deriving from equity rather than from common law. For this reason, some Federal courts have declined to order these injunctions when the case on the merits does not bear upon a right derived from equity, but is a typical case for damages under the common law. However, the practice of the Federal courts on this matter seems to vary widely.<sup>66</sup> Practice also varies in the courts of the different States. Even those which could order such measures are reluctant to do so, and will not order them without first satisfying themselves that there is no other measure available under common law.

40 Under Rule 65, no injunction of any kind can be ordered unless the applicant gives a guarantee that he will pay costs and damages awarded to any party who may have suffered because of an injunction to do or not do something which has been wrongly ordered. We think this rule may also help to explain the small number of reported cases. Applicants must think seriously before seeking an injunction, and must be absolutely certain that they are in the right before doing so.

41 Injunctions of this kind do not depend on an attachment taking place. In fact, they can be ordered quite independently of an attachment. The most famous decision in this sense was the one made against ex-President Marcos of the Philippines, his wife and other persons.<sup>67</sup> The Court of Appeal of the Ninth Circuit ordered the Marcos couple to dispose of their assets in order to pay costs other than their legal fees and current expenditure. The injunction is addressed to them in person, and is not a decision *in rem*.

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<sup>64</sup> G.A. Bermann, *op. cit. supra* note 56, who refers in turn to D. Westin and P. Chrocziel, "Interim Relief Awarded by U.S. and German Courts in Support of Foreign Proceedings", 28 *Colum J. Transant' L.* 723 (1990). Bruno A. Ristau comes to the same conclusion, *cf.* "Extraterritorial Provisional Measures" in J. L. Goldsmith *ed. International Dispute Resolution - The Regulation of Forum Selection*, Transnational Publishers Inc., New York 1997, p. 159 *et seq.*

<sup>65</sup> *Cf. supra* note 11.

<sup>66</sup> T. McEvoy, *op. cit. supra* note 59, mentions two kinds of decisions. The first kind follows the first of the two options referred to in the text (no injunction for a case on the merits for damages). *In re Fredeman Litigation* 843 F. 2d 821 (5th Cir. 1988); *Mitsubishi* 14 F. 3d 1507 (11th Cir. 1994); *Ashland Oil Inc v. Gleave* 540 F. Supp. 81, 85-86 (1982). Schlosser, "Coordinated Transnational Interaction in Civil Litigation and Arbitration"; (1990) 12 *Michigan Journal of International Law*, 150, 155. The second kind, however, makes room for injunctions even in these cases: *Hoxworth v. Blinder* 903 F. 2d 683 (5th Cir. 1980); *Productos Carnic SA v. Central American Beef and Seafood Trading Co.* 621 F. 2d 683 (5th Cir. 1980); *Ebsco Industries Inc v. Lilly* 840 F. 2d 333 (6th Cir. 1985); *Teradyne Inc v. Mostek Corp.* 797 F. 2d 43 (1st Cir. 1986); *In re Estate of Ferdinand Marcos, Human Rights Litigation* 25 F. 3d 1467 (9th Cir. 1994).

<sup>67</sup> *Republic of Philippines v. Marcos*, 862 F. 2d 1355 (9th Cir. 1988), *cert. denied*, 490 US 1035 (1989).



Consequently, it applies to all the property belonging to the Marcos couple, wherever its geographical location.<sup>68</sup>

42 Admittedly, the courts recognise that it is sometimes difficult to enforce injunctions when the defendant is living in a foreign country. However, American courts, like the English courts, may decide that a defendant who refuses to obey the injunction is in contempt, which may result in practice in a fine or an arrest.

43 Another kind of injunction has also been ordered by American courts: the repatriation of assets located on foreign territory.<sup>69</sup> In the case of *Inter-Regional Financial Group, Inc. v. Hashemi*,<sup>70</sup> under the law of Connecticut, the defendant was enjoined to place the share certificates<sup>71</sup> in the hands of the court's registrar so that they could be attached. On several occasions the Securities and Exchange Commission, which polices the stock exchange in the United States, has succeeded in obtaining repatriation of holdings derived from profits which were gained in breach of the law on securities.<sup>72</sup> Other decisions may also be cited from purely commercial cases in which the repatriation of funds in bank accounts was ordered, regardless of whether the accounts were held in the United States or abroad.<sup>73</sup>

44 Finally, a court may also add to an attachment order an injunction to the defendant not to remove the property in question outside the territory.<sup>74</sup> Is the attachment itself not enough to prevent the defendant from doing this? One might think so. In any case, it is clear that American courts have the power to issue injunctions, whether or not they are accompanied by an attachment order. However, in the case of *Carolina Power & Light Co. v. Uranex*<sup>75</sup> the Court was probably afraid that the injunction would not be obeyed and that it would have no means of enforcing it. This is why it made an attachment order, with an injunction on top of it. One may wonder if the Court had jurisdiction to issue such an injunction, which presupposes jurisdiction *in personam* over the defendant, which the Court probably did not have.<sup>76</sup>

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<sup>68</sup> There was a similar result in the decision made in *In re Estate of Ferdinand Marcos, Human Rights Litig.* 25 F. 3d 1467 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995). For a number of other decisions, see G. Bermann, *op. cit. supra* note 56, on pp. 108 and 109. See also *United States v. First National City Bank* 379 US 378 (1965). Finally, it seems that of the various circuits, only the fifth and ninth do not permit the award of an injunction to prevent the defendant from disposing of his assets where the case on the merits is a common law action, not a case in equity. See for instance *Mitsubishi International Corp. v. Cardinal Textile Sales* 14 F. 3d 1507 (11th Cir. 1994).

<sup>69</sup> *Cf.* the English law, *supra* No 12.

<sup>70</sup> 562 F. 2d 152 (2d Cir. 1977) *cert. denied*, 434 US 1046 (1978).

<sup>71</sup> We should explain here that in some countries, and in most states of the US, ownership of company shares lies with the person who actually holds the share certificate. In France, and in a number of other European countries, this would not be possible since for some years shareholdings have been "dematerialised". Consequently, the shares are located on the territory of the entity which is responsible for managing the share account. It would only be possible to enforce such an injunction against shares in a company founded under French law by means of a specific attachment order for company shares under articles 178 to 193 of the decree of 31 July 1992. For an explanation of the French law on protective measures in general, see *infra* No 82 *et seq.*

<sup>72</sup> Decisions cited by G. Bermann, *op. cit. supra* note 56, on p. 117.

<sup>73</sup> *Bank of Crete S.A. v. Koskotas*, 1989 U.S. Dist. Lexis 4289 (SDNY 1989) and *Rosco v. Saxon Energy Corporation*, 758 F. Supp. 164 (SDNY 1991).

<sup>74</sup> Apparently, this was what the court did in the case of *Carolina Power* cited *infra* note 75.

<sup>75</sup> 451 F. sup. 1044 (D.C. N. Cal. 1977).

<sup>76</sup> *Cf. infra* No 55 *et seq.*

## § 2 Attachment orders

45 As regards attachment orders, these may be made in order to ensure that a judgment will be carried out, where it is possible that the defendant may dissipate his assets before judgment is handed down. But Federal law does not itself provide for such attachment orders.<sup>77</sup> Rule 64 of the Federal Rules on civil procedure states that a federal court may make such an order if the law of the State in which it is sitting decides on it.<sup>78</sup> It is clear that the laws of different States vary on this issue. In some States, like New York, the applicant for an attachment order has to show that he stands a good chance of winning the case on the merits; that it is likely that the defendant will dispose of his assets before the future judgment can be carried out, and that there is a genuine need for a draconian measure.<sup>79</sup>

46 The attachment is made against property of the defendant located in the State which agrees to make the decision. Hence this measure is essentially *in rem*. That either of the parties concerned (the applicant or the defendant of an attachment order) is of foreign nationality has no impact on the court's decision. All that matters is that the assets to be seised are on the territory of the court which is called upon for a ruling.<sup>80</sup> Of course, the courts seldom give express rulings on this matter. However, the solution is beyond doubt, in view of the definition given of the so-called attachment order.<sup>81</sup> This is why the practice has developed of issuing injunctions for the repatriation of assets on the territory of the court dealing with the case, as we have explained above.<sup>82</sup>

47 There is no clear definition of the factual circumstances in which an attachment order may be made. On the one hand, a court in the district of Maryland refused to issue a protective attachment order pending the outcome of proceedings which were pending in another jurisdiction (in this instance Louisiana), because it took the view that a protective attachment could not be ordered unless the applicant could show that the defendant was on the point of removing the property in question<sup>83</sup> and that there were extraordinary circumstances warranting a certain degree of urgency.<sup>84</sup>

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<sup>77</sup> Federal law only provides for attachment orders only in the context of insolvency. Section 304 of the US Bankruptcy Code permits a US court to make any appropriate order to assist in a foreign proceeding, provided the foreign court affords fair treatment to all the creditors, that US creditors are protected and that the proceeds of the insolvency are shared on a similar basis to US law.

<sup>78</sup> *De Beers Consol. Mines v. U.S.* 325 US 212 (1945).

<sup>79</sup> N.Y. Civ. Prac. L & R. 6201, 6212 (a) (McKinney 1996), cited by G. Bermann, *op. cit. supra* note 56, on p. 103.

<sup>80</sup> *USACO Coal Co. v. Carbomin Energy, Inc.*, 539 F. Supp. 807 (WD Ky 1982).

<sup>81</sup> Black's Law Dictionary (6th ed. 1990), p. 126, defines this measure as an "act or process of taking, apprehending, or seizing persons or property, by virtue of a writ, summons or other judicial order, and bringing the same into the custody of the court". See also *Nederlandsche Handel-Maatschappij N.V. v. Sentry Corporation*, 163 F. Supp. 800 (1958). In this relatively old decision, the court had in fact refused to make an order for repatriation when asked to do so. Nowadays the decision is probably out of date, both on its finding and the reasons for arriving at it.

<sup>82</sup> *Cf. supra* No 43.

<sup>83</sup> *Cameco Industries v. Mayatrac*, 789 F. Supp. 200 (D. Md 1992).

<sup>84</sup> *Connecticut v. Doehr*, 501 U.S. 1 (1991).

48 On the other hand, in cases where such orders have been made,<sup>85</sup> the courts have not insisted on a demonstration of fraud or urgency before making the attachment order. Moreover, the law in certain States, such as New York, allows the courts to make an attachment order when the defendant is not domiciled in the State or is a company not authorised to carry on business in that State.<sup>86</sup> We will see below that there is a similar rule in Germany, which the Court of Justice of the European Communities has described as discriminatory in the context of relationships under the Brussels Convention of 1968.<sup>87</sup>

49 The case law in some States indicates that it is necessary to show, as well as the urgency of the measure, the likelihood of the case being won on the merits.<sup>88</sup> Likewise, this requirement is spelt out in the law of certain States, such as that of New York, which states: “On a motion of an order for attachment, or for an order to confirm an order of attachment, the plaintiff shall show, by affidavit and by such written evidence as may be submitted, that there is a cause of action, that it is probable the plaintiff will succeed on the merits ...”<sup>89</sup>

50 As with injunctions, most States require the applicant to give a guarantee of paying the costs and any damages which may be awarded to the defendant if the attachment is wrongly made.

51 The effects of an attachment in the particular case of bank accounts should be noted here. The principle has long been that every branch of a bank, although it has no separate legal personality, is to be treated as an independent entity for the purposes of the attachment.<sup>90</sup> However, more recent decisions have shown that the modern methods of telecommunications and computerisation of banks enable them to monitor all the activities of their branches from a central point or by decentralised means. In this case, once an attachment is made it can normally take effect in all the branches.<sup>91</sup> Of course, if the bank in question does not have modern computerised management systems, the old rule may still apply.<sup>92</sup> Similarly, if the question arises of the extent of an attachment ordered in the United States against a branch or head office of a bank located abroad, the old rule will also apply.<sup>93</sup>

52 Moreover, the court will not infrequently require the applicant for an attachment order to begin the proceedings on the merits within a certain time limit. For instance, in the *Carolina Power* case the court compelled the applicant to begin the proceedings within 30 days of its decision.

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<sup>85</sup> *Barclays Bank v. Tsakos*, 543 A. 2d 802 (DCCA 1988) and *Carolina Power & Light Co. v. Uranex*, cited *supra* note 75.

<sup>86</sup> *Op. cit. supra* note 79, § 6201.

<sup>87</sup> *Cf. infra* No 76.

<sup>88</sup> *Cf.*, for example, *Connolly v. Sharpe* 270 SE2d 564 (1980).

<sup>89</sup> *Op. cit. supra* note 79, § 62112 (a). See also *Swiss Bank Corporation v. Eatessami* 273 N.Y.S. 2d 935 (1966).

<sup>90</sup> See for example *Cronan v. Schilling* 100 NYS 2d 474 (1950).

<sup>91</sup> *Digitrex Inc. v. Johnson*, 491 F. Supp. 66 (SDNY 1980).

<sup>92</sup> *Therm-X-Chemical & Oil Corp. v. Extebank*, 84 A.D. 2d 787 (1981).

<sup>93</sup> *Fidelity Partners Inc. v. Philippine Export and Foreign Loan Guarantee Corporation*, 921 F. Supp. 1113 (SDNY 1996).

53 Finally, the purpose of the attachment is not to create a preferential right for the beneficiary of the seizure in case the debtor becomes bankrupt, but merely to grant a certain degree of priority over certain subsequent claimants.<sup>94</sup>

54 As regards the procedural circumstances in which attachment orders may be made, it seems that the principles of due process must apply, the first of which is that the defendant must be heard in order to present his evidence in defence.<sup>95</sup> Does this mean that an attachment order can never be made *ex parte*? The answer must be no. If we take the example of the State of New York, the law has provided an adequate method of preserving the surprise element which is necessary in all provisional measures of attachment, along with the protection of the rights of defence. Although in fact an attachment can take place without the defendant knowing about it, he must be promptly summoned so that the information filed with the court can be discussed in adversarial proceedings<sup>96</sup> and so that other measures for safeguarding the rights of the defendant can be provided for (including supervision by the court of attachment procedures). This solution seems to have received the Supreme Court's blessing in the case of *Mitchell v. W.T. Grant & Co.*<sup>97</sup>

## SECTION 2 – DIRECT INTERNATIONAL JURISDICTION

55 A court which issues an injunction, of whatever kind, must possess jurisdiction *in personam* over the defendant.<sup>98</sup> Jurisdiction of the traditional kind for equity measures is based on the physical presence of the defendant on the territory of the court making the decision. Again, this is to be expected in the case of a measure which has to be practically enforceable against the defendant. It is also a consequence of the nature of the sanction known as “contempt of court”. However, this traditional principle was profoundly changed with the decision in *International Shoe Co. v. Washington*.<sup>99</sup> In this case, the defendant argued that because he was not present on the territory of the State of Washington, the courts of that State could not exercise jurisdiction over him. The Court therefore replaced the rigid criterion of physical presence by a more flexible formula: “[there must be] such contacts of the corporation within the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought here”.<sup>100</sup>

<sup>94</sup> McEvoy cites several cases to that effect, *op. cit. supra* note 59.

