Provisional Relief in Transnational Litigation

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In this article, Professor Bermann identifies and analyzes the principal problems raised by the rapidly growing phenomenon of transnational provisional relief. National courts are facing serious challenges in organizing such interventions, but as yet lack a sufficiently comprehensive framework of analysis. The author begins with the clarifying distinction that provisional relief may be transnational either because of its significant effects abroad or because it lends support to protective measures ordered by foreign courts, and draws on the experiences of U.S. and foreign courts in determining the costs of both granting and withholding provisional relief. He concludes that, despite the very real risk of drawing objections from other countries, U.S. courts should be more receptive to requests for protective measures with extraterritorial effect when shown compelling circumstances for granting them.
The recent growth of transnational litigation in the courts of all countries has brought with it a heightened interest in issues of cross-border provisional relief. This is not surprising, given the importance of provisional relief in litigation generally and its obvious applicability to transnational litigation. As practitioners increasingly resort to remedies of this sort, courts have been called upon to determine how ready they are both to resort (or permit resort) to provisional relief from foreign tribunals and to afford such relief in aid of foreign judicial proceedings when asked to do so.

Transnational provisional relief is not, however, without its serious theoretical and practical problems. Because its incidence has until recently been fairly sporadic, neither courts nor commentators have explored the problems of transnational provisional relief in all their magnitude. The purpose of this article is to identify what it is that renders transnational provisional relief so problematic, to explore the
scenarios in which the issue most characteristically arises, and to propose a policy framework by which courts may address the multitudinous claims to transnational provisional relief that are inevitably coming their way.

This is not to say that courts in the U.S., or other countries for that matter, have been inattentive in general to their interactions with foreign courts. Some judicial interactions occur more or less routinely, and national legal systems have tended to respond to these interactions with more or less conventional solutions; in the U.S., these solutions sometimes may be found in treaties or in statutes (typically, though not invariably, federal). Service of process abroad is a good example, for both the United States Code\(^2\) and the Hague Service Convention\(^3\) (to which the United States is a party) address that issue with some specificity. The same may be said about cooperation in making evidence from U.S. sources available for use in litigation abroad, and vice versa.\(^4\) As to recognition and enforcement of foreign country judgments, another perennial "inter-jurisdictional" issue, state rather than federal legislation plays the dominant role.\(^5\)

Other recurring inter-jurisdictional problems have traditionally been left for the courts themselves to solve. These include questions of whether and to what extent courts should decline to exercise their statutory jurisdiction in deference to the parties’ prior designation of a foreign court as the exclusive forum,\(^6\) in deference to an arbitration agreement,\(^7\) in deference to the greater convenience of litigation abroad,\(^8\)

\(^2\) See 28 U.S.C. § 1696 (1994) (permitting district court to "order service . . . of any document issued in connection with a proceeding in a foreign or international tribunal"). See also FED. R. CIV. P. 4(f) (permitting service upon individuals in a foreign country).


\(^4\) See 28 U.S.C. §§ 1781-82 (1994) (discussing evidence gathering in the United States in aid of foreign or international tribunals); FED. R. CIV. P. 28(b) (prescribing conditions for depositions in foreign countries); FED. R. CIV. P. 29 (permitting parties to stipulate to discovery (including depositions) overseas).


Some legislative guidance is offered by the Uniform Foreign Money-Judgments Recognition Act, which provides that a foreign monetary judgment entitled to recognition in a state is enforceable "in the same manner as the judgment of a sister state which is entitled to full faith and credit." See UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 3 (1962).


\(^8\) See generally Piper Aircraft v. Reyno, 454 U.S. 235 (1981); In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195 (2d Cir. 1987).
or in deference to the pendency abroad of an action on the same or a related dispute. Similarly left for judicial policymaking is the question of when, if ever, a court may issue an anti-suit injunction to prevent someone over whom the court has jurisdiction from bringing or maintaining an action in the courts of another country.

The fact remains that, as a general phenomenon, transnational provisional relief is far less well defined than the more conventional sorts of judicial interventions (or non-interventions) that I have just identified. Serving process or obtaining evidence abroad, recognizing or enforcing foreign judgments, and declining the exercise of jurisdiction on the grounds mentioned are all, in themselves, relatively definite and discrete operations. For all the controversy surrounding it, even the international anti-suit injunction is a reasonably clear form of intervention with reasonably clear consequences. By comparison, the notion of provisional relief is much less well defined and its consequences much more difficult to gauge. If this is so when issues of provisional relief arise in domestic litigation (as I believe it is), it is all the more so when they are introduced into the necessarily more turbulent waters of transnational litigation.

Lack of definition, however, is only part of the problem. Transnational provisional relief presents other complexities as well. First of all, such relief is sometimes sought principally by a party and sometimes by a court itself. Understandably, the identity of the requesting party may affect the way in which a court evaluates a request for relief addressed to it. This particular complexity seldom arises in connection with requests for transnational service of process or for the other, more conventional judicial interventions mentioned above. At least in U.S. courts, such conventional requests are apt to be uniformly understood (or at least treated) as essentially party-driven rather than court-driven, and evaluated in those terms. But U.S. courts may truly not appreciate the extent to which a request for provisional relief in aid of foreign litigation actually has the blessing of the foreign court in question. And even if a request is not expressly couched in terms of the interests of the foreign forum, the response of a U.S. court will inevitably affect the foreign proceedings in important ways. Under these circumstances, the U.S. court cannot, or at least should not, make

9. See generally Laker Airways, Ltd. v. Pan American World Airways, 604 F. Supp. 280 (D.D.C. 1984) (court had previously shown deference and patience during pendency of English proceedings; following House of Lords decision to show deference to U.S. proceedings, court declared itself to be the only forum of competent jurisdiction).

its willingness to intervene depend solely (as is typically the case in the other scenarios mentioned above) on its own interests or on the interests of the parties to the foreign proceeding.

Second, it may also be necessary in cases of transnational provisional relief to distinguish between situations in which a party to foreign litigation seeks relief from a U.S. court and situations in which a foreign court issues its own order of relief and the U.S. court is merely asked (typically by the party in whose favor it was granted) to "enforce" it. The U.S. court may want to treat these situations differently, precisely because in the latter case the foreign court has issued its decree; surely international comity carries greater weight when the foreign court has actually spoken.

Third, discussion of transnational provisional relief often entails some confusion between two distinct questions: whether the court that is asked to intervene by way of provisional relief has jurisdiction to entertain such a request; and whether the application makes out a sufficient case on the merits for granting that relief. Confusion between jurisdiction and merits is much less likely to arise in connection with the more usual forms of international judicial intervention. For example, a court may not even need an independent jurisdictional basis to perform service of documents on a party, though it is very likely to have one. Similarly, a court does not necessarily have to invoke a jurisdictional basis in order to assist a foreign court in the production of evidence—though it certainly will need one in order to compel production. Theoretically, a court may look for a jurisdictional basis to justify enforcing a foreign country judgment, but in practice it will consider the mere presence of assets to be a satisfactory basis. And it goes without saying that, when a court declines jurisdiction in deference to the parties' prior selection of a foreign forum, or for some other reason, it does not first have to establish a basis of jurisdiction for doing so—though once again, it needs jurisdiction in order to take the further step of compelling a party to submit to the jurisdiction of a foreign court or international arbitral tribunal. In contrast to all of these situations, requests for provisional relief seem to invite both a jurisdictional inquiry and (if the result is positive) a determination of the claim for relief on the merits. The distinction between the two may often be difficult to trace, but it is not without significance.

All of these considerations help make the subject of transnational provisional relief a problematic one. The intellectual and practical problems of such relief have not, however, dissuaded parties from requesting it or prevented courts from sometimes raising the prospect on their own motion. As a result, these problems are arising, often enough
with some urgency. In this article, I seek to contribute to their proper analysis.

In Part II of this article, I consider provisional relief that is transnational by virtue of the significant effects it has on persons, property, or conduct located abroad. I begin by defining the principal scenarios that generate claims to transnational provisional relief of this sort and the forms that such relief is likely to take. My purpose is to identify the specific problems that these scenarios and these forms of relief typically entail, and to suggest how courts may best cope with them. In Part III, I consider a related but distinct aspect of transnational provisional relief: the readiness of courts of country Y to lend their support to protective measures that a court of country X has ordered in an action pending before it, at the request of either the country X court or a party to the country X action. This facet of the subject is no less complex. Among the problems apt to arise in both situations are the anticipated and, in some cases, the real objections of other countries. This is the subject of Part IV.

Not surprisingly, I conclude that transnational provisional relief is both an imperative of, and a potential threat to, contemporary international litigation. Absent more comprehensive international agreements than now exist, national courts have no choice but to weigh carefully the costs associated both with granting and withholding relief. In my judgment, U.S. courts (like U.K. courts) are on the right track in entertaining requests for protective measures with extraterritorial effect, and in granting them on occasion when shown compelling circumstances for doing so. On the other hand, the few U.S. courts that have addressed the question of enforcing foreign court orders of provisional relief have thus far adopted too restrictive an attitude toward it. It is to be hoped that this is mostly a product of the relative novelty of this scenario, and that further experience and reflection will yield a more nuanced and more basically positive judicial response.

II. THE TRANSNATIONAL EFFECTS OF PROVISIONAL RELIEF

The aims of provisional relief are essentially the same whether the need arises in transnational or in purely domestic litigation. Perhaps its principal purpose is to ensure that assets within the jurisdiction of the court will remain available for satisfaction of an eventual money judgment. It is easy enough to place this need in a transnational context by imagining, in a case brought by party A against party B in country X, that the assets of party B located in country Y will be needed, to
satisfy an eventual judgment, and that those assets are at risk of disappearance.

In a sense, the pre-judgment attachment of assets as security merely illustrates a broader purpose of provisional relief, namely to help preserve the status quo pending litigation. But preserving the status quo clearly may mean other things as well, such as protecting the subject matter of the dispute or preventing further harm while the litigation is underway. Here, too, transnational applications of provisional relief are easily imagined, as when the subject matter of the dispute before the courts of country X is physically present in country Y and there is reason to fear for its survival.

Put in still broader terms, provisional relief may be thought of simply as a means of enhancing in some fashion the effectiveness of pending litigation. Provisional relief typically is sought from the same court as the one in which the litigation whose efficacy is in question is pending, but that will not necessarily be the case; it may well be sought to enhance the effectiveness of litigation pending elsewhere. Provisional relief becomes truly transnational when the two courts in question belong to two independent States. In no field have U.S. courts more fully explored the potential value of transnational provisional relief than bankruptcy. The lessons learned in the bankruptcy field may be particularly instructive in determining whether transnational provisional relief should be made more widely available in other fields.

In this section, I treat each of these scenarios in turn. I focus in each case on a situation in which the principal action is pending in a court of the United States and the provisional relief that is contemplated is in some sense extraterritorial—that is, furnished abroad. The prospect of transnational provisional relief is somewhat different in each of these scenarios, and so are the problems that it generates.

A. Securing Satisfaction of a Future Judgment

This section discusses the prospect of attaching in country Y the assets of party B, whom party A has sued in country X, due to the risk that B will dispose of the assets needed to satisfy a potential country X judgment. If other countries did not generally recognize this risk as sufficient to justify an award of provisional relief in the form of attachment or of an injunction against the dissipation of assets in domestic litigation, the prospects for transnational relief of this sort might well be dim. But provisional relief to secure satisfaction of a future judgment is hardly unique to the United States; the laws of other
countries provide a similar remedy, albeit sometimes in a different form. U.K. courts, for example, have asserted the right to issue orders enjoining persons from removing or disposing of their assets—orders whose disobedience the courts can presumably punish in the same way that they punish disobedience of court orders generally. This particular remedy bears the name of a *Mareva* injunction, after the 1975 decision in which the House of Lords established it.\(^\text{11}\) The remedy has since been codified by statute.\(^\text{12}\)

There are different ways in which attachments to secure satisfaction of a future judgment can assume transnational dimensions. Since these ways differ significantly, each needs to be analyzed separately. While some will prove relatively simple, others will prove to be problematic.

1. Attaching Domestic Assets of Non-National Parties

It is much too late in the day to suppose that a U.S. court’s willingness to grant provisional relief will depend simply on the nationality of the parties to the litigation. More specifically, neither the nationality of the applicant nor of the respondent has any bearing on the availability of such relief. In what appears to be the only U.S. case even to raise the possibility that the nationality of the applicant might matter, the court assumed this to be a factor of no importance.\(^\text{13}\)

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\(^{11}\) *See* Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A., [1975] 2 Lloyd’s Rep. 509 (C.A. 1975). According to the opinion of Lord Denning in that case, “If it appears that [a] debt is due and owing—and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment—the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.” *Id.* at 510. For further elaboration of the contours of the *Mareva* injunction, see the Court of Appeal opinions in *Third Chandris Shipping Corp. v. Unimarine S.A.* (*The Pythia, The Angelic Wings, The Genie*), [1979] 2 All E.R. 972 (Q.B. 1979).


\(^{13}\) “[W]hile the damaged parties are German Nationals who may have some remedies in their native country, this Court will operate under the same equity principles with respect to them as it does with respect to American citizens.” USACO Coal Co. v. Carbomin Energy, Inc., 539 F. Supp. 807, 814 (W.D. Ky. 1982).
possible immunity of non-national defendants from prejudgment attachment of property, the question seems never to have been raised. The U.S. assets of non-U.S. nationals have commonly been attached for purposes of securing an eventual judgment. 14 This does not necessarily mean, of course, that a court is free to attach property within its jurisdiction without regard to whether the property owner has sufficient contacts with the jurisdiction for due process purposes. On the contrary, the case of Shaffer v. Heitner 15 stands for the proposition that even assertions of quasi-in-rem jurisdiction require "minimum contacts" within the meaning of International Shoe Co. v. Washington. 16 The Shaffer case, of course, involved an assertion of quasi-in-rem jurisdiction for purposes of obtaining jurisdiction over the defendant to adjudicate the merits of the case, and not merely for purposes of securing satisfaction of a future judgment. In fact, the Court in Shaffer held out the possibility of a "security" exception to the requirement of minimum contacts in quasi-in-rem jurisdiction, remarking in dictum that a plaintiff might be entitled, without demonstrating minimum contacts of any kind, to attach property located in one state "as security for a judgment being sought in [another] forum where the litigation can be maintained consistently with [the] International Shoe [case]." 17

In reliance on this language, some courts have asserted jurisdiction for pre-judgment attachment purposes based on nothing more than the presence within the jurisdiction of the assets to be attached. 18 This does


The case for awarding provisional relief in a proper case is stronger, of course, where the addressee is a U.S. national who is merely resident overseas. See United States v. Shaheen, 445 F.2d 11, 11 (7th Cir. 1971). In that case, the government’s request for an order forbidding a taxpayer from leaving the jurisdiction was granted by the lower court on the ground that the taxpayer's presence was necessary to enforce an order requiring him to repatriate assets then located in Europe. The taxpayer was a U.S. national who had taken up residence abroad, but had briefly returned to the U.S. for the limited purpose of defending a criminal action against him. Though the Court of Appeals vacated the injunction as unnecessary, it saw no reason why it could not be issued to a non-resident.

In International Controls Corp. v. Vesco, 490 F.2d 1334, 1338 (2d Cir. 1974), the court permitted attachment for security purposes of a vessel of Panamanian registry owned by a Panamanian company, where the vessel was undergoing repairs at a Miami dry dock. It may have been decisive that the Panamanian company was found to have "performed no function other than that of a mere nominee or shell" of the principal defendant, Vesco, over whom the court indubitably had personal jurisdiction. Id. at 1355.

not seem at all unreasonable. U.S. courts are not deemed to violate due process when they enforce a foreign country judgment against a judgment debtor who has no contacts with the forum other than ownership of local property that can be used to satisfy the foreign judgment.19 If that is so, there is no reason why the presence of local assets belonging to a party cannot also support a pre-judgment attachment to secure payment of an eventual judgment against the property owner, provided of course that the usual criteria for the award of provisional relief are met and the attachment is otherwise proper.

2. “Attaching” Foreign Assets

Far more interesting is the question of whether, in anticipation of a judgment in its favor, a claimant may have recourse to its opponent’s assets abroad for purposes of securing satisfaction of that judgment. Strictly speaking, of course, a court cannot attach assets of the defendant that are not located within the court’s jurisdiction.20 Assuming the defendant is itself “present,” however, the court does have the power to issue an injunction prohibiting it from disposing of foreign assets.21

21. See United States v. Ross, 302 F.2d 831, 834 (2d Cir. 1962). In this action to subject a taxpayer’s property to jeopardy assessments for unpaid income taxes, the district court issued an order forbidding the transfer of the taxpayer’s property, appointing a receiver, and directing the taxpayer to deliver shares of stock to the receiver. The Court of Appeals affirmed, holding that the taxpayer’s failure to file income tax returns for two years or to pay income taxes for four years, and his transfer of a large volume of assets out of the jurisdiction, justified this order of relief:

   The court had personal jurisdiction over Ross, acquired by personal service of summons on his authorized agent. Personal jurisdiction gave the court power to order Ross to transfer property whether that property was within or without the limits of the court’s territorial jurisdiction . . . .

