ASPECTS OF ATTACHMENT IN DUTCH PRIVATE INTERNATIONAL LAW[62]

Abbreviatons (see also p. 9-10)

Cass.	Cour de Cassation (French Supreme Court. The additions 'Civ.' and 'Req.' indicate different divisions)
EEC	European Economic Community
Hof	Gerechtshof (Appeal Court)
HR	Hoge Raad (Supreme Court)
Ktr.	Kantonrechter (sort of Magistrate; 'juge de paix')
NTIR	Nederlands Tijdschrift voor Internationaal Recht / Netherlands International Law Review
Rb	Rechtbank (District Court)

Introduction

This book is chiefly concerned with digesting the Dutch case law on the problems arising out of attachments levied in the Netherlands in situations having international contacts. Nevertheless, some comparison with foreign laws has been made, not only with French law, with which there are obvious relationships for historical reasons, but also with Anglo-American systems.

The Dutch word 'beslag' has been translated by 'attachment', just to have a convenient term which covers both attachment in execution and 'conservatory' attachment. The Dutch 'beslag' is divided into two kinds: firstly 'executoriaal beslag' (attachment in execution) i.e. the levy of an execution upon real or personal property or upon funds for debts, by virtue of a money judgment (or a 'notariële akte'); and secondly, 'conservatoir beslag' (conservatory attachment), which amounts to the same thing, but here *anticipating* a judgment.

It should be noted that attachment of funds for debts ('beslag onder derden' = attachment in the hands of third parties) may be either 'executoriaal' or 'conservatoir'. In both cases I shall call it *garnishment*. Further, it might be useful to point out that attachment in this sense covers only particular goods or debts (or all the debts owed by a particular third person to the judgment

[62] I would like to thank MISS JOAN CROSBIE, LL. B. (Hons.) and MR L. D. LEVIN, AB, JD, MCL, Staff members of the T.M.C. Asser Instituut, for their assistance.

debtor), never the whole of the debtor's assets as in bankruptcy. Finally, a conservatory attachment becomes executorial as soon as a judgment is obtained.

The third chapter deals with conservatory attachment, i.e. with problems arising in the stage up to the obtaining of a judgment, everything after that falling under the heading attachment in execution, dealt with in chapter II. General problems common to both are considered in chapter I.

Whenever I simply use the word 'attachment', it will be clear from the context which kind is meant.

I. ATTACHMENT IN GENERAL

The principle of territoriality and some other principles (§ 2-7)

The law of attachment in p.i.l. is part of the law of international procedure, sometimes called 'formal p.i.l.' as opposed to 'material (substantive) p.i.l.'. International Procedure is generally considered to have no conflict rules, or rather, to have only one: the *lex fori* applies. This rule, doubted and discussed in part, is still good law as far as the law of execution and attachment is concerned. In that branch, however, it should be understood to mean *lex loci,* because in Dutch law it is not always necessary for a judge to order the enforcement measures.

Consequently, an attachment levied in the Netherlands is governed by Dutch law. An attachment levied in a foreign country, on the other hand, is governed by the law of that country, which is also applied by a Dutch court, e.g. having to decide in a action for damages based on an allegedly unlawful attachment. However, as soon as the lawfulness depends on a criterion of substantive law, e.g. the existence of the claim on the basis of which a conservatory attachment has been made, this criterion should be taken from the law applying to the merits (*lex causae*). This is also true for the question whether an attachment, however valid formally, should be considered excessive in the context of the specific relationship between the parties.[63]

Jurisdiction, as well as the applicable law, is generally determined by the place of the attachment. So only the court of the country in which it is to be, or has been, levied has jurisdiction to render an enforceable judgment, to grant

[63] The Paris Appeal Court in *Patino v. Patino* 1-7-1959, Rev. Crit. 1960, 192, allegedly applying New York law, and BOUREL in his note submitting that there was no tort but breach of contract, tend towards the same result in spite of their differing reasoning. See also Restatement 2d, C.o.L. Tent. Draft 9, § 379 k referring to *Weiss v. Hunna* 312 F 2d 711 (2d Cir 1963). There is no decisive authority in Dutch case law.

leave for a conservatory attachment[64], to validate it afterwards, and to annul an unlawful attachment.[65]

But a Dutch court having jurisdiction over the parties may enjoin the plaintiff to dissolve an attachment, levied abroad, on a penalty (to be paid to the other party; French: 'contrainte', Dutch: 'dwangsom').[66]

The effect of the attachment is also territorial. However, the effects of attachment of a chattel cannot be evaded by removal of the chattel to the territory of another country (bankruptcy cases cited in note 3), the rights of innocent purchasers being protected nevertheless according to the (new) *lex rei sitae*.[67]

Some other pertinent principles are: the *'enforcement* principle', stating that a debtor is liable for his obligations with his entire property, an essentially international principle; the principle of *effectiveness,* requiring that enforcement should be made possible at a place where the defendant actually has assets; the principles of *connexity,* and of *speciality;* the principle *nemo plus (iuris transferre potest quam ipse habet).*

Exemptions (§ 8-9)

Exemptions are governed by the *lex fori (lex loci, lex arresti).*[68]

The place of domicile of the garnishee is generally considered as the locus where wages may be garnished. Whenever the wages are recoverable in another country, the law of that country is also applied in a way, because the Dutch courts take into account a possible refusal of the foreign courts to recognize the Dutch garnishment because of foreign exemption statutes.[69]

In paternity actions on behalf of German children against Dutch fathers, the Dutch courts are obliged by the Hague Convention on the Law Applicable to Obligations to Support Minor Children, of 1956, to apply German law. According to German law, the amount of maintenance is determined without

[64] Trib. Seine 12-12-1961 D 1962 Somm. 51.