<sup>95</sup> *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969). This case was about an attachment of the defendant's wages, and for this reason the very strict view taken by the Supreme Court on the case could not be applied with the same rigour in purely commercial cases. However, this interpretation has been seen as a mistaken one, since the Supreme Court confirmed its stance three years later in a case involving the attachment of personal property, *Fuentes v. Shevin*, 407 U.S. 67 (1972).

<sup>96</sup> *Op. cit. supra* note 79, § 6211 *et seq.*

<sup>97</sup> 416 US 600 (1974). This case seems to be confirmed *a contrario* by the decision in *North Georgia Finishing Inc. v. Di-Chem Inc.* 419 US 601 (1974) and the decision in the case of *Connecticut v. Doehr*, 501 US 1 (1991).

<sup>98</sup> This principle is stated by G.A. Bermann, *op. cit. supra* note 56, citing in support the cases of *Securities and Exchange Commission v. Capital Growth Co., S.A.*, 391 F. Supp 593 (SDNY 1974) and *Milstead v. O. Records & Visuals, Ltd.*, No 84 Civ 3657 (SDNY 5 June 1984). See also *Hitchman Coal & Coke Co. v. Mitchell* 245 US 229 (1916).

<sup>99</sup> 326 US 310 (1945).

<sup>100</sup> *Idem.* on p. 317. This is generally called the “minimum contact” test.

56 This criterion is now well known among private international lawyers, including non-Americans. It does of course raise a number of questions. In particular, its application in practice is not always easy to understand. As a judge of the American Supreme Court said in a later case: “Few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable”.<sup>101</sup> Yet it is possible to identify certain key principles, which we cannot define in detail in the framework of this study, but which have been described by Professor Dubinsky in a document submitted to the members of the Special Commission in March 1998.<sup>102</sup> Moreover, the jurisdiction exercised over the defendant must also conform to the principles of “due process”. And finally, there does not seem to be any indication, in the decisions made since *International Shoe*, that the decision on jurisdiction is to be made any differently when the court is considering an application for an injunction.

57 Of course, as we have said above, if a defendant who is resident abroad decides not to defend himself in an American proceeding, it is quite possible that an injunction ordered against him will have no real meaning if the foreign courts refuse to recognise or enforce it.<sup>103</sup> McEvoy explains in his thesis that a court which is aware that an injunction it is about to order has no chance of bringing results will probably be inclined to refuse the request for one.<sup>104</sup>

58 As regards the question of jurisdiction to make an attachment order, the situation is not perhaps as clear as one might wish. This uncertainty begins with the case of *Shaffer v. Heitner*,<sup>105</sup> in which the court decided that jurisdiction for attachment orders must comply with the general principles applicable to jurisdiction as defined by the Supreme Court in the case of *International Shoe* and in subsequent decisions.<sup>106</sup> In this decision, the Court decided that the exercise of jurisdiction over a defendant who is not present on the territory of the court concerned must, in order to observe due process, respect certain minimum links so that the procedure complies with the traditional principles of fair play and natural justice.<sup>107</sup>

59 However, in the *Shaffer* case, the Court did not have to decide whether an attachment was permissible, to prevent the defendant from moving his assets from the territory in question in order to avoid facing up to his obligations.<sup>108</sup> What it had to decide was whether to order an attachment in order to obtain jurisdiction over the defendant to resolve the merits of the case, that is, what was called “jurisdiction *quasi in rem*”. Likewise, the Court did not have to decide on the extent of the jurisdiction of the

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<sup>101</sup> Justice Marshall in the case of *Kulko v. Superior Court*, 436 US 84 (1978), on p. 92.

<sup>102</sup> Cf. Paul Dubinsky, *The Reach of Doing Business Jurisdiction and Transacting Business Jurisdiction over Non-U.S. Individuals and Entities*, Working Document No 64, 6 March 1998.

<sup>103</sup> See for example *Securities and Exchange Commission v. International Swiss Investments Corp.* 895 F. 2d 1272 (9th Cir. 1990).

<sup>104</sup> McEvoy, *op. cit. supra* note 59, Chapter 5, typed pages 15 and 16. He cites *Hamilton v. MacDonald* 503 F.2d 1138 (9th Cir. 1974) on p. 1146.

<sup>105</sup> 433 US 186 (1977).

<sup>106</sup> Same reference, on p. 212.

<sup>107</sup> “Certain minimum contacts ... such that maintenance of the suit does not offend traditional notions of fair play and substantial justice” 326 US 310 (1945).

<sup>108</sup> P. Trooboff, “Provisional and Protective Measures Development of a Limited Security Attachment in the US Cases and Practice”, paper drafted on 29 March 1995 for the ILA Committee on International Civil and Commercial Litigation.

court of the place of the attachment, or in other words, the *forum arresti*.<sup>109</sup>

60 However, as one writer has said,<sup>110</sup> most of the time the court which orders the attachment has jurisdiction *in personam* over the defendant and also has on its territory the assets which are to be attached. It is thus very difficult in most cases to reach a conclusion on the basis of the decisions rendered.

61 There is a typical example of an attachment in the case of *Barclays Bank v. Tsakos*.<sup>111</sup> Barclays had granted a loan to the son of Mr and Mrs Tsakos, guaranteed by the latter. When the son defaulted on the loan, the bank started proceedings against the parents in France and Switzerland. But the parents had removed their assets out of both countries. The bank therefore asked the courts of the District of Columbia to authorise an attachment of the only piece of property which was located in that territory, which was a flat in Washington, DC. The Court of Appeal decided that the connections of the Tsakos parents with the territory of the District of Columbia were sufficient to allow its courts to order the attachment sought, the aim of which was purely protective.<sup>112</sup> But in this case, the Court took the trouble to recite all the links which the Tsakos parents had with the territory of the State concerned. That should not have been necessary if the mere presence of the property was sufficient.

62 In the case of *Carolina Power*,<sup>113</sup> the court gave in its reasoning greater detail of the facts warranting a finding of jurisdiction to order attachment of property owed. The case involved a debt owed by a company in California to a French company. In other words, as in other legal systems, the claim is regarded as being located at the place of the person or entity which owes it. The Court decided that it could order attachment of this claim as its “presence” in California was not merely fortuitous. Moreover, to compel the French defendant to defend the attachment order before the Californian courts would not be too heavy a burden, since the procedure is of its nature extremely limited.<sup>114</sup>

63 To conclude on this point, it can be said that the court which authorises an attachment does not have jurisdiction over the person of the defendant, nor does it have jurisdiction on the merits. Consequently, it is sufficient for this court to be located on the territory where the assets are. Only this link is necessary, but it is a sufficient one.

64 At this stage, let us consider the impact of a choice of forum clause on direct international jurisdiction in respect of provisional and protective measures. This question was examined by the Court of the Southern District of New York in the case of *Sanko S.S. Co. v. Newfoundland Refining Co.*<sup>115</sup> In this case the defendant, a maritime freight company, started proceedings for a breach of the charter party. In this context, the plaintiff sought an attachment of the defendants’ bank accounts which were located

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<sup>109</sup> In the famous note at the bottom of page 37, the Supreme Court says: “[We do not have to consider] the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff”.

<sup>110</sup> L. Silberman, “Shaffer v. Heitner: The End of an Era”, *N.Y.U.L. Rev.* 33 (1978), on p. 54.

<sup>111</sup> 543 A. 2d 802 (DCCA 1988).

<sup>112</sup> On the same point, see *Mendes v. Dowelanco Indus. LTDA*, 651 So. 2d 776 (Fla. Dist. Ct. App. 1995) cited by G. Bermann, *op. cit. supra* note 56, on p. 121, note 63.

<sup>113</sup> Cited *supra* note 75.

<sup>114</sup> The case of *Omni Aircraft Sales Inc. v. Actividades Aereas Aragonesas*, No 77-669 (D. Arizona, Nov. 15, 1977), cited by McEvoy, *op. cit. supra* note 59, rests on similar circumstances. The court refused to order an attachment, but this was only because it was not authorised to do so by the law of the state of Arizona, which makes no provision for attachment in such cases.

<sup>115</sup> 411 F. Supp. 285 (SDNY) *aff'd without op.* 538 F. 2d 313 (2d Cir.), *cert. denied*, 429 US 858 (1976).

in New York. The defendants objected, on the ground that the parties had concluded a choice of forum clause which gave sole jurisdiction to the English courts. The court found that attachment could not be ordered where there was a choice of forum clause giving sole jurisdiction to a foreign court. But the American courts do not all share this opinion. In the case of *Polar Shipping Ltd. v. Oriental Shipping Corporation*,<sup>116</sup> the Court decided that the choice of forum clause in favour of the English courts did not prevent one of the parties from obtaining an attachment order in the United States. The Court based its decision on the fact that the clause did not expressly state that it was exclusive, nor did it forbid the parties to obtain a protective measure from a court other than the one with jurisdiction on the merits.

### SECTION 3 – RECOGNITION AND ENFORCEMENT

65 G.A. Bermann says: “It seems reasonably clear that the court entertaining the main action on a claim is ordinarily free to disregard ancillary orders of provisional relief issued by a court of a different jurisdiction, [...] if it deems the relief inopportune.”<sup>117</sup> The writer does not cite any American decision to justify his conclusion, but a Hong Kong decision which refused to recognise provisional measures ordered by an American court<sup>118</sup> although jurisdiction on the merits of the case lay with the Hong Kong court.

66 The Restatement (Second) of Conflict of Laws explains that the position in American law on the question of the recognition and enforcement of foreign injunctions is not fixed.<sup>119</sup> However, this is immediately followed by the following sentence: “It can therefore be assumed that a decree rendered in a foreign nation which orders or enjoins the doing of an act will be enforced in this country provided that such enforcement is necessary to effectuate the decree and will not impose an undue burden upon the American court and provided further in the view of the American court the decree is consistent with fundamental principles of justice and good morals”. As for the Restatement (Third) on the Foreign Relations of the United States, it does not deal with the question directly, but merely states that although the Uniform Foreign Money Judgments Recognition Act is confined to money-judgments, there is nothing in the wording, or in the practice of the Federal courts, which suggests that other kinds of judgments may not be recognised or enforced in the United States.<sup>120</sup>

67 On the other hand, there are several decisions by American courts agreeing to enforce protective measures ordered abroad.<sup>121</sup> First, we find the decisions most frequently rendered have been those in family law cases. In the case of *Pacanins v. Pacanins*<sup>122</sup> a Florida court, on request from a court in Venezuela, ordered the freezing of certain assets belonging to the defendant in proceedings which were pending in Venezuela. The Court justified its decision by pointing to a previous decision in the same State, Florida, finding that the principle of non-recognition of foreign provisional measures which were “not final” was to be set aside in exceptional circumstances such as provisional measures in family law cases, or measures ordered to enforce a rule of public

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<sup>116</sup> 680 F. 2d 627 (9th Cir. 1982).

<sup>117</sup> *Op. cit. supra* note 56, on p. 156.

<sup>118</sup> *Securities and Exchange Commission v. Wang*, 699 F. Supp. 44 (SDNY 1988), cited by G. Bermann, *op. cit. supra* note 56, on pp. 145-147.

<sup>119</sup> Section 102, *comment g*, p. 310.

<sup>120</sup> See § 481, *Reporters' notes* 2, p. 599. But the decisions cited below do not contain any examples of the type of injunction we are concerned with here.

<sup>121</sup> Most of these decisions are cited by Mr Bermann himself, *op. cit. supra* note 56, on pp. 149-155. On this question, see also Buzard, “US Recognition and Enforcement of Foreign Country Injunctive and Specific Performance Decrees”, 20 *Cal. West Int'l L. J.* 91 (1989).

<sup>122</sup> 650 So. 2d 1028 (Fla. Dist. Ct. App. 1995).

law in force on the territory of the foreign court.<sup>123</sup> We may also note that generally speaking, family law is the field most favourable to the enforcement in the United States of provisional measures ordered abroad. For instance, a court in New York enforced a decision handed down in Brazil ordering the freezing of investment accounts belonging to a couple jointly, pending the outcome of divorce proceedings in Brazil.<sup>124</sup>

68 But other decisions rendered outside the family law field might lead us to believe that certain protective measures may find favour in the eyes of American courts.<sup>125</sup> One frequently cited decision is the one in the case of *Pilkington Brothers plc v. AFG Industries Inc.*<sup>126</sup> This decision was a refusal to order a provisional measure similar in every respect to one ordered in Britain, without however being based on a general principle which would prevent it from recognising or enforcing a provisional measure ordered abroad. The court stated: “A generally recognised rule of international comity states that an American court will only recognise a final and valid judgment. This rule, however, has not been strictly applied to cases involving enforcement of modifiable judgments. Modifiable foreign orders can be granted extraterritorial effect even though they might not be ‘final’ for purposes of *res judicata*”.<sup>127</sup> In spite of this statement, the court does not review the conditions for recognising and enforcing the English decision; on the contrary, it takes care to verify the facts and the factual circumstances of the case, in order to determine for itself whether the measure requested ought to be ordered. We should add here that it probably could not act otherwise, since the applicant was not asking it to give effect to the English decision, but rather to “duplicate” that decision by an identical injunction. It is therefore difficult to come to any firm conclusion on the basis of this decision.<sup>128</sup>

69 There is a more interesting decision by the Florida District Court of Appeal, in the case of *Belle Island Investment Co. Ltd. v. Feingold*.<sup>129</sup> The Florida court, which as we have already seen is liberal in its approach to foreign measures in family law cases,<sup>130</sup> agreed to enforce a provisional injunction ordered by a court in Saint Vincent and the Grenadines against a debtor who had defaulted on his obligations to a bank.

70 As for the recognition or enforcement of an attachment ordered abroad where the assets in question are on the territory of the court addressed, the question probably does not even arise, since the American courts take care to order the repatriation of assets when ordering an attachment, as we saw above.<sup>131</sup> In any event, we have not found any decision indicating that the question arises in these terms.

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<sup>123</sup> *Cardenas v. Solis*, 570 So. 2d 996 (Fla. Dist. Ct. App. 1990), *review denied*, 581 So. 2d 163 (Fla. 1991).

<sup>124</sup> *Cf.* G.A. Bermann, *op. cit. supra* note 56, on pp. 148 and 149.

