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COMMENTS

PROVISIONAL RELIEF IN TRANSNATIONAL LITIGATION IN THE INTERNET ERA: WHAT IS IN THE US BEST INTEREST?

Panagiota Kelali

I. INTRODUCTION

Like most of his fellow students, John, a graduate student in a Chicago Law School, was searching the web looking for the best offers for his summer vacations. During his research he came across the following advertisement: “Limited time offer: Watch the Olympics and enjoy your summer in Greece! Special student price $1,500! The price includes round trip airline tickets from the selected US cities to Athens and from there to Rethymnon as well as 6 nights in the luxurious Hotel “Ledra Marriott” in Rethymnon! Olympic Games tickets are extra. Click here for selected cities and Olympic events. Hurry! Offer expires soon!”

Intrigued by the offer, John clicked on the link and was transferred to a very elaborate and professional web page of the named travel agency supposedly located in Athens, Greece, offering trips from certain U.S. cities to different destinations in Greece. Among the selected cities was Chicago, where he lived. After navigating a while in the Web site John was convinced that it was a serious and reliable agency and proceeded in the purchase of the vacation package. He immediately received an e-mail confirmation stating that his transaction was being processed and the electronic tickets and vouchers would be sent to him via e-mail upon approval of the transaction by his credit card company. When, after a couple of weeks John had still received nothing he tried to contact them. To his surprise, the e-mail address provided in the Web site did not work and the phone number was invalid. After several unsuccessful attempts to contact the agency in Greece, he realized that he had been the victim

1. The following hypothesis is fictional.
of a well-designed scam. Frustrated, he decided to alert the Federal Trade Commission (FTC) of the fraudulent website which, in turn, informed him that he was not the only Chicago college student victimized by it.

In the meantime, he started receiving alerts by his credit card company about large purchases and other credit card companies about unpaid balances. Apparently, somebody, possibly the same person had used his name and the rest of his personal identifying information to open credit card accounts and purchase expensive items over the Internet spending large amounts of money. After several months, the FTC agents managed to track the perpetrators and prepared to bring an action against them. There was, however, a complication; the perpetrators were Greek nationals and were located in Greece.

Some may think that there is some hyperbole in the previous hypothesis; however, the situation described above is not that uncommon. Every day more people fall victim to the newest form of consumer fraud, Internet fraud. The term “Internet fraud” is defined as referring generally to “any type of fraud scheme that uses one or more of the components of the Internet—such as chat rooms, e-mail, message boards, or Web sites—to present fraudulent solicitations to prospective victims, to conduct fraudulent transactions, or to transmit the proceeds of fraud to.

2. See FTC, The Consumer Sentinel database, http://www.consumer.gov/sentinel/ (accessed Nov. 12, 2004) (containing more than three million consumer fraud complaints that have been filed with federal, state, and local law enforcement agencies and private organizations, and maintained by the Federal Trade Commission (FTC)). Additional statistic data and other information on Internet Fraud trends and reports are offered by the Internet Fraud Complaint Center (IFCC), a partnership between the Federal Bureau of Investigation (FBI) and the National White Collar Crime Center (NWCCC); see generally http://www1.ifcctbi.gov/strategy/statistics.asp and http://www.ic3.gov/ (accessed Nov. 12, 2004). The Internet Fraud Complaint Center (IFCC) became operative on May 8, 2000, as a partnership between the National White Collar Crime Center (NW3C) and the Federal Bureau of Investigation (FBI). In December 2003, the Internet Fraud Complaint Center (IFCC) was renamed the Internet Crime Complaint Center (IC3). “IC3’s mission is to serve as a means to receive, develop, and refer criminal complaints regarding the rapidly expanding arena of cyber crime.”; see National Fraud Information Center & Internet Fraud Watch (NFIC), http://www.fraud.org/ and http://www.fraud.org/internet/intstat.htm (providing more information on illegal activity on the Internet); see generally http://www.nclnet .org/about/programs.htm#nfic and http://ndnet.org/advocacy/fraud/speech_internet_fraud_ watch_09101997.htm (accessed Oct. 30, 2004). The NFIC was originally established in 1992 by the National Consumers League, the oldest nonprofit consumer organization in the United States, to fight the growing menace of telemarketing fraud by improving prevention and enforcement. In 1996, the Internet Fraud Watch was created, enabling the NFIC to offer consumers advice about promotions in cyberspace and route reports of suspected online and Internet fraud to the appropriate government agencies.

financial institutions or to other[s] connected with the scheme."4

As the Internet's potential to serve as a powerful medium for international commerce expands,5 so too does its attractiveness as a tool for those who wish to commit illegal acts.6 Indeed, the Internet has enhanced criminals' abilities to commit traditional crimes more efficiently and anonymously and it has also created new opportunities for crime, such as Internet crime.7

As the level of international transactions and communications has assumed increasing significance through Internet use, there has been a corresponding increase in the importance of international litigation.8 However, the intangible and international nature of the Internet9 complicates the relevant issues10 when it comes to litigating a case of Internet fraud since the perpetrators are no longer hampered by the existence of national or international boundaries and can be located anywhere in the world. The critical issues include a determination of the

4. Id.
7. Id; see also supra n. 2.
8. See generally Denis T. Rice, Problems in Running a Global Internet Business: Complying with Laws of Other Countries, 797 PLI/Pat 11, 68 (July 2004); Jeremy Gilman, Personal Jurisdiction and the Internet: Traditional Jurisprudence For a New Medium, 56 Bus. Law. 395, 409-10 (Nov. 2000).
9. ACLU v. Reno, 929 F.Supp. 824, 830 (E.D. Penn. 1996), aff'd, Reno v. ACLU, 521 U.S. 844 (1997) (stating that the Internet is "not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks." The Internet is made up of computers and computer networks owned by governmental and public institutions, non-profit organizations, and private citizens. Id. at 831. The resulting whole is a... global medium of communications — or cyberspace—that links people, institutions, corporations, and governments around the world. Id.)
forum where the suit should be brought,\textsuperscript{11} preservation of the status quo pending determination of the dispute,\textsuperscript{12} and status of transnational cooperation on the issue of recognition and enforcement of judgments.\textsuperscript{13}

While all of the above issues are worthy of discussion, the first will be dealt with only briefly.\textsuperscript{14} By examining what the plaintiff in the presented hypothesis could do to pursue his case, this comment will focus primarily on the second and third issue by dealing with the different alternatives available to a U.S. plaintiff to preserve the status quo pending determination of the dispute.\textsuperscript{15} Indeed, establishing personal jurisdiction over the foreign defendant will not benefit the U.S. litigant at all, even if that action results in a favorable judgment, if the foreign defendant manages to move his assets and thus render himself judgment-proof.\textsuperscript{16}

Given the above determinations and the serious practical problems posed by the litigation's transnational nature arising from the borderless medium of the Internet, this comment will present the options available to the U.S. plaintiff, namely, to use the remedies offered by the local law\textsuperscript{17} (the law of the country where the assets are located) or the use of the remedies offered by U.S. law in combination with bilateral or multilateral agreements regulating the respective issues.\textsuperscript{18} Given the fact that the U.S. is not a party to any bilateral or multilateral treaty providing for the enforcement of its courts' judgments in other countries, the only effective remedy available today to the U.S. litigant is to fight his battle in a foreign country.\textsuperscript{19}

In this view, a presentation of the policy established by the big commercial partner of the U.S., the European Union (E.U.),\textsuperscript{20} will necessa-

\begin{itemize}
\item \textsuperscript{11} \textit{Infra} Part II.A.
\item \textsuperscript{12} \textit{Infra} Part II B.
\item \textsuperscript{13} \textit{Infra} Part II.B (3).
\item \textsuperscript{14} \textit{Infra} Part II.A.
\item \textsuperscript{15} \textit{Infra} Part II B.
\item \textsuperscript{16} \textit{See Mary A. Nation, Granting a Preliminary Injunction Freezing Assets Not Part of the Pending Litigation: Abuse of Discretion Or an Important Advance in Creditors' Rights?,} 7 Tul. J. Int'l & Comp. L. 367, 367-68 (1999) (citing Sir John Holt "If the Plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it: indeed it is a vain thing to imagine a right without a remedy: for want of right and want of remedy are reciprocal.").
\item \textsuperscript{17} \textit{See infra} Part II and III.
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} \textit{The European Union (E.U.) is a unique organization comprised by 25 Member States. It is unique in that its 25 Member States have set up common institutions to which they delegate some of their sovereignty so that decisions on specific matters of joint interest can be made democratically at the European level (the so called "European integration") it is not a State intended to replace existing states, but it is more than any other international organization. More information for the history and structure of the E.U. is available at: http://europa.eu.int/abc/index_en.htm# (accessed Nov. 12, 2004). The E.U. has dealt
\end{itemize}
rily follow as well as the presentation of the current international initiatives in the area of civil and commercial law, the Hague Conference on Private international law has played a significant role. The Conference has proposed a series of treaties and conventions that aim to facilitate the recognition and enforcement of judgments. The first of these was the Brussels Convention of 1968, which laid the groundwork for the later conventions on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

21. In the area of criminal law, an international agreement has already been achieved. The member States of the Council of Europe and the non-member States which have participated in its elaboration and creation have adopted the Convention on Cybercrime on November 11, 2001, available at: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=185&CM=7&DF=9/12/2006&CL=ENG. The council of Europe is a multinational Organization created on May 5, 1949 which aims:

- To protect human rights, pluralist democracy and the rule of law;
- To promote awareness and encourage the development of Europe's cultural identity and diversity;
- To seek solutions to problems facing European society (discrimination against minorities, xenophobia, intolerance, environmental protection, human cloning, Aids, drugs, organized crime, etc.);
- To help consolidate democratic stability in Europe by backing political, legislative and constitutional reform.

General information available at: http://www.coe.int. The Council of Europe should not be confused with the European Union. The two organizations are quite distinct. Most European Union states, however, are members of the Council of Europe. The member states of the Council of Europe are: Albania (13.07.1995), Andorra (10.11.1994), Armenia (25.01.2001), Austria (16.04.1956), Azerbaijan (25.01.2001), Belgium (05.05.1949), Bosnia & Herzegovina (24.04.2002), Bulgaria (07.05.1992), Croatia (06.11.1996), Cyprus (24.05.1961), Czech Republic (30.06.1993), Denmark (05.05.1949), Estonia (14.05.1993), Finland (05.05.1989), France (05.05.1949), Georgia (27.04.1999), Germany (13.07.1950), Greece (09.08.1949), Hungary (06.11.1990), Iceland (07.03.1950), Ireland (05.05.1949), Italy (05.05.1949), Latvia (10.02.1995), Liechtenstein (23.11.1978), Lithuania (14.05.1993), Luxembourg (05.05.1949), Malta (29.04.1965), Moldova (13.07.1995), Monaco (05.10.2004), Netherlands (05.05.1949), Norway (05.05.1949), Poland (26.11.1991), Portugal (22.09.1976), Romania (07.10.1993), Russian Federation (28.02.1996), San Marino (16.11.1988), Serbia and Montenegro (03.04.2003), Slovakia (30.06.1993), Slovenia (14.05.1993), Spain (24.11.1977), Sweden (05.05.1949), Switzerland (06.05.1953), "The former Yugoslav Republic of Macedonia" (09.11.1995), Turkey (09.08.1949), Ukraine (09.11.1995), United Kingdom (05.05.1949). The Observers to the Committee of Ministers: Canada (29.05.1996), Holy See (7.03.1970), Japan (20.11.1996), Mexico (1.12.1999) - United States of America (10.01.1996). The Observers to the Parliamentary Assembly: Canada (28.05.1997), Israel (2.12.1957), Mexico (4.11.1999) available at: http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp (last updated Oct. 2004). http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=49&CM=16&CL=ENG.
Acknowledging that a multinational Treaty for the recognition and enforcement of judgments based on the E.U. paradigm require at least a minimum harmonization of substantial laws. Therefore, it is not likely to be accepted in the world, as we know it today. This comment will conclude that it is, nonetheless, possible and imperative for the United States to initiate a series of negotiations with countries with similar legal systems seeking the conclusion of bilateral or regional treaties, following the example of the E.U. and E.F.T.A. countries. It is argued that the ALI/UNIDROIT Principles and Rules provide the proper basis and the Hague Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters provides the appropriate forum for the U.S. and other participating nations to discuss and attempt to resolve the controversies and the subsequent objections voiced. It is in the best interests of the American litigants to work for the adoption of the Hague Convention. In the meantime, it is also imperative that other more limited agreements are adopted before the issues discussed in this comment start gravely tormenting and potentially suffocating businesses and consumers, especially in the borderless space of Internet and ever-growing on-line transactions.

II. BACKGROUND

When the Internet was created in 1969, as an experimental project of the Advanced Research Project Agency that was essentially a network of linked computers owned by the military, defense contractors, and university laboratories conducting defense-related research, nobody antic-

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24. The cultural, ethnological, historical and political differences between nations render this task practically impossible; see discussion infra Part II and III.

25. This statement reflects the personal opinion of the author.

26. The European Free Trade Association (EFTA) was founded in 1960 on the premise of free trade as a means of achieving growth and prosperity among its Member States as well as promoting closer economic co-operation between the Western European countries. Today the EFTA members are Iceland, Liechtenstein, Norway and Switzerland. More information available at: http://secretariat.efta.int/Web/EFTAAtAGlance/introduction (accessed Nov.10, 2004).

27. See infra Part II A.

ipated its explosive growth and use. The growth of the Internet has already facilitated the globalization of financial markets and the rise of electronic commerce.29 Communications over the Internet allow unparalleled opportunities for education, research, commerce, and entertainment.30

In spite of difficulties, individuals and businesses have continued to expand their online activities and the Internet has become, for an increasing amount of people, an everyday necessity.31 In the U.S., the number of people shopping or paying their bills online doubled between December 1998 and August 2000.32 Very few people would dare say that the advent of the Internet has been anything but beneficial to the global civilization both economically and socially.

