

1986

Maritime Attachment - After-Acquired Property -
Electronic Fund Transfers - Fed. R. Civ. P. Rule B
(Reibor Int'l Ltd v. Cargo Carriers [Kacz-Co.] Ltd.)

Thomas E. Tyler

Follow this and additional works at: [https://digitalcommons.nyls.edu/
journal_of_international_and_comparative_law](https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law)

 Part of the [Law Commons](#)

Recommended Citation

Tyler, Thomas E. (1986) "Maritime Attachment - After-Acquired Property - Electronic Fund Transfers - Fed. R. Civ. P. Rule B (Reibor Int'l Ltd v. Cargo Carriers [Kacz-Co.] Ltd.)," *NYLS Journal of International and Comparative Law*: Vol. 6 : No. 3 , Article 7.
Available at: https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol6/iss3/7

This Notes and Comments is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of International and Comparative Law by an authorized editor of DigitalCommons@NYLS.

MARITIME ATTACHMENT—AFTER-ACQUIRED PROPERTY
—ELECTRONIC FUND TRANSFERS—FED. R. CIV. P. RULE
B—*REIBOR INT'L LTD. V. CARGO CARRIERS (KACZ-CO.)
LTD.*—:*

INTRODUCTION

Perhaps nothing better exemplifies our modern age than today's burgeoning computer technology. With increasing pervasiveness, this technology is making its mark on the venerable heritage of international trade and commerce. The International Chamber of Commerce, for example, recognizing the increasing use of modern electronic transmission systems, recently effected new rules for the writing of letters of credit, designed "to update a system that has fostered trade for more than a thousand years."¹ It should not be surprising, however, that any meeting of the old and new might engender dispute and raise perplexing legal issues. The United States Court of Appeals for the Second Circuit recently decided one such dispute in *Reibor Int'l Ltd. v. Cargo Carriers (Kacz-Co.) Ltd.*²

In *Reibor*, the plaintiff vessel owner, Reibor International, entered into a charter party³ with the defendant charterer, Cargo Carriers, for the carriage of cement from Spain to Jordan.⁴ In order to facilitate payment for the cargo and its carriage, the Jordanian buyer of the cement opened a letter of credit in Madrid, Spain.⁵ The Spanish seller of

* This comment was researched and written while the author was employed on a part-time basis by the law firm representing Reibor International. The author took no part in the research or litigation of the case.

1. Sterngold, *New Rules for Letters of Credit*, N.Y. Times, Oct. 1, 1984, at D1, col. 6. The rules, written by the International Chamber of Commerce as the Uniform Customs and Practice for Documentary Credits, became effective as UCP 400 on October 1, 1984. *Id.*

2. 759 F.2d 262 (2d Cir. 1985).

3. "A charter party . . . is a contract by which an entire ship or some principal part thereof is let to a merchant, called the charterer, for the conveyance of goods on a determined voyage to one or more places or until the expiration of a specified period." 1 E. JHIRAD, A. SANN & B. CHASE, *BENEDICT ON ADMIRALTY* § 225 (7th ed. 1983).

4. Appellant's Brief at 3, *Reibor Int'l Ltd. v. Cargo Carriers (Kacz-Co.) Ltd.*, 759 F.2d 262 (2d Cir. 1985) [hereinafter *Reibor* Brief].

5. A letter of credit has been defined as "an engagement by a bank or other person made at the request of a customer . . . that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit." U.C.C. § 5-103(1)(a) (1978). The importance of the letter of credit, today the primary means of securing payment in international trade, is that it:

the cement was named beneficiary of the letter of credit,⁶ and the defendant also became a beneficiary of irrevocable instructions by which it would receive a portion of the proceeds of the letter in payment for carriage.⁷ The payment was to be made by Manufacturers Hanover Trust (MHT), the bank issuing the letter of credit,⁸ in Madrid. Eventually, this payment was to reach defendant's account at the Royal Bank of Canada (RBC) in Montreal.⁹