<sup>125</sup> *Cf.* G.A. Bermann, *op. cit. supra* note 56, on p. 150, and note 154. We note however that the last-cited decision (*Seetransport Wiking Trader v. Navimpex* 29 F. 3d 79 (2d Cir. 1994)) seems to be irrelevant, since the French decision of *exequetur* is not a protective measure.

<sup>126</sup> 581 F. Supp. 1039 (D.Del. 1984).

<sup>127</sup> *Ibidem* on p. 1045.

<sup>128</sup> G. Bermann also cites other decisions in which *Pilkington* has been interpreted as a general prohibition to enforce foreign protective measures (*cf.* p. 154).

<sup>129</sup> 453 So. 2d 1143 (Florida 1984).

<sup>130</sup> *Cf. supra* No 67.

<sup>131</sup> *Cf. supra* Nos 45 *et seq.*



## CHAPTER III – GERMANY

### SECTION 1 – DESCRIPTION OF THE MEASURES

71 German law has two kinds of measures to protect assets in order to ensure that writs of execution can be enforced at a future date: the *Arrest* and the *einstweilige Verfügung* (provisional injunction).<sup>132</sup> The essential difference between the two is that an *Arrest* will apply where the creditor is claiming a sum of money, whereas a provisional injunction is ordered for claims of a non-monetary kind.

72 An *Arrest* is a means of blocking the assets and property of the debtor, and is ordered by a court.<sup>133</sup> The decision is of a general kind, and will be valid without specifying which assets are involved. It must then be followed by an enforcement measure in the true sense, which may take a variety of forms: attachment, sequestration, or a special entry in the land register. The blocking measure may also affect obligations owed to the debtor by third parties. Hence this measure has no real value unless the creditor can find one or more specific assets against which it can be enforced. The *Arrest* has no concrete value as such; third parties are under no obligation to respect it. This results from the hybrid character of the *Arrest*, which is not in itself a measure *in rem*. It is the specific enforcement measures which take effect *in rem*.

73 There is no specific measure whereby the composition of the debtor's assets can be made known, except as described below in connection with the attachment of claims.<sup>134</sup> However, it may be asked whether the provisional injunction (*einstweilige Verfügung*) could not perhaps be used for this purpose. In fact, the subject-matter of injunctions may be extremely varied; they may for instance carry an obligation not to dispose of certain items of property.<sup>135</sup> In any case, depositions under oath of third parties or parties themselves play an important role although they are not allowed in ordinary proceedings.

74 An *Arrest* involves a prohibition against the defendant disposing of the property, under the general principles on this matter set out in paragraphs 134 and 137 of the BGB. When the *Arrest* relates to claims, the prohibition against disposal also applies to the third party involved. If he contravenes this obligation, he may be compelled to pay a second time. Moreover, the third party involved has a duty to supply information, which

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<sup>132</sup> § § 916 to 945 ZPO.

<sup>133</sup> An *Arrest* may also be ordered against a person (*Personlicher Arrest*) (*i.e.* enforcement against the person herself) and may involve imprisonment as a protective measure in property cases, § 918 and § 933 ZPO. But this form of sanction is only ordered exceptionally.

<sup>134</sup> *Cf. infra* No 76.

<sup>135</sup> § 938 ZPO. *Cf.* replies to the ILA questionnaire by Professor Schlosser, Committee on civil and commercial proceedings, unpublished (1995). We are responsible for the suggestion that the provisional injunction could be used to obtain information about the composition of the debtor's assets.

he must fulfil within 15 days of being notified of the attachment.<sup>136</sup> This duty to supply information is of a general nature (the sum of the obligations held by the creditor; other claims on them; other attachments) but cannot be compulsorily enforced. Thus any error or faulty performance by the third party involved cannot result in anything other than an award of damages.

75 Moreover, the *Arrest* carries a very particular effect, since it accords the creditor a priority right over the attached assets, this priority dating from the date of the attachment. This order of priority is the same as that conferred by a traditional security.<sup>137</sup> One may say that attachment enables the creditor to be given a real right which permits him to proceed to an action in restitution.

76 In order to obtain a protective order of attachment, the applicant must show that he has a good chance of succeeding on the merits of the case. Paragraph 920 ZPO specifies that the claim must be a credible one, both in its principle (its “cause”) and in its *quantum* (the debt). The applicant must also show that there are special circumstances which endanger his claim and which justify the protective measure sought. In this respect, paragraph 917 ZPO states that there is a risk when the enforcement of the claim on which the creditor relies has to take place abroad.<sup>138</sup> In such a case there is an irrebuttable presumption which in itself warrants ordering the protective measure. As we know, this clause can no longer be applied because these relationships are now governed by the 1968 Brussels Convention; it was found to be discriminatory under article 6 of the Treaty of Rome, which states that discrimination on grounds of nationality is prohibited.<sup>139</sup> But it can still be applied in relationships which are outside the scope of that convention.<sup>140</sup>

77 A creditor will obtain this protective measure at his own risk, and may be ordered to pay damages by virtue of a specific objective responsibility under paragraph 945 ZPO if he obtained the protective measure by violating the conditions applying to it.

78 An *Arrest* may be ordered either following an adversarial hearing or, more frequently, *ex parte*. In the latter case, the defendant has the right to petition for a review of the decision (“opposition”) under paragraph 924 ZPO. This review carries no suspensive effect but the judge may suspend enforcement of the provisional measure pending the outcome of the review.

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<sup>136</sup> § 840 ZPO.

<sup>137</sup> § 804 II ZPO.

<sup>138</sup> For a similar provision in the law of the state of New York, see *supra* No 48 note 86.

<sup>139</sup> ECJ 10 February 1994, Case C 398/92, *Firma Mund and Fester v. Firma Hatrex International Transport*, Report p. 467.

<sup>140</sup> It is possible that this text is also excluded when the case falls within the scope of the Lugano Convention, although the decision referred to here by the European Court of Justice in the case of *Firma Mund* has only persuasive force for the interpretation of that Convention, which is not subject to the principles laid down in the Treaty of Rome. This would be the case, for instance, if German law regarded as discriminatory any decision based on nationality in civil proceedings, or if this conclusion could be based on the principles of general public international law.

## SECTION 2 – DIRECT INTERNATIONAL JURISDICTION

79 Under paragraph 919 ZPO a claimant may present his case either to the court with jurisdiction on the merits, or to the court in the jurisdiction where the assets to be attached are located. Although this is a domestic law rule, it has been extended to international relations. As for provisional injunctions, paragraph 937 ZPO provides that only the court with jurisdiction on the merits is competent to order them. Paragraph 942 provides for only one exception, for the court in whose jurisdiction the assets are located in emergency cases, or when the measure has to be recorded in maritime registers.

80 Although all grounds of jurisdiction described in Volume VIII (means of enforcement) are exclusive, by virtue of paragraph 802 ZPO, it seems that this principle does not apply where jurisdiction is exercised in international relations.<sup>141</sup>

81 An *Arrest* relates to the movable and immovable property of a defendant, whether located inside or outside the country. This was the ruling made by the *Oberlandesgericht* of Karlsruhe on 26 April 1972.<sup>142</sup> The German courts justified this approach as follows: paragraph 917 II states that an *Arrest* must be ordered if the judgment is to be enforced abroad. If that is so, it means that there are no assets of sufficient value in Germany. Consequently, if the protective measure is to have any useful effect, it must necessarily apply to property situated abroad. Admittedly, the judges continue their line of reasoning by saying that the actual enforcement of the measure will depend on the competent foreign authorities proceeding to carry enforcement out, but they say that this need not concern the court which makes the order in Germany. The only links with Germany are those defined in paragraph 919, mentioned above, which gives a choice of jurisdiction. There is no need to require an additional connection, even at the risk of the measure remaining a dead letter if there is a refusal to enforce it in the country or countries where the assets owned by the debtor are located.

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<sup>141</sup> This solution seems undisputed for jurisdiction on the merits, see Reinhold Geimer, *Internationales Zivilprozessrecht*, 3<sup>rd</sup> ed., Cologne 1997, p. 248, No 877b; Reithmann/Hausmann, in Reithmann/Martiny, *Internationales Vertragsrecht*, 5<sup>th</sup> ed., Cologne 1996, p. 1651, No 2201; but see *contra* Münchener Kommentar, *Zivilprozeßordnung*, 1992, p. 2150. However, legal scholars do not all agree to extend this solution to provisional and protective measures. But it is difficult to find precise references. One may propose to draw an analogy with choice of forum clauses. For Geimer (*op. cit. supra* p. 456, No 1767), a choice of forum clause granting jurisdiction to a foreign court must, in principle, exclude German courts' jurisdiction to grant provisional measures. In opposition to this position, see Reithmann/Hausmann (*op. cit. supra* p. 1651, No 2201) with other citations for the two opposite solutions.

<sup>142</sup> OLGZ 1973 p. 58.

## CHAPTER IV – FRANCE

82 For a very long time, French legal theory took the view that a decision to order a provisional measure produces its effects, and will often exhaust them, in the country where it is given and enforced. Hence there is no need for it to move to any country other than the one in which it was made.<sup>143</sup> The rules of jurisdiction chosen both in domestic law and in private international law would bear out this statement. To what extent French law can and will evolve in a different direction is hard to say at the moment. We will attempt to do this by describing, as for the other chapters of this study, the various measures available under domestic law (section 1), the rules of international jurisdiction (section 2) and the rules for recognition and enforcement (section 4). But we will also add some brief words about applicable law (section 3) since there are some discussions on this issue under French law.

### SECTION 1 – DESCRIPTION OF THE MEASURES

83 Methods of enforcement in France were reformed through the Law of 9 July 1991 and the Decree of 31 July 1992, which came into force on 1 January 1993.<sup>144</sup> But there are plenty of other instruments to justify the use of provisional or protective measures. We may mention, first, article 145 of the New Code of Civil Procedure, which allows for evidence to be conserved or established before any proceedings begin. This applies even where there is no emergency. But before turning to these particular measures, we will look briefly at the summary measures laid down in the New Code of Civil Procedure.

84 Article 808 of the New Code of Civil Procedure, which deals specifically with the “tribunal de Grande instance”,<sup>145</sup> allows the court which is hearing summary applications<sup>146</sup> to order “any measures which are not seriously challenged, or which are warranted by the existence of a dispute”. For this clause to apply, an emergency must be found to exist; it cannot be deduced, for instance, merely from a rescission clause in a contract which provides for actions before the judge for summary applications.<sup>147</sup> The emergency must be obvious at the time when the decision is made, and not when the court was addressed, and only the judges for summary applications are entitled to decide

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<sup>143</sup> Cf. among others, V. Delaporte, “Les mesures provisoires et conservatoires en droit international privé” *Travaux du Comité français de droit international privé*, 1987-1988, Paris 1989, p. 147 *et seq.* p. 148.

<sup>144</sup> Law No 91-650 of 9 July 1991, JO 14 July 1991; Decree No 9292-755 of 31 July 1992, JO of 5 August and correction of 31 October 1992.

<sup>145</sup> In France, the *Tribunal de Grande instance* has general jurisdiction for all civil and commercial cases, except where special forms of jurisdiction are conferred on the various specialised courts, such as the Conseil des Prud’hommes, the Commercial Court or even the *tribunal d’instance*. The *Tribunal de Grande instance* is the first level appeal court for most cases.

<sup>146</sup> This is a special court (*juge des référés*), with a single judge, usually the president of the court or his deputy, sitting to hear summary applications in a speedy manner. For example, the court sitting “from hour to hour” is able to make an order very quickly, and as its name indicates, sometimes within a few hours of a summons being notified.

<sup>147</sup> Cass. Civ. 3, 15 May 1974, *Bull.* III, No 202.

on it, which implies that the Court of Cassation has no part to play in considering it.<sup>148</sup> The emergency must follow from the nature of the case, not from the whims or actions of the parties. Thus there will be an emergency if the damage suffered by one of the parties if the order is not made may become irreparable.<sup>149</sup> The court must not decide on any of the merits of the case in order to justify the measure requested.<sup>150</sup> This is why it has been said that the court for summary applications, under article 808, is the court “of the obvious”. If, following a superficial examination of the facts, the court cannot proceed to ordering the measure sought, it must refrain from a decision, because this means research is needed which would go beyond its role as a court dealing with summary applications.

85 Moreover, article 809 of the New Code of Civil Procedure, which contains equivalent provisions for other courts,<sup>151</sup> states: “The President may always, even if there is a serious challenge, prescribe any necessary protective or restorative measures when sitting in summary applications, either in order to prevent imminent damage, or to bring to an end a disturbance which is obviously unlawful.” In order to be able to apply this text, the court must find that the damage is in fact imminent, and that it is necessary to prevent it from occurring. As with article 808, a finding that the damage is imminent is enough to demonstrate an emergency.<sup>152</sup> However, the application of article 809, first paragraph, is not subject to proof being brought of the urgency of the requested measure.<sup>153</sup> There are many instances of the concept of “imminent damage”: unfair competition, stock exchange cases, the banning of a film or television broadcast, the right to strike; all these are examples of the type of case in which applications have been made in summary proceedings. As for the notion of a “manifestly unlawful disturbance”, this applies in labour law, in cases on privacy, in economic law cases (advertising, the opening or closing of shops, the organisation of commercial activities or advertising), in medical matters and in defamation cases, especially through the press or publishing. As we see, the areas of application are extremely varied.

86 Article 809 of the New Code of Civil Procedure contains a second paragraph, the wording of which should be reproduced *in extenso*: “In cases where the existence of the obligation cannot be seriously challenged, it [the court for summary cases] may grant a provisional measure in favour of the creditor or order enforcement of the obligation, even if it is an obligation of performance”. This is the well-known “*référé-provision*” which is also found in other countries, such as the Netherlands.<sup>154</sup> This clause can be applied without proving any emergency.<sup>155</sup> Before granting the interim payment, the court must ascertain that the obligation “cannot be seriously challenged”. Indeed, the court for summary cases does not have the power to decide upon a seriously challenged obligation. The applicant for the measure will have to establish the existence of the obligation which he is invoking, but it will be for the defendant to prove that the obligation is seriously contested.<sup>156</sup> The interim payment can be used in both contract and tort cases.

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<sup>148</sup> Cass. Civ. 3, 5 October 1976, *JCP* 1976 IV 344; Cass. Civ. 1, 26 April 1977 *D.* 1978 p. 664, note by Tendler.

<sup>149</sup> Cass. Civ. 3, 20 October 1976, *JCP* 1976, IV, 362.

<sup>150</sup> Cass. Civ. 1, 26 April 1978, *JCP* 1979, II, 19251, note by Couchez.

<sup>151</sup> Article 873 for the Commercial Court, 894 for the agricultural land tribunal, R 516-31 for the Conseil des Prud'hommes.