   The action of the District Court in ordering appellant over whom it had jurisdiction to do an act in a foreign country does not per se involve any invasion of the sovereignty of that country . . . . Of course no court should order the performance of an act in a foreign country when that act will violate the foreign country’s laws.

   Id. at 834 (citations omitted).

   See also In re Feit & Drexler, 760 F.2d 406, 415 (2d Cir. 1985) (“[i]n the present case, there is no question that the district court had personal jurisdiction over [the owner of the property]. Accordingly, the district court had the power to order [her] to transfer her property to [an] escrow agent regardless of where that property was located”); In re Guyana Dev. Corp., 189 B.R. 393, 396 (S.D. Tex. 1995) (construing 26 U.S.C. § 6321, creating a lien in favor of the U.S. upon “all property and rights to property” belonging to a tax delinquent, as reaching all of the latter’s property, both foreign and domestic, and refusing to be influenced by the
While not an attachment as such, an order of this kind may well produce the same practical effect.

The mere fact that the assets in question are located abroad renders the relief transnational in an important respect. One can imagine that, faced with this situation, a court (of country X) will exercise a greater than usual degree of caution in entertaining applications for provisional relief. Not only does such an order interfere with property physically located within the jurisdiction of a foreign state (country Y), and thus operate in a sense extraterritorially, but the court of country X by definition lacks direct means of enforcement against the property in the event that its order is not obeyed. The difficulty may become apparent if and when the court of country X finds it necessary to enlist the cooperation of the authorities of country Y. Winning recognition of the injunction in country Y—and, moreover, getting it enforced in an appropriate fashion by the authorities of country Y—may be problematic. Indeed, the court of country X may hesitate to issue the order in the first place precisely because it anticipates that the authorities of country Y will withhold their cooperation.

The leading American case is Republic of the Philippines v. [prospect that such a lien may not be enforceable in the foreign jurisdiction].

22. The question of whether a court should award provisional relief in the form of an attachment of extraterritorial assets is to be distinguished from the question of whether a court should exercise jurisdiction over an action on the merits concerning those assets. The latter question arose in Islamic Republic of Iran v. Pahlavi, 464 N.Y.S.2d 487 (N.Y. App. Div. 1983). There, a New York appeals court upheld a dismissal on forum non conveniens grounds of an action by the Government of Iran asking a New York court to impress a constructive trust on the worldwide assets of the former Shah and his wife on account of his misuse of powers. The court regarded the cause of action as insufficiently related to New York:

Although the list of assets does include some assets with a relation to New York, this is not a case of a dispute as to the ownership of specific property in this state. The complaint asks to impress a constructive trust on assets of the defendants throughout the world; it asks for an accounting of all monies and property of any kind received by the defendants from the Government of Iran, together with all profits derived therefrom . . . . This is plainly a transitory action arising in Iran . . . .

[The fact that plaintiff chose to bring its suit in New York, rather than in one of the other jurisdictions where the Shah sojourned after his flight, [should not] force us to accept the burden of that suit. New York will have fully discharged its limited responsibility to provide a system of justice applicable to the dispute between plaintiff and its former rulers if New York courts are available for the determination of disputed claims to the ownership of specific property having a situs in New York. That is not this case.

Id. at 490-91. The Court of Appeals affirmed the lower court decision in a ruling that made it clear that forum non conveniens dismissal may be proper even in situations where there is no alternative forum abroad. See Islamic Republic of Iran v. Pahlavi, 467 N.E.2d 245, 249 (N.Y. 1984).
This was a suit by the Republic of the Philippines against its former president, his wife, and others. The suit involved a claim under the Racketeer Influenced and Corrupt Organizations (RICO) Act, and pendent state law claims, arising out of the defendants' investment in the U.S. of fraudulently obtained moneys. The plaintiff petitioned the district court for a preliminary injunction prohibiting the defendants from disposing of any of their assets, except as needed to pay their attorneys' fees and meet their normal living expenses. Those assets included real property and other assets of the Marcoses located not only in the U.S., but also in the U.K. and Switzerland. The district court's order issuing the injunction, which had been vacated by a panel of the Court of Appeals, was reinstated by the Court of Appeals sitting en banc. The court ruled that the district court had not abused its discretion in granting the injunction. After finding that the plaintiff had shown a sufficient probability of success on the merits and a sufficient likelihood of irreparable injury, and that the balance of hardships tipped sharply in the plaintiff's favor, the court turned to the "extraterritoriality" issue:

The injunction is directed against individuals, not against property; it enjoins the Marcoses and their associates from transferring certain assets wherever they are located. Because the injunction operates in personam, not in rem, there is no reason to be concerned about its territorial reach.

In a related case, the Ninth Circuit upheld a district court order temporarily enjoining the Marcos estate from transferring, secreting, or dissipating the estate's assets. That injunction was to remain in effect during the pendency in the district court of a damage action against the estate by families of victims of alleged torture, summary execution, and disappearance. Citing the estate's pattern of secreting and dissipating assets to avoid satisfying court judgments, the court concluded that money damages would not be an adequate remedy. Its order thus barred the estate from transferring any of its assets, including $320 million held

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23. 862 F.2d 1355 (9th Cir. 1988).
24. The Court of Appeals found that the freeze order was not an attachment (and therefore not dependent under Federal Rule of Civil Procedure 64 on state law, in this case California law), but rather an injunction, and thus within the court's inherent equitable powers to preserve the status quo. See id. at 1361.
in Swiss and Hong Kong banks.26

The Marcos decisions were not without precedent. In 1965, in an action by the United States against a Uruguayan corporation for $19 million in income taxes owed, the Supreme Court sustained a federal court order enjoining a New York bank from transferring any assets of the corporation held in the bank’s Montevideo branch. Deeming the branch to be within the court’s jurisdiction on account of the close control exercised over it by the New York office, the Supreme Court concluded that “[o]nce personal jurisdiction of a party is obtained, the District Court has authority to order it to ‘freeze’ property under its control, whether the property be within or without the United States.”27 Justice Douglas’ only apparent reservation was over the propriety of considering the home and branch offices of the bank as a single entity for these purposes.28 In fact, in none of the many cases in which U.S. courts have been asked to restrict a party’s use of overseas assets has a


In addition to satisfying the requisite substantive standards for provisional relief, an order for the pre-judgment attachment of assets (or other similar injunctive remedy) may have to meet procedural due process requirements. In a criminal case arising out of the prosecution of the Panamanian ruler Manuel Noriega for international drug trafficking, a federal court held that the government deprived Noriega of his due process rights by persuading certain foreign countries to freeze temporarily millions of dollars in bank accounts without first conducting an adversarial hearing in which he could refute the charge that the assets in question were linked to drug trafficking. It held that he could not, in any event, be deprived of access to those assets needed to pay his attorney fees unless and until the assets were shown in fact to be connected with illegal activity. See United States v. Noriega, 746 F. Supp. 1541, 1544 (S.D. Fla. 1990). Another relevant case is Connecticut v. Doehr, 501 U.S. 1, 2 (1991). In that case, the United States Supreme Court ruled that a state statute authorizing pre-judgment attachment of real estate without prior notice or hearing, and without requiring a showing of exigent circumstances, runs afield of the requirements of due process.

27. United States v. First Nat'l City Bank, 379 U.S. 378, 384-85 (1965). “If such relief were beyond the authority of the District Court, foreign taxpayers facing jeopardy assessments might either transfer assets abroad or dissipate those in foreign accounts under control of American institutions before personal service on the foreign taxpayer could be made. Such a scheme was underfoot here, the affidavits aver.” Id. at 385.

28. That is not to say that a federal court in this country should treat all the affairs of a branch bank the same as it would those of the home office. For overseas transactions are often caught in a web of extraterritorial activities and foreign law beyond the ken of our federal courts or their competence. We have, however, no such involvement here, for there is no showing that the mere “freezing” of the Montevideo accounts, pending service on [the taxpayer], would violate foreign law (citation omitted) or place [the bank] under any risk of double liability (citation omitted). The District Court reserved power to enter any protective order of that character (citation omitted). And if...the litigation might in time be embarrassing to United States diplomacy, the District Court remains open to the Executive Branch.

Id. at 384-85.
court treated the "extraterritorial" character of the restraint as a salient factor.\textsuperscript{29} Even when they ultimately deny injunctive relief of this sort, courts do not apparently lay much emphasis on the fact (if such is indeed the case) that the property is located in another jurisdiction.\textsuperscript{30}

On occasion, litigants have urged that courts refrain from issuing orders restraining the use of property located abroad in the absence of available sanctions in the event such orders are disregarded.\textsuperscript{31} In my judgment, it is unwise for courts to refrain from issuing otherwise appropriate orders to a person within the jurisdiction merely because they anticipate resistance on the part of the addressee and/or an unwillingness on the part of the foreign authorities to compel obedience. The better course would be for the court to issue the order that the circumstances suggest, hoping that a foreign court will lend the appropriate assistance. If such assistance is not forthcoming, the court should then consider issuing its own contempt order enforceable by fine or arrest.\textsuperscript{32} It is true that, at the present time, the U.S. is a party to very

\begin{footnotesize}
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\item \textsuperscript{29} \textit{See} Reebok Int'l, Ltd. v. Marnatech Enters., Inc., 970 F. 2d 552, 556 (9th Cir. 1992) (court has inherent equitable power to prohibit a party from transferring its assets; this power is ancillary to its authority to provide final equitable relief for the sale of counterfeit goods under the Lanham Act); Securities & Exch. Comm'n v. International Swiss Invs. Corp., 895 F.2d 1272, 1276 (9th Cir. 1990) (courts have equitable powers to require foreign defendants to perform or refrain from performing acts overseas, including an accounting to identify assets subject to disgorgement under the securities laws); \textit{In re} Feit & Drexler, Inc., 760 F.2d 406, 416 (2d Cir. 1985) (bankruptcy trustee is entitled to injunctive relief prohibiting former owner of debtor corporation from disposing of assets in Swiss bank accounts); Fleming v. Gray Mfg. Co., 352 F. Supp. 724, 726 (D. Conn. 1973) (injunctive relief may be granted to give plaintiffs control over defendants' securities in order to ensure the availability of assets to satisfy a judgment, even when the securities are outside the jurisdiction); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 53 (1971).

\item \textsuperscript{30} \textit{See} Chemical Bank v. Haseotes, 13 F.3d 569, 573 (2d Cir. 1994); Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 197 (3d Cir. 1990). In \textit{Hoxworth}, the court suggested that the location of the property was in fact irrelevant: "We assume that the district court intended to prohibit the transfer of funds from a location inside the United States to a location outside the United States, although the paragraph could be read alternatively as prohibiting the transfer of funds located outside the United States. Resolving this ambiguity is not critical to our disposition of the present appeal, but the district court might wish to clarify its language in any order it might issue during future stages of the litigation." 903 F.2d at 193-94, n.10.

\item \textsuperscript{31} \textit{See infra} text accompanying note 50.

\item \textsuperscript{32} \textit{See} International Swiss Invs. Corp., 895 F.2d at 1277. In the \textit{Ross} case, the court likewise dismissed the argument that the addressee of the order was outside the court's jurisdiction for enforcement purposes:

\begin{quote}
Appellant urges that the orders of the court are \textit{brutum fulmen} because Ross is a resident of the Bahamas against whom enforcement powers are not available. One is tempted to inquire why, if the orders are ineffectual, the appellant is making such strenuous efforts to get them reversed. But in any event the argument that an order is an abuse of discretion because the party to whom the order is directed may refuse to obey it, is quite unappealing.
\end{quote}

302 F.2d at 834. The court left open the question of whether similar orders might be directed
few mutual cooperation agreements with other countries, and that the prospects of compelling cooperation by foreign authorities may thus not be great. Experience with such agreements as do exist is, however, favorable. For example, on the basis of a cooperation treaty with the U.K., a federal court hearing a civil forfeiture action asserted authority to reach the overseas assets of a non-U.S. national. According to the court, the demonstrated cooperation of the U.K. authorities under the treaty permitted the conclusion that the U.S. court had constructive control over the overseas funds necessary to support in rem jurisdiction, whether or not it had in personam jurisdiction over the Colombian nationals and residents who owned the property.

No American decision to date, however, approaches the U.K. case of *Derby & Co. Ltd. v. Weldon* in its extensive treatment, and enthusiastic embrace, of the extraterritorial freeze of assets. In June 1987, Derby and other members of a U.S. banking group brought suit against two U.K. nationals (as well as two companies, one Panamanian and one Luxembourg) for breach of contract, negligence, breach of fiduciary duty, deceit, and conspiracy to defraud. In December of that year, the plaintiffs sought *ex parte* orders from the Chancery Division restraining the individual defendants from removing assets from certain of the jurisdictions—France, Italy, Germany, Luxembourg, Ireland, Belgium, the Netherlands, and the U.K.—in which they were located. They also applied for orders restraining the individual defendants from disposing of any of those assets, except insofar as they exceeded £25 million in value. Having won those orders, the plaintiffs then sought to have them both extended until the time of judgment in the main action and broadened to cover all assets of the defendants, wherever located. In addition, the plaintiffs asked the court to order the defendants to disclose the location and value of all their assets.

to persons who, though in privity with *Ross*, were outside the territorial jurisdiction of the court.

For discussion of the problem of enforcing orders that compel action outside the jurisdiction, see generally Ernest J. Messner, *The Jurisdiction of a Court of Equity over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State*, 14 MINN. L. REV. 494 (1930). Messner concludes that U.S. courts commonly issue orders requiring parties before the court to perform acts outside the court’s territorial jurisdiction. *Id.* at 528.


The Chancery Division found that the plaintiffs had made a "good arguable case" and had established a sufficient risk that the defendants might dispose of their assets before judgment to justify continuation of the protective order until the time of judgment. The court noted that while Mareva orders previously had been limited to assets located within the jurisdiction, there was no reason in principle why, in a proper case, such orders could not be issued with respect to assets located overseas. On the other hand, the court declined to make this particular order fully world-wide (or to require disclosure of the defendants' world-wide assets), citing the burdensomeness to the defendants of an order of that scope and the absence of proof of dishonesty on the defendants' part.

On appeal, the Court of Appeal reversed this last aspect of the Chancery Division's decision. While conceding that a world-wide injunction (and the ancillary disclosure order) was a "drastic" and potentially "oppressive" remedy that should only be granted in exceptional circumstances, it nevertheless found such circumstances to be present. Essentially, it determined that the defendants' assets in the U.K. were wholly insufficient to satisfy a prospective judgment, and that there was a high risk that the defendants would dispose of their substantial foreign assets in anticipation of an adverse judgment. Apparently, the evidence "of previous malpractice or nefarious intent" on the defendants' part was critical for Lord Justice May. Acknowledging that the Mareva jurisdiction "is a developing one," he nevertheless concluded that "this case... is one which cries out for a [pre-judgment] worldwide Mareva injunction...."

The other judges, though concurring in the result, were no less cautious in their attitude toward the remedy. Nicholls, L.J., said:

An order restraining a defendant from dealing with any of his assets overseas, and requiring him to disclose details of all his assets wherever located, is a draconian order. The risk of prejudice to which, in the absence of such an order, the


37. "[T]he oppression will still be very severe because the respondents, while preparing for a very complicated trial in England, may at the same time find themselves engaged in courts overseas in applications of a Mareva nature; bearing in mind that the plaintiffs with all their resources may not be slow to seek to engage the respondents in as many courts as possible." Judgment by Mervyn Davies, J., of June 20, 1988, [1989] E.C.C. 273, 280 (Ch.).

38. See id.


40. Id. at 54.
plaintiff will be subject is that of the dissipation or secretion of assets abroad. This risk must, on the facts, be appropriately grave before it will be just and convenient for such a draconian order to be made. It goes without saying that before such an order is made the court will scrutinise the facts with particular care. I do not think that it is correct that, if an order is made in the present case regarding overseas assets, such an order will become, or should become, the norm in cases where a restraint order is made regarding assets within the jurisdiction. Parker, L.J., added that a world-wide Mareva injunction would clearly be unjustified if there were sufficient English assets to cover the judgment in question, if there was no real risk of the foreign assets being disposed of, or if such an order “would in all the circumstances be oppressive.” He found none of those circumstances to be present. On the other hand, to mitigate the harshness of the remedy, the court conditioned its grant on the plaintiffs’ undertaking neither to apply to a foreign court to enforce the order against the individual defendants, nor to use any information disclosed by the defendants about their overseas assets, without first obtaining the English court’s permission.