[65] Cass. Civ. 12-5-1931 S 1932. 1. 137 annotated by NIBOYET (art. 567 CPrC not applicable; this is also true for some similar sections in the Dutch Code of Civil Procedure). Only older Dutch cases known, giving support to different views.

[66] Cf. Restatement 2d C.o.L. Tent. Draft 4, 1957, § 94 and 96; NIBOYET in his annotation S. 1932. 1. 137; a Dutch and an American decision forbidding the use of a trade name abroad: Ktr. Amsterdam 3-6-1930 NJ '31. 196; *Columbia Nastri v. Col. Ribbon* 367 F 2d 308, 61 Am J Int. L 614 (CoA 2d Cir 1966).

[67] Cf. Rest. 2d C.o.L. Tent. Draft 5, 1959, § 268 (1) concerning mortgaged chattels.

[68] Cass. 7-5-1952 D 561; *Sanders v. Armour Fertilizerworks* 54 S.Ct. 677 (1934); Rest. 2d C.o.l. Tent. Draft 11, 1965, § 594b; H. SCHIMA,Festschrift Dölle 1963 p. 355; unless there is *fraus legis:* BEALE, Treatise III p. 1615; NUSSBAUM, Principles 226; GOODRICH, Handbook 4th ed. 1964, 159.

[69] Ktr. Den Haag 10-11-1965 NJ '67, 186.

taking into account the financial capacity of the father, a lack which is counterbalanced by detailed exemption provisions in the German Code of Civil Procedure. These exemption provisions have been characterized by several Dutch courts as substantive law, in order to apply them when determining the amount of maintenance, for Dutch procedure has no exemption provisions as to the enforcement of maintenance orders.[70]

As this method does not help to achieve completely the aim of the Convention, which is equal treatment of all illegitimate children in the same country, the Appeal Court Leeuwarden 15-12-1965 NJ '66, 490 was right in not applying German Law on the grounds that it is inconsistent with our system.

Persons whose property or funds may be attached (§ 10-11)

Attachment is permitted against any debtor, whatever may be his domicile or nationality (except when there is immunity from execution).

In particular, a garnishment in this country is not prevented by the debtor's being domiciled abroad, since the required notice to the debtor is not an essential part of the garnishee proceedings.

Immunity from jurisdiction and immunity from execution are attributed to international organisations, foreign states and their diplomatic agents, or even private corporations acting on their behalf. The distinction between acts 'iure imperii' and acts 'iure gestionis' (the latter not being protected by immunity), common to Belgian and Italian law and more recently introduced in France, Germany and the U.S. has not yet had an opportunity to find support in Dutch case law. Also the limitation of immunity from execution to the same extent as the limitation of immunity from jurisdiction (e.g. in case of waiver) has been supported by Dutch doctrine but not yet by case law.

See the authorities mentioned in the notes to § 11.

Garnishment (§ 12-23)

A debt is considered, for garnishment purposes, to be situated in the country where the debtor has his domicil. In other words, the garnishee must be domiciled in the country. This rule accounts for the substantial part the notice to the garnishee plays in the garnishee proceedings, and for the importance of giving him real notice in order to avoid payments to the debtor which cannot discharge him. Further, the country of the domicil of the garnishee is often also the country where he has his assets, so that admission of garnishment only in that country diminishes the danger of double liability for the garnishee.

[70] Case law cited in § 9.

Finally, to cite RABEL, 'A common basis of recognition is afforded by the widespread idea that a debt may be seized at the domicile of the debtor' (The Conflict of Laws III, 2d ed. 1964, 469).

Dutch case law is scarce and divided. In the Anglo-American systems 'jurisdiction over the garnishee' is required. In continental countries domicil abroad of the garnishee is no obstacle theoretically (for France, see art. 560 CPrC; the cases cited by RABEL are not conclusive since they do not deal with *French* garnishee proceedings). But the notice to the garnishee is generally considered a sovereign act, only possible with the permission of the State of the domicil, which is habitually refused. See authorities cited in § 13.

However, the concept of domicil is, for defendants[71] and therefore for garnishees, extended to actual residence and, for corporations, to branch establishments or offices if vested with some management powers.[72] This seems obvious, but it is not at all. The equalization, in this respect, of defendants and garnishees, and moreover of natural persons and corporations, are automatic devices not taking into account equitable results.[73]

The correction may be sought in the doctrine of real risk of double liability for the garnishee, making inoperative the garnishee proceedings. This Anglo-American doctrine (see case law in § 16) has been introduced by HR 26-11-1954 NJ '55, 698; English summary in IV NTIR (1957) 96 (*Lindeteves*) and continued by Ktr. den Haag 10-11-1965 NJ '67, 186. From the *Lindeteves* case it may be inferred that, whenever the debt attached is recoverable abroad, the burden of proof of the *absence* of a real risk rests with the garnish*or*. The same is proposed for the case where the garnishee has his domicil abroad.

The *nemo plus* principle entails that the garnishor cannot demand more than his debtor could have demanded when himself recovering from the garnishee, e.g. as to place and currency of payment. Foreign exchange control is only important in so far as the garnishee would be prejudiced by not observing the foreign regulations.