<sup>152</sup> Cass. Civ. 3, 19 January 1982, *JCP* 1982, IV, 126.

<sup>153</sup> Cass. Civ. 3, 22 March 1983, *JCP* 1983, IV, 183.

<sup>154</sup> *Cf. infra* No 109 *et seq.*

<sup>155</sup> Cass. Civ. 1, 4 November 1976 *RTD Civ.* 1977, p. 361. Comment by Normand.

<sup>156</sup> Cass. Civ. 1, 4 November 1987, *Bull.* I No 282; Cass. Comm., 22 November 1994, *Bull.* IV No 348, *Justices* 1995, II, 281, note by Heron.

The interim payment can also be granted in order to cover expenses which in principle are irrecoverable, *i.e.* a provision *ad litem*.<sup>157</sup> It has also been found that the court's power to alter the amount of a penal clause does not affect the power of the court for summary cases to award the interim payment when the debt is not seriously challenged.<sup>158</sup> Since the court for summary cases has to ascertain that the existence of the obligation cannot be seriously challenged, it has the power to order for this purpose any investigative measure which it deems relevant, including appearance by the parties in person.<sup>159</sup> However, the court for summary cases is not competent to settle the merits of the case. This is why its investigations can only be limited in nature. Of course, the boundary between what it can and cannot do is extremely difficult to define. Finally, it should be made clear that the amount of the interim payment is limited only by the amount of the alleged debt which cannot be seriously challenged.<sup>160</sup> The court has the power to determine on its own discretion, within this limit, the sum which should be awarded to the applicant.<sup>161</sup>

87 As we have seen, the wording also makes room for a “summary injunction”. Like the interim payment, this decision is conditional upon the court finding that the obligation cannot be seriously challenged. For instance, a vendor of software has been enjoined to communicate the access code to the software, without which it would have been useless.<sup>162</sup> However, we have to admit that the published case law on the summary injunction procedure is extremely scarce, and is no match for the abundant jurisprudence on the summary provision or the other protective measures. Indeed one may speculate that if there is a possibility of French law evolving in a similar fashion to common law, it is because of the existence of the summary injunction, which has not yet developed all its potential effects.

88 All the measures we have described, if they are warranted by the urgency of a case, may be ordered *ex parte* when circumstances require that no hearing is held.<sup>163</sup>

89 We should also mention here the possibility of a court sitting in summary proceedings ordering the payment into court of continuing fines (*astreintes*) which it may settle on a provisional basis.<sup>164</sup> The protective nature of this measure is not obvious. It does not correspond exactly to the definition given at the beginning of this study of the measures which chiefly concern us here. However, even if it is probably not a protective measure as such, it is a sanction as effective as the contempt of court in English law.

90 There are many provisional and protective measures available in matters of wills and inheritances, in the interest of families, in divorce cases and in connection with matrimonial regimes, but we will not deal with these in this study, which aims at helping with the preparation of a convention which will probably exclude these matters from its scope of application.

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<sup>157</sup> Paris 26 May 1986, *Gaz. Pal.* 1986, 386, Bertin, *RTD Civ.* 1986, 628, comment by Normand.

<sup>158</sup> Cass. Civ. 2, 10 July 1978, *JCP* 1978 II. 19355, note by Bey; Cass. Comm. 1 March 1983, *RTD Com.* 1983, 551, comments by Dubarry and Benabent.

<sup>159</sup> Cass. Civ. 1, 30 June 1993, *JCP* 1993, IV.2253; *RTD Civ.* 1994 162, comment by Perrot.

<sup>160</sup> Cass. Comm., 20 January 1981, *Gaz. Pal.* 1981, 332, note by Bertin.

<sup>161</sup> Cass. Civ. 1, 10 March 1993, *JCP* 1993 IV No 1235.

<sup>162</sup> Versailles 25 November 1987, *Juris Data* No 045960.

<sup>163</sup> Article 812 of the New Code of Civil Procedure.

<sup>164</sup> Article 491 of the New Code of Civil Procedure and article 35 of the 1991 Law.

91 One particular protective measure warrants mention: this is the appointment of an administrator, who can take action in certain cases such as where there is property needing to be handled in the absence of its owner, or the deadlock of decisions in the context of a civil or commercial company or association. We note, moreover, that all the major monitoring institutions for economic and financial operations (the Stock Exchange Commission or the Council on Competition, for example) have powers to order protective measures such as sequestration, a temporary ban on business activity or the deposit of funds.

92 In matters of intellectual property, there is a particular measure known as "counterfeit attachment".<sup>165</sup> Under the same legal instruments, it is possible to obtain a provisional ban on copyright infringement or, in other words, the suspension of all ongoing production. The Code of Intellectual Property also authorises attachment of the proceeds of the unlawful copying.<sup>166</sup> Similarly, videograms and phonograms may be attached,<sup>167</sup> and there are other associated measures, such as the temporary closure of the undertakings in which the offence was committed.<sup>168</sup> In order to enforce any of these measures, which are ordered *ex parte*, the bailiff presents himself at the premises of the infringer with the help of the police, if necessary. This is not far distant from the *Anton Piller* measures under English law.<sup>169</sup>

93 Finally, since the entry into force of the 1991 law mentioned above, the search for information about the debtor's bank accounts has been governed by that law.<sup>170</sup> These searches are conducted by the Public Prosecutor at the request of the bailiff responsible for enforcement, who must hold a writ of execution, and on sight of an authenticated statement certifying that investigations for the purpose of enforcement have proved fruitless. The Public Prosecutor may check on the addresses of institutions at which an account has been opened in the debtor's name, the address of the debtor and that of his employer. This list is exhaustive. The Public Prosecutor has no power to seek other information. Moreover, the information obtained can only be used to the extent necessary to secure the title or titles for which it was sought. In no circumstances may it be communicated to third parties, or be included in a file with personal data.<sup>171</sup> The Public Prosecutor becomes involved through an *ex parte* application. Since 1994, requests for information searches on debtors made by bailiffs to the Public Prosecutor have been handled by computer.<sup>172</sup>

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<sup>165</sup> Articles L332-1 to L332-4 of the Code of Intellectual Property.

<sup>166</sup> Articles L333-1 to L333-4.

<sup>167</sup> Article L334-1.

<sup>168</sup> Article L335-5.

<sup>169</sup> *Cf. supra* No 24 *et seq.*

<sup>170</sup> Articles 39 and 40 of the Law of 9 July 1991 and article 54 of the Decree of 31 July 1992.

<sup>171</sup> Article 41 of the Law of 9 July 1991 imposes in the event of any breach of its provisions the penalties for offences set down in article 226-21 of the Criminal Code, without prejudice to disciplinary proceedings and an award of damages where appropriate.

<sup>172</sup> Order of 20 July 1994, JO of 4 August 1994.

94 Finally, we should mention the protective measures provided in the 1991 law. Article 1 states: “Any creditor may carry out a protective measure in order to safeguard his rights”. For this purpose, the law establishes an execution judge, assisted in compulsory enforcement of orders and in protective attachments by bailiffs, the only ones who may carry out these measures. The creditor has a choice among different measures to protect his claim. However, the enforcement of these measures may not go beyond what is necessary to obtain payment of the debt. The execution judge has the power to order the lifting of any measure which is irrelevant or abusive, and to order damages against the creditor if the attachments are abused.<sup>173</sup> Third parties may not stand in the way of procedures instituted to protect claims. They must assist in them when legally required to do so. A third party from whom assets are attached in this manner may also be ordered to pay the debt, which he may reclaim from the debtor. On the other hand, if he evades his obligations without due cause, he may be ordered to meet them, if necessary under pain of a continuing fine (*astreinte*), and may also have damages awarded against him.<sup>174</sup>

95 A protective measure against the debtor's assets must be authorised by the court. Any person whose claim seems justified in principle may seek such authorisation, provided he can show that circumstances exist which may endanger recovery of the debt. The execution judge does not decide on the merits of the case.<sup>175</sup> He makes his decision *ex parte* on the basis of the evidence brought by the creditor. The prior authorisation of the court is not necessary when the creditor holds a writ of execution or a court decision which is not yet enforceable.<sup>176</sup> By virtue of this text, it may be said that a foreign decision which does not yet carry the exequatur may permit a protective attachment to be made directly, without having to seek the authorisation of the execution judge.

96 Protective attachment may affect all the debtor's movable assets, material or non-material. Its effect is to place his property beyond his power of disposal. When the attachment involves a claim for a sum of money, the deed of attachment places it beyond disposal to the amount of the sum authorised by the court, or if such authorisation is not necessary, to the amount for which the attachment is made. The attachment will result in automatic deposit of the sums concerned, that is, it places them in a special category of deposit while giving the creditor a priority claim. The creditor therefore has the right to claim payment under his priority status as against other creditors.<sup>177</sup> The law also provides specific conditions applying to establishments which are entitled to hold deposit accounts (chiefly banks): information concerning the balance of the account or accounts of the debtor on the date of the attachment and special rules for the management of the account depending on the dates of the operations.

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<sup>173</sup> Article 22 of the Law of 9 July 1991.

<sup>174</sup> Article 24 of the Law of 9 July 1991.

<sup>175</sup> The jurisdiction conferred on the execution judge is limited under article 69 of the Law. Authorisation to proceed to a protective measure may be granted by the President of the commercial court when it has been sought before the case begins and is intended to protect a claim which falls within the commercial jurisdiction.

<sup>176</sup> Article 68 of the Law of 9 July 1991.

<sup>177</sup> Article 75 of the Law of 9 July 1991, 2075-1 and 2073 of the Civil Code. This is a similar provision to that in German law, explained above in No 75.



97 Attachment orders are made within a very strict procedural framework. The 1992 Decree specifies not only the arrangements for the attachment, but also the time limits in which it must be notified to the debtor and the various procedures to be gone through if it is contested. These formalities vary according to the measure requested and the property for which it is sought. For instance, there are provisions for the attachment of material movables, the attachment of claims, of partner rights and of securities. There is no need to list all these provisions in detail in this study. We need only point out here that if attachment is effected *vis-à-vis* a third party, the writ of attachment must be served on the debtor within a week, or it will lapse.

## SECTION 2 – DIRECT INTERNATIONAL JURISDICTION

98 In France, the rules of direct jurisdiction in international cases are derived mainly from the rules of domestic territorial jurisdiction, these being extended, sometimes with adaptations, to international relations.<sup>178</sup>

99 In the matter of provisional and protective measures, it has always been recognised that the court which is normally competent for the merits of the case may order these measures. We will see later under which applicable law it must decide a case.<sup>179</sup> But the very principle of a provisional or protective measure is that it will often have to be sought from a court other than the court dealing with the merits. The difficulty then arises that this court may not encroach too far on the prerogatives of the court for the merits of the case. It is possible to avoid doing so for attachment orders and other protective measures taken in advance of enforcing the decision on the merits, but more difficult for the other provisional and protective measures, such as investigative measures and the summary provision.<sup>180</sup>

100 The French courts have given themselves the power to order attachment and protective measures against property located in France, even where they have no jurisdiction for the merits of a case. For instance, in an emergency a French court will authorise a claimant to carry out a protective attachment, to make a protective land charge entry or a charge on a business involving property located in France, even if the parties are all abroad.<sup>181</sup> This situation can be explained by the notion that the protective measures are preparatory to the enforcement of the decision to be made on the merits, since they anticipate and guarantee its effects. In this sense, they are part of

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<sup>178</sup> The exception is articles 14 and 15 of the Civil Code, which base the jurisdiction of the French courts on the nationality of the claimant (art. 14) or of the defendant (art. 15). This is only a subsidiary jurisdiction, if no ordinary jurisdiction is available (Cass. Civ. 1, 19 Nov. 1985, *Rev. crit. dr. int. priv.* 1986.712, note by Y. Lequette; *J.D.I.* 1986.719, note by A. Huet; *JCP* 1987.II.20910, note by Courbe and 7 June 1989; *JCP* 1990.II.21448, note by Remery). For a decision which barred the application of article 14 when the contested protective measure was ordered abroad, see CA Paris 18 December 1996, *Rev. crit. dr. int. pr.* 1997.527, note by M. Santa-Croce.

<sup>179</sup> *Cf. infra* Nos 105 and 106.

<sup>180</sup> This distinction has been suggested by V. Delaporte, “Les mesures provisoires et conservatoires en droit international privé”, *op. cit. supra*, note 143.

<sup>181</sup> Cass. Civ. 1, 14 March 1984, *Bull.* I No 98; *Rev.crit.dr.int.pr.* 1984, 598, note by Oppetit; *D.* 1984, 629, Fabre report, note by J. Robert; *JCP* 1984 II, 20205, Conclusion Gulphe, note by Synvet; *Rev. Arb.* 1985. 69 note by Couchez; Cass. Civ. 1, 18 November 1986, *Rev. crit. dr. int. pr.* 1987, 760, note by Audit; *JDI* 1987, 124, note by Gaillard.

the means of enforcement, and are therefore governed by the law of the place where the enforcement takes place, that is, the place where the attached goods are located or subject to charge. The Decree of 31 July 1992, adopted in application of the law of 9 July 1991 on means of execution, did not alter this rule, since its article 9 provides that the court of execution with territorial jurisdiction is the one where the measure is enforced. However, the same text offers the claimant a choice: he can also decide to bring his request for protective measures to the court of the place where the debtor lives. If the debtor is living abroad or if his place of residence is unknown, the only competent court is the one for the place of enforcement of the measure. We note that these are public policy rules, under article 10 of the same Decree. But this public policy is by nature internal and, for the moment, there has been no decision by the courts to extend it to international relations.

101 The jurisdiction of the court at the place where the measure is to be enforced, under article 9 of the 1992 Decree, merely confirms the jurisdiction already admitted in the case law before the 1991 law was passed.<sup>182</sup> However, article 211 of the 1992 Decree, which specifically covers protective measures and judicial forms of security, carries a provision which seems to derogate from article 9 as regards authorisation of the protective measure. This text states: “The court with jurisdiction to order a protective measure is the court of execution for the place where the debtor resides”. This provision might have been regarded as a derogation from article 9, but in legal writings it has been interpreted as requiring to be taken in combination with paragraph 2 of article 9 where the debtor is resident abroad, in order to avoid compelling the applicant to use the protective measure; in that case, he must go to the foreign court to obtain an authorisation which he will then enforce in France against property located there.<sup>183</sup>

102 It may be asked whether, as regards the summary provision, the same rules of jurisdiction will apply. There is, admittedly, little case law on the question, but the published cases justify an affirmative answer to that question.<sup>184</sup>

103 There is an important development in French law concerning international jurisdiction for protective measures. Until 1995 France had the rule of the *forum arresti*. This form of jurisdiction was acknowledged in a decision in the *Nassibian* case.<sup>185</sup> By virtue of this jurisdiction, French courts could make a decision on the merits, on the validity of the claim on which the protective measure was based, in order to

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<sup>182</sup> *Soci te Varonas*, Cass. Civ. 2, 29 February 1984, *Rev. crit. dr. int. pr.* 1985, 545, note H. Sinay-Cytermann; *Fahim* Cass. Civ. I, 6 December 1989, *Rev. crit. dr. int. pr.* 1990, 545, note by Couchez; *Smith*, Dijon 27 May 1992, *Rev. crit. dr. int. pr.* 1993, 291, note by H. Muir Watt; *Faloughi*, TGI Paris, 11 July 1990, *JDI* 1991, 722, note by M. Revillard.