Shortly thereafter, the plaintiffs sought similar world-wide injunctions and ancillary disclosure orders against the Panamanian and Luxembourg corporate defendants. The trial court ordered those remedies and appointed a receiver of assets of the Luxembourg company (CMI), but not of the Panamanian one (Milco). CMI appealed the orders addressed to it, and the plaintiffs appealed the court’s refusal to issue such orders against Milco. In the Court of Appeal, CMI argued that, even conceding (1) that the individual defendants were likely to dissipate their own assets prior to judgment, (2) that they exercised a high degree of control over CMI and Milco, (3) that CMI and Milco could be found liable at trial in respect to the claims in the case, and (4) that both CMI and Milco might dissipate their own assets as well, a world-wide injunction should nevertheless not issue against it because it (unlike the individual defendants) had no assets whatsoever within the jurisdiction of the court. CMI also argued that it was improper for the court to appoint a receiver for assets outside its

41. Id. at 62 (emphasis added).
42. Id. at 56.
43. To the same effect, see Tate Access Floors Inc. v. Boswell, [1990] 3 All E.R. 303, 310-11 (Ch.).
jurisdiction.

In upholding the CMI orders, Lord Donaldson reaffirmed that "[t]he normal form of order should indeed be confined to assets within the jurisdiction . . . [since] . . . most defendants operate nationally rather than internationally."45 "But, once the court is concerned with an international operator, the position may well be different." He continued:

[T]he key requirement for any Mareva injunction, whether or not it extends to foreign assets, is that it shall accord with the rationale upon which Mareva relief has been based in the past. That rationale . . . [is] that no court should permit a defendant to take action designed to frustrate subsequent orders of the court. If for the achievement of this purpose it is necessary to make orders concerning foreign assets, such orders should be made, subject, of course, to ordinary principles of international law.46

As to CMI's specific claim that a U.K. court may not issue an extraterritorial order against a party having no assets at all in the U.K., Lord Donaldson rightly replied that the argument had "neither rhyme nor reason."47 In fact, he rightly found the argument to be perverse: "[O]ther considerations apart, the fewer the assets within the jurisdiction the greater the necessity for taking protective measures in relation to those outside it."48

Lord Donaldson also rejected the notion that the court should appoint a receiver of the foreign assets of a company having no residence in the U.K. only if the foreign authorities are likely to assist such a receiver in the functions entrusted to it by the U.K. court. He considered it sufficient that the foreign company is a party to the U.K. action who "can properly be ordered to deal with its assets in accordance with the orders of this court, regardless of whether the order is recognised and enforced [by the local authorities]."49

45. Id. at 79. He continued: "[This means] that the court should not go further than necessity dictates, that in the first instance it should look to assets within the jurisdiction and that in the majority of cases there will be no justification for looking to foreign assets."

46. Id.

47. Id.

48. Id. Neill, L.J., agreed, seeing "no good reason for saying that a practice [such as the Mareva injunction, and particularly the world-wide Mareva injunction] which has so recently come into existence has already become ossified." He thus agreed that, while it would be "unusual" to issue an order against the foreign assets of a party having no assets at all within the jurisdiction, there was no reason categorically to exclude that possibility. Id. at 92.

49. Id. at 86.
The court then reviewed the lower court's denial of provisional relief against Milco—a denial that had been based on the fact that, unlike CMI (which was incorporated in Luxembourg), Milco was incorporated in a country (Panama) that was not a party to the Brussels Convention on Jurisdiction and Enforcement of Judgments and was therefore not obligated to enforce a U.K. injunction. Lord Donaldson, quite properly, was not impressed with this distinction either:

Courts assume, rightly, that those who are subject to its jurisdiction will obey its orders . . . . It is only if there is doubt about whether the order will be obeyed and if, should that occur, no real sanction would exist, that the court should refrain from making an order which the justice of the case requires . . . .

[In the context of the grant of the Mareva injunction, I think that a sufficient sanction exists in the fact that, in the event of disobedience, the court could bar the defendant's right to defend. This is not a consequence which it could contemplate lightly as it would become a fugitive from a final judgment given against it without its explanations having been heard and which might well be enforced against it by other courts . . . .

So far as enforcement [against Milco] is concerned, . . . the ordinary sanction of being debarred from defending should suffice, but in any event I think that it is a mistake to spend time considering whether English orders and judgments can be enforced against Panamanian companies in Panama. Whilst that is not perhaps the last forum to be considered in the context of such enforcement, it is certainly not the first. If in due time the plaintiffs are concerned to enforce a judgment against Milco, they will be resorting to the jurisdiction where its assets, if any, happen to be.50

The court thus refused to allow any distinction to be drawn between CMI and Milco on this basis.

Notwithstanding its willingness to issue world-wide *Mareva* injunctions in appropriate circumstances, the Court of Appeal has drawn the line at persons who are not parties to the main action and are not otherwise deemed to be within the court's jurisdiction. In what is known as the *Babanaft* proviso, after the case in which it was first laid

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50. *Id.* at 81-82.
down, the U.K. courts consider that they should not, and under international law may not, seek to control the activities abroad of foreign nationals who are not subject to the ordering court’s personal jurisdiction. It is difficult to argue with this proposition.

Given its close consideration of the proper international scope of Mareva injunctions, U.K. case law may be a useful source of guidance for American courts as they venture into the realm of provisional restraints on foreign assets. Although, like most exercises of discretion, the determination of how far to reach in quest of assets to secure satisfaction of a future judgment depends on the totality of the circumstances, at least some guidelines seem to have emerged from U.K. practice. For one thing, the British courts claim to regard provisional restraints on overseas assets more favorably when the applicant asserts an actual property interest in those assets than when it merely treats them as a convenient way of securing satisfaction of a judgment. In the same vein, they seem to find the extraterritorial Mareva injunction less unattractive when the purpose of the U.K. action is to adjudicate the merits of a claim, rather than merely to enforce a judgment rendered by a foreign court or international arbitral tribunal. However sensible these (and other) guidelines may be, it is nevertheless


The situation may be different when the U.K. court is ordering measures of provisional relief under Article 24 of the Brussels Convention. See infra notes 172-76 and accompanying text.


[T]here is all the difference in the world between proceedings in this country, whether by litigation or by arbitration, to determine rights of parties on the one hand, and proceedings in this country to enforce rights which have been determined by some other court or arbitral tribunal outside the jurisdiction.

Where this court is concerned to determine rights then it will, in an appropriate case, and certainly should, enforce its own judgment by exercising what would be described as a long arm jurisdiction. But, where it is merely being asked under a convention or an Act of Parliament to enforce in support of another jurisdiction, whether in arbitration or litigation, it seems to me that, save in an exceptional case, it should stop short of making orders which extend beyond its own territorial jurisdiction.

See Securities & Invs. Bd. v. Pantell S.A., [1990] 1 Ch. 426, where a U.K. court froze the assets of a Swiss company, including those held in branches of U.K. banks located outside the U.K.
unlikely that they will ever serve as more than rules of thumb for the exercise of judicial discretion.

3. Strengthening the Court's Hand: The Repatriation of Assets

I have mentioned that, where attachable local assets are too few, it may be necessary for the ordering court to look to assets outside the jurisdiction. As also noted, however, a court strictly speaking can only attach assets that are physically within its jurisdiction. In cases in which the property owner is within the court's jurisdiction, the court may be able to do no more than enjoin it from disposing of the property. While an injunction may not be as directly effective as an actual attachment, it has traditionally been treated as the next best thing.

Some courts, however, have taken the further step of ordering the defendant (or other party within the jurisdiction) to "repatriate" the property in question. If obeyed, the order brings the once-foreign assets within the court's jurisdiction, thus rendering them amenable to actual attachment. The case of Inter-Regional Financial Group, Inc. v. Hashemi is a good illustration. There, the Second Circuit affirmed a district court order directing the defendant to deliver stock certificates located in foreign countries into the custody of the court clerk for attachment to secure the judgment sought in the district court proceeding. The Securities and Exchange Commission has been particularly successful in obtaining court orders requiring alleged securities law violators to repatriate profits that they had previously transferred to foreign jurisdictions.

55. See supra note 20 and accompanying text.
56. See Ebsco Indus., Inc. v. Lilly, 840 F.2d 333, 334 (6th Cir. 1988).

Under 26 U.S.C. § 7402, the United States has obtained orders in tax cases directing taxpayers to repatriate assets from overseas to satisfy actual or potential judgments. See United States v. Shaheen, 445 F.2d 6, 10-11 (7th Cir. 1971); United States v. Ross, 302 F.2d 831, 834 (2d Cir. 1962); United States v. McNulty, 446 F. Supp. 90, 92 (N.D. Cal. 1978).

Not surprisingly, repatriation has also emerged in the practice of the U.K. courts. The later phases of the *Derby* case, discussed earlier, provide an excellent example. At one point in that litigation, the plaintiffs joined six additional individuals and companies as defendants on account of their roles in the alleged conspiracy, and obtained world-wide *Mareva* injunctions against them as well. The plaintiffs also prevailed upon the court to appoint a receiver of the assets of the added defendants. The receiver, in turn, sought and obtained from the court *ex parte* injunctions prohibiting the added defendants from removing assets that they held in accounts in Brussels, Paris, Düsseldorf, Toronto, Luxembourg, and New York from these jurisdictions. These injunctions were subsequently reinforced by orders of the courts of the respective countries.

As had occurred earlier in the case, the receiver then sought to have these *ex parte* injunctions extended to the time of judgment. The question arose as to what should happen when the assets in these various countries reached maturity. One possibility (urged upon the court by the defendants) was for these assets to be returned to Switzerland, that being the place where most of the assets of the added defendants were then located. Another possibility was for these assets (and perhaps also the assets of the defendants that were already located in Switzerland) to be ordered transferred out of Switzerland to another jurisdiction (including, presumably, the U.K.). A reason for issuing such an order would be that the Swiss courts were unlikely to recognize or enforce a judgment that the U.K. court might ultimately render against the defendants, and that they might even permit the relitigation in Switzerland of all the underlying issues.

In the end, the chancery judge declined to release the assets located outside Switzerland from the *Mareva* injunction so as to enable them to be transferred to Switzerland upon maturity. At the same time, however, he refused to order that the receivership assets then in Switzerland, or in any of the other countries where they were located, be transferred elsewhere (including the U.K.). Both parties appealed, and the Court of Appeal affirmed. Dillon, L.J., began by reiterating that U.K. courts may, in appropriate circumstances, issue world-wide *Mareva* injunctions, and may even fortify them by appointing a receiver

59. *See supra* notes 45-52 and accompanying text.
of overseas assets.\textsuperscript{61} Turning to the facts of the case, he agreed that no assets should be transferred to Switzerland from the other countries where they were then located. His rationale was that such a transfer would “permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case.”\textsuperscript{62}

As to whether the Swiss assets should be transferred to another jurisdiction, Lord Justice Dillon assumed that a U.K. court had the power to order such a transfer in an appropriate case. He thought such an order might be justifiable where the assets were located in a jurisdiction that would refuse to enforce an eventual U.K. judgment—at least if it could be shown that the owner’s principal reason for depositing them there had been to insulate them from enforcement. The judge nevertheless considered the request to have been properly denied under the circumstances. As to the transfer of assets then in Switzerland, his rationale was that the parties who were in control of the assets were expected to refuse to transfer them and the Swiss government was not expected to compel them to do so.\textsuperscript{63} As to the transfer of assets from banks in Brussels, Paris, Düsseldorf, Toronto, Luxembourg, and New York, he had a different reason for not issuing an order. Based on past experience, he surmised that the courts of those jurisdictions would be prepared to issue their own orders directly enforcing both the \textit{Mareva} injunction that the U.K. court had already entered and the decisions made by the receiver whom the U.K. court had appointed.

One suspects that, without wanting to rule out altogether the

\textsuperscript{61} The jurisdiction of the court to grant a \textit{Mareva} injunction against a person depends not on territorial jurisdiction of the English court over assets within its jurisdiction, but on the unlimited jurisdiction of the English court \textit{in personam} against any person, whether an individual or a corporation, who is, under English procedure, properly made a party to proceedings pending before the English court . . . .\textsuperscript{62} Stoughton, L.J., concurring, underscored that situations warranting world-wide orders “must be rare, if not very rare indeed,” and that the appointment of a receiver of world-wide assets is likewise rarely to be ordered. \textit{Id.} at 1153.\textsuperscript{63} To this extent, Dillon, L.J., acted on the dubious view that a court should not enter an otherwise justifiable order because it anticipates non-cooperation by the addressee and/or the local authorities. \textit{See supra} note 32 and accompanying text.
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prospect of issuing repatriation orders in other situations, Dillon, L.J., nevertheless was seeking if at all possible to avoid issuing one in this case. His colleague, Staughton, L.J., was perhaps more frank in expressing his reservations about ordering the transfer of extraterritorial assets to the U.K. or to a third country:

The growth of pre-trial restraint over the past 15 years has had a number of consequences. The most obvious, although not perhaps the most important, is an increasing demand on the time of the courts and judges. No doubt it is desirable that our judicial system should include measures to ensure that judgments, when eventually given, are enforceable; and it can be argued that the resources of the system must be increased so as to make such measures available. But the amount that the country can spend on courts and judges is finite, just as is the amount that it can spend on the National Health Service . . . .

One more significant consequence is the restraints that are placed on defendants in the conduct of their affairs before there has been any determination of liability against them; they may, after all, eventually be found to owe nothing. Another, which is relevant to these appeals, is an increasing interference with transactions and property abroad. This should not in my view be regarded lightly. If it ever became common practice for English courts not merely to assume jurisdiction over defendants abroad . . . but also to order them to transfer assets here so that any eventual judgment could be more readily enforced, that would in my view justifiably be regarded as unacceptable chauvinism by the international community.

The very examples that Staughton, L.J., gave of situations justifying issuance of a repatriation order—namely, "where the actual proceeds of fraud are on board a ship on the high seas flying no national flag and subject to no country's local jurisdiction [or] in a country which has no effective system of law, or [in] one which can only be regarded as wholly uncivilised"—show how very exceptional indeed he considered them to be. In all other cases, he urged the courts to "proceed with great caution."64 Not surprisingly, Staughton, L.J., did not find the case

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64. See Derby (No. 6), [1990] 1 W.L.R. at 1154 (Eng. C.A.).
before him to be a sufficiently compelling one.\textsuperscript{65}

B. Other Ways of Preserving the Status Quo Pending Litigation

Attachment of assets to secure payment of a future judgment may be regarded as a species of preserving the \textit{status quo}, but it is not the only one. Other scenarios, too, may be imagined in which transnational provisional relief would enable a court to preserve the \textit{status quo} or otherwise "preserve the integrity of [its] final judgment."\textsuperscript{66} In the following sections, I consider the principal respects, other than the attachment of overseas assets to secure a future judgment, in which transnational provisional relief may assist a court in preserving the \textit{status quo}.

1. Enjoining Activity Abroad

Sometimes a pre-judgment attachment of assets is insufficient to guarantee the effectiveness of a future judgment. A party may have to take additional steps to ensure that changes of circumstances during the pendency of the litigation will not undermine the efficacy of the relief that the court ultimately grants it. To be effective, those steps may have to be transnational.

The U.K. case of \textit{Attorney General v. Barker}\textsuperscript{67} clearly illustrates the point. There, the Court of Appeal affirmed a lower court order enjoining a former employee of the Queen and his Canadian publisher from publishing a book (entitled \textit{Courting Disaster}) that disclosed personal, and evidently quite embarrassing, information about the Royal

\textsuperscript{65} Of course it is very inconvenient for the plaintiffs if they have to fight the case all over again in Switzerland before they can recover from some of the defendants there . . . . But I do not see that it is sufficient ground for ordering assets to be transferred from Switzerland elsewhere, at any rate pre-trial. It is a misfortune for the plaintiffs that Switzerland is not a party to the [Brussels Convention] . . . . But that should not by itself lead the English courts to adopt what I would regard as a drastic and wholly exceptional measure.


\textsuperscript{66} COLLINS HAGUE LECTURES, \textit{supra} note 65, at 23.

\textsuperscript{67} [1990] 3 All E.R. 257 (Eng. C.A.).
Household in violation of the express terms of his employment contract. A question in the case was whether the court could properly issue an interim order having effect outside the territory of the U.K. The court answered that question in the affirmative. According to Lord Donaldson:

[Counsel for the defendants] says ... that foreigners, unlike the citizens of this country, have a right to be informed which overrides contractual rights. For that somewhat startling proposition he relies in part on article 10 of the [European Human Rights Convention]....

For my part, I would have thought that much more relevant was the question of whether a man's word is his bond and whether contractual obligations freely entered into shall be maintained. It is not a question of what foreigners are entitled to read, but what somebody subject to the jurisdiction of this court is entitled to publish and it is an incidental result that, if he cannot publish, foreigners cannot read.  

Injunctive relief that is transnational in this sense can in fact become fairly routine. At the request of the Securities and Exchange Commission, for example, U.S. courts will often temporarily enjoin foreign companies from engaging in overseas conduct that may be unlawful under the U.S. securities laws and that has adverse effects on U.S. investors. In connection with this temporary injunctive relief, courts have also appointed receivers and ordered the disgorgement of misappropriated moneys.