A. Where to Bring the Legal Action When the Perpetrator of the Internet Fraud Is a Foreign National Outside the United States

A plaintiff, such as the plaintiff in the given hypothesis, will wish to know where it is most advantageous to begin the litigation. In commercial matters that decision will more likely have been made as part of the initial contractual negotiations.33 However, in a case like the one in the given hypothesis, jurisdiction is not dealt with expressly; "In these circumstances, a prospective plaintiff will need to consider the relative merits of alternative fora."34


30. See generally The Electronic Frontier.


32. Id.


1. Bring An Action Against The Perpetrator In The Country Where He Is Located

One of the most important factors that a plaintiff should consider is the location of the defendant and the defendant's assets. The juridical advantages to be gained by choice of forum is also relevant. Specifically, it may be convenient to bring a suit in the country where the dispute occurred, even if the defendant is elsewhere.

That option practically means that the plaintiff would be obliged to contact local authorities and attorneys who could proceed in the necessary legal actions in that country. The plaintiff might have to travel to that foreign country, understand the applicable national laws, and take the necessary actions to pursue the defendant. Obviously, that demands a substantial amount of time and financial resources, especially if the plaintiff has to be physically present in the foreign forum. It is clear that it would be extremely difficult for the average consumer to initiate such an endeavor, unless the case involves a meaningful amount of money or a law enforcement agency represents the plaintiff.

35. Id. at 518.
37. Id.
38. It is not considered necessary for the purpose of this comment to proceed in a more detailed analysis of the Greek legal system; see infra n. 42. The Greek Code of Civil Procedure is available in Greek at: http://users.otenet.gr/~aantz/kratosnomoi.htm (accessed Nov. 14, 2004).
39. See e.g. in the area of international criminal investigation and litigation Mark Rasch, “Cybercrime treaty flawed, but needed. It may be controversial, but the COE treaty is desperately needed to battle global cybercrime,” http://www.securityfocus.com/columnists/11 (July 22, 2001) (stating that “The old method of obtaining evidence across borders was for the ‘competent authority’ of one nation—usually the ministry of Justice—to make a request under a ‘letters rogatory’ of the competent authority of the requested nation (frequently a court or quasi-judicial body) for assistance with subpoenas, interviews, documents, or other compulsory process. The process, slow and cumbersome in the best of circumstances, could delay an ongoing investigation by months or years—an eternity in cybercrime cases. While the more streamlined M-LAT process—a request from one law enforcement agency to a sister agency for Mutual Assistance in Legal Affairs, was faster and more efficient, not all nations have adopted such bilateral treaties, particularly with respect to the relatively new problem of cybercrime.”).
There is, however, another issue one should worry about the diversity of the law: our hypothesis dealing with the legal system of Greece (member of the E.U. and the Western Civilization in general) does not exhibit the magnitude of potential diversity between countries’ legal principles. However, there are cases where inadequacy of national laws and international cooperation has been obvious. The example of the “I Love You” virus released in spring of 2000, paralyzed businesses across the globe and caused billions of dollars in damages. The fact that conduct is illegal in one country does not necessarily mean it is illegal, thus actionable, in another country.


43. There is no doubt that the conduct of the perpetrator in our hypothesis is both a criminal act punishable under the Penal Code of Greece art. 452 (fraud) and gives grounds for a civil law suit under the Greek Civil Code art. 914. Both documents are available at the Greek legal database “NOMOS” available only in Greek on a website without free access, available at: http://lawdb.intrasoftnet.com (accessed Nov. 13, 2004).

44. In spring of 2000, the “I Love You” virus that attached itself to email lists paralyzed businesses across the globe and spread with alarming speed across international borders. Damage caused by the “I Love You” virus may have reached $10 billion. See Patricia L. Bellia, *Chasing Bits across Borders*, 2001 U Chi Legal F 35, 36 (2001); see also Jay Fisher, *The Draft Convention on Cybercrime: Potential Constitutional Conflicts*, 32 UWLA L. Rev. 339, 340-41 (2001) (describing how the prosecution of the confessed culprit, a computer student in Manila, Philippines named Onel A. de Guzman was hindered by the fact that the Philippines had no computer laws within its criminal statutes when he was arrested but the most applicable law Guzman could be prosecuted under was one addressing credit card theft if the suspect used stolen data to obtain Internet services. Additionally: “In February 2000, a huge denial-of-service attack crippled many large websites in the United States, such as Yahoo!, Amazon.com, and eBay.com. Investigators believe this attack was coordinated by a group of computer criminals working in concert. A problem for American prosecutors is they could only trade information and advice with some of the jurisdictions. For example, Department of Justice lawyers were in close contact with Canadian prosecutors who charged a Montreal juvenile allegedly involved in the denial-of-service attack. These examples highlight the frustrating disunity and lack of coordination facing international law enforcement regarding the Internet.” Id. at 341.

45. Even among countries such as France and the U.S., which have traditionally cooperated politically and commercially, the different legal approaches to the same case may result in very different judgments. The recent lawsuit brought by the L.I.C.R.A and FRENCH UNION OF JEWISH STUDENTS against YAHOO! Inc & YAHOO FRANCE before the County Court of Paris, for providing access to an auction site "for nazi objects and to any other site or service that may be construed as constituting an apology for nazism or contesting the reality of nazi crimes." that resulted in the issuance of No Rg 00/05308: The county court of Paris L.I.C.R.A and FRENCH UNION OF JEWISH STUDENTS vs. YAHOO! Inc & YAHOO FRANCE, for providing access to auction of Nazi memorabilia in contravention of French law criminalizing the promulgation of nazi propaganda is an obvious example. In *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisémitisme*, 145 F. Supp.
2. Bring An Action Against The Perpetrator In The U.S. - Obtain Jurisdiction

A U.S. court cannot adjudicate cases and render binding decisions on the parties unless it has "personal jurisdiction" over the defendant.\textsuperscript{46} Personal jurisdiction is critical to the parties involved in any legal action because a judgment rendered by a court without proper personal jurisdiction will not be enforced if properly challenged.\textsuperscript{47} In the U.S., the courts determine if personal jurisdiction over a non-resident is proper (unless a federal statute expressly provides jurisdiction in a given matter) and use a two-step analysis. First, they apply the state's long-arm statute.\textsuperscript{48} Second, if the long-arm statute grants jurisdiction to the

2d 1168 (2001), U.S. District Judge Jeremy Fogel, of the Northern District of California, refused to enforce the French court's order that Yahoo prevent French residents from viewing Nazi memorabilia in its on-line auctions. For the complete article on the subject, see Tamara Loomis, Internet Companies Sighing With Relief, for Now, New York Law Journal, (Nov. 15, 2001) available at: http://www.law.com/cgiin/gx/cgi/AppLogic+FTContentServer?pagename=LawView&c=article&cid=ZZZGFYJV1UC&live=true&cst=0&pa=0&qs=News&ExpIgnore=true&showsummary=0 www.law.com; see also generally, Michael Traynor, Conflict of Laws, Comparative Law, and The American Law Institute, 49 Am. J. Comp. L. 391 (2001). This case has been overturned after long litigation (see Yahoo! Inc. v. La Ligue Contre Le Racisme, 433 F.3d 1199, 2006 U.S. App. LEXIS 668 (9th Cir Cal. 2006). But Judge Fogel's concerns voiced in the dissent of the latest decision demonstrates the potential problems.

47. See e.g., Burnham v. Superior Court of California, 495 U.S. 604, 608-09 (1990).
48. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 289-90 (1980) (stating that jurisdiction could be tested properly by looking at statutory and constitutional standards). All of the states in the union have created "long-arm" personal jurisdiction statutes that are either specific as to when or how a court can assert jurisdiction or phrased generally by granting jurisdiction "consistent with the requirements of Due Process." Illinois Compiled Statutes 735 ILCS 5/2-209 provides Illinois' requirements for exercising long-arm jurisdiction. Subsection (a) contains examples of jurisdictional submissions by the defendant to Illinois' state courts and the federal district courts of Illinois among which: "The commission of a tortious act within this State." Under subsection (a)(2), a court will consider a defendant like the one in our hypothesis to have submitted to the jurisdiction of Illinois by committing the tortuous act of fraud if it finds that the act of electronically soliciting, selling and later entering John's home computer to steal information was an act committed "within the state" under Illinois law. Examining existing decisions in Illinois containing similar facts and circumstances may allow us to accurately predict what the courts would consider in deciding an issue like this. Subsection (c) allows the court to exercise jurisdiction on any basis allowed under the Illinois Constitution and the United States Constitution. "A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States." Thus, under subsection (c), if the contacts between the defendant and Illinois are sufficient to satisfy the Due Process requirements, then the requirements of both the Illinois long-arm statute and the United States Constitution have been met, and no other analysis is necessary. Illinois' long-arm statute provides several situations in which a party may be subject to the jurisdiction of Illinois' state courts. See 735 Ill. Comp. Stat. 5/2-209 (2000). See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In FMC Corp. v. Varonis, 892
court, then the court must determine if the exercise of personal jurisdiction over the defendant complies with Due Process under the U.S. Constitution.49

Although numerous courts have now tried to apply the traditional principles of personal jurisdiction to electronic activities,50 when viewed

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49. The Fifth Amendment provides that no person shall be “deprived of life, liberty, or property, without due process of law . . . .”, U.S. Const. amend. V. The Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law . . . .” U.S. Const. amend. XIV, § 1. The Due Process Clauses of both the Fifth and Fourteenth Amendments prevent the binding judgment of a foreign jurisdiction over an individual that “. . . has . . . no meaningful ‘contacts, ties, or relations.’” with that given jurisdiction. The Supreme Court delineated the method to be used in the determining jurisdictional issues in its decisions International Shoe, 326 U.S. at 316 and World-Wide Volkswagen, 444 U.S. at 292. In International Shoe Co. v. Washington, the Court modified the traditional requirement of the physical presence of the defendant within a state to properly assert jurisdiction. The Supreme Court utilized a test of minimum contacts, fair play, and substantial justice to enable courts to achieve specific jurisdiction. According to the aforementioned test, even where the defendant is absent, he may be deemed “present” within a forum state in satisfaction of the Due Process Clause, if that person has certain “minimum contacts” with the forum state “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” The Court quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940) stated: The “fair play and substantial justice” standard is deemed satisfied by certain minimum contacts because a person or corporation that conducts “activities within a state . . . enjoys the benefits and protection of the laws of that state.” In World-Wide Volkswagen, 444 U.S. at 297, the Court furthered the International Shoe doctrine in which the foreseeability of involvement in the forum state and purposeful availment of the laws of the state became part of the Due Process jurisdictional test. According to the Court’s reasoning, the defendant’s minimum contacts must be in “conduct and connection with the forum jurisdiction . . . such that he should reasonably anticipate being haled into court there,” because this requirement serves both to protect “the defendant against the burdens of litigating in a distant or inconvenient forum” and ensuring that the states “do not reach out beyond the limits imposed on them by their status as coequal sovereigns.” Id. at 292. Consequently, a nonresident defendant may not be sued in a forum unless: (a) he has established sufficient “minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” The “minimum contacts” requirement is deemed satisfied if the nonresident “purposefully availed” himself of the benefits of doing business in the forum state. (Burger King Corp v. Rudzewicz, 471 U.S. 462, 467-77 (1985)); and (b) the nonresident’s conduct and connection with the forum [must be] such that he should “reasonably anticipate being haled into court there.” Blumenthal v. Drudge, 992 F. Supp. 44, 53-58 (D.C. 1998).

50. See id. at 57-59.
in total, the courts are still trying to find their way and consequently the criteria used in each case are not always consistent or clear. The court in Zippo Mfg. Co. v. Zippo Dot Com, Inc., set forth an important guide to determine whether constitutional requirements are satisfied in the borderless cyberspace. The court stressed that the constitutional requirement of minimum contacts and purposeful availment must be looked at in light of the defendant’s activity on the Internet. The court also established a sliding scale of activities, which may be used to determine whether personal jurisdiction is constitutionally exercised.

51. For instance, Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 164-65 (D. Conn. 1996) was a case involving a trademark infringement suit brought in the United States District Court for the District of Connecticut by Inset Systems, a Connecticut corporation against Instruction Set, a Massachusetts corporation (each corporation had its principal place of business in its respective state of incorporation). The defendant's contacts with the forum state consisted solely of its Web page since it maintained no offices or employees in Connecticut, nor conducted regular business there. The district court faced with the jurisdictional issue examined first whether the defendant's conduct satisfied Connecticut's long-arm statute and second the minimum contacts requirement of the Due Process Clause of the Fourteenth Amendment. The court reasoned that the defendant, by the very nature of the Web, "had been continuously advertising" in Connecticut and therefore had solicited in a "sufficiently repetitive nature to satisfy . . . Connecticut's long-arm statute." Furthermore, the court held that due process was satisfied because the defendant reasonably could have anticipated being haled into court in Connecticut since it had "purposefully availed itself of the privilege of doing business within the State" through its Web page. Maintenance of the suit did not offend traditional "notions of fair play and substantial justice," because the defendant resided near Connecticut and the state had an interest in adjudicating the dispute. The United States District Court for the Eastern District of Missouri reached a similar conclusion in Maritz, Inc. v. Cybergold, Inc., another case involving a trademark infringement suit brought by Maritz, a Missouri corporation, against Cybergold, a California corporation. The district court, after concluding that the defendant's activities satisfied the "commission of a tortious act" provision of Missouri's long-arm statute, further asserted that due process requirements were satisfied. According to the Court's reasoning that since Cybergold "consciously decided to transmit advertising information to all Internet users" and its webpage had been accessed by Missouri residents, the "minimum contacts" factor had been satisfied and personal jurisdiction over the defendant was proper. Maritz Inc. v. Cybergold Inc., 947 F. Supp. 1328, 1333 (D. Mo. 1996). Applying the Inset reasoning to the case, the court further concluded that Cybergold had "purposefully availed itself of the privilege of doing business" within Missouri, and that "traditional notions of 'fair play and substantial justice'" were thus satisfied.