Goods which happen to be abroad but are still under the control of the garnishee fall under the garnishment.[74] The garnishor is bound by jurisdiction and arbitration clauses in the contract between garnishee and debtor.

[71] Section 126 (2) Dutch Code of Civil Procedure.
[72] Implicitly: HR 4-1-1957 NJ '58, 425 *Brummer and Bekker v. Javase Bank*. The equalization of natural persons and corporations, *as defendants*, was settled by HR 19-11-1936 NJ '37, 572.
[73] A similar effect is given by the Anglo-American 'personal service' jurisdiction applied to garnishees (*Harris v. Balk* 198 U.S. 215, 1905) and moreover to corporations (*Seider v. Roth* 216 NE 2d 312, 1966; see 67 Col L Rev 550).
[74] Case law in § 22.

II. ATTACHMENT IN EXECUTION

Enforcement of foreign judgments (24-30) [75]

A prerequisite of execution is, in Dutch law, an 'executoriale titel' (enforceable title) which may be either a judgment or a 'notariële akte' (deed executed by a notary public). An arbitral award could serve as a semi 'executoriale titel', being enforceable only after the holder has obtained judicial leave ('exequatur'). The same position is occupied by foreign judgments, enforceable deeds and arbitral awards from countries with which the Netherlands have a bilateral or multilateral agreement on this matter.[76]

The proceeding to be followed in obtaining an 'exequatur' is laid down in sections 985 ff introduced in 1964 into the Code of Civil Procedure. Jurisdiction to grant 'exequatur' is given to the court of the domicil of the judgment debtor (which is obviously not often in the Netherlands) and the court of the place where enforcement is desired (section 985). That court does not review the merits (section 985), it merely checks the fulfilment of the requirements of the applicable treaty, requirements habitually pertaining to public policy, reasonable opportunity to defend, and jurisdiction.

All foreign judgments not coming under a treaty, are unenforceable in the Netherlands. Section 431 of the Code of Civil Procedure runs as follows: '1. Except for the provisions of sections 985 through 994, no decisions rendered by foreign judges may be executed within the Netherlands. 2. The disputes may be litigated before, and decided by, the Dutch judge anew.' (translation H. SMIT, 16 Buffalo L Rev 166). However, in 'deciding anew' the case, the Dutch courts may attribute conclusive effect to the foreign judgment, not only in the case of express or implied submission to the jurisdiction of the foreign court (established law [77]) but also in other situations.[78]

Where, according to ordinary rules of jurisdiction, no court is found competent, the court of the place where enforcement is desired has jurisdiction to decide the case anew[79] (analogous application of section 985). Otherwise the Netherlands would become what NADELMANN calls a 'no-man's land into which assets could be removed to defraud creditors'. True, there are some other devices to which creditors could resort: foreign attachment and assignment, but both have their limitations and disadvantages.

The Dutch-Belgian Treaty 1925, the Benelux Convention 1961 and the EEC Convention 1964 are so-called 'traités doubles', i.e. agreements regulating jurisdiction as well as enforcement of foreign judgments. Generally speaking, the participating states are made one single territory as to jurisdiction, so that a defendant, domiciled in one of those states, may only be sued before the courts of that state. In situations not covered by the agreement the domestic jurisdiction rules subsist, however exorbitant they may be. The domestic rules, in fact, acquire an even wider range of action because the judgments, based on these rules, will be enforceable in all participating states. This was already the case with the French-Swiss Treaty of 1869. In the EEC convention, section 4 widens still further the range of the exorbitant domestic jurisdiction rules by giving anybody (irrespective of his nationality) domiciled in one of the EEC countries the right to enjoy the domestic jurisdiction rules of the country of his domicil. This 'assimilation clause' has particular effect on section 14 of the Civil Codes of France and Luxembourg which bases jurisdiction on the nationality of the plaintiff. According to section 14 CC, a Frenchman may sue an inhabitant of New York before a French court. According to the assimilation clause, even a Dutchman domiciled in Paris may do so. The assimilation clause also has an old predecessor: section 1 of the French-Belgian Treaty of 1899.

The other treaties and conventions mentioned in note 76 are so-called 'traités simples': they only regulate the enforcement of foreign judgments, and give in this context only some ('indirect') jurisdiction rules, addressing themselves only to the judge asked to declare enforceable the foreign judgment. One of the most recent and most curious 'traités simples' is the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 1966, being a multilateral 'frame-convention' to be implemented and supplemented by bilateral treaties.

The 'traités simples' give the prerequisites for enforcement of the foreign judgments concerned, one of which is that the foreign court must have had jurisdiction, that is to say, jurisdiction according to the treaty itself (every treaty contains a so-called jurisdiction catalogue). Most of them grant recog-

[75] See literature mentioned in § 24.

[76] Bilateral treaties with Belgium 1925, Italy 1959, Germany 1962, Austria 1963, Britain 1967; Multilateral conventions: Arbitral Awards 1927 and 1958; Maintenance Orders 1958, Benelux 1961, EEC 1964, Hague Convention with Protocol 1966, the latter three not yet in force; a number of treaties and conventions dealing primarily with other subjects, contain provisions about enforcement of foreign judgments or awards, e.g. the American-Dutch Treaty of Friendship, Commerce and Navigation, 1956, in section V, 2 (b) concerning arbitral awards. For references, see § 25.

[77] HR 26-4-1918 NJ 587; HR 14-11-1924 W 11 301; most recently: District Court Breda 26-4-1966 NJ '67, 48.