When a court of country X provisionally enjoins the performance of acts on the territory of country Y, it runs the risk that country Y will consider the order offensive to its own laws or policies and even to its very sovereignty. As I show in a later section of this article, this may well lead country Y to withhold the assistance it might otherwise be prepared to give to the orders of country X courts, and possibly even to order countermeasures. The Supreme Court has affirmed that courts must avoid "interference with the sovereignty of another nation" when they exercise their equity powers to "command persons properly before

68. Id. at 260-61. Lord Donaldson immediately added: "I am bound to say, having read this book, I do not think they will miss anything at all, but that is merely a personal view." Id. at 261.


70. See notes 172-81 infra and accompanying text.
[them] to cease or perform acts outside [their] territorial jurisdiction."  

The Restatement 3d of Foreign Relations Law strongly and appropriately echoes this theme.  

Despite the utility of transnational injunctive relief, it is not as frequently sought from U.S. courts as might be expected. At least one commentator has described the situation as "surprising," considering that "parties embarking on litigation with foreign parties must often [fear] that, unless restrained, their adversaries will take actions that will make ultimate victory pyrrhic."  

The absence of any general policy on transnational provisional relief for purposes of preserving the status quo is not, of course, due to any lack of appropriate legal remedies. U.S. law offers a perfectly appropriate remedy for these purposes, namely the preliminary injunction or temporary restraining order, and other nations have the equivalent. Although these remedies—and the standards for their use—have by and large been developed for domestic cases, they have no less potential for preserving the status quo in transnational cases. The basic objective of a court would presumably be the same in both types of cases: to find the appropriate balance between ensuring the effectiveness of relief to which the claimant ultimately may be entitled and protecting its adversary from unjustified restraints prior to the final determination of the claim.

74. See Collins Hague Lectures, supra note 65, at 11-12 (citing Films Rover Int'l Ltd. v. Cannon Film Sales Ltd., [1987] 1 W.L.R. 670, 680 (Ch.)).
75. This is not to say that all jurisdictions employ the same test for determining whether a preliminary injunction is warranted. A notable point of disagreement involves whether and to what extent the underlying merits of the dispute should be taken into account at this preliminary stage. Many systems appear to assess the merits preliminarily in all requests for provisional relief. The newer view in the United Kingdom, however, is that the court need examine the merits at this stage only to satisfy itself that the claim is not frivolous or vexatious, and that it should avoid becoming prematurely drawn into the parties' relative probabilities of success. Entitlement to preliminary relief is thus ordinarily to be based not on a prediction of outcome, but on "whether the plaintiff would be adequately compensated by damages after trial . . . and, if he would not, whether the balance of convenience requires that an injunction be granted." Collins Hague Lectures, supra note 65, at 13 (citing American Cyanamid Co. v. Ethicon Ltd., [1975] App. Cas. 396 (Eng. C.A.)). The main exception to this rule is in situations where granting or refusing the protective measure would effectively dispose of the whole action, in which case the relative strength of the parties' claims is appropriately taken into account. See N.W.L. Ltd. v. Woods (The "Nawala"), [1979] 2 Lloyd's Rep. 325, 330 (Eng. C.A.).
2. Ordering the Preservation of Evidence

Another specific way in which a court may seek to maintain the status quo pending litigation is to order a party to preserve documents or other evidence important to that litigation. In the U.K., such a remedy is known as an Anton Piller order, after the case in which it was formally recognized. In that case, Lord Denning, for the Court of Appeal, held that courts have inherent jurisdiction to issue an order requiring that a party give its opponent access to its premises so that the latter may inspect, copy, and even remove evidence located there. U.K. courts are supposed to issue such orders only upon a showing that vital evidence is likely to be destroyed or secreted and, even then, only if the order would not cause undue harm to the defendant or the defendant’s case. Like the Mareva injunction, the Anton Piller order has obvious utility in transnational litigation. To be sure, the extraterritoriality of the premises is a factor that is likely to weigh against the grant of such an order, perhaps even heavily so. Nevertheless, U.K. courts occasionally have addressed Anton Piller orders to U.K. and non-U.K. nationals alike in connection with premises located outside the U.K., provided those parties are otherwise subject to the jurisdiction of the British courts.

In recognition of the Anton Piller order’s inherent intrusiveness, U.K. courts have refused to issue such an order until they have

77. See Protector Alarms Ltd. v. Maxim Alarms Ltd., [1978] F.S.R. 442, 446 (Ch.)

In my view the Anton Piller type of order represents a very special form of the court’s action. It is a highly localized and coercive form of mandatory order requiring the party against whom it is made, without prior notice, to admit representatives of the opponent to specified premises. That is very different from a practical point of view from a negative injunction requiring a party to abstain from doing something abroad and very different also from a mandatory order to supply in this country goods of foreign manufacture [as in the case of Acrow (Automation) v. Rex Chainbelt Inc., [1971] 3 All E.R. 1175 (Eng. C.A.)]. . . . Taking a practical view of the nature of an Anton Piller order and the way that it is enforced, I do not find it consistent with the comity prevailing between the courts of the several parts of the United Kingdom for the English court to make an Anton Piller order in respect of premises in Scotland. If the Court of Session is able to grant such relief it is better, though far less convenient for the plaintiff, that it should be sought there. If, however, the Court of Session is unable or unaccustomed to grant relief of this kind, it seems to me even more inappropriate for the English courts to authorize a search expedition on Scottish soil. Therefore, without assuming to decide abstract questions of jurisdiction, I shall exercise my discretion to decline to include Scottish addresses in the order.

established the existence of personal jurisdiction over the addressee. The case of Altertext Inc. v. Advanced Data Communications Ltd.\textsuperscript{79} is illustrative. There, the plaintiff asked the court for Anton Piller orders against the six parties that it had named, though not yet served, in the main action. The court was willing, on the proper showing, to issue such an order against the five defendants who were English, but not against the remaining defendant, which was a Belgian company, albeit directed and controlled by the five others. Underscoring that the order would require the company to allow the plaintiff to enter upon Belgian premises to copy and even remove evidence, the court observed:

[A] foreign defendant is, prima facie, not subject to the jurisdiction of the court. Such a defendant may become subject to the jurisdiction of the court if service of process can be effected on the defendant in England . . . . But until service has been effected the foreign defendant does not become subject to the jurisdiction of the court.

An Anton Piller order is an in personam order. It is an order which it is within the power of the court to make in an action in which the court has jurisdiction. It ought not, however, in my view, to be made except against a party over whom the court does have jurisdiction. If the order is sought ex parte before service of the writ and against a foreign defendant in respect of foreign premises, an essential requirement must be that the case is one in which leave . . . for service outside the jurisdiction ought to be given. Otherwise the court has no jurisdiction over that defendant. But since the initial application is ex parte and since the foreign defendant may seek to have the leave . . . set aside, the assumption by the court of jurisdiction is, in a sense, provisional only . . . . [Thus,] the Anton Piller order ought not to be executed until the foreign defendant has been given the opportunity to apply to set aside the . . . leave . . . . It would be wrong, in my view, for the court to . . . require a mandatory order of an Anton Piller character to be executed [before the foreign defendant] has had an opportunity to challenge the court's assumption of jurisdiction over him.\textsuperscript{80}

The court then addressed the plaintiff's argument that suspending execution of the order for the period necessary to establish jurisdiction

\textsuperscript{79} [1985] 1 W.L.R. 457 (Ch. 1984).
\textsuperscript{80} Id. at 461-63.
would render the order useless:

It does not follow that persons in the position of the plaintiff are without alternative remedy . . . . [I]t might have been possible for effective concurrent proceedings to have been commenced in Belgium for the purpose of obtaining or preserving any relevant evidence situated in the . . . defendant's Belgian premises.\(^{81}\)

This last bit of reasoning assumes, of course, a Belgian court's willingness to assist the U.K. litigation in this manner, thus raising larger questions to which I turn in Part III.

### III. PROVISIONAL RELIEF IN AID OF FOREIGN LITIGATION

Provisional relief assumes an important transnational aspect not only when the forum is asked to furnish relief implicating persons or property abroad, but also when it is asked to issue local protective orders in connection with litigation in a foreign jurisdiction. That transnational provisional relief should have this further dimension is not in the least surprising. Reference has already been made to the fact that, while the courts of country X may see fit to issue protective orders affecting persons or property in country Y, they may not be able to ensure that those orders are obeyed or that the relief sought to be achieved will otherwise be effective. Precisely because they cannot enforce their orders of transnational provisional relief extraterritorially, the courts of country X may find that they also need orders of provisional relief from the courts of country Y. From the point of view of the latter courts, such relief is likewise transnational in an important sense.

Despite the importance of the issue, U.S. law thus far has not adopted a particularly coherent position on the availability of provisional relief in aid of foreign litigation. As has already been noted,\(^{82}\) legislation or treaty provides a reasonably good framework for analysis with respect to certain other distinctive forms of international judicial assistance—notably, serving documents, obtaining evidence,

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\(^{81}\) Id. at 463. It should be noted that even if a party obtains information on the whereabouts of property overseas from an *Anton Piller* order, the requesting party may still have to seek permission from the U.K. court to use the information and documents obtained for the purpose of commencing civil proceedings in those other jurisdictions. Such permission was granted in *Bayer AG v. Winter*, [1986] F.S.R. 357 (Ch. 1985).

\(^{82}\) See notes 1-10 *supra* and accompanying text.
and recognizing or enforcing foreign country judgments. With respect to still other forms of assistance, the ground rules may be less well established, but the propriety of such assistance is still generally conceded. A good example is an order by a court of country Y compelling a party to participate in proceedings in the courts of country X, where that party had previously consented to do so.83 In such cases, the courts of country Y presumably will intervene only if they have a basis for exercising personal jurisdiction over the party sought to be compelled. That party may, of course, have submitted to the jurisdiction of the courts of country Y through a forum selection clause.84 But country Y’s courts may have a sufficient basis of jurisdiction to order transnational provisional relief even in the absence of such a clause.

Once we move beyond these fairly standardized situations, matters become much less clear. Writing on the subject of transnational provisional relief in this journal some eight years ago, two commentators reported that “there is at present nothing that can fairly

83. Arbitration provides an analogy. In the United States, the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (1994), authorizes a court having jurisdiction over a party to issue an order compelling that party to proceed to arbitration in a foreign jurisdiction. Indeed, § 8 permits a court in admiralty cases not only to commence an action by “libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceeding,” but also to retain jurisdiction in order to enter judgment upon an eventual award. In the case of Blueye Navigation, Inc. v. Oltenia Navigation, Inc., Nos. 94 Civ. 1500, 94 Civ. 2653, 1995 WL 66654, at *5 (S.D.N.Y. Feb. 17, 1995), a U.S. company asked the court to attach the defendant’s property in New York to secure an award expected in an arbitration proceeding then pending in London. The request was denied due to the plaintiff’s inability to identify any property belonging to the defendant in the district. The court dismissed the action without prejudice, however, in the event that it was subsequently able to locate property of the defendant within the district.

84. The English case of Acrow (Automation) Ltd. v. Rex Chainbelt Inc. is a good illustration. The Court of Appeal sustained an interim injunction against a U.S. corporation (“S.I.”) that had declined to appear in a breach of contract action brought in the U.K. by its U.K. licensee. The order enjoined S.I. from refusing to supply goods to the plaintiff. (S.I.’s English subsidiary—a co-defendant in the action—appeared and submitted to the injunction). When S.I. disregarded the order in the belief that it was not bound by it, the Court of Appeal disagreed:

The proceedings in England were not only against the English subsidiary. They were also against the American parent, S.I. The licence agreement expressly gave jurisdiction to English courts . . . . S.I. were bound by this injunction just as much as if it had been granted by United States courts. It could be enforced by proceedings in the English courts, as, for instance, by a writ of sequestration of the property of S.I. in the United Kingdom. It could not be enforced directly in the courts of the United States, but those courts would, I have no doubt, out of comity, recognise the injunction, especially as it gave effect to a contract that was governed by English law and was expressly subject to the jurisdiction of the English courts.

be described as a general U.S. approach to the question of when U.S. courts will issue interim orders in support of non-U.S. proceedings.\textsuperscript{85} Though this situation may, for the reasons I indicated earlier,\textsuperscript{86} be entirely understandable, it is not entirely satisfactory.

In this part of the article, I examine transnational provisional relief from the perspective of the courts of country Y. Not surprisingly, the main scenarios closely mirror the scenarios already examined in the preceding part, where the focus was on the courts of country X.

A. Freezing Local Assets in Aid of Foreign Proceedings

The transnational "freezing" of assets dominates discussions of transnational provisional relief when viewed from the perspective of country Y, much as it did when viewed from the perspective of country X. Moreover, in entertaining requests for transnational provisional relief of this sort, the courts of country Y—like the courts of country X—face both jurisdictional and substantive questions. The case of Barclays Bank, S.A. v. Tsakos\textsuperscript{87} is a striking example.

Barclays, a French bank (and wholly-owned subsidiary of a British bank of the same name), brought suit in a court of the District of Columbia against a Greek couple (the Tsakos) to enforce a guarantee on a loan that the bank's Paris office had made to their son. Barclays concurrently sued Mr. and Mrs. Tsakos in France and Switzerland, but by that time the couple evidently had placed their assets in those countries beyond the bank's reach. In the U.S. action, Barclays obtained a pre-judgment attachment of the cooperative apartment that the Tsakos owned in the Watergate complex in Washington, D.C. The Tsakos then moved to dismiss the U.S. action on forum non conveniens grounds. Granting their motion, the trial court ruled that, once the action was dismissed, the attachment "ipso facto" had to be lifted too.\textsuperscript{88}

On appeal by the bank, the D.C. appellate court acknowledged the distinction between what I have called the jurisdictional and the substantive aspects of the attachment order. In affirming its jurisdiction the court relied on dictum in the case of Shaffer v. Heitner, where the United States Supreme Court had stated: "at most ... a State in which

\textsuperscript{85} David Westin & Peter Chrocziel, Interim Relief Awarded by U.S. and German Courts in Support of Foreign Proceedings, 28 COLUM. J TRANSNAT'L L 723, 725 (1990).
\textsuperscript{86} See notes 1-10 supra and accompanying text.
\textsuperscript{87} 543 A.2d 802 (D.C. 1988).
\textsuperscript{88} See id. at 804.
property is located should have jurisdiction to attach that property . . . as security for a judgment being sought in a forum where the litigation can be maintained” consistent with the requirements of due process. As to the merits of the relief sought, however, the appellate court was not asked to, nor did it, review the lower court’s determination that an attachment was justified. The closest it came to the merits was to reverse the lower court’s decision for erroneously assuming that the dismissal of the action (and the resulting discharge of the attachment) must follow as a matter of course when a forum non conveniens motion is granted; the appellate court instructed the lower court on remand to determine whether, notwithstanding the conclusion that the merits of the action should not be tried in its jurisdiction under the doctrine of forum non conveniens, the action should be stayed and the attachment maintained pending the outcome of the proceedings in France.

The Barclays Bank decision thus not only distinguishes between jurisdiction and merits in freezing local assets in aid of foreign litigation, but also clearly dissociates the question of jurisdiction to order provisional relief from the question of jurisdiction to adjudicate the underlying claim. The decision has other important implications for the subject of transnational provisional relief as well. In the first place, it suggests that the owners of property located within the jurisdiction of a court do not themselves also have to be within the personal jurisdiction of that court in order for the latter to entertain an application for provisional relief concerning that property. Second, the property

89. See id. at 804 (quoting Shaffer v. Heitner, 433 U.S. at 210). See also supra notes 16-17 and accompanying text.

90. See id. at 806-08. According to the appellate court, the district court had a choice between dismissing the action on forum non conveniens grounds or staying the action on the same grounds, while maintaining the attachment. See id. On remand, the trial court stayed the action pending the outcome of the French litigation. The bank eventually sought a judgment condemning the apartment in enforcement of the French court’s subsequent judgment against the Tsakos in the amount of $2.5 million. See First Savs. Bank v. Barclays Bank, S.A., 618 A.2d 134, 135 (D.C. 1992).

91. In the case of Mendes v. Dowelanco Indus. Ltda, 651 So.2d 776, 778 (Fla. Dist. Ct. App. 1995), a state court was upheld in deciding to maintain a temporary injunction freezing the defendants’ bank accounts within the state, even after ordering the action stayed on the ground that the dispute was best resolved in connection with a suit involving the same parties and issues already pending in Brazil.

92. On the other hand, the presence of assets was by no means the Tsakos’ only connection with the District of Columbia. The court noted that Mr. Tsakos had once operated a business in Washington DC, and that the couple had lived in the Watergate apartment for some period of time. “Although these contacts existed prior to the making of the disputed loan and may be insufficient to support in personam jurisdiction . . ., they need not be ignored.” See Barclay’s Bank, S.A. v. Tsakos, 543 A.2d at 805 (footnote omitted).
in question evidently does not have to bear any particular relationship to the subject matter of the foreign litigation. Third, a court may apparently be justified in granting provisional relief even in the absence of any order (interim or otherwise) on the part of the foreign court that would be hearing the main action—and indeed absent any indication from that court as to the measure’s necessity or appropriateness. The latter is a point to which I shall return.