<sup>183</sup> P. Mayer, *Droit international priv *, 5th ed. Paris 1994, No 287, p. 194; P. de Vareilles-Sommi res, “La comp tence internationale des tribunaux fran ais en mati re de mesures provisoires”, *Rev. crit. dr. int. pr.* 1996, p. 397, p. 423.

<sup>184</sup> *Tron* TGI Nanterre, 9 October 1978, *Rev. crit. dr. int. pr.* 1979, 128, note by E. Mezger, set aside on a different issue by Versailles, 27 June 1979, *JDI* 1980, 894, comment by D. Holleaux. This form of jurisdiction is however endorsed by one writer: cf. P. de Vareilles-Sommi res *op. cit. supra* Note 6 on p. 425.

<sup>185</sup> Cass. Civ. 1, 6 November 1979, *Rev. crit. dr. int. pr.* 1980.588, note by Couchez, *JDI* 1980.95, report by Ponsard.

validate the protective measure and turn it into a measure of execution.<sup>186</sup> But in 1995, and again in 1997, the Court of Cassation reversed this decision and decided that French courts can no longer declare themselves competent on the merits solely because they are competent to decide on the protective measure.<sup>187</sup>

104 We will study, finally, what will be the effect of a choice of forum clause for the jurisdiction of the court ordering a provisional measure. We note, first, that there are very few published cases on this point. As for legal writings, they tend to favour a solution which makes it possible to respect judicial unity as between the provisional proceedings and that on the merits. From this point of view, a valid and lawful choice of forum clause will apply equally to any provisional measures which one of the parties to the contract wishes to take against the other, even if the clause does not expressly say so.<sup>188</sup> This means that if the choice of forum clause gives jurisdiction to a foreign court, the French courts dealing with provisional measures have no jurisdiction, because of the principle that in French law, the jurisdiction of the chosen court is exclusive jurisdiction unless the parties have specified otherwise.<sup>189</sup> Hence in the case of *Compagnie de Signaux et d'Entreprise électrique*,<sup>190</sup> the Court of Cassation found that the court for the merits had been right to declare itself without jurisdiction to order an expert investigation as a summary measure, despite the fact that the investigation was to be carried out in France, because there was a choice of forum clause in favour of a foreign court. The only exception admitted by the Supreme Court is in cases of emergency, or a risk which would necessarily ensue if the French court intervened to protect an asset or an obligation located on its territory. We should note, however, that this case predates the 1991 law which, as we recall, makes rules of domestic territorial jurisdiction into public policy rules. We must therefore await a decision of the Court of Cassation in order to find out if a choice of forum clause can waive this jurisdiction where the dispute is an international one. We know in fact that the French Court of Cassation has in the past admitted the validity of choice of forum clauses in certain cases where they would have been annulled under domestic law. In addition, efficiency may require that, in exceptional circumstances, jurisdiction be granted to a French court to order provisional measures even if there is a choice of court clause in favour of a foreign court.

### SECTION 3 – APPLICABLE LAW

105 As one writer has said, the problem of conflict of laws is largely a matter of conflict of jurisdictions: legislative competence lies in principle with the State which has judicial competence for provisional measures.<sup>191</sup> This solution has long been admitted in France, and seems unlikely to be changed.<sup>192</sup> It is justified by the notion that provisional measures must be ordered very rapidly, and that in general, the court which orders them cannot obtain sufficient knowledge of any foreign law which may apply.<sup>193</sup> Moreover, the risk of fraud which arises when the law of the forum offers an incentive

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<sup>186</sup> A similar decision had been made in a case concerning the validity of a protective attachment: *Banque camerounaise du développement*, Cass. Civ. 1, 18 November 1986, *Rev. crit. dr. int. pr.* 1987, 773, note by H. Muir Watt, *JDI* 1987, 632, note by P. Kahn.

<sup>187</sup> *Cobenan*, Cass. Civ. 1, 17 January 1995, *JCP* 1995, No 22430, note by H. Muir Watt; *Rev. crit. dr. int. pr.* 1996, 133, note by Y. Lequette; Cass. Civ. 1, 11 February 1997, *Bull.* No 47, p. 30.

<sup>188</sup> Cf. P. de Vareilles-Sommières, *op. cit.* note 183 on p. 432.

<sup>189</sup> P. Mayer, *op. cit. supra* note 183, No 378, p. 252.

<sup>190</sup> Cass. Civ. 1, 17 December 1985, *Rev. crit. dr. int. pr.* 1986.537, note by Gaudemet-Tallon.

<sup>191</sup> P. de Vareilles-Sommières, *op. cit. supra*, note 183 on p. 400.

<sup>192</sup> See Delaporte, *op. cit. supra* note 143, p. 148.

<sup>193</sup> We prefer this explanation to the traditional one, according to which the law on provisional measures was a procedural regulation of the powers of the court cf. V. Delaporte, *op. cit. supra* note 143, p. 148.

for “forum shopping” does not seem to be present where provisional measures are concerned, because of the very nature of the measures sought and their limited effect in time.<sup>194</sup>

106 This does not mean, however, that the foreign law cannot be consulted. It may be, especially to ascertain the likelihood that the subjective right claimed by the applicant for the provisional measure actually exists. And indeed, one writer argues that the foreign law has a much more important role to play.<sup>195</sup> However, it should be noted that this writer is commenting chiefly on family law, with its special features which may result in extra attention being paid to the foreign law on the merits in deciding whether to award and enforce a provisional measure.

#### SECTION 4 – RECOGNITION AND ENFORCEMENT

107 This question has so far been very little discussed as far as French law is concerned. Reference has simply to be made to the ordinary law on the recognition and enforcement of foreign judgments. Traditionally, in France, for a foreign judgment to be enforceable, it need not necessarily be final, but it must be enforceable abroad. The foreign judgment accompanied by an *exequatur* has no greater force in France than in its country of origin. Consequently, if it is challenged in its country of origin, the *exequatur* in France will lapse.<sup>196</sup>

108 Despite this principle, some writers are hesitant about the possibility of enforcing in France provisional measures ordered abroad. The main arguments against doing so turn upon the nature of the provisional or protective measures, which are directly linked with the means of enforcement. As such, they are considered to be within the exclusive province of the judicial authorities of the State where they were ordered.<sup>197</sup> One may ask whether this analogy is still relevant. After all, a protective measure is primarily a court order without carrying, as of itself, the nature of a writ of enforcement. However, the enforcement of the measure does carry that nature, but, at that point, the problem is not really different than the one posed for any other decision. Difficulties will only arise if the law of the forum does not itself provide for the measure ordered abroad, and if there is no means of enforcing it. However, the current principles on international judicial co-operation could make it compulsory for the court of the forum to proceed to execution by substitution - executing instead an equivalent measure which does exist in the forum law. In any case, there is now a tendency in French legal theory to admit the recognition or enforcement in France of certain foreign provisional measures. By way of example, it has been pointed out that an injunction not to act, ordered abroad in a case of unfair competition could possibly be enforced in France.<sup>198</sup>

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<sup>194</sup> On this point, see P. de Vareilles-Sommières, *op. cit. supra* note 183 on p. 401.

<sup>195</sup> P. Picone, “Misure provvisoria in materia familiare e diritto internazionale privato”, *Riv. Dir. Int.*, 1995, p. 1 *et seq.* on p. 30 *et seq.*

<sup>196</sup> Cass. Civ. 1, 12 November 1986, *Rev. crit. dr. int. pr.* 1987, 750 and the note.

<sup>197</sup> V. Delaporte *op cit.* note 143 on p. 155.

<sup>198</sup> D. Foussard, “Entre exequatur et exécution forcée - de quelques difficultés théoriques et pratiques relatives à l'exécution des jugements étrangers”, *Travaux du Comité français de droit international privé* 1997, to be published. The author is very circumspect, but he points out that a less reserved approach is taken by P. de Vareilles-Sommières, *op cit. supra* note 183; E. Jeuland, “Les effets des jugements provisoires hors du territoire du for”, *Rev. Rech. Jur* 1996.177.

## CHAPTER V – THE NETHERLANDS

### SECTION 1 – DESCRIPTION OF THE MEASURES

109 In Dutch law, as in French law, there is an abundance of provisional and protective measures. This is not surprising, since the Dutch Code of Civil Procedure has its origins in Napoleonic law. For the purposes of this study, we have chosen to concentrate only on protective attachment orders and the summary procedure for interim payment (*kort geding*).

110 Protective attachment orders are governed by articles 700 to 770 of the Code of Civil Procedure. Their purpose is to safeguard a right. They may be made in connection with any movable or immovable property, and any material or non-material assets of the debtor. Their effect is to make it impossible to dispose of these assets. In addition to attachment, the person in whose favour the attachment order is made may ask the court to place the asset in question in the custody of the court, by entrusting it to a depositary appointed by the court. This measure is awarded where there is a risk of the assets being concealed. The court may also order the assets to be wound up.

111 A protective attachment order may be enforced *vis-à-vis* a third party. This too is governed by articles 718-723.

112 The procedure for an order of attachment is a summary procedure, because of the need for rapidity which is typical of such orders. The order is made *ex parte*. This is justified by the surprise effect which an attachment calls for. But all protective attachments require authorisation by the court.<sup>199</sup>

113 When a court authorises an attachment, it must specify the time period within which the application on the merits is to be made, unless the case has already been introduced when the court makes its order. The time limit is at least eight days following the attachment. It will normally be longer if the application on the main case is to be instituted before an arbitrator or a foreign court. Moreover, the court may extend this time limit at the request of the applicant. If the set time limit is not observed by the beneficiary of the attachment order, the attachment will lapse (art. 700-3).

114 The court may require the beneficiary of the order to pledge a guarantee against any damages which may be sustained in the course of the attachment.<sup>200</sup> Since the law of 1 January 1992, there is no longer any validation procedure as such. It is the decision on the merits which will determine whether the protective measure was justified, by confirming it or ordering it to be lifted.<sup>201</sup> A protective attachment order will be enforceable when its beneficiary has obtained a writ of execution in the main case, whether the writ consists of a judgment in a Dutch court or a foreign judgment enforceable in the Netherlands.

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<sup>199</sup> Jurisdiction is normally conferred on the President of the district court. There are 19 of these in the Netherlands.

<sup>200</sup> Article 701 of the Code of Civil Procedure.

<sup>201</sup> Article 704 of the Code of Civil Procedure.

115 The attachment must be notified to the debtor, and in the case of an attachment *vis-à-vis* a third party, to the third party also, who will then have the option, as has the debtor, of asking the court to suspend the attachment.<sup>202</sup>

116 Dutch law also has an interim payment order (*kort geding*) which is historically close to the French interim payment order (*référé-provision*), but which also contains elements of an injunction; it is, in fact, a “measure of order”. It is enormously significant in practice. The procedure is a summary one, the decision handed down is, in principle, a provisional one, but in fact it often puts an end to the litigation. The Dutch summary provision is governed by articles 289 to 297 of the Code of Civil Procedure. The measure which is ordered may be an obligation to do or refrain from doing something, but may also consist of an order to pay a sum of money. On the other hand, declaratory action cannot be decided in summary proceedings.<sup>203</sup> The first condition is that there must be an emergency as stipulated in article 291. The *Hoge Raad* has decided that the court must appraise the existence of an emergency *ex officio*.<sup>204</sup> Moreover, the court in summary proceedings hears and weighs the arguments of the parties, and if these arguments are too complex, must reject the application.<sup>205</sup> The *Hoge Raad* has however stated that “according to the notions of contemporary law”, the court must be reticent in this respect.<sup>206</sup> In fact, in Netherlands practice the issues handled in “*kort geding*” may be extremely complex.

## SECTION 2 – DIRECT INTERNATIONAL JURISDICTION

117 Under articles 765-767 of the Code of Civil Procedure, an attachment may take effect in the Netherlands even if the debtor does not reside there, provided the property to be attached is in the Netherlands. This is called the “foreign attachment” (*saisie foraine*). In principle, jurisdiction for provisional measures does not create jurisdiction for the merits of a case. However, article 767 states that *subsidiarily*, the competence given to the court of the place where the assets are located confers on it jurisdiction for the merits by way of *forum arresti*, when jurisdiction for the merits is normally conferred on a foreign court, but that the resulting decision cannot be enforced in the Netherlands.<sup>207</sup> In such a case - a rare one in practice because of the large number of enforcement agreements, as well as the jurisprudence referred to below -<sup>208</sup> the judgment on the merits may be enforced even against other assets than those affected by the attachment.

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<sup>202</sup> Article 705 of the Code of Civil Procedure.

<sup>203</sup> *Hoge Raad* 2 April 1976, *NJ* 1977 No 361.

<sup>204</sup> 2 February 1968 *NJ* 1968 No 62.

<sup>205</sup> *Hoge Raad* 8 January 1965, *NJ* 1965 No 162 and 4 June 1993, *NJ* 1994 No 659. This requirement is identical to the one already explained for the French system, see above, No 86.

<sup>206</sup> See *Hoge Raad* 2 April 1993, *NJ* 1994 No 650, setting aside a judgment in which the Court had declined to consider the antecedents to a law based on an international convention, on the basis that this would go beyond the duties of the court in summary proceedings. This approach, according to the *Hoge Raad*, was “too narrow”.

<sup>207</sup> This will apply, for instance, if the foreign country on whose territory jurisdiction is based is not linked to the Netherlands by an agreement on the recognition and enforcement of foreign judgments.

<sup>208</sup> *Cf. infra* No 120.

118 If the parties are bound by a choice of forum clause, the Dutch court will lose its jurisdiction on the merits under the *forum arresti* rule, even if the judgment handed down by the court appointed under the clause cannot subsequently be enforced in the Netherlands, because there is no treaty on execution. The applicant must therefore, having obtained an award in his favour abroad, apply afresh to the Dutch court to obtain a writ guaranteeing enforcement of the attachment.<sup>209</sup> In that case, jurisdiction on the merits will be conferred according to article 431-2 of the Code of Civil Procedure. In all cases where a foreign decision cannot be enforced in the Netherlands because there is no treaty (or specific legal provision), a new procedure may be instituted in the Netherlands; the Dutch court will then have jurisdiction on the merits under article 431-2 of the Code of Civil Procedure.