[78] The decision of the Hague Appeal Court 27-4-1966 NJ '67, 248 construing the appearance of a defendant, who challenged expressly (but in vain) the jurisdiction of the French court, as an implied submission, can hardly be considered a mere application of the case law mentioned in note 77.

[79] HR 5-1-1866 W 2765. This remarkable decision stated moreover that the new decision may be cast in the mould of an exequatur (declaring enofrceable the foreign judgment); a rule now completely abandoned.

nition and enforcement only to judgments of the natural judge (the judge of the domicil, habitual residence, or – as to corporations – principal place of business of the defendant. To this one might add the judge of the place of the establishment or branch office from whose business the specific proceeding arose) or any other commonly admitted forum (forum contractus and forum delicti, forum rei sitae as to immovables, forum prorogatum).

Opposed to these fora are the so-called exorbitant fora, listed by the Protocol to the Hague Convention (e.g. jurisdiction based on the presence or attachment of assets not related to the claim; jurisdiction based on the nationality or domicil of the plaintiff; the 'doing business' jurisdiction; the 'personal service' jurisdiction). Are the judgments of these exorbitant fora entitled to recognition and enforcement in other countries? According to the 'traités doubles': yes, in so far as the defendants concerned are not nationals[80] of, or domiciled[80] in one of the contracting states. According to the 'traités simples': generally, no, but with some notable exceptions: art. 4 (1) h of the Dutch-German Treaty, art. 3 (1) A, h of the Belgian-Austrian Treaty of 1959, and art. 3 (1) 9° of the Belgian-German Treaty of 1958 entitle judgments of a forum patrimonii to enforcement in the other contracting state against judgment debtors domiciled in neither of the two states. Thus, only these states' own inhabitants are protected. These exceptions illustrate that the policy of the jurisdiction catalogue of all the 'traités simples' is exclusively: protection of the participating states' own inhabitants, not of the inhabitants of third states. The conclusion is that European international practice does not see any objection to the enforcement of a judgment of an exorbitant forum in another country as long as it is not the country where the judgment debtor lives. The EEC Convention is in this respect in conformity with European tradition, contrary to what NADELMANN has implied in his Columbia Law Review article.

NADELMANN has unleashed a campaign against the EEC Convention, beginning with his article in 58 American Journal of International Law (1964) p. 724. His opinion is that the forum arresti (jurisdiction based on attachment of assets not related to the claim) is sometimes necessary to prevent debtors from defrauding their creditors, but that the forum arresti decision should be enforceable only upon the assets attached. Other exorbitant fora should be abolished completely.[81] 'Grant of extraterritorial effect, throughout the Common Market, to judgments rendered at improper fora would be a most serious threat to established trade practices'.

[80] That depends on the criterion adopted by the applicable treaty for determining the field covered by the jurisdiction rules of the treaty.

[81] In the same sense already KOSTERS, Bijdrage tot int. regeling der rechtsmacht, 1914, p. 97-99.

What NADELMANN proposes to introduce in Europe is the American quasi-in-rem jurisdiction. This device is unknown to European law systems.[82] The European device is: refusing extraterritorial effect to judgments of the forum arresti and other exorbitant fora, by not adding them to the jurisdiction catalogue of treaties. This amounts to the same thing, as regards the practical effect, as the American quasi-in-rem jurisdiction, with one important qualification however: as we have seen, European international practice trends to consider only extraterritorial enforcement in the state where the debtor *lives* as unjustified. I do not see any serious objections to the European approach. When a plaintiff has attached Dutch assets of an inhabitant of New York and thereafter obtained a judgment from the Dutch *forum arresti,* and when the goods attached turn out to satisfy only part of the claim, why should it then be so unreasonable to enforce the judgment for the balance upon assets in Germany or France, countries *equally far from home* to the debtor? Has the debtor any interest in having the proceedings litigated anew? I would think new proceedings would be a useless harassment of the plaintiff and perhaps even entail disadvantages to the debtor because of increased costs.

Originally, the European approach was probably also the American approach. The construction as an action *in rem,* once used in order to *establish* jurisdiction[83], has been seized upon in the U.S. in order to *limit* jurisdiction, in view of the full faith and credit clause. NADELMANN mentions cases from 1786 to 1828 refusing enforcement in the state where the debtor lived to judgments rendered by courts of sister states whose jurisdiction had been based on the attachment of a blanket or handkerchief. The courts simply refused full faith and credit, but, probably because this was unconstitutional, the courts passed on to another device in order to achieve the same result. STORY, in § 549 of his Commentaries (1834), speaks about 'a mere proceeding in rem', not binding

[82] N. seems to believe (relying on H. SMIT, 16 Buffalo Law Review 189, note 130) that the Dutch and Belgian forum arresti have only a quasi-in-rem jurisdiction. This is not so. Section 4, 1, h of the Dutch-German Treaty provides for reciprocal enforcement of judgments of the *forum patrimonii* (jurisdiction based on the presence of assets), that is, as far as the Netherlands are concerned, the forum arresti of section 764-767 of the Code of Civil Procedure (thus expressly the Governmental comment to the Bill implementing the Treaty, Bill nr. 7570 p. 8). Consequently, judgments of the Dutch forum arresti, far from being enforceable only on the goods attached, are even enforceable in Germany. The same is undoubtedly true for the Belgian forum arresti of section 52, 5° of the 'Loi sur la compétence' of 1876, seen in relation to section 3(1)9° of the Belgian-German Treaty, and section 3(1)A, h of the Belgian-Austrian Treaty. I cannot adduce other proofs. As no European lawyer ever dreamt of quasi-in-rem jurisdiction, the question has never been discussed, except by SCHUERMANS, XIII NTIR (1966) 243, 281, obviously under American influence.