Finally, the remand in Barclays Bank raises the question of whether the standards for granting a pre-judgment attachment should differ according to whether the main action is being heard in that same court or in a court of another country. The appeals court did not take a position on this question, and the position it would be likely to take is unclear. On the one hand, if the court thought there should be no difference, it should simply have maintained the attachment since the lower court had already found that (but for the forum non conveniens dismissal) the attachment was justified. On the other hand, the court gave no positive indication that the analysis should differ in the two situations, nor did it imply what the difference (if any) should be.93

On each of these questions—pertinent and interesting though they may be—U.S. case law is remarkably thin. These questions will necessarily recur, however, since litigants may be expected to bring increased pressure on courts to grant relief of this sort in the years ahead. At this stage, the U.K. courts (which, once again, share many of the presuppositions of U.S. courts about transnational provisional relief) offer a richer body of experience. In consulting that experience, one should bear in mind that, by virtue of British membership in the European Community (and now the European Union), U.K. practice has come to be influenced in large part by the European Convention on Jurisdiction and Enforcement of Judgments (the Brussels and Lugano Conventions).94

Article 24 of the Convention expressly provides that a court lacking jurisdiction to decide the merits of a case may entertain a request for provisional relief pending a decision on the merits by a competent court in another contracting state. According to Article 24,

93. By the same token, in the case of Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986), the Court of Appeals at one stage affirmed a preliminary injunction barring the Marcoses from transferring or encumbering real property in New York, without drawing attention to the fact that the underlying dispute was at that time being litigated in the Philippines rather than the United States. See supra notes 23-26 and accompanying text.

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. 95

Presumably, any provisional measure ordered by a court of a contracting state pursuant to Article 24 of the Convention will itself be entitled (under the general policies of the Convention) to recognition and enforcement by the courts of all the other contracting states. 96

The Court of Justice of the European Communities set forth the rationale behind Article 24 in its judgment in the case of Denilauler v. S.n.c. Couchet Frères. 97 That ruling arose out of an action in French court by a French seller against a German buyer for the purchase price of goods. The French court issued an ex parte order freezing the defendant’s accounts at the Frankfurt branch of the Société Générale Alsacienne de Banque, and the plaintiff succeeded in having the freeze order enforced by a German court. On appeal, the German appellate court asked the European Court of Justice to decide whether the Brussels Convention requires courts to enforce provisional measures ordered by courts of another contracting state when those orders have been issued on a wholly ex parte basis. In the course of answering that specific question, the Court broadly emphasized the discretion enjoyed by the courts “of the place . . . where the assets subject to the measures sought are located.” According to the Court, those courts are “best able to assess the circumstances which may lead to the grant or refusal of the measures sought.” 98 Clearly, then, Article 24 authorizes attachment in aid of foreign litigation, but does not in all circumstances compel it.

Likewise, the U.K. implementing legislation—Section 25 of the Civil Jurisdiction and Judgments Act of 1982—authorizes courts to grant interim relief in connection with litigation begun or to be begun in another contracting state (or in another U.K. court), provided the litigation concerns a subject matter within the scope of the Convention. Like Article 24 itself, Section 25 permits courts to decline to grant

95. Id. art. 24.
96. Article 25 defines the judgments entitled to recognition and enforcement under the Convention so as to include non-final and non-monetary judgments.
98. Id. at 1570. For a discussion of the case, see Lawrence Collins, The Territorial Reach of Mareva Injunctions, 105 L.Q. Rev. 262, 290-94 (1989). Collins emphasizes that Article 24 is “permissive” only. “National law may (not must) supply the remedy.” Lawrence Collins, Provisional Measures, the Conflict of Laws and the Brussels Convention, 1 Y.B. EUR. L. 249, 254 (1981).
relief, though apparently only where, "in the opinion of the court, the fact that the court has no jurisdiction . . . in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it."\textsuperscript{99} U.K. case law on Section 25 reflects the basic Community law notion that national courts must provide essentially the same provisional remedies (and employ the same standards for doing so) that they would ordinarily provide under like circumstances in domestic cases pending before them. At the same time, courts are not restricted to providing the remedies that the foreign court hearing the main action ordinarily provides under those circumstances.\textsuperscript{100}

The case of \textit{X} v. \textit{Y}.\textsuperscript{101} illustrates a standard application of Section 25. There, a French bank sought and obtained an order from a London court enjoining a Saudi party (against which the Bank had brought suit in Paris) from disposing of any money held for its account in the London branch of a U.S. bank. The London court found that the underlying claim was based on an undisputed debt and that the defendant was likely to remove those assets to Saudi Arabia, where they would no longer be available for satisfaction of an $8 million judgment that the bank was likely to win in the French action.\textsuperscript{102}

Although the U.K. court in \textit{X} v. \textit{Y}. froze assets in aid of a foreign proceeding, it at least did so with respect to assets located within the U.K. A more interesting and difficult question is whether, in a proper case, the U.K. court could (or indeed must) seek to achieve the same result with respect to assets located outside the U.K. This was precisely the situation in the case of \textit{Republic of Haiti v. Duvalier}.\textsuperscript{103} That case arose out of an action brought in France by the Republic of Haiti against the former Haitian president and members of his family and associates to recover some $120 million allegedly embezzled under the Duvalier regime. Based on evidence that the Duvalier family was attempting to

\textsuperscript{99} Civil Jurisdiction and Judgments Act, 1982, ch. 27, § 25.

\textsuperscript{100} See Alltrans Inc. v. Interdom Holdings Ltd., [1991] 4 All E.R. 458, 468 (Eng. C.A.). The court also ruled that, while section 25 of the 1982 statute was enacted to give effect to Article 24 of the Brussels Convention, it is not necessarily limited in scope and effect by the obligations set out in that Article. "Since the source of the English court's jurisdiction is not article 24 but section 25, there is no reason why it should not be wider than the article would confer." Id. at 469.

\textsuperscript{101} [1990] 1 Q.B. 220. See also House of Spring Gardens Ltd. v. Waite, [1984] F.S.R. 277 (Ch.).

\textsuperscript{102} The court also took the opportunity to hold that Section 25 of the Civil Jurisdiction and Judgments Act of 1982 is not limited to cases in which the defendant against whom the provisional relief is sought is domiciled in a convention state. See \textit{X} v. \textit{Y.}, [1990] 1 Q.B. 220, 229.

\textsuperscript{103} [1990] 1 Q.B. 202.
conceal its assets, the Republic of Haiti sought and obtained a *Mareva* order in a U.K. trial court. This order not only froze the family's assets within the U.K. up to the value of $120 million, but also (1) barred family members from dealing with assets, wherever located, that represented the proceeds of the alleged embezzlement, and (2) compelled them to disclose the nature, location, and value of all their assets world-wide.\(^{104}\)

In fact, the U.K. court's basis of jurisdiction over the Duvaliers was highly tenuous. None of the family members was resident in the U.K., and the U.K. evidently lacked jurisdiction to adjudicate the merits of the underlying claim.\(^{105}\) Moreover, although the family had engaged English solicitors to administer some of their assets, most of those assets were in fact located outside the U.K. On appeal, the Duvaliers argued that the Republic of Haiti should have sought interim relief, if at all, either from a French court (since the action was pending in France) or from a court in the country where the bulk of the assets were located. The Court of Appeal, however, sustained the order in full. Admitting that "[t]he cases where it will be appropriate to grant such an injunction will be rare—if not very rare indeed," Staughton, L.J., nevertheless affirmed the courts' jurisdiction, in appropriate circumstances, "to grant a Mareva injunction, pending trial, over assets worldwide." He found these to be such circumstances:

What . . . is determinative is the plain and admitted intention of the defendants to move their assets out of the reach of the courts of law, coupled with the resources they have obtained and the skill they have hitherto shown in doing that, and the

\(^{104}\) See id. at 208. The order was made pursuant to the Supreme Court Act, 1981, ch. 54, § 37, and the Civil Jurisdiction and Judgments Act, 1982, ch. 27, § 25(1). See id. at 205, 209, 215-16.

Section 37 authorizes the High Court "by order (whether interlocutory or final) [to] grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so." It specifies, in subsection 3, that "[t]he power . . . to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction."

Section 25(1) permits the High Court to grant interim relief even "where . . . proceedings have been or are to be commenced in a Contracting State other than the United Kingdom."

\(^{105}\) Clearly the fact that the U.K. has no jurisdiction in relation to the subject matter of the underlying proceedings is not a bar to awarding interim relief under Section 25, since Section 25(2) authorizes a U.K. court to refuse relief if "the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it." Civil Jurisdiction and Judgment Act, 1982, ch. 27, § 25(2).
vast amount of money involved. This case demands international co-operation between all nations . . . . [I]f ever there was a case for the exercise of the court’s powers, this must be it . . . . If the Duvalier family have a defence to the substantive claim, and feel that they are being persecuted, then their remedy . . . is to co-operate in securing an early trial of the dispute. It is not to secrete their assets where even the most just decision in the world cannot reach them.  

The decision is striking in still another respect: it enabled the government of Haiti to obtain provisional relief far in excess of the scope of relief that the French court hearing the main action would have granted if the request had been addressed to it. Indeed, a French court would not have granted such broad relief even if the action had been pending in the U.K. and ancillary provisional relief had been sought in France. It is also noteworthy that the government of Haiti appears to have obtained this far-reaching relief from the U.K. without the French court in which the main action was pending having made any such request to the U.K. court, and conceivably even without its knowledge.  In this respect, if in no other, the result is questionable.

While prompted by Article 24 of the Brussels Convention, enactment of the U.K. implementing legislation just discussed was also necessary in light of the traditional restrictions placed by the House of Lords on the grant of provisional relief in aid of foreign litigation. The principal decision of the Lords had been Siskina v. Distos Compania Naviera S.A. (The Siskina). The Siskina was a vessel owned by a Panamanian company but managed in Piraeus, Greece. When the vessel was about to enter the Suez Canal en route from Italy to Saudi Arabia, loaded with $5 million in cargo, the shipowner ordered that the ship turn back and unload the cargo in Cyprus on the ground that the Italian charterers of the ship had failed to pay the full freight owed under the charter agreement. The shipowners asserted a lien on the discharged cargo for the unpaid freight, and brought an action in the courts of Cyprus. While en route back to Greece, the vessel sank in Greek waters, whereupon the shipowner filed a $700,000 claim against its London insurer. Meanwhile, the cargo owners in Saudi Arabia, having brought an action in Genoa against the shipowner for damages for the arrest of the cargo (pursuant to a clause in the bill of lading designating

Genoa as the exclusive forum for disputes), also sought an injunction in the U.K. restraining the shipowners from disposing of the insurance proceeds of the *Siskina* or removing them from the jurisdiction. They argued that otherwise the proceeds would disappear into one of the shipowner’s foreign bank accounts.

The principal question for the English courts was whether the insurance proceeds could properly be attached in the U.K. to secure an anticipated foreign judgment, given that the defendant in the foreign action (and obligee of the insurance debt) was outside the jurisdiction of the U.K. and that the dispute bore no other relationship with the U.K. The trial court held that its lack of jurisdiction over the defendant in the main proceedings barred it from addressing a *Mareva* injunction to the defendant. A majority of the Court of Appeal, speaking through Lord Denning, disagreed, invoking the notion of comity toward judicial proceedings pending in Italy, another Community state.¹⁰⁹

The House of Lords, in turn, reversed. In an opinion by Lord Diplock, the Lords effectively held that a U.K. court lacks jurisdiction to award provisional relief against a party to a foreign proceeding unless it has an independent basis of personal jurisdiction over that party. What was fatal to the request, therefore, was not the contractual choice of a foreign forum in Genoa but the absence of any jurisdictional basis in the U.K. While recognizing that “there may be merits in . . . extending the jurisdiction of the High Court over foreign defendants” in this fashion, Lord Diplock could find no basis in either treaty or comity for doing so.¹¹⁰

Subject to Section 25, *The Siskina* is presumably still good law. British courts may therefore be expected, in cases falling outside the Brussels and Lugano Conventions, to continue denying requests to attach U.K. assets in anticipation of a foreign judgment unless the U.K. has an independent basis of jurisdiction over the owner of those assets. This is borne out by the recent Privy Council decision in *Mercedes Benz*
A.G. v. Leiduck.111 There, on appeal from a decision of a Hong Kong court, the Privy Council refused to attach the local assets of a German company against which Mercedes-Benz had brought suit in the courts of Monaco.112 It found that the defendant in the Monaco action was not present within Hong Kong and that the Hong Kong court therefore lacked authority to restrain the defendant's disposition of its property:

It may well be that in some future case where there is undoubted personal jurisdiction over the defendant ... an attempt will be made to obtain Mareva relief in support of a claim pursued in a foreign court ... [A] situation would then exist in which the availability of relief otherwise considered permissible and expedient would depend upon the susceptibility of the defendant to personal service.113

Although the case prompted a vigorous dissent,114 it expresses a very clear limitation on the willingness of British courts, outside applicable conventions, to ensure that U.K. assets are available to enforce prospective foreign country judgments.

B. The Effect of a Choice of Forum or Arbitration Clause

Before turning to remedies other than the pre-judgment attachment of assets, it is worth considering how the availability of provisional relief from a court other than the forum might be affected by the presence of a choice of forum clause. Suppose the parties to litigation in country X had validly designated country X as the exclusive jurisdiction for resolving their disputes,115 but one of them finds it

112. Neither Hong Kong nor Monaco is a party to the Brussels or Lugano Conventions.
114. Lord Nicholls of Birkenhead filed the dissent. He wrote in part: The first defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. Id. at 305.
115. A court may, of course, rationalize granting interim injunctive relief, despite the presence of a clause giving exclusive jurisdiction to a foreign court, by finding the clause to be invalid or unenforceable. Such was the case in Evans Marshall & Co. v. Bertola S.A., [1973] 1 W.L.R. 349 (Eng. C.A.). Evans Marshall was a wholesale wine merchant that had for over twenty years distributed a Spanish sherry, known as Bertola, in the U.K. When new owners took over Bertola, they declared Evans Marshall's performance to be unsatisfactory and
necessary or desirable to seek an ancillary order of provisional relief from a court of country Y. Although such relief presumably will have the limited purpose of securing a judgment expected to be rendered by the court designated by the parties, it nevertheless could be viewed as an intrusion on the jurisdiction of that court. In this section, I examine this question both through the handful of cases directly on point and through the much larger number of cases dealing with the analogous problem of judicial intervention in disputes subject to arbitration.

One of the few U.S. decisions to address the issue squarely is *Sanko Steamship Co. v. Newfoundland Refining Co., Ltd.* In *Sanko*, a shipping company brought suit for breach of a charter party agreement and, in that connection, sought to attach certain New York bank balances claimed to be owed to the defendants. The defendants moved to dismiss the underlying action on the basis of the parties' prior choice of England as the exclusive forum for resolution of their disputes (citing the Supreme Court decision in *The Bremen v. Zapata Off-Shore Co.*, which essentially upheld the validity of international choice of forum clauses), and also opposed the grant of the attachment. The plaintiff argued that *Bremen* was not controlling because the plaintiff in that case had sought to avoid the chosen forum for the adjudication of the merits, whereas the plaintiff in *Sanko* was merely asking the U.S. court to attach property in order to secure payment of a judgment to be rendered by the chosen court. The district court nevertheless considered *Bremen* to be decisive:

[The *Bremen*] case laid at rest any doubt as to the

appointed a new U.K. distributor, in apparent breach of the contract. *See id.* at 352-57. Although a clause in the contract designated Barcelona as the exclusive forum for disputes between the parties, *see id.* at 353, Evans Marshall brought suit against Bertola and the new distributors in the U.K. The suit claimed damages for breach of contract and interference with contract, and sought an injunction restraining the defendants from marketing Bertola sherry in the U.K. through channels other than Evans Marshall. The suit also sought an interim injunction to that effect. *See id.* at 357. When Bertola moved to have the U.K. proceedings dismissed on the basis of the forum selection clause, the U.K. trial court refused because it considered the case to be among the very exceptional ones that a U.K. court should decide on the merits despite the clause. (The trial court asserted that U.K. courts have a limited discretion to disregard exclusive choice-of-forum clauses.) The court's reasons for treating the case as exceptional in this respect were that the substance of the case overwhelmingly concerned England, that the plaintiff's action against the new U.K. distributor was unquestionably within the jurisdiction of the U.K. courts, and that Spanish procedure was very much slower and afforded no form of interlocutory relief. *See id.* at 359-65. The Court of Appeal affirmed. *See Evans Marshall*, [1973] 1 W.L.R. 349, 368-86 (Eng. C.A.).