119 As in France, the rules of direct jurisdiction in international cases are generally drawn from the rules of domestic territorial jurisdiction, in certain cases with adaptations to international relations. Thus the president of the court of the defendant's domicile (article 126.1 of the Code of Civil Procedure) is in principle competent to make an order in summary proceedings. Likewise, the president of the court for the applicant's domicile (article 126.3 of the Code of Civil Procedure) may assume international jurisdiction. However, presiding judges are inclined not to declare themselves competent in international cases where the case does not present enough connection with the Dutch legal system. They prefer in such cases to let the foreign courts more closely concerned handle the case (this solution may be seen as akin to the theory of *forum non conveniens*). In fact, this flexibility reflects the extremely informal character of the *kort geding* procedure, which has grown to such dimensions that the question arises whether it can be regarded as a "provisional measure" within the meaning of article 24 of the Brussels/Lugano Convention.<sup>210</sup>

120 In a judgment of 24 November 1989, the *Hoge Raad* found that the Dutch court had jurisdiction to order measures or make restraining orders having international effects.<sup>211</sup> In this instance, it was a matter of an infringement of an intellectual property right. The defendants, incidentally, were of United States, French and Dutch nationality, and the requested measure involved trademark infringements in Benelux. The fact that the measure would affect acts performed abroad did not prevent the Dutch court from ordering it, because the applicant stood to suffer losses in Belgium and Luxembourg.

121 The existence of a choice of forum clause in favour of a foreign court does not necessarily seem to prevent the President of the Dutch court from having jurisdiction in summary proceedings. In its judgment of 17 October 1991,<sup>212</sup> the Court of Appeal of Amsterdam, while declining jurisdiction in summary proceedings, seemed to admit the possibility that in certain urgent cases, the court in summary proceedings has jurisdiction in spite of the existence of a choice of forum clause.<sup>213</sup>

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<sup>209</sup> *Hoge Raad* 16 June 1995, *RvdW* 1995, No 139, confirming *Hoge Raad* 17 December 1993, *NJ* 1994 Nos 348, 349 and 350.

<sup>210</sup> For further remarks on this question, see below, No 147 *et seq.*

<sup>211</sup> Case of *Interlas v. Lincoln*, *NJ* 1992 No 404 and *NIPR* 1991 No 117.

<sup>212</sup> *NIPR* 1992, No 123.

<sup>213</sup> See also R.C. Gisolf, *Kort geding en rechter 1993*; Ch. 5, p. 79-97, (Th. M. de Boer).

## CHAPTER VI – SWITZERLAND

### SECTION 1 – DESCRIPTION OF THE MEASURES

122 As in German law, Swiss law has two provisional measures *largo sensu*. When the objective of the measure is to recover a sum of money, one must request a sequestration order (*séquestre*) (*Arrest*). For all other substantive rights, one may request a provisional or protective measure *stricto sensu* (injunction; *vorsorgliche Massnahme*, *provisorische Massnahme*). Distinguishing both categories is absolutely essential for the source of applicable law: the *séquestre* is regulated by a federal text which forms a unified body of law for the Swiss territory as a whole;<sup>214</sup> the other provisional measures are regulated by the Codes of Civil Procedure of the 26 cantons. In the latter case, the system is different from one canton to the other.<sup>215</sup>

123 A sequestration order is a measure which freezes the debtor's assets so that the creditor may be paid out of those assets once he has prevailed in the litigation on the merits. Such an order may be made as long as the creditor can show that he has a due debt<sup>216</sup> and that it does not enjoy any preferential claim. To be granted a sequestration order, the creditor must demonstrate that his claim is credible and that he is within one of the cases listed under article 271 of the LP.<sup>217</sup> In addition, and this is contrary to German law, the creditor must specify exactly which goods are to be sequestered and this must be done canton by canton, as a court in Geneva cannot order sequestration of property located in the canton of Zurich. The difficulty of doing this varies according to the nature of the property concerned:

- objects (movable or immovable, securities) must be designated by a description or a precise indication of their location;
- debts payable are indicated by stating the name and address of the creditor and of the debtor third party. In the case of a bank holding the pre-existing banking relationship between the sequestered debtor and the bank in which the sequestration is to take place must be demonstrated with a degree of probability.

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<sup>214</sup> Federal law on debt recovery and bankruptcy of 11 April 1889 (LP). The *séquestre* is regulated by articles 271 *et seq.* of the LP. This has been recently partially revised. The new text entered into force on 1 January 1997.

<sup>215</sup> There are three main categories of measures in Swiss law: protective measures (*Sicherungsmassnahmen*) which seek to keep the status quo on the subject of the dispute or other property, so that the right relied upon in the substantive case can later be enforced; regulatory measures (*Regelungsmassnahmen*) which are provisional measures par excellence, as they regulate a legal situation for a given period while awaiting a final decision; and measures ordering performance (*Leistungsmassnahmen*) which cancel the suspensive effect of an ordinary appeal against a decision already handed down, and enable the decision on the merits to be enforced, in whole or in part. As for investigative measures, these belong to a fourth category: they enable investigations to be ordered for later use in the proceedings on the merits, or to establish that there is in fact a legal claim protected by law (investigative measures *in futurum*). This list has been taken from the work of A. Bucher, *Droit international privé suisse*, Vol. I/1, Helbing & Lichtenhahn, 1998, p. 118 No 336.

<sup>216</sup> Art. 271, paras. 1 and 2 LP.

<sup>217</sup> *Cf. infra* No 125.



- goods held in trust, on the other hand, cannot be sequestered as they belong to the trustee.<sup>218</sup> Only fraud or wrongdoing will justify an exception to this rule: “When the absolute economic identity as between the debtor and the third party is not disputed nor contestable nor seriously contested, and when it is clear that the debtor is taking refuge in legal duality in order to evade enforcement”.<sup>219</sup>

It is also important to underline that only assets of the debtor located in Switzerland may be the subject of a sequestration order. This is due to the principle of territoriality which applies to forced execution. The Federal Supreme Court requires further that the assets be permanently in Switzerland. Thus, it is not enough that they be brought in the country on a temporary basis to be taken immediately outside.

124 The appointment of the assets to be sequestered poses special problems when the sequestration is carried out on assets deposited with a bank. Under the auspices of the former law, practice had allowed for the assets to be designated only by their generic nature (the so-called “generic” sequestration).<sup>220</sup> “Investigatory” sequestrations are not admitted. The sequestration is called “investigatory” where the creditor requests sequestration from a considerable number of banks, stating in so doing that he does not know whether assets belonging to the debtor are with one or the other of them.

125 Sequestration can be ordered in five instances specified by law:<sup>221</sup>

- when the debtor has no fixed abode;
- when the debtor, with the intention of evading his obligations, makes his assets disappear, flees or prepares to flee;
- when the debtor is in transit, or is in the category of persons who frequent fairs and markets, if the debt is immediately repayable by reason of its nature;
- if the creditor possesses a notice of property default against the debtor;
- when the debtor does not live in Switzerland, if there is no other case of sequestration, provided the claim has a connection with Switzerland or is based on an enforceable judgment or on an admission of debt.

126 As regards the latter case, where the debtor does not live in Switzerland, this provision has to be seen as follows: the criterion here is that of the domicile or headquarters of a legal person, not the nationality. Consequently, no sequestration can be sought against property of a Swiss citizen residing abroad. The notion of residence, domicile or headquarters is governed by articles 20 and 21 of the Federal law on private

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<sup>218</sup> ATF 107 III, 103, 104.

<sup>219</sup> J. Terracina, E. Mauge, X. Petremand, “Le nouveau droit du séquestre en Suisse”, *RDAI* 1996 p. 867 who cite an unpublished decision of the Federal Supreme Court of 29 March 1994.

<sup>220</sup> For example, the creditor would request sequestration of “all accounts, cash, claims, titles and other assets either on open deposit or in safes belonging to the debtor”.

<sup>221</sup> Art. 271, first paragraph of the LP.

international law.<sup>222</sup>

127 Furthermore, it will have been noted that in order to make an order for sequestration against a debtor who does not live in Switzerland, it is also required that the claim which underlies the order has a connection with Switzerland or is based on a title. This connection consists of either a Swiss domicile for the creditor, or one or other of the connecting factors in Swiss private international law concerning jurisdiction: a commercial activity in Switzerland or the availability of proof. On the other hand, the mere presence of property, or the nationality of one or other of the parties, do not seem to be enough to create a sufficient connection with Switzerland.<sup>223</sup>

128 As for the requirement of a title, which is another option for awarding a sequestration order when the debtor lives abroad, this will be either an enforceable judgment or an admission of debt. As regards an enforceable judgment rendered abroad, it is not necessary for the judgment to be recognised or enforced in Switzerland, provided it is enforceable in the State of origin.

129 A sequestration order is made on application by the creditor. The procedure is a summary one and *ex parte*. The court may impose guarantees on the creditor, either at the time when the order is made, or subsequently if the debtor has objected to the measure. The order in itself has no concrete value; it has to be put into execution by the competent administrative authority, that is, the execution department of the district concerned. The sequestration will then be carried out without delay, and both the debtor and the third party concerned will be informed of its existence.

130 An important innovation has been introduced through the reform of the LP by article 91 which imposes on the debtor a general obligation to provide information. He must give an up to date statement on the property he holds, even such items as are not in his possession, as well as on his claims and other rights *vis-à-vis* third parties.<sup>224</sup> The creditor may also ask for the premises and movables of the debtor to be made open and

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<sup>222</sup> Article 20 reads as follows:

“1 *For the purposes of this law, a natural person:*

*a has his domicile in the State in which he resides with the intention of settling there;*

*b has his habitual residence in the State in which he has lived for a period of time, even if this period is initially limited;*

*c has his establishment in the State in which the centre of his professional or commercial activities is located.*

2 *No person can have more than one domicile. If a person is not domiciled anywhere, the habitual residence will be determining. The provisions of the Civil Code on domicile and residence will not apply.”*

Article 21 provides:

“1 *For companies, the head office is the domicile.*

2 *The head office of a company is deemed to be the place appointed in the statutes or articles of association of the company. If none is appointed, the head office of a company is the place where the company is actually administered.*

3 *The establishment of a company is in the State where it has its head office or a branch office.”*

<sup>223</sup> It should be explained here that the various factors suggested in the text have not yet been confirmed by the case law. For instance, one may wonder whether Swiss nationality, shared by both parties to a case, would not perhaps create a sufficient connection.

<sup>224</sup> Art. 91, paras. 2 and 3 of the LP.

free of access.<sup>225</sup> A breach of this obligation will be sanctioned by the detention or fine laid down in article 323, chapter 2, of the Penal Code.<sup>226</sup>

131 As for a third party who holds property which is subject to sequestration, or the debtor of an obligation against whom sequestration has been ordered, he has a similar obligation to inform the creditor.<sup>227</sup> This rule applies to banks, which cannot therefore in principle hide behind banking secrecy. But unlike the obligation of information which is incumbent on the debtor, the one affecting third parties does not involve any criminal responsibility on their part, but simply a civil responsibility, insofar as the creditor who benefits from the sequestration would suffer damage from the absence of any indication of the presence or amount of the assets. This would be the case, for example, if the creditor were to incur expenditure fruitlessly in order to validate the sequestration, although the third party did not in fact hold any property belonging to the debtor.

132 The debtor must be notified of the sequestration. If the debtor is abroad, the notification must follow the ordinary rules for service abroad, either under treaty law or under ordinary law if there is no convention which applies. The foreign creditor may elect domicile in Switzerland, failing which he is deemed to be domiciled at the execution department.<sup>228</sup>

133 The notification ensures that the debtor will be informed, and will therefore be able to object to the sequestration. The aim of this procedure is to enable the court to ascertain, once the debtor has put his case, that the sequestration is well founded. The court must therefore ensure that the conditions for allowing sequestration are met: the probability of the obligation relied upon by the creditor being genuine; the existence of one of the cases for sequestration prescribed by law; and the designation and existence of the assets to be sequestered. The opposition procedure must be launched within ten days from the date on which the objector learned of the measure. The court must hear the parties and make a decision without delay, so that the procedure retains its summary and speedy character. A contested decision rendered by the court of sequestration may be appealed within ten days from the making of the award. But neither a challenge nor a subsequent appeal against the decision on the challenge will have any suspensive effect. The sequestration will therefore continue in force during this period, which explains the importance of a rapid procedure.

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<sup>225</sup> Art. 91, paragraph 3.

<sup>226</sup> We do not think the penal character of the sanctions in this text will change the attitude of foreign legal systems towards this obligation of information by the debtor. It is clear that non-pecuniary sanctions which can be imposed on a debtor will only apply in a territorial sense if the debtor comes to Switzerland; they cannot be applied abroad. This considerably reduces the obligation involved when the debtor is abroad. However, it remains an important obligation, a sister requirement of the *disclosure orders* in English law (see above, No 20).

<sup>227</sup> Art. 91, paragraph 4 of the LP. In this sense Swiss law is similar to German and French law.

<sup>228</sup> Art. 272, paragraph 2 of the LP. Art. 278, first paragraph of the LP.

134 The provisional nature of a sequestration makes it compulsory to hold a court hearing on its validity, so that the measure can be replaced by a judicial decision on the merits. In this respect, sequestration is very close to the French procedure of protective attachment. This validation procedure must be initiated within ten days of the date when the creditor receives the memorandum of the sequestration. This procedure for validation may take a variety of forms: a writ of execution to the execution department of the place where the sequestered assets are located, or a civil action under ordinary law.

135 In international cases, a civil action to validate the sequestration may be instituted in the Swiss forum of the sequestration if the debtor is domiciled abroad, subject to international treaty.<sup>229</sup> But this forum allows for concurrent fora, such as the one determined by a choice of forum clause.<sup>230</sup>

## SECTION 2 – DIRECT INTERNATIONAL JURISDICTION

136 The general rule on direct international jurisdiction is found in article 10 of the Federal law on private international law (hereinafter the LDIP), which states: “The Swiss judicial or administrative authorities may order provisional measures, even if they have no jurisdiction to deal with the merits of the case”. In addition, there are several special rules in different matters such as article 62, first paragraph, in matters of divorce or separation or article 89, in inheritance cases. We will not focus on these two areas, because they probably lie outside the substantive scope of the future Convention for which this study has been prepared.

137 Article 153 states: “Measures intended to protect the property in Switzerland of companies with their headquarters abroad will be taken by the judicial or administrative authorities of the place where the property is located”.<sup>231</sup>

138 The purport of article 10, and the language used, warrant an interpretation *a fortiori* of the text, leading to the conclusion that a Swiss court which has jurisdiction for the merits of the case may order provisional measures. In other words, all the provisions of the law on private international law which create direct jurisdiction on the merits of a case may warrant competence also for provisional and protective measures.