53. Id. The Court expressed the rationale "that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."

54. Id. This scale may generally be described as: (i) the defendant actively doing business on the Internet (selling products or services into the forum jurisdiction in which case jurisdiction will be found); (ii) the defendant maintaining interactive web pages where users can exchange information with the host computer (again jurisdiction is likely appropriate if the exchange involved the forum state); and (iii) the defendant maintaining "passive" web sites, i.e., sites that merely provide information or advertisements for users to view (where personal jurisdiction is likely inappropriate). Applying the aforementioned
Returning to the facts of the given hypothesis, the conduct of the Greek defendant satisfies the Due Process requirements since he maintained an interactive commercial web site where he specifically targeted Chicago students in order to defraud them. With these considerations in mind, the court should have no reluctance in establishing personal jurisdiction over the Greek defendant both on grounds of the state's statute and the Due Process requirements.

B. Secure Satisfaction of Future Judgment: How Can You Freeze Defendant’s Assets Located Abroad?

Establishing personal jurisdiction will not prove useful to the U.S. plaintiff if the foreign defendant succeeds in moving or dissipating his assets. A pre-judgment court order preventing the defendant from dissipating them is thus necessary. Again, the transnational nature of litigation arising from the borderless medium of the Internet poses serious practical problems. In general, a plaintiff might use either the remedies offered by the law of the country where the assets are located or use the remedies offered by the plaintiff's law in combination with bilateral or multilateral agreements regulating the respective issues.

reasoning the court declined to find personal jurisdiction simply because the non-resident defendant owned and operated a web site accessible from the forum jurisdictions.

55. See supra n. 48 discussion of the Illinois' long-arm statute.

56. See supra n. 48-49 discussion of the Due Process requirements.


58. See Nation, supra n. 16, at 368.

59. See George A. Bermann, Provisional Relief in Transnational Litigation, 35 Colum. J. Transnat’l L. 553, 555 (1997) (stating: "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 and the Hague Service Convention (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. As to recognition and enforcement of foreign country judgments, another perennial "inter-jurisdictional" issue, state rather than federal legislation plays the dominant role.").
1. Pre-Judgment Attachment In Greek Legislation: "Security Measures"

Greece, like most other European civil law countries, recognizes the need for prejudgment attachment orders. This type of attachment order is known as "security measures." The requirements for their granting are set forth in the Code of Civil Procedure in articles art. 682 seq. Article 682 (1) of the Code of Civil Procedure gives the Court of First Instance the power to issue security measures order to protect or preserve a right in cases of emergency or in order to avoid imminent danger.

To obtain such a remedy, the plaintiff must meet the "urgency and danger criteria," which requires the plaintiff to prove that the judgment’s execution would be frustrated or made substantially more difficult without the order. Practically, that would mean that the defendant is attempting to make himself judgment-proof by removing or otherwise dissipating his assets. The plaintiff must also provide evidence to "demonstrate the principal of the debt and even its amount, as precisely as possible" and show there is a fair likelihood of success on the merits. The president of the Court of First Instance orders the security measures that usually include the provisional attachment of all the assets of the debtor, immobile and mobile, tangible or intangible.

The attachment may also be served on a third party such as a bank. The application for the order of attachment or seizure must include the amount of the claim and the amount that a defendant may have to deposit to have the order removed. The court has the discretion to order the measures it deems appropriate for each case but at no time should the measure result in the complete and permanent satisfaction of the right, the preservation of which is asked.

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61. The special procedures for the issuance of an order of security measures are described in articles 683-703 of Greek Code of Civil Procedure.


63. Code of Civil Procedure art. 682 (1).

64. Id. There is substantial case law on the requirements for conservatory measures in the Greek legal database "NOMOS" available only in Greek on a website without free access at: http://lawdb.intrasoftnet.com/ (n.d.).

65. Id.


67. Id.

68. Greek Code of Civil Procedure art. 682-703.

69. Id.

70. Id.
The measures are revocable.\textsuperscript{71} A defendant may petition to revoke the order by claiming, for instance, changed circumstances, absence of imminent danger, or that the plaintiff has not instituted the seizure proceedings in the main action.\textsuperscript{72} The court, at its discretion, may then impose a time limit (not less than 30 days) on the plaintiff to begin such proceedings. The plaintiff's failure to do so will cause the order to be revoked.\textsuperscript{73}

Greece is a signatory to the Brussels Convention.\textsuperscript{74} Article 24 would allow plaintiffs from the E.U. to make use of the "security measures." The question posed when dealing with a case like the one in the given hypothesis is whether the "security measures" may be employed by non-E.U. plaintiffs as well.\textsuperscript{75} The problem is based on the plain language of articles 683 and 693, according to which, the measures are ordered by the Court that has jurisdiction over the subject matter underlying the "security measures."\textsuperscript{76} Furthermore, within a reasonable time, not less than 30 days,\textsuperscript{77} the plaintiff must bring an action against the defendant before the competent Greek Court.

So, can a plaintiff who is adjudicating an action in the United States ask a Greek court to attach a defendant's assets, which are held in Greece? There is no explicit provision as to that in the Greek Code of Civil Procedure.\textsuperscript{78} However, following the general provisions on the recognition and enforcement of foreign judgments one might argue that this is possible if, before this attachment can occur, the plaintiff show that the foreign judgment issued by the foreign court, vested with jurisdiction over the subject matter, will be susceptible to recognition and enforcement in Greece.\textsuperscript{79} To decide on this issue the Greek Courts (in absence of an international agreement) examine both the procedural and the sub-

\begin{footnotesize}
\begin{enumerate}
\item[71.] \textit{Id.}
\item[72.] \textit{Id.}
\item[73.] Greek Code of Civil Procedure art. 693.
\item[74.] 1978 O.J. (L 304) 77. The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters was signed in Brussels on September 27, 1968 (full text available at: http://www.ejus.uio.no/lm/ec.jurisdiction.enforcement.judgments.civil/commercial.matters.convention.brussels.1968/doc.html).
\item[75.] For more information on how the French and German legal system deal with this problem; see generally Dominguez, \textit{supra} n. 60, at 41.
\item[76.] Greek Code of Civil Procedure art. 683, 693.
\item[77.] Greek Code of Civil Procedure art. 693.
\item[78.] After substantial research in the Greek legal database "NOMOS" available only in Greek on a website without free access, at http://lawdb.intrasoftnet.com/, the author had not been able to find important case law on the specific subject.
\item[79.] Greek Code of Civil Procedure art. 323 and 780. There is important case law on the specific subject available in the Greek legal database "NOMOS". Specifically on the recognition and enforcement of preliminary injunctions the Appellate Court of Piraeus in a recent decision refused to enforce a prejudgment order issued by an English Court finding that this judgment conflicted with the Greek public policy, 110/2004 (350985).
\end{enumerate}
\end{footnotesize}
stantial law applied in the case in order to ensure that the foreign judgment would not conflict with the fundamental principals governing civil litigation in Greece and their public policy.80

2. U.S. System: Attachments v. Injunctions

Contrary to most civil law countries’ courts,81 American courts have always been reluctant to provide prejudgment relief.82 Nevertheless, two general preliminary remedies83 are available to plaintiffs who want to freeze defendant’s assets pending trial.84 Depending on whether the plaintiffs seek remedies at law or in equity, they may apply respectively for prejudgment attachments85 or preliminary injunctions.86

i. The Prejudgment Attachment

The provisional relief provided by Rule 6487 “Seizure of Property or Person” “attaches” the defendant’s property and thus prevents the dissipation of assets prior to a judgment on the merits. Rule 64 provides in pertinent part: “[A]ll remedies providing for the seizure of the person or property for the purpose of securing satisfaction of judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held [. . . ].88 The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained

80. Id. One should note at this point that the Greek legal system is very similar to the French and German systems; therefore, it would be useful to examine how those two civil law systems deal with this issue. See for instance Dominguez, supra n. 60, at 41, and Campbell & Popat, supra n. 34, at 517.
81. Id; See short discussion above, Part II B(1).
83. The author chose not to examine the other remedy available, the Temporary Restraining Order, because of its time limitation.
84. See generally Laycock, supra n. 82, at 687; see also Wasserman, supra, n. 57, at 262 (discussing how the attachment statutes are poorly designed to reduce the plaintiff's risk that the defendant will attempt to render herself unable to satisfy the expected money judgment by hiding or dissipating assets and how Courts should overcome their reluctance to issue preliminary equitable relief since they can effectively reduce the risk of harm to plaintiffs without interfering with the rights of innocent third parties by granting preliminary injunctions to bar the dissipation of assets).
85. See Wasserman, supra n. 57.
86. Id.
88. Id.
by an independent action." Consequently, the prejudgment attachment is a statutory remedy that varies from state to state. Courts issue prejudgment attachments to provide security for plaintiffs' claims, if a plaintiff shows the validity of his claim and the likelihood that the defendant will dissipate his own property. Attachment orders ordinarily create security liens in defendants' targeted assets. The assets must be located within the court's jurisdiction. The prejudgment attachment requires in-rem jurisdiction.

ii. The Preliminary Injunction

When a plaintiff ultimately seeks equitable remedies, they may apply for preliminary injunctions. The preliminary injunction is predicated upon Rule 65 and has traditionally been defined as a remedial provision granted by "a court in equity" aiming to preserve the status quo between litigants pending trial. Therefore, the court may direct defendants to act or refrain from acting.

According to Rule 65, the court has discretion to grant preliminary injunctions "pursuant to traditional equitable principles and the substantive law applicable to the claim upon which the application for the injunction is based." Therefore, under the traditional test the Court must find the following: (1) irreparable injury, (2) likelihood of success on the merits, (3) that the injury to the applicant will outweigh the potential injury to the adverse party, and (4) that the granting of a preliminary

89. Id.
90. See Dominguez, supra n. 60, at 59 (analyzing the N.Y. Statute).
91. See Johansson, supra n. 82, at 1098 (referring to Rhonda Wasserman, supra n. 57, at 262, explaining how courts issue prejudgment attachments to provide security for plaintiffs' claims).
92. See Wasserman, supra n. 57, at 262.
93. See Nation, supra n. 16 (stating: "[h]owever, this [attachment order] poses a severe constraint. Most importantly, the assets must be within the court's jurisdiction, and this remedy may not be available when the plaintiff merely seeks money damages. Thus, a fast-moving defendant can remove or dissipate those assets held within the court's jurisdiction. Such an attachment remedy, therefore, will prove no remedy at all because of (1) its limited geographical reach and (2) its unavailability to those plaintiffs seeking money damages.").
94. Fed. R. Civ. P. 65 (describing the procedure by which a preliminary injunction may be granted: (1) notice; (2) consolidation of hearing with trial on the merits; (3) temporary restraining order, notice, hearing, duration; (4) security; (5) form and scope of injunction or restraining order; and (6) employer and employee, interpleader, constitutional cases); see also American Hosp. Assoc. v. Harris, 625 F.2d 1328, 1330 (7th Cir. 1981) (stating that "the purpose of a preliminary injunction is to preserve the status quo pending a final hearing on the merits.").
95. See American Hosp. Assoc., 625 F.2d at 1330.
96. See Nation, supra n. 16, at 369 (citing Paul H. Dawes & William J. Meeske. Provis-
injunction will serve the public interest. Another "alternative test," employed by some jurisdictions requires the plaintiff to prove: "(1) probable success on the merits and possibility of irreparable harm, or (2) serious questions on the merits and the balance of hardships tipping sharply in the applicant's favor." While the two tests may seem practically identical, when applied by the courts, there may be significant differences regarding the importance attached to any given factor, such as likelihood of success on the merits, the balance of hardships, or irreparable injury.

Unlike attachments, preliminary injunctions require in personam jurisdiction, therefore, these remedies are also suitable for indirectly reaching assets abroad. After all, it is permissible under international law to order a person, otherwise subject to personal jurisdiction, to maintain activities abroad or not to commit acts abroad. Consequently, for the exact same reason, injunctions can legitimately be used for the purpose of enjoining the defendant from transferring certain assets wherever they are located.

There is important case law recognizing the FTC's ability to seek preliminary injunctions based on section 13(b) of the Federal Trade Commission Act. The Courts have ruled in several cases that Section

97. Id.
98. Id.
99. Id; see also Fed. R. Civ. P. 64.
100. See discussion supra part II. B(2)(i).
101. See Bermann, supra n. 59, at 564 (stating "[t]he 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.").
102. Id. (stating that, Courts of many nations have ordered acts to be committed abroad; none has ever expressed any doubt about being entitled to do so; e.g., Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984) (anti-suit injunction); Judgment of Apr. 9, 1986, Bundesgerichtshof, W. Ger., 7 Praxis Des Internationalen Privat-Und Verfahrensrechts 176 (1987) (blood samples in paternity proceedings); see also Babanaft Int'l Co. S.A. v. Bassatne, [1989] 2 W.L.R. 232, 252 (Neill, L.J.) (stating "[t]here is abundant authority for the proposition that, where a defendant is personally subject to the jurisdiction of the court, an injunction may be granted in appropriate circumstances to control his activities abroad"); Judgment of Feb. 23, 1988, Oberster Gerichtshof, Aus., 110 Juristische Blatter 459 (construction of a nuclear power plant); contra, Judgment of Apr. 29, 1989, No. 6 N/503/89, Oberster Gerichtshof, Aus. (based on grounds of state immunity, although the issue was not raised in very clear terms).
103. Id.
104. 15 U.S.C. § 53(b) (providing in relevant part: "[w]henever the Commission has reason to believe— (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and (2) that the enjoining thereof... would be in the interest of the public— the Commission... may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ulti-
13(b) of the FTCA authorizes the FTC to seek, and the district courts to grant, preliminary injunctions. Thus, a court has the “power to order any ancillary equitable relief necessary to effectuate” its grant of authority.105 This unqualified grant of statutory authority to issue an injunction under section 13(b) “carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits”.106

Consequently, even if section 13(b) does not expressly authorize courts to grant monetary equitable relief, a district court may order preliminary relief,107 including an asset freeze, to ensure that the assets of the corporate defendants are available to “make restitution to the injured customers”108 and thus make permanent relief possible. In certain circumstances, the assets freeze ordered may involve property located outside of the United States.109 Specifically, “once personal jurisdiction