[83] HUBER, Heedendaegse Rechtgeleertheyt, 3d ed. 1726, IV, XXXII, 10: 'The attachment is understood to give the creditor a sort of pledge or mortgage through which the action becomes directed towards the goods attached' (our translation).

beyond the property attached, a formula apparently understood by STORY as being synonymous with 'having no extraterritorial force or obligation.' This is perhaps the origin of the American opinion that the forum arresti is inherently unjustified unless limited to the goods attached. The device used turned out to be inadequate, having consequences that went beyond the original purpose.

What is occurring now in the EEC is just an abolition of the inner frontiers as regards jurisdiction and enforcement. Reform of all jurisdiction rules is quite another thing. If a third state desires such a reform in behalf of its nationals, it should enter into negotiations with the view of concluding a 'traité double' with the EEC countries. Unfortunately, a proposal of the British and U.S. delegations at the Hague Conference to that effect had to be withdrawn. The result now is the Protocol, in which the contracting states are forbidden to enforce any foreign, exorbitant forum judgment against a (protesting) inhabitant of another contracting state. As the Protocol conflicted with the EEC Convention, a new section 59 was added to the latter convention, enabling the EEC countries to join the Protocol (French text see § 30; English translation given by NADELMANN in 67 Col L Rev 1022 note 159).

This result is unsatisfactory for both parties, but it might work as a retaliation measure apt to speed up the conclusion of a 'traité double'.

Priorities (§ 31-32)

Most of Dutch case law pertains to maritime liens, and is the object of much discord. Thus, it is only with reservations that one could try to present a summary.

The question whether a claim has priority, is governed by the same law as the claim itself (*lex causae*). The rank, however, is determined by the law of the place of execution (*lex fori*) unless all competing claims are governed by one and the same foreign law, or by various but corresponding legal systems. The law of the flag as such has not found support in case law, being confined to literature (see § 31 *in fine*), and treaties, section 23 of the Dutch-Belgian Treaty 1925 and section 25 of the Benelux Convention 1961 in case of bankruptcy.

For immovables the *lex rei sitae,* for movables the *lex fori* governs, according to these treaties.

An EEC Convention on bankruptcy is now being studied which prefers the *lex rei sitae* for all assets.

According to section 16 of the Benelux Uniform Law on P.I.L. (still not in force) the existence as well as the rank of priorities is governed by the law of the place of execution.

III. CONSERVATORY ATTACHMENT

Jurisdiction to validate (§ 33-38)

Conservatory attachment anticipates a judgment. As it is more liable to be the subject of abuse and vexation than execution, some supplementary formalities have to be fulfilled: judicial leave beforehand, and a 'validation' afterwards. The judgment of validation is, no doubt, historically explainable, but at present it is a useless double of the judgment on the merits. Most often both judgments are combined, though sometimes the validation is rendered separately from the judgment on the merits, but not independently, being only a 'declaratory' judgment, not enforceable on its own.

As a rule, the court which has jurisdiction on the merits, also has jurisdiction to validate the attachment. A negative consequence of this rule is that if no Dutch court has jurisdiction on the merits, no lawful attachment is possible. However, in a number of situations the attachment itself forms the basis for jurisdiction (see § 45 ff).

In French law, an attachment comes under the 'mesures provisoires et conservatoires', which are always possible irrespective of whether there is jurisdiction on the merits or not. If not, the French court only deals with the action on validation, which is stayed until the competent foreign court has decided on the merits (see the case law in § 34 *in fine*). This process is desirable, but only feasible in a system which entitles, as a rule, any foreign judgment to recognition and enforcement.

In Dutch law, the aforementioned rule that the validation follows the action on the merits has some exceptions. When there is a contractual stipulation submitting all disputes to the exclusive jurisdiction of a foreign court, or to arbitration, the action on validation cannot follow the action on the merits. The latter is judged by the foreign court or by arbitrators, but the validation, because it concerns enforcement measures, is held to be a sovereign act of the state, falling under the exclusive jurisdiction of the courts of the country in which the attachment has taken place. Thus the action on validation is brought before the Dutch court which would have had[84] jurisdiction on the merits but for the jurisdiction or arbitration clause.

[84] and still has, according to Dutch procedural terminology. If the action on the merits should be brought into a Dutch court in breach of the contract, the court would not deny having jurisdiction, but would 'not receive' the plaintiff, which is comparable to the English 'stay of proceedings' in the same situation.

Separate adjudication of the validation (§ 39-44)

The sections of the Code of Civil Procedure (726, 732, 738) requiring the action on validation to be instituted within 8 days, are generally construed as applying to the action on the merits as well, if brought separately before another *Dutch* court, but not if brought before a foreign court or before arbitrators, in which case a reasonable time suffices, varying with the circumstances.

A Dutch court, adjudicating the validation only, sometimes stays proceedings until the merits have been decided, sometimes validates the attachment conditionally upon future judgment for the plaintiff on the merits. In my view there is no harm in an immediate, unconditional validation, as this is merely a declaratory judgment only having effect when combined with a 'condemnatory' judgment on the merits.