139 If despite the fact that there is jurisdiction on the merits on Swiss territory, an action has been brought before a foreign court, does the Swiss court still have power to order a provisional or protective measure? Article 9 of the LDIP states that the Swiss court should stay the proceedings where the action which has the same subject-matter is already pending between the same parties abroad, if it can be anticipated that the

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<sup>229</sup> Art. 4 of the Federal law on private international law.

<sup>230</sup> Art. 5 of the Federal law on private international law.

<sup>231</sup> Reference should also be made to article 168, which provides for protective measures when a foreign bankruptcy decision has to be recognised, and article 183, which authorises arbitration tribunals, meeting under article 176 *et seq.*, to order provisional measures. For the same reasons as those given above, we will not go into these issues in our study.

foreign court will render within a reasonable time a decision which can be recognised in Switzerland. Hence what is needed for the Swiss court with jurisdiction on the merits to decline to order a provisional or protective measure is that the foreign court which has to deal with the case on the merits is also dealing with an application for a provisional or protective measure. Otherwise, the conditions for article 9 to apply (same subject matter) would not be met. On the other hand, if the foreign court with jurisdiction on the merits already has before it an application for a provisional or protective measure, the Swiss court cannot make a decision irrespective of the jurisdiction provided in article 10. The explanation given here has not yet received any confirmation in the case law.

140 The power granted to Swiss courts under article 10 is subsidiary on two levels. Indeed, this provision is superseded, on the one hand, by all the provisions on jurisdiction on the merits as provided in the general or the special part of the law.<sup>232</sup> Thus, article 10 can only apply if there is no ordinary jurisdiction in favour of a Swiss judge.<sup>233</sup> In such a case, the reference to “Swiss administrative or judicial authorities” does not allow to ascertain which authority, *ratione loci*, has jurisdiction to order provisional measures. Legal scholars are divided on this question.<sup>234</sup> On one side, some authors interpret article 10 as article 24 of the Lugano Convention to the effect that it only refers back to cantonal law which must define which court has special jurisdiction to order provisional or protective measures. On the other side, some authors emphasise that article 10 is silent on this issue and leaves no room for a subsidiary application of cantonal law. The open form of article 10 would thus simply refer to the variety of measures available. For these authors, local jurisdiction would depend upon “the kind of measure to be taken or the localisation of the right or the claim to be protected”.<sup>235</sup> Finally, we note that legal scholars are divided also on the question whether the forum of necessity (art. 3) may serve as a basis to grant provisional measures.<sup>236</sup>

### SECTION 3 – APPLICABLE LAW

141 With the exception of two specific clauses, article 62, paragraph 2 (divorce), and article 183, paragraph 2 (arbitration), the LDIP does not expressly provide for the designation of the law applicable to provisional measures.

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<sup>232</sup> B. Dutoit. *Droit international privé suisse, Commentaire de la loi fédérale du 18 octobre 1987*, 2<sup>nd</sup> ed., Basel 1997, and Article 10, No 1.

<sup>233</sup> Decision by the Federal Supreme Court of 5 March 1991, *Revue suisse de droit int. et europ.* 1991, pp. 190-1996; Tribunal of the canton of Zoug, 20 October 1989, *Revue suisse de droit int. et europ.* 1991, pp. 368-369.

<sup>234</sup> See O. Merkt, *Les mesures provisoires en droit international privé*, Neuchâtel 1993, pp. 133-136 and Bucher *op. cit. supra* note 214, p. 128 *et seq.*

<sup>235</sup> Message concerning a federal law on private international law, p. 42.

<sup>236</sup> See the discussion in Bucher, *op. cit. supra* note 214, p. 129, No 377.

142 Legal scholars have different solutions to offer. For Knoepfler and Schweizer, the court must consider whether the *lex causae* makes provisional measures “a kind of accessory, indissolubly linked to the substantive right in issue”.<sup>237</sup> If this is the case, these writers believe that the court must then take account of the rules of the *lex causae*. These writers are not clear on the question whether the foreign law has to be applied or merely taken into consideration. On the other hand, if the measure is essentially connected with the procedure, it is part of the *lex fori*. Schwander takes the view that provisional measures must not protect disputed claims by means of more incisive or distinctly more effective measures that the proceedings on the merits would be able to provide. The court dealing with the provisional measures must therefore apply the *lex causae*. For others, by contrast, it is the *lex fori* which has to be applied.

143 The truth probably lies somewhere between the two. A provisional or protective measure has no purpose, within the meaning given to it in this study, except to support a case on its merits and to safeguard rights connected with it. This is why the *lex causae* has to be examined, among other things, in order to ascertain whether certain conditions for granting the provisional measure are met. Hence the degree of probability of the claim relied upon by the creditor must be governed by the *lex causae*.<sup>238</sup> As one writer says,<sup>239</sup> “These legal instruments of protection are among the effects of the subjective claim, and delimit its effectiveness”. To establish the need for protection to which the applicant may point, reference should be made to the law applicable to the merits of the case. It is not enough to abide by the law of the forum; there is the risk that no appropriate measure will be found in it, and so the substantive right will remain without the protection it could enjoy under its *lex causae*. On the other hand, there is little point in resorting to a measure of the forum court to provide a contested claim with a form of protection unknown to the law applicable to the merits of the case.<sup>240</sup> However, the law of the forum governs the procedural aspects of the litigation, the presentation of evidence and the requirements to prove alleged facts, the obligation to furnish a guarantee, the requirement for an action for validation within a certain time limit, and any decision to substitute an equivalent local measure for a measure peculiar to the foreign law which cannot be transposed to the forum court.

144 What has just been said of the distributive application of the *lex causae* and of the *lex fori* can be somewhat confusing, bearing in mind that a protective measure must normally be ordered in an emergency. The court ordering it will have great difficulty in establishing exactly what the foreign law has to say if it is to carry out its investigation with the required degree of rapidity. This difficulty will usually lead, even implicitly, to the suppletive application of Swiss law.<sup>241</sup> We therefore end up with a solution akin to the one described for France.<sup>242</sup>

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<sup>237</sup> Cf. *Precis* p. 211.

<sup>238</sup> ATF 110 II 188.

<sup>239</sup> Andreas Bucher, *op. cit. supra* note 215, p. 126, No 364.

<sup>240</sup> Cf. the references to learned writings given by the author, No 364 *in fine*.

<sup>241</sup> Bucher, *op. cit. supra* note 215, No 366, p. 126.

<sup>242</sup> Cf. *supra* No 105.

**SECTION 4 – RECOGNITION AND ENFORCEMENT OF FOREIGN PROVISIONAL MEASURES**

145 It seems that Swiss law has always been reluctant to recognise or enforce foreign decisions made for provisional or protective purposes.<sup>243</sup> However, for some years now, this traditional attitude seems to have been softening, and this probably dates back to the entry into force of the 1988 Lugano Convention. As we know, in this instrument, like the Brussels Convention, article 25 on the recognition and enforcement of foreign decisions makes no exception for measures adopted under article 24.<sup>244</sup> The LDIP does not expressly govern the recognition of foreign provisional measures, except in cases of inheritance.<sup>245</sup>

146 In all other areas, the LDIP fails to specify whether provisional or protective measures ordered abroad can be recognised or enforced on Swiss territory. The general conditions for the recognition and enforcement of foreign decisions are governed by articles 25 to 32 of the text. Article 25 (b) states that the foreign decision must no longer be open to appeal in the ordinary way, or must be final. The same clause, sub-paragraph (c), refers back to article 27 for the other grounds for refusal of recognition or enforcement. For some writers, it is the requirement for the foreign decision to be final which excludes recognition in Switzerland of a foreign provisional measure.<sup>246</sup> Of course, it all depends on what is meant by finality. If there is a different interpretation, whereby the concept of a final decision has to be taken in the broad sense of the term, it is possible that this requirement will act as a bar to recognition of provisional or protective measure).

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<sup>243</sup> Knoepfler/Schweizer, *Les mesures provisoires et l'arbitrage*, *Recueil des travaux suisses sur l'arbitrage international*, Zurich 1984, p. 233.

<sup>244</sup> We will deal with this in greater detail below, No 147 *et seq.*

<sup>245</sup> This is art. 96, paragraph. 3, which states: “protective measures ordered in the State where the property of the deceased person is situated must be recognised in Switzerland”.

<sup>246</sup> Staehelin, *BJM* 1989 p. 180-181.

## CHAPTER VII – BRUSSELS AND LUGANO CONVENTIONS

147 The Brussels<sup>247</sup> and Lugano<sup>248</sup> Conventions contain a clause on provisional and protective measures. This is article 24, which is identical in both Conventions:<sup>249</sup> “Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.” This text, with its brevity and concision, seems at first simple to interpret and apply. In practice, however, it poses a number of problems not all of which have yet been elucidated by the case law of the European Court of Justice. What follows is intended to draw the attention of the experts on the Special Commission to the chief issues of interpretation, and to assist in the process of preparing a text for adoption in the future Hague Convention.<sup>250</sup>

148 The first question which arises is how to define the concept of “provisional or protective measures”. There is no definition in the text itself, and as we have seen in the foregoing discussion,<sup>251</sup> comparative law shows us that these measures vary considerably in their nature, their reach and their design from one legal system to another. Article 24 relies on a straightforward *renvoi* to the law of the contracting State in which the measures have been requested. However, in view of the policy which has been clearly defined by the European Court of Justice since the entry into force of the Convention, the emphasis should be placed whenever possible on an autonomous interpretation of the concepts used in the Convention.<sup>252</sup>

149 It was in its judgment in the case of *Reichert II*<sup>253</sup> that the Court defined what is to be understood by provisional or protective measures, within the meaning of article 24. It ruled that they were “measures which [...] are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the

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<sup>247</sup> *Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, done at Brussels on 27 September 1968, adopted under article 220 of the Treaty of Rome. This Convention can be ratified by Member States of the European Union, only.

<sup>248</sup> *Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, done at Lugano on 16 September 1988. This Convention is to be ratified by Member States of the European Union, on the one hand, and Member States of the European Free Trade Association, on the other. It may also be extended to other States, especially those who have concluded association agreements with the European Union during the interim period before being admitted to membership of the Union.

<sup>249</sup> In what follows, we refer simply to the Brussels Convention. These remarks also apply, *mutatis mutandis*, to the Lugano Convention.

<sup>250</sup> However, we cannot deal here in any detail with the many academic discussions which have arisen concerning each of the problems of interpretation surrounding article 24.

<sup>251</sup> *Cf. supra* Chapters I to VI.

<sup>252</sup> *Cf.* the third judgment rendered in interpretation of the Brussels Convention, case of *LTU v. Eurocontrol*, case 29/76, 14 October 1976, Report, p. 1541.

<sup>253</sup> Case C 261/90. 26 March 1992, Report, I. 2149.



*court having jurisdiction as to the substance of the matter*".<sup>254</sup>

150 In spite of this definition, the matter has remained controversial, especially as regards the summary provision in French and Luxembourg law, or the *kort geding* of Dutch law. In France, the Court of Cassation has yet to give a ruling, and the appeal courts are divided on the issue.<sup>255</sup> In Luxembourg, on the other hand, the only decision so far on record comes out clearly against including the summary provision within the scope of article 24.<sup>256</sup> As for the Netherlands, the *Hoge Raad* put a preliminary question to the Court of Justice of the European Communities in the case *van Uden Maritime BV*.<sup>257</sup> In this case, the company *van Uden Maritime*, incorporated under Dutch law, was taking action against the company *Deco-Line*, a company under German law, for payment of a sum due to it in accordance with a charter party, although the latter agreement contained an arbitration clause and the *van Uden* company had had recourse to that clause for the merits of the dispute. At first instance, the president of the tribunal decided that he had jurisdiction and that article 24 should apply in order to award the summary measure sought by the company *van Uden*. As a basis of jurisdiction, the president mentioned article 126 (3) of the Dutch Code of Civil Procedure, which however is regarded as an exorbitant jurisdictional ground according to article 3 of the Brussels Convention. Although the Court of Appeal set the judgment aside on other grounds, in its reasoning it upheld the opinion of the president of the court of first instance that article 24 of the Brussels Convention does in fact apply to the *kort geding*, and the Dutch court may therefore base its jurisdiction on article 126 (3) of the Code of Civil Procedure, provided the case shows enough connecting factors with the Dutch legal system. It was on appeal on a point of law from the appeal judgment that the *Hoge Raad* applied to the European Court of Justice. Advocate General Léger concluded that interim payment orders such as the *kort geding* of Dutch law are covered by Article 24, even though the case on the merits is already before a court. He is of the opinion that national courts can assert jurisdiction on any rule under their respective laws, including those bases of jurisdiction listed in Article 3, second paragraph, of the Convention. Finally, he is of the opinion that an arbitration clause has no bearing, apart

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<sup>254</sup> Recital 34 of the decision. In this case, Mr and Mrs Reichert, who lived in Germany, owned a piece of property situated on the territory of the commune of Antibes, in France. They had given its "bare ownership" to their son, through a notarial act in France. This gift was challenged by the Dresdner Bank, a creditor of the Reicherts, before the Tribunal de Grande Instance of Grasse (France), the place where the disputed property was situated. The bank based its action on article 1167 of the French Civil Code, under which the creditors, in their own name, are entitled to impugn acts done by their debtor which deprived them of their rights. This is the type of action called "*paulienne*". The bank argued that this action under French law (but unknown in German law) was a protective measure within the meaning of article 24 of the Brussels Convention. Having given the definition reproduced textually here, the Court concluded that the *paulienne* action under French law, although a means of protecting the creditor's floating charge by preventing voluntary impoverishment of his debtor's assets, is not intended to preserve a *de facto* or *de jure* situation pending a court decision on the merits of the case. On the contrary, it tends to alter the legal position of the debtor's property, and that of the beneficiary, by ordering revocation *vis-à-vis* the creditor of the deed of gift entered into by the debtor depriving him of his rights.

<sup>255</sup> In favour of applying article 24 to interim payments, Chambéry 2 March 1992, *Gaz. Pal.* 1992, II, p. 511, note Mourre. Against the application of article 24, Rennes 4 November 1992, *Gaz. Pal.* 19 October 1993, Summary, comment by Mourre. These two judgments are reprinted in *JDI* 1994, 173, comment by A. Huet. We note also that French legal scholars are extremely divided on this question.

<sup>256</sup> Luxembourg Court of Appeal, 7<sup>th</sup> Chamber, Case No 12 898, 26 November 1991 (*Bernard Ruckert v. Gilbert Karmann*), *Bulletin du Cercle François Laurent*, 1993, II, p. 141.