105. See FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 572 (7th Cir. 1989).
106. See also, FTC v. GEM Merchandising Corp., 87 F.3d 466, 469 (11th Cir. 1996).
107. Id.; see also, FTC v. Amy Travel Service, 875 F.2d at 571-72 (providing that in a proceeding under section 13(b), district court has the "power to order any ancillary equitable relief necessary to effectuate" its grant of authority); see FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1112-13 (9th Cir.1982) (explaining that the power to grant permanent injunctive relief carries with it authority for ancillary equitable relief); see FTC v. Southwest Sunsites, Inc., 665 F.2d 711, 717-19 (5th Cir.1982) (explaining that section 13(b) permits court to exercise full range of traditional equitable remedies); Hecht Co. v. Bowles, 321 U.S. 321 at 329 (1944) (stating: “An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.”).
108. See FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1031 (7th Cir. 1988) (stating “[t]he district court had determined that it was probable that the FTC would prevail in a final determination of the merits. Restitution would therefore be an appropriate remedy at the conclusion of the proceedings. Therefore, the district court had a duty to ensure that the assets of the corporate defendants were available to make restitution to the injured customers”); FTC v. GEM Merchandising Corp., 87 F.3d at 469 (“Among the equitable powers of a court is the power to grant restitution and disgorgement.”); see FTC v. World Wide Factors, Ltd., 882 F.2d 344 (9th Cir.1989) (affirming the district court’s grant of the preliminary injunction finding that consumers involved in the World Wide prize scheme may be entitled to restitution.); see Pereira v. Farace, 413 F.3d 330, 340 (2d Cir. 2005) (stating that “restitution is measured by a defendant’s ‘unjust gain, rather than [by a plaintiff’s] loss.’”).
109. See United States v. First Nat’l City Bank, 379 U.S. 378, 384 (1965) (stating that “once 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”); see Reebok Int’l, Ltd. v. Marnatech Enterps., Inc., 970 F.2d 552, 558-59 (9th Cir.1992) (explaining the procedure for the issuance of a preliminary injunction); see SEC v. International Swiss Inv. Corp., 895 F.2d 1272, 1276 (9th Cir.1990) (stating “The power to grant a preliminary injunction which freezes assets is among the district court’s inherent
of a party is obtained, the District Court has authority to order it to ‘freeze’ property under the party’s control, whether the property be within or without the United States.” 110

However, the preliminary injunction has its limitations. 111 It may not be limited to specific claims 112 like the attachment, but it is available only if plaintiffs seeking final remedies in equity. 113 Therefore, plaintiffs might be inclined to characterize contract claims as equitable in order to apply for preliminary injunctions. 114 Consequently, courts have become reluctant in granting such motions when they construe plaintiffs’ injunction applications as attempts to circumscribe the statutory limitations of the prejudgment attachment. 115 Most commonly, courts deny plaintiffs’ motions for preliminary injunction based on the irreparable injury rule 116 since plaintiffs must show that a damage award would be insuffi-

110. State of New Jersey v. City of New York, 283 U.S. 473, 482 (1931); see also United States v. First Nat’l City Bank, 379 U.S. 378, 384 (1965); see Republic of the Philippines v. Marcos, 862 F.2d 1355 (9th Cir. 1988) (involving a suit by the Republic of the Philippines against its former president, his wife, and others where the plaintiff petitioned the district court for a preliminary injunction prohibiting the defendants from disposing of any of their assets located not only in the U.S., but also in the U.K. and Switzerland. The Court of Appeals, sitting en banc, 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. For a more detailed discussion on the subject); see Bermann, supra n. 59, at 553.

111. See Wasserman, supra n. 57, at 316-327 (presenting cases where courts have felt constrained by precedent to deny injunctive relief or refused to grant preliminary injunction to freeze assets invoking the principle that an equitable remedy should not issue when an adequate remedy at law exists or prejudgment attachment, while in others prejudgment attachment has been considered adequate remedy or even the exclusive means for preventing tertiary harm in money damages cases and explaining why such cases fail to recognize the substantive need for injunctive relief).

112. Id.

113. Id.

114. Id.

115. Id.

116. Id. (describing principle that preliminary injunction is available to secure equitable remedy); see also Laycock, supra n. 82, at 732 (outlining history behind equitable remedies and showing origin of irreparable injury rule. The preliminary injunction is the product of the historical conflict between law and equity. The dichotomy between law and equity originated in fourteenth century England when courts of equity developed in competition with common-law courts. To keep the courts separate, courts of equity took jurisdiction only when there was no adequate remedy at law. The courts summarized the practice
cient to compensate them for harm suffered.\textsuperscript{117}

\textit{iii. The Current International Regime: Available Remedies}

Assuming that the plaintiff in our hypothesis has obtained jurisdiction, been granted a preliminary order preserving the defendant's assets, and is determined to bringing an entirely new action in a foreign nation to obtain recognition,\textsuperscript{118} the U.S. plaintiff is in a weak position do to the lack of uniformity in U.S. state laws.\textsuperscript{119} Since there is no federal legislation regarding the enforcement of foreign judgments, and since United States has not acceded to any judgment-recognition or enforcement treaties with other nations, it is state law, rather than uniform federal law, that has governed and continues to govern this area.\textsuperscript{120} On the one hand, it is practically impossible to discuss U.S. judgment-recognition law without constant references to exceptions.\textsuperscript{121} On the other hand,
many jurisdictions around the world still have reciprocity requirements that must be met before they will recognize and enforce foreign judgments, requiring a U.S. litigant to prove a similar judgment from an enforcing court would be given effect in the U.S. rendering court before such litigant is able to have his judgment enforced. The variations in state enforcement rules can make it challenging to convince a foreign court that a U.S. court would receive its judgments. Additionally, federalism issues are often difficult for the U.S. litigant to explain to the foreign court, because U.S. federal courts are required to apply state law in this area.

Adding to difficulties, most civil law countries are rather suspicious or even negatively predisposed towards the American judicial system. Representative of this perspective on the American legal system, English Lord Denning, offered the following statement:

As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side. . . . There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic. . . . The plaintiff holds all the cards.

In view of these disadvantages, in 1992 the U.S. State Department proposed that the Hague Conference on Private International Law begin work on a judgments convention that would permit the United States to gain the benefits of reciprocal recognition with other contracting nations. The Lugano Convention, modeled on the European Brussels
PROVISIONAL RELIEF IN TRANSNATIONAL LITIGATION

Convention, served as the paradigm for the development of a comprehensive enforcement system. It is therefore necessary to examine the application of the regime of European judgment enforcement under its most important instrument on the matter, the Brussels Convention.

a. The Brussels Convention/Regulation

The foundational document of Europe's Common Market, the 1957 Treaty of Rome, aims to establish the free movement of goods and services among its member states. The Brussels Convention sought to facilitate the cross-border litigation (one of the consequences of the free movement of goods and services); because, rights arising from transactions within the European Community needed adequate legal protection in order to establish a true internal market. This, in turn, necessitated a satisfactory solution to the problem of recognition and enforcement of judgments in civil and commercial matters.

To achieve this goal the Convention required the Member states to negotiate for the reciprocal recognition and enforcement of judgments. Brussels Convention members recognize judgments from other states without any special procedures. The Convention replaced an indirect system of judgment enforcement applicable under preexisting treaties and invalidated centuries old rules and dogmas on the recognition of foreign judgments. The result achieved is that judgments are more portable between the European Community member states since

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130. See Campbell & Popat, supra n. 34, at 545.

131. Article 220 of the Brussels Convention reads as follows: “Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals . . . the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.”


under the Convention, a judgment rendered in one Member State automatically is recognizable and enforceable in all other Member States, with a few limited exceptions.\textsuperscript{134}

As the European Community grew to become the European Union, additional States have acceded to the Convention and to the parallel Lugano Convention of 1988, which applies to the Member States of the EFTA.\textsuperscript{135} Recognizing the significance and the effect of the Brussels Convention in the European integration and unification, the Council of the European Union reinstated, practically verbatim, the Brussels Convention as a Regulation. This action transformed the Convention into a binding legal instrument on all Member States that participated in the adoption of the Regulation.\textsuperscript{136} Because this Regulation practically repeated the language of the Brussels Convention and because it is still fairly recent, this Comment will use the term Brussels Convention/Regulation, making the relevant distinctions only when necessary. The most obvious change is that by virtue of its form, Council Regulation is binding for all member states with the exception of Denmark,\textsuperscript{137} whereas the former Brussels Convention had to be adopted into national law by each member state individually.\textsuperscript{138}

Although beyond the purpose of this article a brief presentation of the jurisdictional rules under the Brussels Convention/Regulation is deemed necessary, especially in order to better understand the differences in legal mentality between US and EU and why issues arise. In general, when dealing with personal jurisdiction under the Brussels Convention/Regulation, three different types are distinguished.\textsuperscript{139}

\textsuperscript{134} See Danford, supra n. 120, at 391.


\textsuperscript{137} See Council Regulation, consideration 21.


Like in most civil law countries, the prevalent principle is that the plaintiff must follow the defendant to his forum in order to sue him, or in Regulation terms, persons domiciled in a member state can be sued in the courts of that member state. The plaintiff can choose between the competent courts of general or special jurisdiction, and exclusivity, where only one court can assert jurisdiction over the defendant.

For the purposes of this article, Article 5, which governs special jurisdiction of courts for tort and contract cases, is of importance. In brief, the court at the place of performance in question shall have jurisdiction unless the parties have agreed on a contractual provision defining the place of performance for the obligations of their contract. Article 15 through Article 17 govern consumer contracts within the scope of the Council Regulation. In the Internet context, the European Commission declined to adopt the Zippo active vs. passive scale, prevalent in the U.S. at the time, adopting instead a set of well-defined criteria detailed in Articles 15-17. According to the language of the Regulation, a consumer, defined as a person who is acting outside his trade or profession, must conclude a contract for the sale of goods on installment credit terms or for a loan repayable by installments, or for any other form of credit, made to finance the sale of goods, and the consumer must conclude a contract with a party who either pursues commercial or professional activity in the member state of the consumer’s domicile, or by any means directs such activities to that member state or to several states including that member state and the contract falls within the scope of such activities. The adoption of these provisions were accompanied by severe criticism, warning that according to the language of the Regulation, every e-commerce company actively engaging in Internet business is subject to jurisdiction in all member states, while pointing that the modern consumer is in no need of protection in today’s competitive world; instead, it is the seller that sometimes can be seen as

140. Section 1 Art. 2 - 4. Art. 2; see also Keller, supra n. 139, at 54 (providing a more detailed description).
141. Id.
142. Id.
143. Id. at 56.
144. Id. (modifying this provision in comparison to the Brussels Convention where the term “place of performance” was not further defined).
145. See Council Regulation, Art 15 - Art. 17; see also Keller, supra n. 139, at 54-60 (providing a more detailed analysis of these provisions which are beyond the scope of this article).
146. Id. at 56.
147. Council Regulation Art. 15(1).
148. Id. at Art. 15(1)(a) and (b).
149. Id. at Art. 15(1)(c); see also Keller, supra n. 139, at 54-60 (providing a more detailed analysis).
the weaker party.\textsuperscript{150}

Art. 5(3) of the Council Regulation regulates special jurisdiction in Internet tort cases stating that the courts located where the harm occurred, or may occur, have jurisdiction. The European Court of Justice provided clarification of that term by ruling that the place where the harm occurred can be either the place where the damage occurred or the place of the event giving rise to the damage.\textsuperscript{151} The approach chosen by the European Community thus establishes the plaintiff’s right to choose, giving the victim more options than the prevalent approach in the United States.\textsuperscript{152}

As to the recognition and enforcement of judgments, applicability of the Brussels Convention/ Regulation is limited to “civil and commercial matters.”\textsuperscript{153} The European Court of Justice (ECJ) in the Case 29/76, LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol,\textsuperscript{154} gave a Community definition of “civil and commercial matters,” independent of Member State law, by stating, in the interpretation of the concept of civil and commercial matters for the purposes of interpretation of the Convention, reference should be made “first to the objectives and scheme of the Convention, and, secondly, to the general principals which stem from the corpus of the national legal systems.”\textsuperscript{155} Article 220 of the Treaty of Rome, which established the E.C, sets out the objectives referred to, providing in pertinent part:

Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals . . .

the simplification of formalities governing the reciprocal recognition

\textsuperscript{150} Id. at 59-60.

\textsuperscript{151} Case 21/76, Bier v. Mines de Potasse d’Alsace, 1976 E.C.R. 1735 (validating the given proposition although the decision refers to the 1968 Brussels Convention, because the Council Regulation provisions are identical. Under the ruling, the plaintiff has the right to choose either to sue the defendant at the place where the damage occurred, or at the place of the event giving rise to the damage (principle of ubiquity)); Compare with case 68/9, Shevill v. Presse Alliance, 1995 E.C.R. I-415 (deciding that the place where the event giving rise to the damage occurred is the place where the harmful event originated, and from which the libel was issued and put into circulation, meaning the place where the publisher of the newspaper in question was established was that place. In the Internet context, this place would be the place where the content was published and the place where the damage occurred in these cases is, in the opinion of the court, the place where the publication is distributed, provided that the victim is known in those places restricting the right of the plaintiff to choose where to sue: the courts in the place where the publisher is established can award damages for all the harm caused by the defamation, whereas the courts where the publication was distributed and where the victim has suffered injury can award only those damages felt in the specific forum).

\textsuperscript{152} See Keller, supra n. 139, at 61.

\textsuperscript{153} Article 1 Brussels Convention.

\textsuperscript{154} 1976 E.C.R. 1541 [hereinafter Eurocontrol case].

\textsuperscript{155} Eurocontrol case, at 1552.
and enforcement of judgments of courts or tribunals and of arbitration awards.\textsuperscript{156}

The Brussels Convention/Regulation applies only to "judgments," which can include decrees, orders, decisions, writs of execution, and even provisional court orders granted in a proper hearing.\textsuperscript{157}

Within that scope, the Brussels Convention/Regulation addresses the use of interim relief. Recognizing that a judgment, even if recognized by another jurisdiction, would be of no use if the defendant can remove assets before the final judgment can be executed,\textsuperscript{158} Article 24\textsuperscript{159} of the Brussels Convention, as reinstated by Article 31 of Brussels Regulation,\textsuperscript{160} establishes four (4) requirements for creditors seeking prejudgment attachments: \textsuperscript{161} (1) the measures required must be provisional and may be protective; \textsuperscript{162} (2) the measures must be available as a remedy in the state in which they are being sought; \textsuperscript{163} (3) the measures must fall within the scope of the Brussels Convention; \textsuperscript{164} (4) the courts in one of the contracting states must have subject matter jurisdiction over the main proceeding from which the provisional relief is derived.\textsuperscript{165} Article 24 allows a plaintiff to attach the assets of a defendant in one contracting state, even if the state does not have jurisdiction in the main proceeding.\textsuperscript{166} If in the given hypothesis the plaintiff were a French resident, he could petition the Greek Court to attach property or other assets located in Greece, even though the main proceeding in a French court.