118. In fact, the parties in *Bremen* had agreed that a bond should be posted and available both in the U.K. and the U.S. *See id.* at 4 n.3.
enforceability of such clauses and specifically held that they were applicable to *in rem* actions . . . . What [the Supreme Court] establish[ed] was a rule of law which entitles defendants to a dismissal of this action. Such dismissal makes an attachment unavailable.\(^{119}\)

The court’s refusal to distinguish between a litigant turning its back on the chosen forum, on the one hand, and a litigant going outside that forum for a preliminary attachment, on the other, is regrettable. The Ninth Circuit took the better view when, in the case of *Polar Shipping Ltd. v. Oriental Shipping Corporation*,\(^ {120}\) it came to the opposite conclusion. There, the owner of a ship filed an action in the U.S. for a maritime attachment of property belonging to the ship’s charterer, claiming breach of the charter agreement. The trial court vacated its initial grant of a writ of foreign attachment due to the fact that the charter agreement between the parties contained a clause designating the courts of England as the exclusive forum.\(^ {121}\) The Court of Appeals properly reinstated the writ on the ground that, absent an expression of intent to the contrary, a forum selection clause should not be construed as automatically precluding a party from seeking a pre-judgment attachment in a different court.\(^ {122}\)

The view expressed in *Polar Shipping* has been the longstanding position of the U.K. courts.\(^ {123}\) In the leading case of *Mike Trading & Transport Ltd. v. R. Pagnan & Fratelli (The Lisboa)*,\(^ {124}\) a vessel called *The Lisboa*, which had broken down en route from Argentina to Italy with a large cargo of wheat, was towed to Tunisia and from there to its destination in Italy. The owners of the cargo, liable for large towage expenses, brought an action in Venice against the vessel’s owners and secured its arrest, disregarding the requirement in the bill of lading that all legal proceedings be brought in London. The vessel’s owners responded with a suit in London for damages for the unlawful arrest of

\(^{119}\) *Sanko*, 411 F. Supp. at 286 (citations omitted).

\(^{120}\) 680 F.2d 627 (9th Cir. 1982).

\(^{121}\) *See id.* at 630.

\(^{122}\) *See id.* at 633.

\(^{123}\) In the century-plus-old case of *Law v. Garrett*, [1878] 8 Ch.D. 26 (Eng. C.A.), a contract between British nationals designated the Commercial Court of St. Petersburg, Russia (the place of business) as the exclusive forum for disputes under the contract and required a British court to refer any such dispute to the St. Petersburg court. Nevertheless, the English Court of Appeal ruled that a British court could appoint a receiver of partnership assets in Britain and afford other ancillary relief if it could be shown that no adequate relief was available in Russia.

The Lisboa in breach of the choice of forum clause, and for a declaration of non-liability for the towage expenses. They also sought an injunction restraining the cargo owners from maintaining the ship’s arrest. At this point, the cargo owners began their own proceedings in London on the merits by bringing an unseaworthiness claim. The Court of Appeal refused the injunction sought by the shipowners. According to Lord Denning, the choice of forum clause encompassed only actions to establish liability and not proceedings brought for security purposes. Courts of other countries facing this issue have reached essentially the same conclusion.

125. I am clearly of the opinion that we should not grant an injunction so as to compel the release of this vessel. I can conceive of some cases where an injunction might be granted. For instance, if the cargo-owners had no ground whatever for making any claim against the owners and nevertheless arrested the ship—this Court might grant an injunction to prevent the continuance of the arrest. . . . But when the arrest is made in good faith—for the purpose of obtaining security for a just demand—then I am of [the] opinion that the English Courts should not restrain it by injunction, even though it is said to be in breach of an exclusive jurisdiction clause; . . . nor should they award damages for the breach of such a clause. It seems to me that, by the maritime law of the world, the power of arrest should be, and is, available to a creditor—exercising it in good faith in respect of a maritime claim—wherever the ship is found—even though the merits of the dispute have to be decided by a Court in another country.

Id. at 549-50 (citations omitted).

The other members of the court agreed with the result insofar as it preserved the cargo owners’ access to security. Lord Justice Dunn was emphatic: The question at the end of the day is whether the arrest of the vessel was so vexatious and oppressive that the defendants ought to be ordered by mandatory injunction to release her. It is said on behalf of the plaintiffs that the effect of not granting the injunction will be to enable the defendants to take advantage of their breach of the exclusive jurisdiction clause. . . . But there are other considerations here. There is no suggestion that the merits of the defendants’ claim will be litigated in the Italian courts. The only purpose in arresting the vessel was to provide security in the event of the defendants succeeding in the English proceedings. The arrest of a ship is a very common and recognized proceeding in all maritime countries. And the remedy of arrest was not available to the defendants in England because the vessel was not here, and was only available in Italy.

Id. at 552.

The readiness of courts to entertain claims for provisional relief, even when the courts of another state have exclusive jurisdiction over the merits of the case, may of course lead parties to draft their forum selection clauses so as to exclude such recourse. There would appear to be no reason in principle why parties should not be able to do so, provided they arrive at that understanding fairly and freely. That being so, the question of whether a forum selection clause excludes access to the courts of other jurisdictions for ancillary relief, as well as for principal relief, is essentially a matter of party intention. In one French case,\footnote{See Compagnie de Signaux et d'Entreprises Électriques v. Société Sorelec, Cass. 1er civ., Dec. 17, 1985, R.C.D.I.P. 1986, 539: Admittedly, when there is urgency or when the security of persons or goods is at risk, a French court has jurisdiction to order any protective measures required, even in the presence of a clause conferring on a foreign court jurisdiction over the merits of the dispute. But here, the lower court found that the parties, who were free to contract respecting their rights, had agreed to submit all requests to the Libyan courts, even requests for orders of a provisional nature.} the parties were found to have had precisely that intention.

In urging a U.S. court to attach local assets in aid of foreign judicial proceedings despite a clause designating the foreign forum as exclusive, a litigant would be advised to invoke as precedent U.S. cases authorizing the attachment of local assets in aid of foreign arbitral proceedings. The leading case is probably still Carolina Power & Light Co. v. Uranex.\footnote{451 F. Supp. 1044 (N.D. Cal. 1977).} There, a federal district court in California upheld a buyer's right to attach \textit{ex parte} a wholly unrelated debt owed to the seller by a California corporation, notwithstanding the fact that the dispute between buyer and seller was subject to arbitration and that an arbitration was in fact underway.\footnote{The court required, however, that the buyer file an action directed to the underlying merits within 30 days in a court with personal jurisdiction over the seller. \textit{Id.} at 1049. This aspect of the decision is quite controversial, because the underlying merits had properly been submitted to an arbitral tribunal in accordance with the parties' prior agreement. Only an action \textit{not} addressed to the underlying merits, therefore, would have been proper to bring in a judicial forum.} The court concluded that this exercise of \textit{quasi in rem} jurisdiction was justified because the seller had property in California, the presence of that property there was not
"merely fortuitous," and California was in any event not an inconvenient forum in which to litigate the limited issues arising from the attachment.\textsuperscript{130} Although there is certainly authority to the contrary,\textsuperscript{131} the Uranex case seems to reflect the prevailing view.\textsuperscript{132} Not surprisingly, the British courts, too, acknowledge circumstances in which they may justifiably grant a measure of provisional relief in aid of an arbitration being conducted in a foreign jurisdiction.\textsuperscript{133}

130. The Court ruled:
[A] fair reading of . . . \textit{Shaffer v. Heitner}, requires that the application of notions of "fair play and substantial justice" include consideration of both the jeopardy to plaintiff's ultimate recovery and the limited nature of the jurisdiction sought, that is, jurisdiction merely to order the attachment and not to adjudicate the underlying merits of the controversies. . . . [W]here the facts show that the presence of defendant's property within the state is not merely fortuitous, and that the attaching jurisdiction is not an inconvenient arena for defendant to litigate the limited issues arising from the attachment, assumption of limited jurisdiction to issue the attachment pending litigation in another forum would be constitutionally permissible. \textit{Id.} at 1048. Of course, significantly more would have been required to support the exercise of in personam jurisdiction over the seller in California.


The arbitration analogy is a highly persuasive one. If the courts of country Y are willing, at least in some circumstances, to intervene for purposes of provisional relief in cases that the parties have committed to non-judicial (i.e. arbitral) dispute resolution, they should be similarly willing to intervene to that same limited extent in cases that the parties have committed to adjudication on the merits in the courts of country X. The only reason for drawing a distinction would be that the resolution of international disputes in arbitral fora is more deserving of support from national courts than the resolution of international disputes in the courts of other countries. That would seem to be a dubious proposition.

C. Other Ways of Preserving the Status Quo in Aid of Foreign Litigation

As noted in Part II of this article, there are ways other than the pre-judgment attachment of assets by which courts may usefully preserve the status quo pending the outcome of litigation. Precisely because protective measures in transnational litigation implicate persons, property, or conduct in other countries, litigants may need the assistance of local courts in these countries in order to ensure that such measures are effective. The willingness of local courts to furnish such assistance is the subject of this section.

Curiously, U.S. courts have not often been asked to issue orders in support of the status quo in foreign country litigation, and their receptiveness to requests of this kind therefore cannot reliably be gauged. Only in one area of the law does federal legislation expressly authorize the courts to furnish provisional relief ancillary to foreign judicial proceedings. Section 304 of the U.S. Bankruptcy Code authorizes the bankruptcy courts to order any “appropriate relief” in connection with foreign bankruptcy proceedings, provided those proceedings (a) afford just treatment for all claimants, (b) protect U.S. claimholders against prejudice and inconvenience, and (c) distribute proceeds substantially in accordance with the American bankruptcy law principles. Clearly, such “appropriate relief” includes the pre-judgment attachment of assets, but it may also extend further, as the

C.A.), however, the Court of Appeal deemed an arbitration clause to be broad enough to rule out resort to any judicial forum, even for the limited purpose of provisional relief in the form of a sequestration of assets.

134. See notes 66-81 supra and accompanying text.
case of *In re Lineas Aereas de Nicaragua*\(^{136}\) illustrates. There, a trustee appointed under Nicaraguan law to administer the assets of a Nicaraguan airline sought an order for the turnover of all of the airline's property located in the United States, as well as an injunction restraining the conduct of any litigation in the U.S. against the airline or its property. The U.S. bankruptcy court not only ordered that all of the airline's U.S. property be turned over to the trustee (albeit on condition that it be applied primarily to satisfy debts owed to U.S. creditors), but also enjoined the bringing of any new legal actions in U.S. courts against the debtor or its property.\(^ {137}\)

Even before enactment of Section 304, U.S. courts had explored ways of supporting foreign bankruptcy proceedings. The leading case was *Clarkson Co., Ltd. v. Shaheen*,\(^ {138}\) in which a Canadian trustee in bankruptcy brought an action in federal district court in New York to obtain records located in the New York offices, or held by the New York corporate officers, of bankrupt Canadian companies. The preliminary injunction granted by the district court required the New York officers not only to turn over the records, but also to refrain from disposing of any corporate property over which they had or might come to have control. The Court of Appeals affirmed, upholding both the lower court's power to issue such an order and the appropriateness of the order.\(^ {139}\)

Enactment of Section 304 has served more broadly to reinforce the willingness and capacity of courts to assist foreign bankruptcy proceedings so as to enhance their effectiveness. A good illustration is

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\(^ {137}\) While the court did not require the suspension or discontinuance of actions that had already been instituted, it did prohibit the litigants in those actions from seeking to enforce any such judgments without a prior order of the U.S. bankruptcy court.

But see *In re Toga Mfg. Ltd.*, 28 B.R. 165 (Bankr. E.D. Mich. 1983), where the court denied a petition by the bankruptcy trustee of a Canadian company for an injunction restraining all of the company's creditors from bringing or continuing actions against the company or its assets. The court found that the Canadian law would not distribute the estate's assets in substantial accordance with the relevant U.S. law standard and that comity did not require that action in U.S. courts be restrained. "We find that comity requires that [the U.S. creditor's] claim remain in the Michigan and United States courts, there to be fully litigated . . . . This Court must protect United States citizens' claims against foreign judgments inconsistent with this country's well-defined and accepted policies." *Id.* at 170.

\(^ {138}\) 544 F.2d 624 (2d Cir. 1976).

\(^ {139}\) The Court of Appeals thought that it would contravene the doctrine of comity not to recognize the Canadian bankruptcy proceedings. See *id.* at 632.
Cunard Steamship Co. Ltd. v. Salen Reefer Services AB. In that case, the Court of Appeals affirmed a lower court order vacating an attachment of the New York assets of a Swedish corporation on the ground that a Swedish court had declared the company bankrupt and had issued a stay of actions by the company's creditors. The court emphasized that the principles of Swedish bankruptcy law were not dissimilar to those of the U.S. Bankruptcy Code and that recognition of the Swedish bankruptcy proceedings would not offend any overriding U.S. law or public policy; it also found that Cunard would not be prejudiced or treated unjustly if it were required to participate in the Swedish bankruptcy proceedings. The comity displayed by U.S. courts in the bankruptcy field is actually quite surprising in one respect. While any ancillary relief that U.S. courts might order will most likely have been solicited (or at least favored) by the foreign liquidator or trustee, the decisions do not suggest that the courts necessarily solicit the views of the foreign court itself on the appropriateness of their contemplated intervention. Their failure to do so would be questionable.

140. 773 F.2d 452 (2d Cir. 1985). For a related case, and similar result, see generally Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709 (2d Cir. 1987). In Victrix, the court actually awarded costs and attorneys fees for the wrongful attachment of local property in disregard of an ongoing foreign bankruptcy proceeding. For a decision awarding damages as well as costs and fees under these circumstances, see generally Rashi Textiles, U.S.A., Inc. v. Rhomberg Textil G.m.b.H. of Austria, 857 F. Supp. 1051 (S.D.N.Y. 1994).

141. The court rejected Cunard's claim that proof of reciprocity by the Swedish courts was necessary before recognition could be given to the Swedish proceedings. It also rejected the argument that a foreign bankruptcy tribunal must have in personam jurisdiction over a creditor before the creditor could be required to resort to the tribunal. See Cunard Steamship, 773 F.2d at 458, 460.


142. Not surprisingly, foreign bankruptcy actions are the type of foreign litigation to which U.S. courts are also most likely to show deference by declining to exercise their jurisdiction over related disputes. In the case of Cornfeld v. Investors Overseas Services, Ltd., 471 F. Supp. 1255 (S.D.N.Y. 1979), aff'd mem., 614 F.2d 1286 (2d Cir. 1979), a former officer and director of a Canadian corporation brought an indemnity action against the corporation in U.S. district court to recover litigation expenses incurred in service to the corporation. The court declined to entertain the suit because the company was then involved in liquidation proceedings in a Canadian court, and the court saw no reason why that the plaintiff could not adequately protect its rights in Canada. See id. The court reached this result despite the fact that the plaintiff was a New York citizen and that the indemnification contract contained a clause providing for the application of New York law. See id.
The bankruptcy cases naturally raise the question of whether U.S. courts should also afford provisional relief in aid of other kinds of actions before foreign courts. Although the aims of bankruptcy law are particularly well served by a policy favoring international judicial assistance, nothing requires that such a policy be limited to that field. As noted, Article 24 of the Brussels and Lugano Conventions—which cover virtually all civil and commercial litigation in the courts of the contracting states—expressly allow (and presumably encourage) a court lacking jurisdiction over the merits of a case to entertain a request for provisional relief pending the outcome of proceedings in the competent court.\(^{143}\) This is suggestive of the room that remains for the future development of transnational provisional relief in U.S. courts.

D. Enforcing a Foreign Court’s Provisional Remedies

In many of the cases discussed thus far, the courts of two or more nations were competing, or seen to be competing, in the exercise of judicial authority over a given dispute. It would be a mistake, however, to suppose that issues of transnational provisional relief arise only in that context. A court of country X may have granted a protective measure in a case that it, and it alone, has an interest in adjudicating. The measure may then come to the attention of a court of country Y only because one of the litigants—and possibly even the court of country X itself—believes that the measure would profit from enforcement or reinforcement by the courts of another jurisdiction.

In fact, foreign courts very rarely address U.S. courts directly for assistance in enforcing their orders of provisional relief. One such case, however, is *Pacanins v. Pacanins*,\(^{144}\) where a Florida trial court declined to honor a request from a Venezuelan court to freeze, pending the outcome of the Venezuelan action, one half of the funds in Florida belonging to the Venezuelan defendant. The appeals court reversed, finding that the Venezuelan order, though non-final, was deserving of enforcement. The court relied on a prior state court decision for the proposition that compelling public policy considerations sometimes

\(^{143}\) Nothing, of course, prevents a court of a contracting state from exercising discretion to offer provisional relief even in cases not covered by the Brussels or Lugano Conventions. See, e.g., Laffitte v. Société les Transiaries Réunis et Ortoli, CA Paris, Oct. 8, 1964, J. DR. INT’L, 1965, 901. There, a French court appointed a provisional administrator of property in France belonging to a Vietnamese company, notwithstanding a clause conferring exclusive jurisdiction on the courts of Vietnam.