The 'action on the merits' must be an action that leads to an enforceable title, either directly or indirectly. This condition is satisfied when the action on the merits is brought before a foreign court or before arbitrators, whose decision will be enforceable in the Netherlands, by virtue of Dutch law or of an international agreement, after having obtained an 'exequatur'. If the action on the merits has to be brought before a foreign court or before arbitrators whose decision will not be enforceable in the Netherlands, a second, 'formal' action on the merits has to be instituted, within 8 days, before the competent Dutch court, asking that the defendant be ordered to pay the amount that he will later be found to owe according to the future foreign judgment or award. This time the Dutch court will be well advised to stay the proceedings awaiting the 'substantive' judgment or award, for the Dutch court should keep some control over the foreign judgment, e.g. in view of public policy and due process requirements, in order not to buy a pig in a poke.

Jurisdiction on the merits. Forum arresti (§ 45-50)

In the following situations an attachment forms the basis for jurisdiction on the merits:

1. if the debtor has no domicil or actual residence in the country ('vreemdelingenbeslag', to be dealt with later on)
2. in maritime law, attachment of ships in matters of collision and of assistance and salvage; attachment of freight; attachment of transported goods (sections 543, 569, 946, 950, 488, 500 of the Commercial Code; see also the International Conventions mentioned in § 46 note 29, to which the Netherlands are not a party)

3. in cases falling under the Dutch-Belgian Treaty 1925, garnishment against debtors without domicil or residence in either country forms the basis for jurisdiction on the merits (in the new Benelux Convention 1961 it will only form the basis for jurisdiction to validate).

The forum arresti may, as well as the common fora, be set aside by a contractual jurisdiction clause. Such stipulations, when conflicting with the in rem or quasi-in-rem jurisdiction of the court applied to, do not have everywhere the same effect. In England the courts have discretion as regards jurisdiction clauses in general, and the circumstance that the court has in-rem jurisdiction in the case in hand, may induce it not to give effect to the clause conferring jurisdiction to a foreign court (*The Athenee,* Ll.L.R. XI p. 6, 1922; cf. The *Fehmarn,* 1958, 1 WLR 159). In the U.S., although until recently exclusion of jurisdiction by contract was generally held invalid, the Supreme Court has hinted that the parties may exclude even an *in rem* jurisdiction in actions against vessels, but only in express terms; a jurisdiction clause couched in general terms was construed by the S.Ct. as extending only to *in personam* actions (*Monrosa v. Carbon Black Export* 359 U.S. 180, 1959; 4 out of 9 judges dissenting). In Germany, the *forum patrimonii* may be contractually derogated only in behalf of a foreign court whose decisions are enforceable in Germany (Oberlandergericht München 2-8-1956, GAMILLSCHEG, Die deutsche Rechtsprechung IPR 1956-'57 p. 594). The same solution is applied in Switzerland (GULDENER p. 81, note 264).

An unjustified attachment does not found jurisdiction. As soon as it is dissolved, the court's jurisdiction on the merits disappears too. But, when the dissolution is voluntary or is made against security, the jurisdiction subsists (HR 20-10-1967 NJ '68, 52; *Chem. Nat. Resources v. Venezuela,* Supreme Court Pennsylvania 60 Am J Int L 838, 840 (1966)). Also unjustified is an attachment of goods of trifling value obviously intended exclusively for founding jurisdiction.

'Vreemdelingenbeslag': attachment against debtors without domicil or actual residence in the country (§ 51-62) [85]

The word 'vreemdelingenbeslag' (French: saisie foraine) may conveniently be translated as *foreign attachment,* not in the sense of garnishment, but rather in the sense the term has in American maritime law. The original function of foreign attachment is to secure recovery of a debt owed by a foreigner. This function has split into two functions which should be clearly distinguished: (1) to retain assets whose presence in the country is considered transient

[85] For literature, see § 51.

because the owner lives elsewhere (*conservatory* function); (2) to create the jurisdiction necessary so as to be able to realize the security (*jurisdictional* function). In France and Belgium only the conservatory function remains; in the Netherlands, on the contrary, only the jurisdictional function.

In old French law the 'saisie foraine' existed in the charters of many cities and was usually construed as a privilige of the inhabitants of the city concerned. According to section 173 of the 'Nouvelle Coutume de Paris' the citizens of Paris could attach the assets, found in that city, of their foreign debtors ('débiteurs forains' = having their domicil out of the *city*). After the political unification of France, the drafters of the French Code of Civil Procedure (section 822) carelessly maintained the term 'débiteur forain' implying debtors domiciled in France but outside the municipality where the creditor lived, as well as the limitation to assets found in this municipality. Through this limitation the saisie foraine could only be used by inhabitants of France. When, however, the plaintiff is a French national, inhabitants usually being nationals, the French courts already have jurisdiction (Section 14 Civil Code). Thus, in modern French law, the jurisdictional function of the saisie foraine is hardly needed. But in old French law, too, the 'saisie foraine' as a rule did not found jurisdiction on the merits. According to a comment of MOLINAEUS on section 192 of the 'Ancienne Coutume de Paris' (see note 36) the defendant could, by showing that he had an arguable defence and by giving security, obtain dissolution of the attachment and remittance of the merits to 'his' judge.[86] As to the whole of France, see MERLIN, *sub voce* 'Ville d'arrêt', IX, and authors there mentioned, a.o. BOULLENOIS, Traité de la Personnalité et de la Réalité des Loix (1766) I, 613. This remarkable solution has been continued by modern French case law for attachment in general (see § 34). This case law is no doubt applicable to foreign attachment in the exceptional situations in which section 14 Civil Code does not enter into the picture. The case *Doze v. Absalon,* D 1912 II 319 (Tribunal Grasse 12-7-1911) referred tot by DUQUENNE as well as by VON MEHREN and TRAUTMAN, The Law of Multistate Problems, p. 696, was wrongly decided, and was not in conformity with the authorities generally referred to.[87]

In the law of the Province Holland, attachment founded jurisdiction, it even

[86] by which is obviously understood a French judge, only French judgments being enforceable anywhere in France by 'pareatis' (see M. JOUSSE, Nouveau Commentaire sur l'Ordonnance Civile 1667, Nouv. éd. 1772 p. 71, 469).