In January 1983, Reibor instituted the subject action against Cargo Carriers in the United States District Court for the Southern District of New York.¹⁰ Pursuant to its complaint in this action, the plaintiff applied for, and the district court issued, processes of maritime attachment and garnishment¹¹ against garnishees MHT and RBC,

[S]ubstitutes a bank's credit for that of a customer and thereby facilitates payment from buyer to seller By using the letter of credit the buyer can find comfort in knowing that the shipment has been made before he is called upon to pay and the seller knows that he will be paid as soon as he ships regardless of any change in the buyer's financial standing.

P. OPPENHEIM, *INTERNATIONAL BANKING* 154 (4th ed. 1983). See generally Deak, *Letters of Credit (Documentary Credit)*, 2 N.Y.L. SCH. J. INT'L & COMP. L. 229 (1981).

6. "A 'beneficiary' of a credit is a person who is entitled under its terms to draw or demand payment." U.C.C. § 5-103(1)(d) (1978).

7. "[O]nce an irrevocable credit is established as regards . . . the beneficiary it can be modified or revoked only with his consent." U.C.C. § 5-106(2) (1978).

8. "An 'issuer' is a bank or other person issuing a credit." U.C.C. § 5-103(1)(c) (1978).

9. *Reibor Int'l Ltd. v. Cargo Carriers (Kacz-Co.) Ltd.*, No. 83-793, slip op. at 2 (S.D.N.Y. July 24, 1984).

10. *Reibor Brief, supra* note 4, at 4-5. In its complaint, plaintiff alleged that defendant had wrongfully cancelled the charter and had failed to pay demurrage, interest on late freight payments, and the cost of excess bunkers consumed by the vessels prior to the wrongful cancellation. *Id.* at 3.

11. See FED. R. CIV. P. B(1). Rule B(1) states:

With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or his attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and process of attachment and garnishment and the plaintiff shall have the burden on a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by the state law for

directing the garnishees to attach "a portion of the proceeds under a letter of credit (No. E70482) that the Manufacturers Hanover Trust Company is instructed to release to said defendant through the Royal Bank of Canada"¹²

The payment that Reibor was attempting to attach in New York was effected from Madrid to Montreal through the Clearing House Interbank Payments System (CHIPS) in New York.¹³ The transfer moved from the account of the Spanish cement seller at MHT in Madrid to the MHT branch in New York, to RBC in New York and finally to the defendant's account with RBC in Montreal. Since both MHT and RBC are CHIPS participants, the payment passed through the New York branches of the two banks, and it was at these two branches that Reibor attempted to garnish the transferring funds.¹⁴

Reibor served its first Process of Maritime Attachment and Garnishment against MHT on January 28, 1983. MHT answered on February 7, 1983 that it had no property of defendant Cargo Carriers.¹⁵ MHT was again served with garnishment process on February 8. On February 11, at approximately 10:25 a.m., Reibor served its garnishment process on RBC. On that same day, at approximately 2:20 p.m., MHT was advised by its Madrid branch to credit RBC.¹⁶ At 2:21 p.m. that afternoon, RBC in New York received a CHIPS credit advice¹⁷ from MHT in the amount of \$180,000, with instructions to credit RBC in Montreal with reference to Cargo Carriers.¹⁸ One hour later, at 3:22 p.m., RBC in New York credited RBC in Montreal with \$180,000.¹⁹ The garnishee banks in New York did not garnish the funds, and the district court denied the plaintiff's resulting motion for an order directing the garnishees to provide security.²⁰ Thus, the stage was set for

attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

Id.

12. Reibor Brief, *supra* note 4, at 5.

13. *Reibor*, No. 93-793, slip op. at 2. The Spanish cement seller's account at MHT in Madrid had presumably received payment for the sale of the cement from proceeds of the letter of credit opened by the Jordanian buyer; payment was then effected from the Spanish cement seller's account to Cargo Carrier's account with RBC in Montreal pursuant to the irrevocable instructions. See *Reibor*, 759 F.2d at 263.