Summarizing the effectiveness of the European system, the first observation is that the European Community gives extra emphasis on con-


\textsuperscript{157} Reuland, supra n. 132, at 589-590.

\textsuperscript{158} See generally, Dominguez, supra n. 60.

\textsuperscript{159} Brussels Convention article 24, 1978 O.J. (L 304) 77.

\textsuperscript{160} Brussels Regulation, supra n. 138, at art. 31.

\textsuperscript{161} Brussels Convention, art. 24, 1978 O.J. (L 304) 77.

\textsuperscript{162} Id.

\textsuperscript{163} Id.

\textsuperscript{164} Id. (explaining Article 1 of the Brussels Convention provides that it is to apply, in civil and commercial matters, whatever the nature of the court or tribunal; and that it is not to extend, in particular, to revenue, customs, or administrative matters. In addition, it is specifically provided that the Brussels Convention is not to apply to the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession, bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings, social security matters, or arbitration. In general, disputes between a public authority and a private individual arising out of the authority's exercise of its statutory powers are outside the scope of the Convention. The same language is used in Brussels Regulation).

\textsuperscript{165} Id.

\textsuperscript{166} Id.
sumer protection, an entirely different approach in handling jurisdictional issues than the United States. The United States relies on market self-regulation rather than giving the consumer the utmost protection against litigating in a distant forum, especially with regard to forum selection clauses.\footnote{See Presentation under II.B.3; see also Keller, supra n. 139, at 64.} Based on a codified set of rules the 1968 Brussels Convention and its successor, Regulation 44/2001, have made enormous progress in multinational litigation and recognition and enforcement of foreign judgments allowing sellers and buyers, consumers, and e-business owners to conduct their business based on the clarity of a reliable set of rules.\footnote{Id.} The harmonization of jurisdictional rules has also facilitated the exportability and enforcement of national judgments and decrees throughout the E.U. It appears that a codified and reasonably clear system of accepted bases for jurisdiction, providing foreseeability and certainty for both business owners and consumers, is strongly preferable to a system of prevailing case law.\footnote{Id.} This concept has been the basis for the creation and adoption of an international system on Jurisdiction and Foreign Judgments in Civil and Commercial Matters in the international context of the Hague Conference.

b. Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

In the area of civil and commercial law, the Hague Conference on Private International Law, an intergovernmental organization, the purpose of which is “to work for the progressive unification of the rules of private international law,”\footnote{More about the scope and works of the Hague Conference is available at: http://hcch.e-vision.nl/index_en.php?act=text.display&tid=26 (accessed Oct. 31, 2004).} is currently in the process of negotiating a new convention on jurisdiction and the recognition and enforcement of foreign judgments in civil and commercial matters.\footnote{See Department Of Commerce, Request for Comments on Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, available at: http://www.uspto.gov/web/offices/com/sol/notices/prdconjjud.html (accessed Oct. 11 2004).} The draft convention aims to create jurisdictional rules governing international lawsuits and to provide for recognition and enforcement of judgments by the courts of Member States. At the request of the U.S., discussions began in 1992.\footnote{Id.} The impetus behind the request was to gain recognition and enforcement of U.S. judgments in other countries. Contrary to what one might think, no bilateral or multilateral international agreement exists between the United States and any other country on reciprocal recognition.
and enforcement of judgments.\textsuperscript{173} While U.S. courts generally recognize and enforce judgments from other countries, U.S. judgments do not always receive the same treatment abroad.\textsuperscript{174} Depending on the country, there are many reasons for the absence of such agreements, but in general, it seems that many foreign states perceive U.S. money judgments as excessive according to their own notions of liability, or object to the extraterritorial jurisdiction asserted by U.S. courts.\textsuperscript{175}

The first session of the two-part Diplomatic Conference took place on 18 June 1999, where the preliminary Draft Convention\textsuperscript{176} was provisionally adopted by the Special Commission and then revised at a meeting held at the Hague from 25-30 October 1999; the second session took place in the Netherlands in January 2002.\textsuperscript{177} The draft Hague Convention on

\begin{footnotesize}

\textsuperscript{174} See The Committee on Foreign and Comparative Law, \textit{Survey on Foreign Recognition of U.S. Money Judgments}, 56 The Record 378 (noting the results of a survey on recognition of United States money judgments abroad in response to a request by the Department of State). Within the context of public policy of other foreign nations, four principal reasons have emerged for refusal of enforcement of United States judgments: "(a) judgments awarding multiple or punitive damages; (b) judgments deemed to have the effect of unacceptably restraining trade; (c) judgments based on decisions grounded in novel causes of action; and (d) judgments deemed to be based on U.S. public law or having a criminal or quasi-criminal nature." Id. at 391.

\textsuperscript{175} Id; see supra part III.A. For more information and country-by-country analysis; see Enforcement Of Money Judgments, Vol. I & II (Lawrence W. Newman ed., 1999).


Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters consists of three parts. Chapter I defines the scope and the application of the Convention. Article 1 specifies that it applies only to civil and commercial matters.

Chapter II creates three categories of jurisdiction: (1) Required basis for jurisdiction: Articles 3-16 set out jurisdictional rules for specific types of actions that the courts in Contracting States must provide and from which any resulting judgment may gain the benefits of the recognition and enforcement provisions of the Convention. It also provides for exclusive jurisdiction for certain actions (Article 12) concerning patents, trademarks, or other similar rights required to be deposited or registered, in the courts of the country in which the deposit or registration has been applied for or has occurred. It also allows parties to enter into agreements designating a choice of court (Article 4); (2) prohibited bases for jurisdiction: Article 18 defines grounds of jurisdiction that are prohibited in Contracting States placing a general limitation on the judgments project in the context of the future work programme of the Conference.


180. See id. (contending "[copies rights are excluded from the exclusive jurisdiction rule; however, actions concerning copyrights could fall under the other non-exclusive required jurisdictional provisions]; Specifically, Article 12 provides:

4. In proceedings which have as their object the registration, validity, [or] nullity [or] revocation or infringement of patents, trademarks, designs or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place, have exclusive jurisdiction. This shall not apply to copyright or any neighboring rights, even though registration or deposit of such rights is possible. [5. In relation to proceedings which have as their object the infringement of patents, the preceding paragraph does not exclude the jurisdiction of any other court under the Convention or under the national law of a Contracting State.] [6. The previous paragraphs shall not apply when the matters referred to therein arise as incidental questions.]" The brackets identify potential language alternatives to be considered and discussed in detail during the Diplomatic Conference.

182. See also text of art. 4, available at http://www.hcch.net/e/workprog/jdgm.html (accessed Nov. 1, 2004). However, such agreements shall be without effect if they conflict with the provisions of Article 12.
exercise of jurisdiction based on the absence of a "substantial connection between that State and the dispute;" and (3) everything that does not fall under either of these categories is included in the "gray area" as defined in Article 17. Chapter III provides rules for the recognition and enforcement of judgments based on a ground of jurisdiction provided for in Articles 3-16.

III. ANALYSIS

A. CURRENT STATUS AND PROPOSED SOLUTIONS.

1. General Discussion

As presented above, the U.S. litigant will most likely attempt to obtain a preliminary remedy, either a prejudgment attachment or an injunction. Although the prejudgment attachment provides some protection to plaintiff's interests, this provisional remedy is insufficient. First, it is only available to a plaintiff seeking a legal remedy. In addition, since this remedy is regulated by state statute it is possible for the prejudgment attachment to be limited, by statute, to specific enumerated claims (i.e. contractual claims). So even if plaintiffs seek remedies at law, courts may still not have subject-matter jurisdiction over the specific claims. Additionally, the most critical aspect of the prejudgment attachment is its jurisdictional restraints. Since the assets to be attached are to be located within the court's jurisdiction, courts may never attach foreign assets. This jurisdictional restraint is increas-

183. See also text of art. 18 (available at http://www.hcch.net/e/workprog/jdgm.html); Department Of Commerce Request for Comments on Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, available at: http://www.uspto.gov/web/offices/com/sol/notices/prdrconjud.html (accessed Oct. 11, 2004) (stating that: "Article 18(2)(e) is of particular interest to U.S. litigants because it states that jurisdiction cannot be based solely on the fact that the defendant carries on commercial or other activities in that State, except where the dispute is directly related to those activities. This provision would prohibit the exercise of general "doing business" jurisdiction as currently recognized under U.S. law. Article 18(2) also would prohibit the exercise of " tag" jurisdiction in a court based on service upon the defendant in the State.").

184. Id.

185. See id. Part II.B. (2).

186. Id.


188. See id. at 155.

189. The prejudgment attachment requires in-rem jurisdiction; see Nation, supra n. 16, at 370.

190. Id.
ingly significant in today's world where territorial boundaries do not really affect financial mobility.

The preliminary injunction presents its disadvantages mainly because the courts are divided as to when they have the discretion to grant a preliminary injunction. While the majority view was that the grant of preliminary injunction is available only when no adequate legal remedy exists, the minority view considered such grant as an abuse of discretion noting that preliminary injunction is unavailable if the plaintiff seeks money damages. That view has been enforced by the recent Supreme Court decision in Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc in which the Court, by a marginal majority 5-4, rejected the expansion of interlocutory relief past the limits of traditional equity jurisprudence. Thus, despite the objections voiced in the dissenting opinion on "an unjustifiably static conception of equity jurisdiction," the Supreme Court mandates U.S. courts to return to the "traditional principles of equity jurisdiction." Considering the expansive use of equitable relief to secure future damages remedies through judicial imperialism is an infringement of a defendant's substantive rights and an attack to American principles of equity and fair-play.

Additionally, due to the diversities between the common law and civil law system on prejudgment attachments, it is highly probable that civil law countries could have issues recognizing and enforcing such measures absent any prior bilateral or multilateral Agreement. In fact, the flexibility characterizes the American legal system's approach to system jurisdiction and international or interstate litigation in Internet cases. The U.S.' flexibility that represents the system's outmost strength also represents its worst flaw. On one hand, the U.S. has only a framework of requirements needed to comply with the U.S. Constitution,


192. Id. at 385-387. 


195. Grupo Mexicano de Desarrollo, 119 S.Ct. at 336 (stating that Justice Ginsburg joined by Justices Stevens, Souter, and Breyer decried the Court's reliance "on an unjustifiably static conception of equity jurisdiction."); see also Theuer, supra n. 194, at 483.

196. Id.

197. Id.

198. See infra part II. (B) (3).

199. See Keller, supra n. 139, at 49-50.
instead of a specific set of rules. This system allows for an evolution of a jurisdictional doctrine unlike in any other place in the world. Conversely, the same flexibility leads to a lack of foreseeability and predictability.\textsuperscript{200} The evolution of jurisdictional doctrine in \textit{International Shoe}, \textit{Burger King}, and \textit{Burnham},\textsuperscript{201} adding many more requirements and tests in an effort to construct some sort of “virtual presence” and adjust to the modern world, did little to provide more certainty.\textsuperscript{202} Further, the “minimum contacts” test\textsuperscript{203} is widely criticized.\textsuperscript{204} The gravity of an outcome’s unpredictability is further demonstrated by recent international cases, such as \textit{Asahi Metal Industry Co., Ltd. v. Superior Court of California},\textsuperscript{205} and becomes even more evident in connection with Internet use.\textsuperscript{206}

However, most European counties, which are mostly civil law countries, are accustomed to a different problem solving approach based on a concrete set of rules codified in their respective laws.\textsuperscript{207} Such codification is less flexible and adaptable to the continuing technological evolutions model; however, it provides a great sense of clarity and predictability in the area of jurisdictional law. Indeed, litigating about the appropriate forum for a contract or tort case in the European Union Countries rarely occurs.\textsuperscript{208} Additionally, European law in general is more consumer-protection oriented that American law.\textsuperscript{209} For these reasons, European countries are not inclined to either recognize or enforce judgments issued by American courts.

Assuming that the plaintiff in our hypothesis has obtained jurisdiction and a preliminary order preserving the defendant’s assets, he still faces the problem of enforcing such judgment in a foreign country, namely Greece. Regardless of how successful a plaintiff may be in the pursuit of such remedy, he will be hindered by the fact that the U.S. is

\textsuperscript{200} See id. at 50 (discussing the American law of jurisdiction).
\textsuperscript{201} \textit{Burnham v. Superior Court of California}, 495 U.S. 604 (1990).
\textsuperscript{203} See id.
\textsuperscript{205} 480 U.S. 102 (1986).
\textsuperscript{207} See supra discussion of Brussels Convention/Regulation Part II. 3.a.
\textsuperscript{208} Keller, \textit{supra} n. 139, at 64-65; See also infra discussion of Brussels Convention/Regulation Part II. 3.a.
\textsuperscript{209} Id. at 64.
not a party to any bilateral or multilateral treaty providing for the enforcement of a U.S. court’s judgments in other countries.\textsuperscript{210}

Several proposals have been made advocating for a federalized judgment regime,\textsuperscript{211} or for a WTO-based approach to the recognition and enforcement of judgments,\textsuperscript{212} or even for the adoption of a \textit{Mareva} type injunction.\textsuperscript{213} On the other hand, it has also been argued that there is

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210. Danford, \textit{supra} n. 120; Charles T. Kotuby, Jr., \textit{Internal developments and external effects: the federalization of private international law in the European Community and its consequences for transnational litigants}, 21 J.L. & Com. 157 at 158 (2002); see also Brand, \textit{supra} n. 121, at 204 (observing that the United States, which is not a party to a single bilateral treaty on recognition of foreign judgments, could avoid the effects of the Brussels Convention through country-by-country treaty negotiation).