[87] See GLASSON-MOREL-TISSIER, Procédure Civile, 3d ed., IV. § 1225 note 1; GARSONNET-CÉSAR BRU, 3d ed. § 79 note 10. These authors, however, create misunderstanding by not clearly distinguishing between (international) jurisdiction and (domestic) venue, nor between jurisdiction to validate and jurisdiction on the merits; but see GLASSON § 1116 bis about the latter distinction.

being admitted that attachment served no other purpose. The debtor could, by giving security, obtain dissolution of the attachment, but not remittance of the merits to his own judge. The judgment, even when it was a default judgment, was enforceable not only upon the goods attached but also on the other assets of the debtor situated in other countries or other Provinces, so probably even where the debtor lived. The French solution was, nevertheless, not entirely unknown, being applied in cases where the main action was already pending elsewhere at the time the attachment occurred (see MERLIN *in fine*).

This infringement of the principle *actor sequitur forum rei* was defended by a reference to the interests of commerce.

The Dutch Code of Civil Procedure (1838) leaned heavily on the French Code. The original draft of section 764 of the Dutch Code was nearly a translation of section 822 of the French Code (text in § 54). Afterwards, some modifications were introduced, and finally section 764 was shaped as follows: 'Every creditor . . . may attach the assets of his debtor who has no known domicil in the country.' The device was no longer made available against debtors living in another town than the creditor but in the Netherlands. On the other hand, the device was no longer limited to the assets found in the creditor's municipality. Later case law concluded from this that foreign attachment may be levied *by creditors* domiciled abroad, but this was clearly not the intention of the legislator of 1838, who only wanted to protect local inhabitants. As inhabitants may always sue a foreigner before the court of their domicil or residence (section 126, 3 Code of Civil Procedure), no attachment was necessary for jurisdictional purposes. Thus, the legislation only looked to the conservatory function of the foreign attachment. Later case law made it more useful[88] by restoring the jurisdictional function known in old Dutch law, a development unintentionally prepared for by the aforementioned modifications in the text of section 764, as well as by section 767: 'The action on validation is to be brought in the court in whose jurisdiction the attachment has occurred.' (case law in § 58 *in fine*).

Viewed in this historical light, some questions concerning sections 764-770 are easily solved. Foreign attachment is available whenever the debtor has 'no known domicil' in the country; the words 'known domicil' cannot mean anything other than the words 'domicil' and 'residence' in the context of the jurisdiction provisions of section 126. Sometimes foreign attachment has been held inapplicable as soon as the debtor has assets more or less permanently in

[88] The conservatory function is sufficiently exercised by the more general form of attachment, against debtors suspected of defrauding their creditors (section 727). Debtors without known domicil within the country will very soon fall under this category. In France, this general form was unknown from the codification until 1955 (section 48 CPrC).

the country (case law in § 59). But this construction is not at all suited to the jurisdictional function of the foreign attachment, the presence of assets being precisely one more contact with the forum. Some sections of the Code are generally considered to prohibit foreign attachment upon debts. The result would be that a foreign debtor could put his assets safely out of reach of his foreign creditors by placing it in banking accounts in the Netherlands.[89] This particularly unsatisfactory result, unknown to any other country having the forum arresti or forum patrimonii, as well as to old Dutch law, may be avoided by viewing the sections concerned (765 and 766) as suited only to the – now disappeared – conservatory function of foreign attachment (case law and literature in different senses in § 60). The same difficulty arises with attachment of immovables (note 44).

Critical examination of the forum arresti concept

Forum arresti judgments from one country are generally held unenforceable in other countries (see chapter II). Now, if the forum arresti concept is disapproved for export, it ought to be suspected that it has some defect *ab initio*, which makes it already undesirable for mere internal use. This defect consists of suing the debtor away from his natural judge. The forum arresti extends jurisdiction too greatly. The American quasi-in-rem device, limiting the enforcement to the assets attached, does not remedy this usurpation, because the debtor loses these assets, possibly of substantial value, anyway, through the decision of a forum which may be inconvenient.

The *forum arresti* is known to the law of the Netherlands, Belgium[90], Scotland (for movables), Switzerland[91], South Africa[92], and the United States. Of these countries, only the Netherlands (section 126, 3 Code of C. Pr.) and Belgium (section 53 and 54 of the 'Loi sur la compétence' of 1876; with the exception of reciprocity) have, besides this, the *forum actoris*, i.e. jurisdiction based on the domicil of the plaintiff. Whenever the plaintiff has his domicil or actual residence in the forum state, he need not, in Dutch and Belgian law, resort to attachment in order to find a forum. In the other countries, the forum arresti is of particular use in that very situation.

[89] There are other possibilities: assignment of the claim to an inhabitant of the Netherlands; and a first suit in the country of the domicil of the debtor followed by a second suit in the Netherlands. Neither way is always satisfactory.