<sup>257</sup> Case 391/95. The Advocate General presented his conclusions on 10 June 1997. The decision by the Court is expected for 10 November 1998.

from what is provided by the *lex fori*. On these three issues, the Court's decision is awaited with great curiosity.

151 The second disputed interpretation of article 24 bore on the question whether provisional or protective measures which are requested on the basis of this text must relate to a matter within the scope of the Convention as defined in article 1. There were no fewer than three decisions before the European Court of Justice was apparently able to silence controversy on this subject. In the case of *De Cavel I*,<sup>258</sup> the Court found that a provisional measure closely associated with divorce proceedings does not fall under article 24, since divorce lies outside the scope of the Convention. In the case of *De Cavel II*<sup>259</sup> the Court confirmed this decision *a contrario*. In fact, in the first *De Cavel* decision, there was a genuine provisional or protective measure, and the Court had stated that it was of its nature ancillary to the main case. The second decision involved an application for maintenance payments, and this was regarded as a separate matter, insofar as the question of maintenance obligations, as the Court states, "is, by itself, included in the notion of civil matters". This is confirmed in article 5 (2) of the Convention, which provides for a specific competence concerning maintenance obligations. But the clearest statement from the Court comes in the third decision,<sup>260</sup> where it holds expressly that "*article 24 ... may not be relied on to bring within the scope of the Convention provisional or protective measures relating to matters which are excluded from it*".

152 The text of article 24 does not lay down any specific jurisdictional criterion to show which court has the power, according to this article, to order the provisional and protective measures sought by a plaintiff. Moreover, although there is a clear *renvoi* to national law for the nature of the measures concerned, it is merely implicit as regards jurisdiction. In fact, this text seems to indicate that jurisdiction derives from the law applicable to the merits. If this interpretation is correct, the competence question would be merely a general competence, *i.e.*, that of the judicial system of a Contracting State as a whole. To find out which court has special jurisdiction, it would still be necessary to apply the ordinary law of the member States. But this poses the question of article 3 of the Convention - how far would it take effect? In other words, one must ask whether a court dealing with provisional measures has to rest its jurisdiction on the exceptional rules which are precluded by article 3 of the Convention. So far, the Court of Justice of the European Communities has not given a verdict on this issue. It must be expected to do so, because of the preliminary question put to it by the *Hoge Raad* in the *van Uden* case.<sup>261</sup>

153 Pending the decision of the Court of Justice, some lines of reasoning may be suggested. First, it should be noted that article 3, which lists exorbitant forms of jurisdiction which are excluded by the Convention, is placed in Title II, "Jurisdiction", in an initial section called "General provisions". Because of the place it holds, it may be thought that article 24, which is in section 9 of the same Title, must be part of the overall scheme of these general provisions. But the *chapeau* of article 3 seems to contradict this initial reaction, since its scope is confined to sections 2 to 6 of Title II. And as we have just pointed out, article 24 is placed in section 9. From this *chapeau* to

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<sup>258</sup> Case 143/78, 27 March 1979, Report, p. 1055.

<sup>259</sup> Case 120/79, 6 March 1980, Report, p. 731.

<sup>260</sup> *C.H.W. v. G.J.H.*, case 25/81, 31 March 1982, Report, p. 1189.

<sup>261</sup> *Cf. supra* No 150.

article 3, the following conclusion seems to arise: the forms of jurisdiction which are excluded by article 3 are excluded only for a case on the merits to which the rules in sections 2-6 apply. As a form of jurisdiction which may justify action by a court dealing with provisional measures, they would no longer be quite so exorbitant, because of the very nature of the measures concerned. Indeed, this is why the author of the first report on the Brussels Convention states that provisional and protective measures under article 24 may be required from the competent authorities “without taking into account the jurisdictional rules of the Convention”.<sup>262</sup> This is also, partially, how the Advocate General has reasoned in the *van Uden* case.<sup>263</sup>

154 However, one cannot help thinking that although this is probably the only possible interpretation, because of the structure and present wording of the Brussels Convention provisions, it is bound to be open to abuse. Two examples will make this clear. A French national could obtain an award for interim payment in France by virtue of article 14 of the Civil Code, which confers jurisdiction on the French courts because of the applicant's nationality, even if the case shows no connection with French territory and regardless of the place where the future decision has to be enforced. An English court could award a *Mareva* injunction even if its jurisdiction is based solely on the fact that the original summons was served on or notified to the defendant at a time when he was temporarily on United Kingdom territory. As we see, the relationship between jurisdiction for provisional measures and exceptional forms of jurisdiction (or prohibited ones, in the language adopted at The Hague) is fundamental in ensuring sound application in practice of the text in question. Moreover, it must immediately be said that if there is a mere *renvoi* to the law of the contracting States, there would be nothing to prevent an English court, at that point, from applying the doctrine of *forum non conveniens* in the case described above.<sup>264</sup>

155 The difficulties posed by article 24 in relation to the other provisions of the Convention are not confined solely to article 3. The question has also arisen of how article 24 is to operate in conjunction with articles 16, 17, 21 and 22. As regards article 16, the Jenard Report explains that the court only has exclusive jurisdiction under article 16 if the proceedings have to do with the merits of the case.<sup>265</sup> Although most writers concur with this interpretation, some have challenged it either as a whole<sup>266</sup> or in part, depending on the subject matter of the various subparagraphs of article 16.<sup>267</sup> O. Merkt takes the view that in each case, one must ascertain the objective pursued by the clause in the Convention, and decide whether the award of a provisional or protective measure by a court other than the court of this exclusive forum might imperil this objective. This approach, an attractive one in theory, seems to us to be too complicated to permit of a proper application of the Convention's provisions. It does however show

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<sup>262</sup> Jenard Report, *OJEC* 1979, No C 59, p. 42.

<sup>263</sup> *Cf. supra* No 150.

<sup>264</sup> What we just explained in the text is also exemplified by the circumstances in the *van Uden* case. The Hague Court of Appeal, while approving the use of an exorbitant basis of jurisdiction, required nonetheless, that there are some close links with the Netherlands before the requested measure is ordered.

<sup>265</sup> *OJEC* 1979 No C 59, p. 34.

<sup>266</sup> O'Malley and Layton, *European Civil Practice*, Sweet & Maxwell, London 1989, p. 652 No 24.08.

<sup>267</sup> O. Merkt, *Les mesures provisoires en droit international privé*, thesis, Hubert Druck AG, Neuchâtel, 1993, p. 120 No 304.

that there is a need for a better drafting in order to establish the relationship between the exclusive forms of jurisdiction and those which relate to the provisional and protective measures.

156 As regards article 17, the same controversy exists as for article 16. The parties are of course free to decide in advance, in their choice of forum clause, whether it is to apply also to provisional measures. However, practice shows that the parties rarely think of doing this. It should also be noted that there are virtually no contentious cases on this issue. And if we admit, as the Jenard Report does for article 16 of the Convention, that article 24 does not constitute a waiver, we cannot see why the exclusivity which might pertain to the jurisdiction chosen by the parties should be stronger than that contemplated in article 16. In this respect, we recall that the *Hague Conventions of 15 April 1958 on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods*<sup>268</sup> and of *25 November 1965 on the Choice of Court*,<sup>269</sup> state that the choice of forum has no impact on provisional and protective measures.

157 Finally, as regards the relationship between article 24 and articles 21 and 22, we find it difficult to reconcile their wording and logic with the nature and objective of a clause on provisional and protective measures. Indeed, it is clear that the aim of articles 21 and 22 is to prevent irreconcilable decisions on substantive issues being made. In this sense, these texts do not relate to the measures referred to in article 24. Of course, it quite frequently happens that a plaintiff requests protective measures against the same defendant from several different courts located in different countries. But it is not usually possible to apply the rules of *lis pendens* (article 21) because the conditions for these are not met: the object of the proceedings is usually not the same. Moreover, because of the doubts concerning the extraterritorial effect of any awards made,<sup>270</sup> we think the question of *lis pendens* and connexity cannot be raised in this context.

158 The application of article 24 is limited to cases in which jurisdiction on the merits is conferred to another Contracting State. This requirement does not raise any problem in the context of the Brussels Convention; but it is mentioned here in order to highlight the issue as regards the future Hague Convention. It may in fact be thought, in the context of this Convention, that the clause on provisional and protective measures may apply even if jurisdiction for the merits does not lie with a Contracting State.

159 As regards recognition and enforcement in a Contracting State of a provisional or protective measure awarded in another State, this calls for application of Title III of the Convention. This begins with article 25, stating as follows: "For the purposes of this Convention, 'judgment' means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court." On the basis of this text, it is not possible to exclude provisional or protective measures from the decisions envisaged in the Convention. Indeed, that was

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<sup>268</sup> See article 4.

<sup>269</sup> See article 6, paragraph 4.

<sup>270</sup> Cf. *infra* No 159 *et seq.*

the understanding of the European Court of Justice, in the first *De Cavel*<sup>271</sup> decision. However, it is equally clear that the other provisions of Title III also apply, including the exceptions to recognition or enforcement contemplated in article 27.

160 This is why, in the *Denilauler* case,<sup>272</sup> the Court of Justice explains that the Convention deals essentially with judicial decisions which, before their recognition and enforcement is sought in a State other than the State of origin, have been or could have been, in the State of origin, the subject of adversarial proceedings of one kind or another. For this reason, if in the context of proceedings in the State of origin the defendant cannot be summoned or heard in some fashion, the decision which authorises the measure cannot be covered by the regime of Title III of the Convention. Obviously, this decision removes some of the attraction of provisional measures, the primary aim of which is to be applied and take effect before the defendant dissipates his assets. Nevertheless, some provisional measures may have extraterritorial effect, once the defendant has been heard, and may not be the less effective for that. For instance, under a decision of 22 September 1995, the single judge on the Zurich District Court handed down a decision recognising a *Mareva* injunction by virtue of the Lugano Convention.<sup>273</sup> In this case, the English court had heard the defendants; after being notified of the *Mareva* injunction, they had obtained a hearing before the court in order to have its terms amended.

161 Nevertheless, it was for this reason that the Court of Justice, again in the *Denilauler* judgment, explained that: “*The courts of the place or, in any event, of the Contracting State, where the assets subject to the measures sought are located, are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures ordered*”. But we cannot go so far as some writers in concluding from this that provisional measures can only be ordered by the court of the place where the measure is to be enforced, especially as the Court of Justice itself refrains from going as far as this.

162 In the context of the revision of the Brussels and Lugano Conventions, the European Commission proposed an amendment in article 18 *a* of the revised text. It reads as follows:

“1 *Where such provisional or protective measures as are available under the law of a Contracting State are to be enforced in its territory, they may be sought in that State, irrespective of the place where they produce their effects, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.*

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<sup>271</sup> Cf. *supra* No 151.

<sup>272</sup> Case C 125/79, 21 May 1980, Report, p. 1553.

<sup>273</sup> This decision is cited by Nathalie Voser, “Recognition and enforcement of foreign interim measures in Switzerland”, *International Litigation News*, January 1997, p. 27.

2 For the purposes of this Convention, provisional, including protective measures means urgent measures for the examination of a dispute, for the preservation of evidence or of property pending judgment or enforcement, or for the preservation or settlement of a situation of fact or of law for the purpose of safeguarding rights which the courts hearing the substantive issues are, or may be, asked to recognize.”<sup>274</sup>

163 There is no need to paraphrase the Commission's proposal, but some aspects are worthy of comment. First, the Commission places emphasis on a treaty definition of provisional and protective measures, being stricter than the one given by the European Court of Justice in the *Reichert II* case,<sup>275</sup> in that it insists on an emergency as one of the conditions for implementing the treaty provision. On the other hand, it widens the definition by including in it all the evidentiary means as well as measures intended to “resolve” a de facto or de iure situation, not merely to maintain the status quo. Bearing in mind the variety of theoretical views excited by the definition in the *Reichert II* case, the Commission certainly sought to authorise the court dealing with provisional measures to resolve certain issues, even on a temporary basis, for a given period. But taken literally, the definition given in the *Reichert II* judgment does not allow for this.

164 The most important innovation in the Commission's proposal relates to jurisdiction. The first paragraph of article 18 *a* clearly confers jurisdiction on the court of the place where the measure is to be enforced, as will in practice apply in the great majority of cases. However, the Commission added the following words: “whatever the place where they will have effects”. It is not very clear what the Commission intends by this. It seems to be drawing a distinction between the effects of the measure and its enforcement. Most of the time, the two will coincide. But there is one possible case in which they could not be the same: this is the case of *Mareva* injunctions. In this case, the injunction may be enforced on English territory, the territory on which the debtor is “situated” and having regard to the fact that the measure has an effect *in personam* on the debtor himself. However, if it is an extraterritorial injunction, *i.e.* one which has an impact on assets outside the United Kingdom, it may produce effects in other States. It may, for example, prevent transfer of ownership of an asset belonging to the defendant, but which is located outside UK territory. But if this is the underlying notion in the clause proposed by the Commission, we believe it would be clearer and easier for the litigant to apply if the text were worded differently, for instance by clarifying the difference in jurisdiction and effects as between measures *in personam* and measures *in rem* or, in other words, between injunctions and the measures which are directly associated with a given asset or collection of assets.

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<sup>274</sup> *JOCE*, 1998 C 33 of 31 January 1998, p. 20.

<sup>275</sup> *Cf. supra* No 149.

## CONCLUSION

165 It will be clear from the foregoing that the experts of the Special Commission will probably wish to consider whether the Convention itself should contain a definition of what is meant by “provisional or protective measures”. If it is decided to include such a definition, it must also be decided whether urgency should be one of the conditions set for the award of a provisional or protective measure. We may say here that this will require, at the least, certain explanations and examples in the Report in order to assist litigants (and later the courts) in gaining an idea of the circumstances in which a provisional or protective measure may be ordered. But this approach may perhaps give rise to more argument than the drafters of the Convention would wish. A further decision to be made is whether investigative or probative measures (such as an expert examination) should be included in the treaty provision.<sup>276</sup>

166 Furthermore, the relationship between the clause on provisional and protective measures and the other Convention provisions will have to be defined in considerable detail. Are the treaty provisional measures confined to subjects covered by the Convention, or may the treaty provision be applied outside these? If the Convention specifies exclusive jurisdiction, the role of provisional and protective measures in relation to such jurisdiction must be explained. The same goes for the choice of forum. It should also be made clear whether the treaty provision may apply even if jurisdiction for the merits does not lie with a court of a contracting State. Finally, the extent of the extraterritorial effect to be given to measures awarded in a contracting State calls for explanation.

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<sup>276</sup> This point is especially important in view of the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.