211. Danford, \textit{supra} n. 120, at 424.


213. \textit{See generally} Theuer, \textit{supra} n. 194. The \textit{Mareva} injunction, the United Kingdom’s extensive injunction for the extraterritorial freeze of assets, took its name from the second case to apply this remedy, \textit{Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.}, 2 Lloyd’s Rep. 509, 509 (Eng. C.A. 1975). In \textit{Mareva Compania Naviera S.A.}, the plaintiffs, owners of the ship \textit{Mareva}, leased the ship to International Bulkcarriers, who in turn, sublet the ship to the Indian government. The Indian government paid International Bulkcarriers for services rendered, but International Bulkcarriers failed to pay the ship owners a portion of the contract price; consequently, the ship owners brought a cause of action against International Bulkcarriers for the unpaid portion. When the ship owners realized that the defendants had assets available in a London Bank, which could satisfy their claim, they applied for an injunction to restrain the defendant from disposing of the assets, and the court granted them the injunction, reasoning that the injunction afforded the plaintiffs some degree of protection before becoming actual judgment creditors. In order to grant the \textit{Mareva} injunction, the Court requires the plaintiff: (a) to make a full disclosure to the court of all material matters, (b) to specifically identify all claims against the defendant, including the grounds for the claim, the amount of the claim, and the defendant’s affirmative defenses against the claim and establish a good arguable case, (c) to state why the defendant is believed to have assets within the United Kingdom, (d) to state why assets are at risk of being dissipated, (e) to undertake the responsibility of paying damages in the event that the claim falters or the injunction proves to be unjustified. English Courts employ the \textit{Mareva} injunction as an effective protection for plaintiffs against defendants willing to dissipate their assets. Although the \textit{Mareva} injunction operates \textit{in personam}, it can affect defendants’ assets in ways that would ordinarily require courts to have \textit{in rem} jurisdiction. It may be applied to a variety of assets such as bank accounts, ships, aircraft, automobiles, real property, chattel, and even goodwill. Initially, the \textit{Mareva} Injunction was limited to assets only within the Court’s jurisdiction. However, the \textit{Mareva} injunction evolved, and now reaches assets located worldwide. In 1978, the United Kingdom became a signatory to the Brussels Convention. As a result, England adopted Article 24 in Section 25 of the Civil Jurisdiction and Judgments Act 1982, effectively extending the territorial reach of the \textit{Mareva} injunction, thus nullifying the previous contrary case law. The cases that followed gave a comprehensive set of guidelines for using a \textit{Mareva} injunction outside English borders. Under the guidelines established by the courts, plaintiffs seeking a \textit{Mareva} injunction must satisfy the following standards: (1) English assets must be wholly insufficient to afford protection; (2) a high risk of disposal of foreign assets must be present; (3) the defendants should be sophisticated operators, with the ability to render assets untraceable; (4)
no real problem to address. It may not be a problem because until recently, typical plaintiffs involved in transnational litigations in U.S. courts were either large multinational corporations, which have enough financial power to pursue a litigation abroad, or the legal battle is targeted against other similarly large foreign corporations that have sufficient assets in America to satisfy domestic judgments. Consequently, this continues to trouble American scholars and jurists. 

Regardless of the applicability of each proposed solution, the fact remains that the only effective remedy available today to the U.S. litigant is to fight his battle in a foreign country. Indeed, the problem of lack of recognition of U.S. judgments abroad tends to arise mainly in the case where the defendant is a small business or an individual. From the above presentation it becomes obvious that currently the only option realistically available to the average U.S. litigant is to obtain a judgment, interim or final, from a U.S. court and attempt to enforce it abroad.

There must be no oppression of the defendant by allowing them to be subjected to a multiplicity of proceedings; (5) the defendants must be protected from the misuse of any information obtained pursuant to this order; (6) a world-wide tracing order must be receivable, which would require the defendant to reveal the location of all his foreign assets. The Court in *Derby & Co. Ltd. v. Weldon* added that a Mareva injunction can apply world-wide, without the need to prove that the defendant has assets within the jurisdiction of the United Kingdom. The world-wide application of the Mareva Injunction allows plaintiffs with proceedings in the UK or a contracting state, to use the Mareva in helping to preserve assets for execution. This use has made the Mareva one of the most innovative and flexible protective remedies available in international litigation, which resulted in being called by a judge the “nuclear weapon” of law. That is why several authors have proposed the adoption of a “Mareva-type” injunction in the U.S. legal system but until now, this view does not seem to gain ground. For more information on the history, development, and use of the Mareva injunction; see generally Lars E. Johansson comment, *The Mareva Injunction: A Remedy in the Pursuit of the Errant Defendant*, 31 U.C. Davis L. Rev. 1091 at 1098 (1998); see generally Dominguez, supra n. 60; Bermann supra n. 59; Nation, supra n. 16, at 368.


215. Id.


218. Id.

219. These statements reflect the personal opinion of the author based on the preceding analysis in this comment, Parts II and III; see also Juenger, supra n. 214, at 114-115. Thus, the problem of recognizing American judgments abroad tends to arise only in the event that the defendant is a fairly small business or an individual. In such cases, counsel ought to advise their clients to sue abroad, rather than waste time and money in the hope of enforcing a domestic judgment that may be considered excessive by foreign standards. But, as a case decided by the German Bundesgerichtshof shows, even a hefty American judg-
However, given the problem of financing litigation in a foreign forum, which is more burdensome than undertaking litigation at home and can become a deterrent to the individual litigant such as the one in our hypothesis, one might argue that suing abroad is not a viable solution. Although, it may be true that, up until recently, most transnational litigation involved large companies, and this may continue to be true because they have enough resources to pursue their interests in any part of the world, it is nevertheless true that with the advent of the Internet and its continuously increased use, cases will start to arise that would involve small businesses and/or individuals. These plaintiffs would not be able to afford the "luxury" of maintaining litigation abroad.

Thus, the only realistically available option to such U.S. plaintiffs, obtaining a judgment, interim or final, from a U.S. court and attempting to enforce it abroad, would be ineffective. Because the United States has no treaty benefits upon which to rely, enforcing a U.S. judgment in Europe means looking to the general rules of recognition and enforcement in the courts of European nations, which in practicality usually means that an entirely new action must be brought on the judgment in order to obtain recognition. The most tangible international instrument currently available in this area is the Hague Convention, and a brief commentary is deemed appropriate.

2. Reactions To And Critique Of The Hague Convention

The Hague Convention is intended to harmonize jurisdictional

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220. See Juenger, supra n. 214, at 114-116.


222. See generally Danford, supra n. 120; see also Franklin & Morris, supra n. 221, at 1222-23.

223. These statements reflect the personal opinion of the author based on the preceding analysis in this comment, Parts II and III.

224. See Brand, supra n. 121, at 205 ("Absent the benefits of a treaty, a U.S. judgment is governed by general rules of recognition and enforcement in the courts of European nations. Normally, this means that a new action must be brought on the judgment in order to obtain recognition, with the resulting local judgment of recognition being the one for which enforcement is sought"), Matthew H. Adler, If We Build It, Will They Come? - The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments, 26 Law & Pol'y Int'l Bus. 79, 81 (1994).

225. Brand, supra n. 121, at 205.

226. See infra Part II B (3)(b).

227. The previous draft titled Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001, Interim Text, avail-
rules governing cross-border litigation between private parties. It is not intended, however, to harmonize national laws on any topic.\textsuperscript{228} The way that it is envisaged to function is to create a general framework according to which member States would be required to recognize and enforce judgments covered by the Convention if the jurisdiction in the court rendering the judgment were founded on one of the bases of jurisdiction required by the Convention.\textsuperscript{229} It thus establishes that a final judgment of one member state must be recognized in the courts of any other contracting party, provided that the issuing court had valid jurisdiction and that the enforcing state cannot review the merits of the claim on which the judgment is based. Discretionary grounds for refusal, set out in Article 28, limit this general rule of recognition.\textsuperscript{230}

The reactions to the proposed convention have been conflicting.\textsuperscript{231} It should not, however, be overlooked that early discussions on the current convention began in 1992, when the Internet was still in an infant stage and consequently dealt generally with more traditional notions of trans-border litigation.\textsuperscript{232} Some argue that this Convention will fill the

\footnotesize{\textsuperscript{228} See James Love, What you should know about the Hague Conference on Private International Law's Proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, (available at: http://www.cptech.org/ecom/jurisdiction/whatyoushouldknow.html) (June 2, 2001); see Sprigman, supra n. 177.}  


\footnotesize{\textsuperscript{230} See text of art. 28 (available at http://www.hcch.net/e/workprog/jdgm.html) (accessed Nov. 1, 2004) (noting that a judgment may be refused if: (a) a suit involving the same subject matter is pending before a court first seized; (b) the judgment is inconsistent with a prior, enforceable judgment; (c) the issuing court was partial or violated fundamental principles of procedure; (d) the defendant did not have sufficient time to prepare a defense; (e) the ruling was procured by fraud; or (f) recognition would be incompatible with the public policy of the enforcing state).}  

\footnotesize{\textsuperscript{231} See Love, supra n. 228 (arguing that while the convention would clearly have some benefits, in terms of stricter enforcement of civil judgments, it would also greatly undermine national sovereignty and inflict far-reaching and profound harm on the public in a wide range of issues); see Sprigman, supra n. 177 (arguing that the convention may strangle both e-commerce and free speech on the Internet); Franklin & Morris, supra n. 221, at 1234-1235; see also generally Tapio Puurunen, article, The Judicial Jurisdiction of States Over International Business-to-Consumer Electronic Commerce from the Perspective of Legal Certainty, 8 U.C. Davis J. Int'l L. & Pol'y 133 (2002).}  

\footnotesize{\textsuperscript{232} See Morris, supra n. 177, at 1218-19 (stating that the Internet is one of the factors responsible for the recent increase in interest in the language and scope of an international convention on foreign jurisdiction and enforcement); see also generally Puurunen, supra n. 231 (explaining how the possibilities, growth and globalization of the Internet have accen-}
current gap in the international enforcement of judgments and it will strongly benefit the U.S. litigant, especially the medium size corporations or the middle class American that do not have the financial potency to pursue an international litigation.\textsuperscript{233} Given the traditional difficulty of most civil law countries in understanding the U.S. case law and the jurisdictional rules (the view jurisdictional tests such as "purposeful availment" and reasonable expectation of being "haled into court" as vague) and the resulting reluctance in enforcing the U.S. judgments,\textsuperscript{234} this argument seems to be well founded. On the other hand, U.S. Department of State has expressed its concerns about the draft following "too closely the structure and content of the Brussels Convention,"\textsuperscript{235} which appears to be the main obstacle.

The critics of the Convention concentrate on the "chilling" effect it may have on Internet speech and the negative repercussions on e-commerce.\textsuperscript{236} They argue that Internet websites operate worldwide; therefore, liability for online conduct deserves special attention.\textsuperscript{237} Since the


\textsuperscript{234} Id.


\textsuperscript{237} Id; see also Love, \textit{supra} n. 228.
Convention does not impose any global standards on the substantive issues in cross-border lawsuits it obliges signatories to enforce the judgments rendered by the courts of other member countries based on substantially different laws, even if the alleged offense does not constitutes an illegal act in the U.S. The Convention generally adopts the rule of country of destination, thus permitting the injured party to bring an action where the injury occurred or arose.238 Unlike in the Brussels Convention that applies in the E.U.,239 where national laws are broadly similar and are undergoing further convergence, the national laws of the Hague Convention member countries240 often diverge and sometimes even clash. As a result, if the Convention is ratified, in its present form, U.S. courts could be obliged to enforce foreign judgments even against people and companies whose actions were entirely legal in the U.S.241

To better illustrate the confusion that may occur under the treaty it may be pointed out that different national laws concerning libel, copyright, patents, trademarks, trade secrets, unsolicited e-mail, unfair competition, comparative advertising, or parallel imports of goods will give rise to judgments and injunctions. As a consequence, people will find that activities that are legal where they live are considered illegal in a different country.242 Under the treaty, the foreign country will likely have jurisdiction and their laws will be enforceable in all Hague member countries.

There is the limitation of Article 28(f), to which judgments need not be enforced if recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.243 This provision is quite important, but what is “manifestly incompatible” with the U.S. policy is an issue that most likely would be determined in a case by case approach by individual courts.244 Moreover, its usefulness is limited by the fact that judgments will be enforced in any Hague member country.245 Even if U.S. courts decline to enforce foreign censorship judgments, the threat to Internet free speech remains. Under that provision, the defendant will only escape the judgment if every country finds the

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238. Text of the convention Chapter II, art. 10.
239. See supra Part II.B, (3)(a).
240. There are 57 States Members of the Hague Conference, including countries like USA, Canada and the E.U. member countries as well as developing countries such as Chine, Romania, Turkey and Pakistan. The list of member countries is available at http://www.hcch.net/e/members/members.html.
241. See Burk, supra n. 202, at 207.
242. See a detailed discussion on Intellectual Property rights protection and proposed solutions in Franklin & Morris, supra n. 221.
244. Franklin & Morris, supra n. 221, at 1234-1235.
245. See supra Part II. B. 3.b.
judgment "manifestly incompatible public policy," but the plaintiff need only find one country that is willing to enforce the judgment.