\(^{144}\) 650 So.2d 1028 (Fla. Dist. Ct. App. 1995).
require a relaxation of the general rule against enforcing the non-final orders of foreign courts.145

In the more usual scenario, a foreign court issues an order of provisional relief in aid of its own proceedings, and the litigant in whose favor that order was issued then asks a U.S. court to enforce it. The field in which U.S. courts are most commonly asked to enforce the provisional remedies of foreign courts is family law, and especially matters of alimony and child support. This is perhaps because such awards, even if modifiable and thus non-final, typically take the form of fixed money judgments,146 thus closely resembling the foreign country money judgments that U.S. courts are customarily asked to recognize and enforce.

The case of Wolff v. Wolff447 is a perfect illustration. There, the plaintiff filed suit against her former husband in a Maryland court to

145. See generally Cardenas v. Solis, 570 So.2d 996 (Fla. Dist. Ct. App. 1990). Among the examples of enforcement given in this case were interlocutory decrees ordering payment of support for spouses and minor children, or ordering collection of a valid debt on behalf of a creditor.

146. Requests that U.S. courts enforce non-monetary foreign orders of provisional relief are not, however, unknown in the family law area. For example, a New York court recently granted enforcement of a foreign court order freezing investment accounts in New York. In the case, Rohlfing v. Rohlfing (unpublished), a Brazilian court had issued an ex parte order in favor of the wife (plaintiff in the separation and divorce action in Brazil) freezing half of the couple’s $4 million in assets in accounts in New York financial institutions. The New York court rejected the husband’s argument that New York lacked personal jurisdiction over him since it had no jurisdiction over the marriage and since he had no connections, personal or business, with New York other than maintenance of the accounts. It effectively asserted in rem jurisdiction over the assets, noting that the husband offered no evidence to suggest that the Brazilian procedures were not fair or that the Brazilian court had improperly issued the orders. See Cerisse Anderson, Brazilian Court Order Enforced in New York, N.Y.L.J., May 18, 1995, at 1.

One type of non-monetary foreign provisional order that U.S. courts are particularly willing to enforce in the family law area is a foreign child custody order. See, e.g., Adamsen v. Adamsen, 195 A.2d 418, 420-21 (Conn. 1963) (return of child to father who had been awarded custody by a Norwegian court); Zanzonico v. Neeld, 111 A.2d 772, 774-76 (N.J. 1955) (valid adoption of niece under Italian law makes adoption valid under New Jersey law for inheritance tax purposes, despite failure to comply with New Jersey requirement that adopted child reside with adoptive parents for a year prior to adoption hearing); Willson v. Willson, 55 So.2d 905, 906 (Fla. 1951) (full faith and credit given to Canadian custody decree awarding custody to paternal grandmother, subject to proof of new conditions that would have produced a different decree if presented to the Canadian court). But see Fantony v. Fantony, 115 A.2d 610, 613 (N.J. Super. Ct. 1955), modified on other grounds, 122 A.2d 593, 598 (N.J. 1956) (comity denied to foreign custody decree where not based on child’s best interest). See also Sheldon Shapiro, Annotation, Extraterritorial Effect of Valid Award of Custody of Child of Divorced Parents in Absence of Substantial Change in Circumstances, 35 A.L.R.3d 520 §§ 9-10a (1971), and cases cited therein. See generally David Buzard, Note, U.S. Recognition and Enforcement of Foreign Country Injunctive and Specific Performance Decrees, 20 CAL. W. INT’L L.J. 91, 93 (1989).

enforce the alimony provisions of an English divorce decree. The trial
court dismissed the action for lack of subject matter jurisdiction, chiefly
because Maryland had enacted the Uniform Foreign Money-Judgment
Recognition Act. This Act expressly does not cover "judgments for
support in matrimonial or family matters." The Court of Appeals
reversed. It first found that, while the Act does not require recognition
of such judgments, neither does it prohibit their recognition. It then
proceeded to find the decree worthy of recognition under general
principles of comity. More particularly, it held that Maryland equity
courts may enforce the decree of a court of a foreign state or country,
both as to alimony accrued and to accrue, to the same extent and by the
same means that they enforce decrees of their own:

Once it is determined under principles of comity that a
foreign country decree will be recognized in this State, the
question of enforcement becomes . . . should the equity
courts of this State compel obedience to a valid decree of a
court of competent jurisdiction? We think the answer is yes.
To recognize a foreign country decree as valid, but then to
leave a litigant without a remedy for the enforcement of such
a decree would, in our view, render comity a rather
meaningless concept.

148. Id. at 415. The lower court also found that it lacked personal jurisdiction. See id. at
414. It appears, however, that the husband had not only been personally served with process
in Maryland, see id. at 415, but was a Maryland resident. The appeals court readily found that
personal jurisdiction was not lacking.

149. "To those foreign money-judgments which are excluded from the scope of the Act,
the legislature simply has not spoken. We do not think this silence can be construed as
evidencing an intent that such judgments never, under any circumstances, be accorded
recognition." Id. at 416.

150. The court, of course, stated that a foreign decree would be denied recognition for lack
of jurisdiction, violation of due process, or offense to the public policy of the state where
recognition is sought. But it held that "a foreign decree is presumed valid until some evidence
to the contrary is presented." Id. at 419.

Not all state courts, however, are prepared to enforce alimony awards of foreign courts when,
under the law of the foreign country, those awards are not considered to be final. See Ogden
v. Ogden, 33 So.2d 870, 874 (Fla. 1947). In Ogden, the court also considered the U.K.
judgment non-final insofar as it purported to restore the wife's conjugal rights. See id. For an
older statement of the view that modifiable awards of support by foreign courts are not worthy
of enforcement, see De Brimont v. Penniman, 7 F. Cas. 309, 311 (S.D.N.Y. 1873) (No. 3,715).
To the same general effect, in the U.K., see Nouvion v. Freeman, 1889 15 App. Cas. 1 (P.C.).

In the interstate context, certainly, courts have enforced decrees of courts in other U.S.
states that ordered payment of alimony and child support, even when those decrees are
expressly subject to modification and are thus provisional only. See, e.g., Worthley v.
Worthley, 283 P.2d 19, 24 (Cal. 1955) (sister-state alimony and support obligations are
enforceable even if modifiable, and either party may tender any plea for modification that could
Even outside the family law sphere, non-final or otherwise modifiable monetary awards may win recognition and enforcement in U.S. court, though the risk of non-recognition or non-enforcement is substantial. That risk increases enormously, however, when the foreign provisional relief takes non-monetary form. By definition, such relief is not only provisional, but is also “specific” in form and thus more difficult to police. When a party to an action in a court of country X wins a non-monetary protective order from that court, and then seeks to enforce that order in a court of country Y, it is thus apt to run into difficulties.

The still leading case is *Pilkington Brothers P.L.C. v. AFG Industries Inc.* Pilkington (a British corporation) had begun arbitration proceedings in London against AFG (a Delaware corporation) for breach of the parties’ licensing agreement. In connection with that proceeding, Pilkington applied to a U.K. court for an interim injunction restraining AFG, without Pilkington’s consent, from copying or communicating to any party materials obtained from Pilkington under their agreement or from giving third parties access to the production facilities where operations under the licensing agreement were performed. Though invited to participate in the hearings in the U.K. court, AFG did not do so, and the court eventually entered an *ex parte* order along the lines Pilkington had requested. Pilkington then filed an application for provisional relief in federal district court in Delaware. Rather than asking the U.S. court to devise its own protective order, however, it merely asked that the court issue a preliminary injunction “exactly track[ing] the wording” of the U.K. order. The district court judge declined to grant that relief:

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154. Nevertheless, enforcement of non-monetary foreign provisional orders, whether in the family law area or not, is not unknown in U.S. courts. *See supra* note 146, *infra* note 158.


156. *See id.* at 1042.
I conclude that principles of international comity do not require, and in fact militate against, the issuance of a duplicative order that would interject this Court into the arbitration dispute now before the English courts and the English arbitration panel.

Unlike decisions by American courts, those issued by foreign jurisdictions are not entitled to automatic recognition or enforcement in the United States . . . .

In the usual case parties seek enforcement in this country of foreign money judgments, not injunctive orders. According to the Restatement (Second) of Conflict of Laws, however, the principle of international comity should not be limited to money judgments . . . . This Court has no reason to quarrel with the Restatement's position. Nonetheless, plaintiff is not entitled to its requested relief.\footnote{157}{Id. at 1043.}

The court based its refusal on the fact that, unlike a modifiable injunction entered after a full adjudication of the merits in the foreign court (as in custody and divorce decrees), the modifiable order of the U.K. court was purely interlocutory and had not been based on a full consideration of the merits of the underlying dispute. It reasoned:

\[R\]ather than create a per se rule against recognition and enforcement of foreign interim injunctions, the Court will analyze the particular facts of this case under general principles of international comity . . . .

On the facts of this case it would be inappropriate to enter into Pilkington's requested relief. By issuing an identically worded injunction while arbitration is still proceeding under the watchful jurisdiction of the English High Court, this Court would offend, rather than promote, principles of international comity. For were this Court to issue Pilkington's requested relief, it would interfere unnecessarily in those foreign proceedings—proceedings in which Pilkington agreed by contract to participate. For example, upon a future application to this Court for a sanction against violations of its order, this Court would be compelled to interpret and apply an injunction which was drafted by the

\footnote{158}{U.S. courts have sometimes enforced foreign injunctive orders—even outside the matrimonial law field—when entered after a full adjudication of the merits in the foreign court. See, e.g., Belle Island Inv. Co. v. Feingold, 453 So.2d 1143, 1145-46 (Fla. Dist. Ct. App.), case dismissed, 459 So.2d 1039 (Fla. 1984).}
English High Court in furtherance of the High Court's special role under the English Arbitration Act. This might lead to inconsistent interpretations and inconsistent enforcement. Any interpretation of the High Court's order should be made by that court, not a United States district court. In addition, the existence of two identical outstanding injunctions could lead to a race to that courthouse which is perceived by each party as the more favorable forum. Finally, modifications of an injunction in one jurisdiction could lead to confusion and procedural tangles in the other jurisdiction. It is far simpler to have one court receive all applications for modifications. An alternative basis for the district court's refusal was that the relief sought was unnecessary in any event. In the court's view, the U.K. order, as it stood, extended to AFG's conduct in the United States, so that an order of relief by a U.S. court would in a sense be "redundant." The court further assumed that the U.K. court would be willing to punish any violations of its interim order that were committed in the United States—through a fine, if not through some form of specific relief like a sequestration of assets. The court accordingly left for another day "the question of whether insufficient enforcement mechanisms in a foreign jurisdiction of a litigant's choice would ever constitute grounds for issuing a duplicative interim injunction at the behest of the same litigant."

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The court in *Pilkington* evidently did not doubt its jurisdiction to entertain the request for provisional relief. But jurisdiction can sometimes of course be an issue, as illustrated by the case of *International Shipping Company, S.A. v. Hydra Offshore, Inc.*, 675 F. Supp. 146 (S.D.N.Y. 1987). International had begun arbitration in the U.K. against Hydra and others to enforce a contract for the purchase of a vessel. At International's request, the High Court issued an injunction restraining Hydra from transferring possession of the vessel. Thereafter, International brought suit on the same underlying claim in the U.S. and applied for a similar preliminary injunction. The U.S. court dismissed the action for lack of subject matter jurisdiction, and the defendants then moved for the imposition of Rule 11 sanctions against plaintiff's counsel. The court found that it manifestly lacked jurisdiction, whether under (a) admiralty (since admiralty jurisdiction does not cover breaches of contracts to sell a vessel), *Hydra*, 675 F.Supp. at 150-51, (b) diversity jurisdiction (since the presence of aliens on both sides of the case destroyed diversity), *see id.* at 152, or (c) the Convention on Recognition and Enforcement of Arbitral Awards (since the Convention only confers jurisdiction in an action to compel arbitration or to enforce an arbitral award), *see id.* at 153-54. It consequently imposed Rule 11 sanctions.


161. *See id.* at 1046 & n.11.

162. *Id.* at 1046. For criticism of the *Pilkington* decision, see Buzard, *supra* note 146, at 100-02; David L. Underhill, *Note, Denying Enforcement of a Foreign Country Injunction—Solution or Symptom?:* Pilkington Bros. v. AFG Indus., Inc., 17 CONN. L. REV. 703, 718-19 (1985). For a more favorable account, see Vince Carson, *Note, Foreign
Nevertheless, the principal argument advanced in Pilkington for denying enforcement of provisional orders issued by a foreign court in an action before that court on the merits was that such enforcement would interfere with the foreign court’s jurisdiction. In order to evaluate this argument, one must consider the alternatives that the U.S. court had open to it. One such alternative (which the court did not embrace) would be for the courts of country Y categorically to deny enforcement to all foreign provisional orders. A policy of that sort would, however, run the obvious risk of systematically frustrating not only provisional remedies ordered by a court of country X, but also that court’s ultimate judgments. Obviously, worse yet would be a policy of disregarding the country X proceedings altogether and entertaining the action on the merits.

Another alternative would be for the courts of country Y to entertain requests for provisional relief, but to insist that any such relief take the form of an original protective measure of the court’s own devise. Under this approach, courts would deny requests for enforcement, as such, of measures ordered by a court of country X. Doing so presents a different, but no less serious, disadvantage. If the courts of country Y address de novo the necessity of provisional relief in a case pending before a court of country X—that is to say, if they show little or no regard for the latter court’s previous determination of that issue—they risk acting at cross-purposes with and even offending that court. It is difficult to see how such an approach could be considered more respectful of the country X court than simply entertaining an action to enforce that court’s order as it stands.

Although Pilkington involved only the enforcement of foreign provisional relief taking non-monetary form, later decisions have applied its language broadly as authority for withholding comity from all non-final foreign judgments. One court specifically cited the case for the proposition that provisional orders of foreign courts should be denied enforcement even when they take purely monetary form.\(^1\) Another court cited it as evidence of a general judicial aversion to basing recognition of a foreign court’s provisional orders on considerations of international comity:

\[\text{[I]n every case [cited] where the principle of comity was}\]

\(^{1}\) See Mayekawa Mfg. Co. v. Sasaki, 888 P.2d 183, 188-89 (Wash. Ct. App. 1995) (Japanese holder of promissory note cannot enforce note against a Japanese national residing in the state since the judgment, though monetary in form and though enforceable in Japan, is only preliminarily enforceable in the state).
applied, the foreign court had made some form of binding decision. The [foreign court here] has not yet taken any action in the related case before it . . . . The principle of comity is inapplicable in the present stage of this litigation. Such reasoning, taken at face value, would lead to a policy of non-enforcement of all non-final foreign orders. Even *Pilkington* did not go that far.

This is not to say that the courts of country Y invariably should enforce within their territory all measures of provisional relief ordered in cases before the courts of country X. This too would be unwise. Although there appears to be little danger of this in the United States, one state court has announced a general rule favoring the enforcement of even interlocutory foreign court orders. In *Nahar v. Nahar*, a Florida court gave effect (over a vigorous dissent) to the interlocutory order of an Aruban court determining that Dutch law governed the disposition of the decedent's Florida bank accounts and ordering that the accounts be transferred to Aruba for disposition in accordance with that body of law:

[R]ather than trying to analyze each foreign order on the basis of whether it is final and entitled to comity, [or] non-final [and] not subject to an exception and [thus] not entitled to comity, or non-final [but] subject to an exception and entitled to comity, the better approach is to follow the Restatement (Second), Conflict of Laws, approach in its entirety . . . .

Consequently, it appears that any foreign decree should be recognized as a valid judgment, and thus be entitled to comity, where the parties have been given notice and the opportunity to be heard, where the foreign court had original jurisdiction and where the foreign decree does not offend the public policy of the State of Florida. It is doubtful whether courts will be able to maintain such a hospitable policy toward foreign provisional orders when faced with the more difficult situations that future cases will inevitably bring.

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166. *Id.* at 228-29.
E. Treaty-based Enforcement of Foreign Provisional Remedies

Although the United States has not ratified any general convention on the recognition of final foreign country judgments, it is a party to a number of specific treaties on judicial assistance that are drafted broadly enough to encompass mutual enforcement of provisional judicial remedies. Such conventions may be bilateral or multilateral. The best example of a multilateral arrangement of this sort is the U.N. Convention Against the Illicit Traffic in Narcotic Drugs and Psychotrophic Substances. This Convention requires each state party to enact measures enabling it to identify, trace, and freeze property derived from, or used in, drug trafficking and money laundering offenses. Each party must provide judicial assistance by either initiating forfeiture proceedings or enforcing foreign forfeiture orders with respect to such property. The U.S. has opted in its implementing legislation for the former method.

The United States is also a party to several bilateral "mutual legal assistance treaties." The signatory states to these treaties agree, upon request by the authorities of another signatory state, to freeze assets, initiate forfeiture actions against local property, repatriate assets, and enforce forfeiture judgments. The U.K.-U.S. agreement specifically provides for such forms of assistance in cases of drug trafficking. Similarly, a mutual assistance treaty with Switzerland permits the U.S. Securities and Exchange Commission to obtain provisional freezes on the suspected proceeds of securities law violations.