[90] Section 52,5 of the 'Loi sur la compétence' of 1876; case law and treaty provisions in § 66. See also Schuermans, XIII NTIR (1966) 243.

[91] A. NUSSBAUM, Amer.-Swiss p.i.l. 2d ed. 1958, p. 49; GULDENER, p. 81.

[92] W. POLLAK, The South African Law of Jurisdiction, 1937, p. 22,54.

In *Scotland*, the *arrestum ad fundandam jurisdictionem* was probably borrowed from, or at least reinforced by, Dutch law in the 17th century (*Elvies v. Vernor;* for all references and citations see § 67). The 'arrest' has lost its character of attachment and amounts only to a proof of the presence in the country, at the commencement of the action, of movables belonging to the debtor. (Cf. Wisconsin law, where an affidavit suffices: 63 Harv L Rev 657, 661). If the plaintiff really wants to retain the goods attached, a second attachment is necessary, called 'arrestment on the dependence' (of the action; *pendente processu*).

The application of the arrest to found jurisdiction has been restricted by the *forum non conveniens* doctrine (*Atkinson & Wood v. Mackintosh; Société du Gaz v. Les Armateurs Français; Sheaf Steamship Cy v. Companea Transmediterranea*). The court, finding itself a forum non conveniens, usually dismisses the action, but 'may sist procedure rather than dismiss an action where it is desired to preserve arrestments on the dependence and secure a fund to answer to the foreign court's decree, if and when obtained' (Prof. ANTON, p. 154; *Hawkins v. Wedderburn*, 1842; but see *Atkinson & Wood v. Mackintosh, 1905*).

In the *United States,* (for references and citations, see § 68) a most peculiar feature of the law on attachment and garnishment is that the action is treated as directed towards the goods attached, rightly called an action *quasi* in rem. The judgment is not enforceable upon other assets of the defendant, unless the defendant has appeared without expressly limiting his appearance to the goods attached. Here, too, the device is mitigated by the *forum non conveniens* doctrine, but this doctrine has so far been adopted in only 15 states.

The quasi-in-rem jurisdiction, as far as it is based on garnishment, has been criticized by BEALE, GOODRICH, and JAMES. More fundamental criticism has been made in recent times by CARRINGTON, PERRY, a Note in 73 Harv. L. Rev. 909, 956, VON MEHREN and TRAUTMAN, and NADELMANN, all more or less inclined to abolish the distinction between *in personam* and *quasi-in-rem* jurisdiction, and to require substantial connexions with the forum state in any situation. The reasoning is that in a federal state the creditor may always obtain a judgment in the state of the debtor's domicil, and afterwards levy an execution in any sister state where the debtor has assets. But what is to be done if the debtor has disposed of or removed his assets while the action was pending? The solution of this rarely discussed problem was given as early as 1913 by BEALE, who recommended the French method, which, as we know, goes back to DUMOULIN. BEALE's hint has only recently been adopted, by NADELMANN and by VON MEHREN and TRAUTMAN, but an equivalent result was obtained much earlier in an admiralty case, by dismissing an action for

forum non conveniens reasons on the condition that the defendant must give security equal to that which had been obtained by the attachment (*Canada Malting Co v. Paterson Steamships* 1931, referred to in *Swift & Co v. Comp. Colombian del Caribe* 1949).

Reviewing the situation in the various systems of law, one may conclude that jurisdiction based on attachment is rather unpopular, not only where enforcement of a judgment of a forum arresti in other states[93] is concerned, but also, and more and more, in its domestic aspects. Mere attachment is considered to offer an insufficient connexion with the forum state. In the Netherlands this feeling is not yet general, probably because of the fact that until recently practically no foreign judgment could be enforced in the Netherlands. In fact, in those circumstances the forum arresti is indispensable. But as soon as the creditor may obtain a judgment from the natural judge of the debtor or another commonly admitted forum, which is enforceable in the Netherlands by virtue of Dutch law or an international agreement, the Dutch court should have a discretion to deal with the attachment proceeding separately for security purposes, and to remit the case on the merits, at the demand of the parties or one of them, to the proper foreign court on any conditions that may be just. This variant of the French solution would retain the advantages and avoid the disadvantages of the forum arresti. It might be adopted by case law without any modification of the code, as the French method has been adopted in France without any statutory changes. A separation between principal proceeding and attachment proceeding is already known to Dutch law, not only in the case of a contractual choice of a foreign court (just one of the 'commonly admitted fora') but also in section 7 of the Benelux Convention 1961, in combination with section 2 of the implementing statute, and in section 16, 6° and 24 of the EEC Convention 1964 (neither yet in force). The French solution is particularly apt for adoption in the 'full faith and credit' situation, existing in the United States and under the 'Ancien Régime' in France. This situation will actually be reached soon in Western Europe because of the network of international agreements.

This restricted application of the *forum non conveniens* doctrine should not give rise to scruples. The doctrine is no longer entirely unknown in Dutch law, and an extension e.g. to the *forum actoris* of s. 126,3 of the Dutch Code of Civil Procedure, especially in cases of assignment of the debt by the original creditor to a Dutch debt collecting office, would actually be desirable.

If the legislature were to concern itself about the matter, it could consider

[93] at least, in the state where the debtor lives, according to European concepts.

authorizing the plaintiff to bring a case directly, on his own motion, befor the proper foreign court after having levied an attachment in the Netherlands and secondly, make every foreign judgment in principle 'enforceable' in thi country, either after a review of the merits or not, as the Hoge Raad did i 1866.