The inadequacy of that provision becomes clearer in Internet related disputes where the ISP will typically be sued, both because it has the financial resources and because it has assets in many countries.\footnote{See id.} One can easily see that the outcome in the Yahoo! case\footnote{See supra n. 45.} could have been different if the convention had been in force. Even if the enforcement of the French judgment had been refused by the U.S. courts due to "public policy" reasons, it still could be enforced elsewhere, thus financially crippling the company. If that is so, perhaps another court can similarly stamp out online criticism of the local government, or religion.\footnote{Id.} This will eventually result into reducing the World Wide Web to the lowest common denominator and seriously traumatizing the electronic commerce.\footnote{Id.}

As far as provisional or protective measures are concerned,\footnote{See supra n. 199. Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Hague Convention, 2003 Draft; Hague Convention, 2001 Draft; Hague Convention, 1999 Draft.} it is unclear, at least as to the 2001 draft, if the Hague Convention will support such remedies. As they are discussed in the scope section,\footnote{Hague Convention, 2001 Draft, supra n. 199, Art. 1, reprinted at 77 Chi-Kent L. Rev. 1015, 2(k).} the jurisdiction section,\footnote{Id. at 1033, Art. 13} the enforcement section,\footnote{Id. at art. 23(A).} the result could differ drastically and vary from the enforcement of a wide range of preliminary injunctions to no enforcement of foreign preliminary injunctions, depending on which clauses the countries select. Some commentators have characterized this issue as one of the many complicated and pivotal parts of the Hague Convention negotiations.\footnote{Franklin & Morris, supra n. 221, at 1283.}

However, the problems are not insurmountable. It is true that the U.S. and E.U. embody different perspectives in establishing jurisdiction, and seem unable to agree upon an approach to handling consumer contracts and torts.\footnote{The European Community emphasizes consumer protection, whereas the U.S. will not accept such strict consumer protection rules that appear heavily pro-business. See Timothy P. Lester, Globalized Automatic Choice of Forum: Where Do Internet Consumers Sue?: Proposed Article 7 of the Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters and Its Possible Effects on E-Commerce, 9 New Eng. J. Int'l. & Comp. L. 431, 457-58 (2003).} The success of any international negotiation is based
on the willingness of the parties to compromise. In this case, the most workable and probably successful scenario would include adopting a draft incorporating the advances in technology and a combination of the best of both worlds. First, it has started becoming evident that although difficult, at least some regulation of the Internet is feasible,\textsuperscript{256} which is partially due to the newly developed geo-identification in general, and \textit{geo-location technologies} in particular.\textsuperscript{257} Second, the European system's big advantage is the fact that it has established clear and unambiguous rules for jurisdiction, and provides adequate consumer protection. Since the consumer is usually the weaker party in a lawsuit and does not have the option to initiate costly litigation in a distant forum, he must have the option to sue at home, as well as the assurance that he will not be sued in a distant forum. Thus, for reasons of foreseeability and certainty, the European community's rules can be the foundation for an international solution. However, strict rules do not allow for flexibility that Internet-related cases require, or the continuously evolving technologies that web based transactions employ. Thus, the international solution should also incorporate a modified U.S. approach to allow for the flexibility and adaptability of the usually rigid rules to address the continuously evolving real world and its legal needs.\textsuperscript{258} Not only would such a solution be acceptable to both the U.S. and the E.U., it would also likely provide a realistic and viable international scheme for the mutual recognition and enforcement of judgments, provisional or final.

3. \textit{The Hague Impasse and the ALI Proposals}

Currently, neither side appears willing to compromise. Consequently, the negotiations in the Hague Convention have reached an impasse.\textsuperscript{259} The causes for this impasse, as explained above, seem to be deeper and the rapid development and spread of commerce and new technologies, combined with the still unresolved economic, political, and legal issues in fields such as intellectual property and electronic commerce, worsen the problem.\textsuperscript{260} The undisputed result is that the future of the Hague Convention is uncertain.\textsuperscript{261} It is characteristic that limits

\textsuperscript{256} Keller, \textit{supra} n. 139, at 5-16.

\textsuperscript{257} For a more detailed discussion of how these technologies work and how they may affect the way the law views "location" online, see generally Dan Jerker B. Svantesson, \textit{Geo-Location Technologies and Other Means of Placing Borders on the 'Borderless' Internet}, 23 John Marshall J. Computer & Info. L. 101.

\textsuperscript{258} See generally Keller, \textit{supra} n. 139, at 68-70 (discussing possible solutions to the Hague impasse).


\textsuperscript{260} Id. at 194.

\textsuperscript{261} Id. at 194; see also generally Keller, \textit{supra} n. 139, at 67-70.
the latest negotiations and discussions have been the “exclusive choice of court agreements [that are] as effective as possible in the context of international business.”

Faced with uncertain prospects for a speedy conclusion to the Hague Convention negotiations, the American Law Institute (ALI) shifted its purpose from drafting the implementing legislation for a final Hague Convention to drafting a proposed federal statute on jurisdiction and judgments, independent of the Convention. Subsequently, ALI has released two revised drafts in 2002: Draft No. 2, released in September and Draft No. 3, released in December. The ALI has named its proposed legislation “The Foreign Judgments Recognition and Enforcement Act.” The drafters' intent behind drafting this legislation is to have a federal statute in place in the event that a “satisfactory” convention is not forthcoming from the Hague Convention.

Some have argued that federalization of the U.S. judgment-enforcement regime would be a wise course of action, since it would clarify and somehow unify the patchwork of differing rules and requirements. Reciprocity seems a compelling reason for unification of U.S. law in this

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262. See Trevor C. Hartley and Masato Dogauchi, “Draft Report on the Preliminary Draft Convention on Exclusive Choice of Court Agreements” (Prel. Doc. No. 26 of Aug. 2004) (available at http://hcch.e-vision.nl/upload/wop/jdgm_pd26e.pdf) (accessed Nov. 1, 2004). Article 8 states that the Convention does not govern interim measures of protection. It neither requires nor precludes the grant of such measures by a court of a contracting state, nor does it affect the right of a party to request such measures. Id. at 133. A court that grants a measure of this kind does so under its own law. The Convention does not require that a court grant the measure, but it does not preclude a court from granting it. This does not require that courts in other contracting states recognize or enforce it; however, nothing precludes them from doing so. That decision depends on national law. Id. at 28, 30-31.

263. Danford, supra n. 120, at 434.


265. Id. at § ii.


268. See Memo, from Andreas F. Lowenfeld and Linda Silberman, § II, ¶ A (Nov. 30, 1998) (available at http://www.ali.org/ali/1999_Lowen1.htm); see also generally Danford, supra n. 120, at 415-32 (discussing the ALI proposals in detail).

269. See id. at 424-27. For a general discussion of the proposed regime; see also Trooboff, supra n. 235 (available at http://www.cov.com/publications/download/oid51615/486.pdf).
area, while the existence of national standards for judgment enforcement might give a negotiating advantage to the American side aiding into multilateral negotiations in the Hague Convention or elsewhere.\(^{270}\)

However useful or true this might be, the reality is that no one can predict if or when such a development will occur, or if and/or when the U.S. will accede to a judgments convention with the nations of the E.C. or with any other group of nations in the near future.\(^{271}\) Although such development would be desirable, the efforts of recent years have either failed\(^{272}\) or were never realized\(^{273}\).

In the meantime, on the international level, ALI took initiative and proposed to International Institute for the Unification of Private Law (UNIDROIT)\(^{274}\) to prepare uniform rules of procedure.\(^{275}\) These rules include provisional measures that are applicable to transnational disputes once countries settle the question of jurisdiction, but before the question of recognition and enforcement of the judgment arises.

The ALI/UNIDROIT\(^{276}\) principles recognize the competent court’s ability to grant provisional measures “with respect to a person or to prop-

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270. Danford, supra n. 120, at 415-23.
271. Id.
273. Id. at 432-33; see also generally Franklin & Morris, supra n. 221, at 1283; see also generally Arthur T. von Mehren, Drafting a Convention on International Jurisdiction and the Effect of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed, 49 Am. J. Comp. L. 194.

As to the provisional measures, it states in pertinent part:

3.4 Provisional measures may be provided with respect to property in the forum state, even if the courts of another state have jurisdiction over the controversy.
e in the territory of the forum state, even if the court does not have jurisdiction over the controversy,\textsuperscript{277} when such measures are necessary to ensure effective relief by final judgment or to preserve the status quo.\textsuperscript{278} The principles also provide for proceedings without notice, \textit{ex parte}, when applying for a provisional remedy.\textsuperscript{279} Also, there is an attempt to compromise between those jurisdictions requiring the plaintiff to provide security for costs, or for liability for provisional measures in those jurisdiction that do not have such requirement, while not attempting to modify forum law in that respect.\textsuperscript{280}

The ALI/UNIDROIT Principles offer the appropriate basis and the Hague Convention offers the appropriate forum for the U.S. government to start negotiating agreements on a smaller scale than it initially attempted.\textsuperscript{281} Indeed, at a certain point in time, one must pick his battles.

4. Proposed Principles for a Mutual Recognition and Enforcement of Judgments Agreement

Currently, it appears difficult to make progress on a large international level,\textsuperscript{282} but significant progress might be possible on a smaller scale.\textsuperscript{283} The most efficient course of action would be to proceed in a negotiation and devise a series of bilateral or multilateral agreements with these nations that seem to maintain the bulk of transnational litigation.

\textsuperscript{277} A person should not be required to provide security for costs, or for liability for provisional measures, solely because that person is not domiciled in the forum state. In any event, security for costs should not restrict access to justice.

\textsuperscript{278} The court may grant accelerated attention to provisional measures and issues that may be peremptorily dispositive, such as issues of jurisdiction or statutes of limitations.


\textsuperscript{277} Draft Principles of Transnational Civil Procedure at Principle 2.3.

\textsuperscript{278} Draft Principles of Transnational Civil Procedure at Principles 5.8, 8.

\textsuperscript{279} \textit{Id.} at P8A-P8G (accompanying comments).

\textsuperscript{280} Draft Principles of Transnational Civil Procedure at Principle 3.3 (stating "[a] person should not be required to provide security for costs, or security for liability for pursuing provisional measures, solely because the person is not a national or resident of the forum state.").

\textsuperscript{281} See Brand, \textit{supra} n. 121, at 204 (observing that the U.S. which is not a party to a single bilateral treaty on recognition of foreign judgments, could avoid the effects of the Brussels Convention through country-by-country treaty negotiation).

\textsuperscript{282} See \textit{supra} at pt. III(A)(2) (discussing The Hague Convention).

\textsuperscript{283} This statement reflects the personal opinion of the author.
In our hypothetical, that would entail negotiating a bilateral treaty with Greece. Given the fact that most European and civil law countries do have the same main issues with the U.S. judicial system, this may serve as a paradigm as to the issues that may arise and how they can be addressed.

In general, absent any international agreement, the Greek Code of Civil Procedure provides that the judgments of foreign courts:

1. If the judgments constitute *res judicata* according to the laws of the country where it was issued.

2. If the courts of the State to which the foreign court belongs have jurisdiction under Greek law.

3. If the nonprevailing party had been given the opportunity to defend itself and participate in the legal proceeding, unless the law of the country of the court issuing the decision authorized that party’s absence from the legal proceeding, and such provision is applicable to both that of the country and of the foreign litigants.

4. If the judgment conflicts with a Greek judgment between the same parties for the same case.

5. If recognition of the judgment would lead to a result that clearly conflicts with essential public policy the basic Greek laws recognize.

Article 780 of the Code of Civil Procedure governs enforcement of foreign judgments and provides that, absent any international agreement, American courts shall enforce the judgments of foreign courts:

1. If the courts of the State to which the foreign court belongs had jurisdiction under its domestic law and have applied the substantive law that would be applicable in the case of Greek law.


285. *Id.* at art. (1).

286. *Id.* art. 323(2).

287. *Id.* at art. 323(3). Practically, in these cases, Greek courts examine whether service of documents on the defendant was in accordance with law or in such a timely manner that he could defend himself if he made no appearance and he pleads this fact, or if the law permits lack of notice, that such law applies equally to citizens and aliens.

288. *Id.* at art. 323(4). Such earlier Greek judgment will also include with an earlier recognizable foreign judgment.

289. *Id.* at art. 323(4). It is necessary to note here that the term “public policy” does not appear in the Code of Civil Procedure. Greek legislation and jurisprudence use the terms “public principles” and “public order” instead. Greek courts usually apply these concepts jointly, which together cover the same content as the English term “public policy”. Therefore, the author deems it appropriate to use the English term “public policy” where Greek texts use the terms “public principles” and “public order”, especially since such terms do not make much sense to English speaking jurists.

290. Greek Code of Civil Procedure, art. 780.

291. *Id.* at art. 780 (1).
2. If the judgment would lead to a result that clearly conflicts with essential public policy the basic Greek laws recognize.  

It becomes obvious that an *ex parte* injunction would clash with the Greek law provision mandating the notification and appearance of the other party. Yet, this issue is not insurmountable. First, Greek law recognizes the need for measures in order to preserve the status quo pending or even prior to the commencement of litigation. Therefore, in cases where there is a need to protect a right or preserve the status quo until an issuance of of the court’s decision on a petition for “security measures,” Greek law authorizes the court of first instance to issue a “preliminary order” after a party’s petition. Thus, effective resolution of these issues is possible through the adoption of specific provisions dealing with the provisional measures, which would achieve a balance between the need of surprise and the protection of both parties’ interests.

Additionally, the Greek State has already concluded a series of bilateral agreements with several countries regarding the enforcement of default judgments in Greece. Although the requirements may vary depending on the relations between the two countries, they clearly indicate that there is not a rigid application of the law on that issue, and negotiations may result in a position countries commonly accept.

First, it is necessary to address the issue of jurisdiction, concerning both the main litigation and the provisional measures. That means the negotiating parties would have to decide the legal basis for determin-

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292. *Id.* at art. 780 (2).

293. Greek Code of Civil Procedure at art. 691(2). In practice, whenever a plaintiff files a motion for security measures, he concurrently files a motion for preliminary order, which the President of the Court of First Instance hears that same day the same day in an effort to protect the alleged rights of the plaintiff pending the hearing of the security measures motion. In theory, presence of the party against which such a motion is filed is not necessary for a hearing on the motion. However, in practice, every possible effort is made to ensure the presence of both parties at the hearing. In most cases, these efforts are successful and both parties are represented in the proceedings.

294. See generally *Dominguez, supra* n. 60; see also generally *Danford, supra* n. 120.

295. *Id.*


297. This statement reflects the personal opinion of the author, based on the presentation above.

298. See e.g. *Draft Principles of Transnational Civil Procedure at Principle 2.*
provisional relief in transnational litigation

Indeed, while tag jurisdiction has enjoyed judicial and constitutional approval in the U.S., both academics and foreigners have heavily criticized the practice. Its application in international litigation is useless to the extent that resulting judgments would be unlikely to receive recognition or enforcement abroad. Given tag jurisdiction’s dubious propriety and general superfluous, the U.S. should be willing to compromise in negotiating a treaty with any civil law country and in the context of the Hague Convention. Besides surrendering these old concepts of tag, attachment, and doing-business jurisdiction, doctrines in the negotiating process, which most Europeans find questionable, and unnecessary and even offensive the U.S. also could gain bargaining power on specific jurisdiction. This merits some argument, and may elicit other countries to respect U.S. judgments and to renounce their own exorbitant bases for jurisdiction.