14. Reibor Brief, *supra* note 4, at 5-7.

15. *Id.* at 5. See also FED. R. CIV. P. B(3)(a).

16. Reibor Brief, *supra* note 4, at 5-6.

17. See *infra* note 33 and accompanying text.

18. Appellee [RBC]'s Brief at 4, *Reibor Int'l Ltd. v. Cargo Carriers (Kacz-Co.) Ltd.*, 759 F.2d 262 (2d Cir. 1985) [hereinafter RBC Brief].

19. *Id.*

20. *Reibor*, No. 83-793, slip op. at 1. See FED. R. CIV. P. B(3)(a), E(5)(a).

a legal confrontation, which pitted the "old" regiment against the "new."

A. *The Clearing House Interbank Payments System*

The element of the "new" system represented in the dispute was the CHIPS computerized funds clearing house system, administered by the New York Clearing House Association (NYCHA),²¹ itself a venerable institution.²² NYCHA's governing Clearing House Committee, composed of officers of twelve member banks,²³ is authorized to "establish and/or maintain a Computer Department of the Clearing House [CHIPS] and prescribe the rules and regulations under which it is to be conducted."²⁴

Created by the NYCHA in 1970 to serve nine banks, CHIPS now serves nearly 150 foreign and international banks and on an average day transmits well over \$200 billion.²⁵ The system facilitates dollar movements consisting largely of Eurodollars, foreign trade and foreign currency transactions.²⁶ "It has become a dominant player in international transactions," one observer has written, and "is said to handle as much as 90% of the dollar payments moving between the countries around the world"²⁷

21. See THE NEW YORK CLEARING HOUSE ASSOCIATION, CONSTITUTION OF THE NEW YORK CLEARING HOUSE ASSOCIATION, art. VI, § 3(H) (1983) [hereinafter NYCHA CONSTITUTION].

22. See The New York Clearing House Association, *The New York Clearing House Association* (n.d.) [hereinafter NYCHA]. The Association was founded "to bring order out of confusion in the chaotic exchange and settlement process among the banks of New York City." *Id.* at 1. On October 11, 1853, 52 banks participated in the first exchange of checks worth \$22.6 million. *Id.* at 2.

23. NYCHA CONSTITUTION, *supra* note 21, art. V, § 1. The twelve banks currently serving on the Committee are: The Bank of New York; The Chase Manhattan Bank (N.A.); Citibank, N.A.; Chemical Bank; Morgan Guaranty Trust Company of New York; Manufacturers Hanover Trust Company; Marine Midland Bank, N.A.; United States Trust Company of New York; National Westminster Bank USA; and European American Bank & Trust Company.

24. *Id.* at art. VI, § 3(H). This section also authorizes the Committee "in its discretion [to] permit other than members [of NYCHA] to participate in [CHIPS] services." *Id.* Currently 92 non-NYCHA banks participate in CHIPS. The New York Clearing House Association, *Clearing House Interbank Payments System* (n.d.) [hereinafter CHIPS]. See also NEW YORK CLEARING HOUSE ASSOCIATION, RULES GOVERNING THE CLEARING HOUSE INTERBANK PAYMENTS SYSTEM, preamble (1981) [hereinafter CHIPS Rules]; Comment, *Risk Allocation in International Interbank Electronic Funds Transfers: CHIPS & SWIFT*, 22 HARV. INT'L L.J. 621, 626-30 (1981).

25. CHIPS, *supra* note 24.

26. NYCHA, *supra* note 22, at 14.

27. *Corporate EFT Report* (n.p., n.d.), quoted in CHIPS, *supra* note 24.