Clearly, the treaty initiatives undertaken thus far have been confined to specific "high-profile" law enforcement problems. Such initiatives are undoubtedly welcome, but are probably an inadequate framework for coping with the large volume and diverse nature of requests for the enforcement of foreign provisional remedies that can be

168. See id. art. 5(4)(a)(i) & (ii).
170. See Agreement Concerning the Investigation of Drug Trafficking Offences and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, Feb. 9, 1988, U.S.-U.K., art. 10, T.I.A.S. No. 11,649. See also supra note 33 and accompanying text.
expected to reach the courts in the years ahead. The courts have no choice, in the near term, but to confront these challenges on their own.

IV. PROTECTING AGAINST "INTERFERENCE" BY FOREIGN COURTS

In Part II of this article, I focused on the willingness of the courts of country X to order provisional relief under circumstances in which that relief will have important extraterritorial effects in country Y. In Part III, I examined the "reverse" question of whether, and under what circumstances, the courts of country Y should be willing to lend their assistance to the provisional remedies ordered by the courts of country X in cases pending in country X. As Part II in particular shows, one must reckon with the possibility that the measures adopted by a court of country X will provoke a distinctly negative reaction in country Y. Country Y may have such a reaction for the simple reason that the measures strike it as "extraterritorial" and possibly even as threatening its own jurisdiction.

Conflict between countries X and Y over the allegedly extraterritorial protective measures ordered by the courts of country X is not at all uncommon and promises to become even less so in the years ahead. Indeed, conflict may even arise in situations in which a court of country Y purports to act in "aid" of litigation pending before a court of country X. Suppose, for example, the court of country X (which is adjudicating the main action) deems the provisional relief ordered by the court of country Y—however well-intentioned—to have seriously prejudged the merits of the case or to be otherwise inopportune. Inasmuch as country Y’s intervention was presumably intended from the start merely to "support" the proceedings in the court of country X, the latter court would seem perfectly justified in disregarding it (e.g., in denying it recognition or enforcement). As the incidence of transnational provisional relief grows, one should not be surprised to find that courts entertaining the merits of a case are prepared to reject interventions by other courts even when they are presented merely as "friendly" provisional remedies.

This very scenario has arisen in the context of the European Convention on Jurisdiction and Enforcement of Judgments (the Brussels and Lugano Conventions). As has been seen,172 Articles 24 and 25 of the Convention authorize courts of the contracting states to make

172. See infra notes 94-100 and accompanying text.
provisional relief available in aid of litigation in another contracting state and, in principle, obligate the latter state to enforce that relief. On occasion, a court (evidently, in all reported cases, a French court) has seen fit to order the provisional or "interim" payment of a monetary claim pending final adjudication of that claim in a court of a co-contracting state. It may be debated whether ordering the provisional payment of a claim, pending final adjudication, constitutes "prejudging" the case. Surely, however, it is one thing for the court that is hearing the main action (and that will eventually decide the case on the merits) to order provisional payment of the claim, but quite another for the court of a different jurisdiction to do so. Although the European Court of Justice has not yet had to decide whether such orders properly constitute measures of "provisional" relief within the meaning of Article 24, the

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> The plaintiff has the right under the labor code to seek provisional judicial relief, and the judge has the power to prescribe all protective measures that are called for. Article 24 of the Brussels Convention, drafted in the same terms, confirms the jurisdiction of the court of Mr. Tron’s domicile (le juge naturel) for these purposes. It is not seriously contested, in connection with the plaintiff’s request for provisional relief, that he is owed relatively substantial sums of money on account of back salary and paid holidays. The payment of salary that is indispensable for the plaintiff’s ability to live is obviously a protective measure that must be accorded him. Consequently, this court may award Mr. Tron an advance of the sums to which he is entitled on this account, while leaving all other elements of his claim to be decided by the court that has jurisdiction over the merits. The ruling was reversed by the Court of Appeal, but only on the ground that, contrary to the lower court’s finding, Mr. Tron’s entitlement was seriously contested. Société Verkor v. Tron, CA Versailles, June 27, 1979, J. DR. INT’L 1980, 894.

See, in this connection, the case of Diehm v. Sire, CA Aix-en-Provence, May 4, 1981, R.C.D.I.P. 1983, 110, in which the court overturned in large part (while sustaining in small part) an award of interim damages to a French national for claims that arose out of a traffic accident in Germany and over which the German courts had jurisdiction under the Brussels Convention. The court evidently found that awarding the plaintiff the “quasi-totality” of her claim would amount to “circumventing” the jurisdiction of the German courts. See also Société Nordstern v. Eon, CA Rennes, May 20, 1980, DIGEST OF CASE-LAW RELATING TO THE EUROPEAN COMMUNITIES, 1985, I-24-B11; Sahm v. Maechler, CA Colmar, Mar. 5, 1982, DIGEST OF CASE-LAW RELATING TO THE EUROPEAN COMMUNITIES, 1985, I-24-B11 (discussed in COLLINS HAGUE LECTURES, supra note 65, at 38 n.117).

174. On two occasions, the Court of Justice has ruled that a provisional measure ordered by a French court was not mandatorily enforceable in Germany against German assets, Articles 24 and 25 notwithstanding. In neither of those cases, however, did this result turn on considerations of extraterritoriality. In one case, it turned on the fact that questions of matrimonial rights in property fell outside the Convention. See Case 143/78, de Cavel v. de Cavel, 1979 E.C.R. 1055, 1066-67, [1979] 2 C.M.L.R. 547, 558-59. In the other, it turned on the fact that the French court order in question had been obtained on an ex parte basis. See Case 125/79, Denilauler v. S.n.c. Couchet Freres, 1980 E.C.R. 1553, 1571. The Denilauler
weight of scholarship clearly rejects that notion, \(^{175}\) and this view seems correct. In fact, the French courts themselves have on occasion ruled that the court before which the principal action is pending (or the court that has exclusive jurisdiction over the case) is the more appropriate forum for the award of provisional relief when it takes the form of an interim payment. \(^{176}\)

If the only issue in such cases was whether the courts of country X will cooperate in enforcing country Y’s orders (for example, upon the request of the party in whose favor the order was granted), the problem would not be too serious. But the stakes of the conflict can become much more weighty, as when the courts of country X, resenting the intrusions by the courts of country Y, adopt and enforce countermeasures. Put more concretely, the party adversely affected by

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court stated:

Article 24 does not preclude provisional or protective measures ordered in the State of origin pursuant to adversary proceedings—even though by default—from being the subject of recognition and an authorization for enforcement on the conditions laid down in Articles 25 to 49 of the Convention. On the other hand the conditions imposed by Title III of the Convention . . . are not fulfilled in the case of provisional or protective measures which are ordered or authorized by a court without the party against whom they are directed having been summoned to appear and which are intended to be enforced without prior service on that party. It follows that this type of judicial decision is not covered by the simplified enforcement procedure provided for by Title III of the Convention . . . .

[Thus,] judicial decisions authorizing provisional or protective measures, which are delivered without the party against which they are directed having been summoned to appear and which are intended to be enforced without prior service do not come within the system of recognition and enforcement provided for by Title III of the Convention.

Id. The U.K. courts have reached the same result in cases involving ex parte provisional orders by courts of Convention states. See E.M.I. Records Ltd. v. Modern Music Karl-Ulrich Walterbach G.m.b.H., [1992] 1 Q.B. 115.

175. See COLLINS HAGUE LECTURES, supra note 65, at 37-39; PIERRE GOTHOT & DOMINIQUE HOLLEAUX, LA CONVENTION DE BрюЖЕLES DU 27 SEPTEMBRE 1968 115-17 (1985); Jean-Mare Bischoff & André Huet, Communautés Européennes, 109 J. DR. INT'L 942, 946-47 (1982). A recent ruling of the Court of Justice confirms these doubts. See Case C-261/90, Reichert v. Dresdner Bank AG, 1992 E.C.R. I-2149, I-2184, holding that provisional or protective measures, within the meaning of Article 24, are measures “intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.” In that case, the Court ruled that since an action paulienne under French law allows the court to “vary the legal situation of the assets of the debtor and that of the beneficiary by ordering the revocation as against the creditor of the disposition effected by the debtor in fraud of the creditor’s rights,” it cannot be considered a provisional or protective measure within the meaning of Article 24.

protective measures ordered by the courts of country Y may actually succeed in getting a court of country X to "cancel" or "undo" those measures, or to order some kind of countervailing relief of its own.

The recent case of Securities and Exchange Commission v. Wang177 illustrates this scenario. In June 1988, the SEC filed a civil complaint in federal district court seeking penalties and recovery of profits from Wang and Lee, who allegedly engaged in insider trading and defrauded purchasers and sellers of securities on U.S. exchanges in violation of the Securities Exchange Act of 1934. Lee (a Taiwanese citizen and resident of Hong Kong) was alleged to have benefited in his securities dealings from non-public information obtained from Wang, who had been a financial analyst with the Morgan Stanley & Co. investment bank. At the SEC's request, the court issued an ex parte temporary restraining order barring Lee from removing assets from the U.S.—an order that Lee promptly violated by demanding the release of funds from his bank's New York branch. Lee never filed an answer in the action, and the court entered a final order of default enjoining Lee from transferring (or bringing a legal action to recover) his assets, which included $12.5 million in an English bank having branch offices in Hong Kong and New York. When Lee (who had meanwhile instructed his broker to transfer money to the bank's Hong Kong branch via its New York branch) then sued the bank in Hong Kong for possession of these funds, in violation of the district court's anti-suit injunction, the U.S. district court ordered the bank to deposit the $12.5 million into the court's registry. The bank complied under protest, and the U.S. court entered a default judgment that Lee unsuccessfully sought to set aside. The district court then impressed the funds with a constructive trust in favor of the defrauded investors and ordered an inquiry into the amount of actual insider trading profits for purposes of determining Lee's penalty.

Eventually, the court in the Hong Kong action rendered a judgment denying effect to the orders of the U.S. court, including the anti-suit injunction. It considered those orders to be unworthy of recognition, not only because they were extraterritorial in reach, but also because they were "public" in nature:

In the present case [the] SEC, a United States federal agency, is the sole plaintiff in the New York court proceedings. The order for disgorgement and the order for penalty are solely sought by the SEC. No investor or private party has

intervened in the SEC’s statutory enforcement proceedings. The terms on which the Receiver will hold the disgorged funds are those to be proposed by [the] SEC and approved by the court . . . .

The disgorged offender’s funds, it is true, are not paid into the United States treasury. However, the disgorged funds are a monetary sum recovered by [the] SEC, in its capacity as a federal agency, in exercise of its statutory powers forming part of the enforcement provisions of the Securities Exchange Act. I am satisfied that the disgorgement proceedings . . . amount to “the enforcement of a sanction, power or right at the instance of the state in its sovereign capacity” [quoting authority]. If the . . . proceedings are not in the narrow sense the enforcement of a sanction, they are certainly the enforcement of a public power or right at the instance of the United States in its sovereign capacity . . . .

I have already held that the triple penalty provisions form part of the penal laws of the United States. I further hold that neither of the New York court orders . . . can be invoked by the Bank in Hong Kong, by way of defence to the plaintiffs . . . summonses. 178

Notwithstanding its refusal to enforce the orders of the U.S. authorities, the Hong Kong court was prepared to protect the defrauded investors by recognizing the existence under Hong Kong law of a constructive trust in their favor.179

At this point, the bank filed an appeal from the U.S. district court judgment and order, claiming that the district court had effectively placed it in double jeopardy by creating a duplicate constructive trust and raising the risk that the bank would have to indemnify the investors twice, once in each jurisdiction. The British government strongly supported the bank, complaining that the district court had acted extraterritorially, in violation of international law, by “seek[ing] to regulate . . . relations between a banking company, not of United States nationality . . . , and a customer of that Bank in respect of a sum of money held in accounts in a branch of that Bank in Hong Kong.” “The presence of another branch of the same Bank in the United States,” it

179. The court emphasized that its recognition and enforcement of a constructive trust did not amount to a direct or indirect enforcement of U.S. penal or other “public” laws. See id. at 419.
argued, "is immaterial." The parties settled the case before the Court of Appeals could decide the appeal and before the Hong Kong court had issued any order disposing of the constructive trust funds.

The Wang case demonstrates the capacity of transnational provisional relief to precipitate international judicial warfare; in this respect, it is not unlike the practice of international anti-suit injunctions. But unlike the international anti-suit injunction, whose use presumably can be sharply curtailed without prejudice to the international legal system, transnational provisional relief is unquestionably here to stay. The challenge will be for national courts to distinguish between its use and its abuse, and to ensure that when used, it is used with measure and discretion.

V. Conclusion

Given the variety of scenarios in which issues of transnational provisional relief may arise, it is scarcely surprising that neither Congress nor the courts have thus far managed to articulate clear or consistent policies on this aspect of transnational litigation. With the exception of the states that are parties to the Brussels and Lugano Conventions—and, even then, only as to international judicial cooperation among themselves—most other countries do not appear to have done much better.

The courts cannot afford to adopt a policy toward transnational provisional relief that ignores the range of forms that such relief may take or the range of procedural settings in which it is sought. Some measures are transnational chiefly by virtue of their effects on persons, property, or conduct located abroad. Even as to this category, distinctions must be drawn. Where, for example, the applicant or its opponent is a foreign national, the transnational element is not in itself significant enough to justify modifying customary judicial attitudes toward the grant of provisional relief. In situations where the transnational element is more substantial, national courts face a more delicate task. The U.K. experience demonstrates in a general way that

180. Diplomatic Note annexed to the United Kingdom brief to the Court of Appeals.
courts need not be paralyzed by the prospect of ordering provisional relief with extraterritorial effects, but that they should not succumb to the temptation to order such relief when less drastic (and indeed less extraterritorial) measures would suffice. U.S. courts do not yet have as much experience with these problems, but the prospects for putting the lessons of the U.K. experience into practice appear to be promising.

In the other major scenario of transnational provisional relief, the court asked to order a protective measure is a court other than the foreign one in which the main action is pending. In addressing this scenario, courts should not overstate the difference between requests for relief in aid of ongoing foreign litigation, on the one hand, and requests for enforcement of provisional remedies already ordered by foreign courts in cases pending before them, on the other. The central questions in either situation are whether the court of country Y has a sufficient jurisdictional basis for acting in the manner proposed, whether the litigation in country X truly requires its intervention, and whether the intervention is a reasonable one given the circumstances of the litigation in country X and the claim on resources in country Y. After confirming its jurisdictional basis for acting, therefore, the requested court should inquire into whether the relief that is sought is indeed necessary, in some identifiable respect, to ensure the efficacy of the foreign proceeding (whether by protecting the foreign court’s jurisdiction, assisting in the conduct of its proceedings, supporting the effectiveness of its likely outcome, or assisting in some other way) and whether granting it would impose disproportionate costs or other risks on the jurisdiction in which it sits.

To help satisfy itself on these matters—as well as to promote international comity more generally—the court of country Y should normally solicit and consider the views of the court of country X on the necessity and utility of the protective measure contemplated. This will often be necessary precisely because requests for ancillary provisional relief (including enforcement of the main forum’s own provisional remedies) typically come from the parties and not directly from the foreign court hearing the action. In some cases, the ancillary relief that is envisaged would be regarded by the foreign court itself as an interference; it would be well for the court entertaining the request for relief to know that if it is indeed the case. This is not to suggest that U.S. courts should under no circumstances entertain a request for provisional relief in connection with foreign litigation in the absence of a positive indication by the foreign court, or that a negative indication on the foreign court’s part must in all circumstances be regarded as conclusive. By the same token, however, there may well be
circumstances in which U.S. courts should decline to grant relief ancillary to a foreign judicial proceeding, even though the situation might ordinarily warrant the issuance of an order and even though the foreign court has given every indication of welcoming one.

Even in the absence of any clear indication of the forum court’s views on these issues, it may be appropriate for the intervening court to require that the applicant first exhaust any analogous provisional remedies that are ordinarily available from the court hearing the main action and that would be reasonably adequate for the protective purposes sought to be achieved. Nor should the intervening court be indifferent to the forum state’s policies, if any, on the appropriateness of litigants resorting to the courts of foreign jurisdictions for purposes of obtaining provisional relief. The fact remains that provisional relief has its greatest impact on the court hearing the main action and that court’s assessment of the impact is entitled to serious consideration.

More importantly, U.S. courts called upon to grant provisional relief ancillary to foreign judicial proceedings should take a more open-minded attitude than is reflected in the few decisions that have thus far been rendered. Issues of transnational provisional relief admittedly do not lend themselves to simple solutions; indeed it is doubtful, given the slim number and range of cases that have thus far arisen, that we have yet seen the full dimensions of the problem. It is already clear, however, that neither slavish enforcement (or reinforcement) of provisional remedies ordered by foreign courts in actions pending before them nor categorical refusal to enforce such remedies is an appropriate response. The extensive experience of U.S. courts in entertaining requests for transnational provisional relief in the limited field of bankruptcy suggests that U.S. courts are capable of making similarly sound exercises of judgment over a much wider legal landscape, and that the international legal order would be correspondingly benefited if they did so.