After resolving jurisdictional issues, the next step is to clarify some substantial law issues, including the purposes, form and basis to obtain a measure of provisional relief. The purposes are common to both jurisdictions. The principal purpose is to prevent dissipation of the defendant’s assets, and thus to ensure that assets will remain available for satisfaction of an eventual money judgment. In the U.S., the well...

299. Under U.S. law, the ancient basis of presence gives the forum state power to adjudicate any personal claim if the defendant is served with process within the state’s territorial limits. Thus, even momentary physical presence of the defendant at the time of service creates power to adjudicate a claim totally unrelated to that transient presence. See Amusement Equip., Inc. v. Mordelt, 779 F.2d 264, 270-71 (5th Cir. 1985).


301. Id. at 112.

302. Id. at 112 (citing David Epstein & Jeffrey L. Snyder, International Litigation 6.04, 3 (2d ed. 1994); Louise Ellen Teitz, Transnational Litigation 1-6, 50-52 (1996)).

303. See Clermont, supra n. 301, at 115-16.

304. See Danford, supra n. 120, at 409-14 (need a more specific pinpoint); see also generally Puurunen, supra n. 231 (discussing jurisdictional issues specific to e-commerce).


306. See Bermann, supra n. 59, at 559; Andrews, supra n. 306, at 993.
established purpose of the provisional measures\textsuperscript{307} is to preserve the status quo pending a final determination on the merits.\textsuperscript{308} Preserving the status quo necessarily entails the need for identification of assets, and/or preservation of evidence that is vital to proof of the relevant case.\textsuperscript{309}

The Greek legal system equally recognizes that a claim may remain unsatisfied if, at the resolution of the dispute, the defendant is left with no assets. The Greek Code of Civil Procedure allows a court to order security measures in all urgent matters or to prevent imminent risk.\textsuperscript{310} Risk prevention is therefore the main basis to apply for security. The majority of the provisional measures aims to maintain the status quo and to secure assets\textsuperscript{311} but some countries envision other purposes, such as preservation of evidence.\textsuperscript{312}

With common ground already between them, the two countries may proceed in drafting principles on which an agreement may be reached. It would also be beneficial to clarify that the provisional measures that this agreement would recognize and enforce, must be in accord with well specified principles of law the agreement discusses or references.

Furthermore, the principles should mandate that the issuing court undertake to carefully balance the interests. Given the nature of such measures, the court would grant a protective order only if it appears necessary, proportionate, and just.\textsuperscript{313} In granting provisional measures, both countries treat the likelihood of irreparable harm to a plaintiff without the injunction and a plaintiff's likelihood of success on the merits as

\begin{itemize}
\item \textsuperscript{307} Fed. R. Civ. P. 65 (governing preliminary injunctions); Fed. R. Civ. P. 64 (governing prejudgment attachments).
\item \textsuperscript{308} See Alliance Bond Fund \textit{v. Grupo Mexicano de Desarrollo, S.A.}, 143 F.3d 688, 692 (1998) (citing \textit{Arthur Guinness \& Sons, PLC v. Sterling Publishing Co.}, 732 F.2d 1095, 1099 (2d Cir. 1984)); \textit{United States v. White County Bridge Com.}, 275 F.2d 529, 534 (7th Cir. 1960) 2 FR Serv 2d at 107, cert. denied; 364 US 818 (1960), 5 L. Ed. 2d 48, 81 S. Ct. 50 (stating that the “function of the equitable remedy of injunction . . . is preventive, prohibitory, protective, or restorative, as the law and circumstances of case warrant”); \textit{id. at} 11; \textit{U.S. v. Criminal Sheriff}, 19 F.3d 238, 240 (5th Cir. 1994) (utilizing injunctive relief to preserve the status quo so that a court may render a meaningful final decision); \textit{see also} Moore's \textit{Federal Practice} at § 65.04.
\item \textsuperscript{309} See \textit{id. at} 293; \textit{see also} Andrews, \textit{supra} n. 306, at § III.
\item \textsuperscript{310} Greek Code of Civil Procedure at art. 323 (using substantive case law to interpret and apply the “urgency” and “imminent danger” criteria).
\item \textsuperscript{311} Greek Code of Civil Procedure at art. 683 et seq.
\item \textsuperscript{312} \textit{See e.g.} Greek Code of Civil Procedure at art. 725 (providing for judicial custody of commercial and professional books or documents). For a brief presentation in English of the Greek system of provisional measures, see \textit{http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc/prov_measures_1_en.pdf} (accessed Nov. 14, 2004).
\item \textsuperscript{313} \textit{See Andrews, supra} n. 306, at § III; \textit{see also} Draft Principles of Transnational Civil Procedure at Principles 5.8, 8; Greek Code of Civil Procedure at art. 683 et seq.
\end{itemize}
crucial factors. Additionally, it is clear that there is also a need to balance the applicant's interest in vindicating his claim and the danger of irreparable loss or damage to the respondent if the order is granted without proper cause. This balancing of interests should reflect an examination of whether there is a substantial risk that the defendant would attempt to dissipate or remove assets supported by adequate indications of his intention to do so, taking also into account the interests of justice, proportionality and the defendant's privacy.

314. Greek Code of Civil Procedure at art. 682; Maryland Undercoating Co. v. Payne, 603 F.2d 477, 481 (4th Cir. 1979) (stating that a decision to grant or deny interlocutory injunctive relief should be based upon a flexible interplay among all relevant factors); Unisys Corp. v. Dataware Products, Inc., 848 F.2d 311, 314-15 (1st Cir. 1988) (demonstrating that a showing of irreparable injury and favorable balance of harms was necessary in an action by creditor against corporate successor of corporate debtor and against individual who was officer of each, where it was alleged that debtor and its officers conspired to defraud creditor by liquidating assets of debtor and transferring them at sacrifice prices to customers or successor corporation; the district court required defendants to file audited balance sheet, to submit reports of financial transactions, and to confine stock transfers to ordinary course of business).

315. Greek Code of Civil Procedure at art. 682; Mylan Pharms., Inc. v. Thompson, 207 F. Supp. 2d 476, 484 (N.D. W.VA. 2001) (ruling that where the balancing of hardships did not tip decidedly in plaintiff's favor, at least part of FDA's ruling was reasonable, and public interest weighed in favor of denying the motion); St. Charles Mfg. Co. v. St. Charles Furniture Corp., 482 F. Supp. 397, 405 (N.D. Ill. 1979) (stating that a "decision to grant or deny preliminary injunction, an extraordinary remedy, requires balancing of several factors, including likelihood of success on merits, lack of adequate remedy at law, lack of irreparable harm if injunction is not issued and comparison of relative hardships imposed on parties"); Hartford v. Hills, 408 F. Supp. 879 (D. Conn. 1975) (stating that the court must consider the impact of preliminary injunction on various defendants in effort to balance equities: thus, where a grant of interim relief cannot possibly harm the interests of certain defendants, such is appropriate even though other defendants' interests will suffer somewhat where denial of interim relief could well result in defendants' obtaining all they seek from litigation before it is even decided); see Andrews, supra n. 306, at § III; Draft Principles of Transnational Civil Procedure at Principles 5.8, 8, P8A-P8G (accompanying comments).

316. Horizon Mktg. v. Kingdom Intl. Ltd., 244 F. Supp. 2d 131, 134 (E.D.N.Y. 2003) (entitling produce sellers to a preliminary injunction barring produce buyers from dissipating assets of trust that the Perishable Agricultural Commodities Act of 1930 formed, 7 USCS § 499a et seq., as sellers showed irreparable harm (risk that trust funds would be dissipated, real risk in light of corporation's insolvency) and were likely to succeed on merits, since parties did not dispute that sellers had not been paid for produce sold to one or both defendants).

317. In Greek law, due to the provisional nature of the security measures, a plaintiff need not prove his claim, but must provide enough evidence that he is likely to succeed in the mail action. Greek Code of Civil Procedure at art. 690.

318. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 8 (1978) (finding that a court can issue an injunction only after plaintiff has established that conduct sought to be enjoined is illegal and that defendant, if not enjoined, will engage in such conduct).

319. Hartford v. Hills, 498 F. Supp. 879, 884 (D. Conn. 1975) (ruling that preliminary injunctive relief is appropriate where it may be necessary to prevent one party from being
It is also advisable that the principles set a financial limit to such measures, for instance, to the total sum the petitioner claims.\textsuperscript{321} It is necessary to stress that such provisional measures be of a conservative nature only, and do not entitle the claimant to enforce against the debtor's assets.\textsuperscript{322} This means the claimant must obtain an enforceable instrument, i.e., a substantive judgment or arbitration award, a settlement agreement recorded in court minutes or in some form of public act which is enforceable under the law of the country of origin.

In the context of protecting the defendant's interest in his property, the principles should also include special provisions to assure that prompt review of the order imposing the provisional measure is available to the defendant, and that he/she has the opportunity to seek its amendment or dismissal.\textsuperscript{323} Additionally, the plaintiff should accept the responsibility to compensate the defendant for any loss the provisional measure causes, if it is later determined that that court should not have granted the measure.\textsuperscript{324} It is advisable that the plaintiff provide some

\begin{footnotesize}
\begin{enumerate}
\item [321.] \textit{See} Draft Principles of Transnational Civil Procedure at Principles 5.8, 8, P8A-P8G (accompanying comments); Greek Code of Civil Procedure at art. 688 (requiring the plaintiff/petitioner to specify the amount he is requesting); \textit{see also generally} Andrews, \textit{supra} n. 306.
\item [322.] Greek Code of Civil Procedure at art. 695.
\item [323.] Greek Code of Civil Procedure at art. 694-98; \textit{see also generally} Andrews, \textit{Provisional and Protective Measures}, § III.
\item [324.] Greek Code of Civil Procedure at art. 694. According to this provision, if the plaintiff does not offer security, the security measure is revoked. Additionally, if the court grants security measures on account of plaintiff's requirement to provide security, those measures are not enforceable until the plaintiff satisfies the security requirement. \textit{Id.} at art. 701; \textit{see also} Geoffrey C. Hazard, Jr., Michele Taruffo, Rolf Sturner, Antonio Gidi, \textit{Principles and Rules of Transnational Civil Procedure: Rules of Transnational Civil Procedure}, 33 N.Y.U. J. INTL. L. & POL. 793, ¶ 17 (2001).
\end{enumerate}
\end{footnotesize}
To mutually recognize and enforce such orders, the participating states should adopt provisions in their respective legislations that would implement the above mentioned principles. Given that both countries already have incorporated in their legal system the basic principles mentioned above, such an endeavor should not be difficult.

Once these countries adopt the substantial law regulating the issuance and recognition of judgments according to the principles above, the practical part of efficiently implementing such an agreement comes into play. To efficiently execute such an agreement, the participating states should establish a system of direct communication and co-operation among the competent courts in this agreement, taking advantage of all the new technologies for fast and effective exchange of information, e.g. e-mail, facsimile, telephone or otherwise. To facilitate such recognition, accompanying all provisional orders should be a jointly drafted document, which would constitute a declaration that the court granting the order has respected the procedural principles as set out in the agreement.

IV. CONCLUSION

Transnational litigation is no simple endeavor. The global patchwork of legal systems makes it even more difficult and unpredictable. The remedies available today may not always prove to be effective for the average American litigant. Therefore, international co-operation is indispensable. However, a multinational treaty providing for the recognition and enforcement of judgments cannot work unless there has been, at least, a minimum harmonization of substantial laws, and in the present case, jurisdictional laws. The long negotiations of the Hague Convention have proven that such a harmonization in a world so different culturally, ethnologically, historically and politically is slow and uncertain. What is possible however, is the initiation of such an effort among countries with similar legal systems and the conclusion of bilateral or regional treaties, following the example of the E.U. countries.

Instead of rejecting the Hague Draft Convention on Jurisdiction and

325. Id.; but see Draft Principles of Transnational Civil Procedure at Principle 3.3.
326. See Andrews, supra n. 306, at § III.
327. See id. at § III.
328. See id. at § III(A) and general discussion (presenting the problems an American litigant could face today).
329. See id. at § III(A)(3) (presenting the current Hague impasse).
330. See id. (presenting the Brussels Convention/Regulation about how the E.U. countries have dealt with this issue).
Foreign Judgments in Civil and Commercial Matters completely,\textsuperscript{331} the participating nations should seize the opportunity and attempt to resolve the controversies and any subsequent objections\textsuperscript{332} that parties affected during the second session of the Diplomatic Conference may voice. After all, if this Convention succeeds, American litigants shall benefit greatly for years to come,\textsuperscript{333} provided that countries address some of the current controversies. If it fails, it would be a challenge for the next generation to resume discussion, while the issues that initiated its negotiation will continue to torment businesses and consumers, especially in the borderless space of the Internet.

In the meantime, there is no reason not to proceed to negotiations with separate countries. This is necessary, given the relations and needs as applied to specific states based on years of experience in the negotiations of the Hague and with the principles that ALI/UNIDROIT promulgated.\textsuperscript{334} Such bilateral or multilateral (but on a smaller scale) agreements will not only benefit the American plaintiff, but might eventually provide a pattern, a model agreement for adoption, not just between the U.S. and the E.U., where infrastructure and legal ties are sufficiently strong, but throughout the world.

\begin{itemize}
\item \textsuperscript{331} See Franklin & Morris, \textit{supra} n. 221, at pt. II (discussing why an international convention on jurisdiction and enforcement may be unimportant).
\item \textsuperscript{332} See id. at pt. III(A) (2) (discussing the objections against the Convention).
\item \textsuperscript{333} See Trooboff, \textit{supra} n. 235 (available at http://www.cov.com/publications/download/oid6609/243.pdf) (author Trooboff is a partner at Wash. DC. Covington & Burling, and a member of U.S. delegation to the Hague Conference on Private International Law).
\item \textsuperscript{334} See Franklin & Morris, \textit{supra} n. 221, at pt. III (A) (3) with accompanying endnotes (discussing the current Hague standstill and the ALI proposals).
\end{itemize}