A model CHIPS transfer may be illustrated using the parties in the *Reibor* action in their respective roles.²⁸ All CHIPS participating banks are linked by communications lines to the CHIPS central computer.²⁹ When the paying bank, in this case MHT in New York, initiates a payment, it transmits the relevant data electronically to the central computer, which immediately and electronically advises the receiving bank—in this case, RBC in New York.³⁰ During the course of a day, in any number of payment instructions, all participating banks, among them RBC and MHT, accumulate credits and debits, depending on whether the individual bank receives or sends these payment instructions. The CHIPS central computer keeps track of all these payment instructions, and at 4:30 p.m., New York time, it stops accepting payment instructions and advises each bank of the netted-out, aggregate amounts due to or from each bank for that day.³¹ The settling participants³² then confirm that they will settle for themselves and for all other banks that settle through them.³³ After this confirmation, those settling banks that owe money send payment messages to a special CHIPS settlement account at the Federal Reserve Bank of New York, maintained for the joint benefit of all settling banks.³⁴ Once NYCHA authorities confirm that the funding of the CHIPS settlement account is correct, they authorize disbursements from the account to those settling institutions that are owed money. By 6:00 p.m., the settlement process is complete,³⁵ and RBC in New York, having earlier in the day been advised of the payment instruction from MHT via CHIPS, now has the disbursed amount in hand. From RBC in New York, of course, the payment is eventually credited to Cargo Carriers' account at RBC in Montreal.

28. See also *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 464 F. Supp. 989 (S.D.N.Y.), *aff'd*, 609 F.2d 1047 (2d Cir. 1979). District Judge Broderick gave a complete description of the "mechanics of effecting an interbank payment under the CHIPS system." 464 F. Supp. at 992-93 n.5. One correction: Judge Broderick's description of next-day settlement, *id.*, no longer is true; CHIPS began same-day settlement on October 1, 1981. Bennett, *Same-Day Settlement Begins Today for Banks*, N.Y. Times, Oct. 1, 1981, at D1, col. 1.

29. CHIPS, *supra* note 24.

30. *Id.*

31. *Id.*; Comment, *supra* note 24, at 628.

32. A settling participant differs from a regular CHIPS participant insofar as the former is responsible for settling up the balances of its own account and the accounts of any other participants for which it may settle. CHIPS Rules, *supra* note 24, Rules 1(b), (d). "The settling banks have the ultimate responsibility for the settlement of transfers in the system." Comment, *supra* note 24, at 626.

33. CHIPS *supra* note 24; CHIPS Rules, *supra* note 24, Rule 13.

34. CHIPS, *supra* note 24; Comment, *supra* note 24, at 629.

35. CHIPS, *supra* note 24.

B. *The Maritime Attachment Remedy*

Confronting this representative of the new technology is the long-standing admiralty practice of maritime attachment and garnishment, codified as Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure.³⁶ An early procedure of the ancient practice of admiralty law, attachment and garnishment it was already a familiar proceeding in 1825, when the Supreme Court recognized that "[t]he remedy by attachment, . . . to compel appearance, has very respectable support in precedent. . . . Its origin is to be found in the remotest history, as well of the civil as the common law."³⁷ A more specific reference to the antiquity of the remedy was noted by the Supreme Court in 1873:

The use of the process of [maritime] attachment . . . by courts of admiralty . . . has prevailed during a period extending as far back as the authentic history of those tribunals can be traced The rules by which it was regulated in the English admiralty are found in Clerke's *Praxis*, a work still of authority, published in the time of Elizabeth.³⁸

The Supreme Court in *Manro v. Almeida* had explicitly recognized the maritime attachment remedy, which had been discontinued in the English courts.³⁹ One commentator in 1848 offered an explanation for this development in the United States courts and, relying on an alternative source, indicated the primary justification in English legal history for the remedy:

["S]uppose that the person against whom a warrant has issued, cannot be found, or that he lives in a foreign country; here the ancient proceedings of the admiralty court provided an easy and salutary remedy The goods of the party were attached, to compel his appearance. By this means, if a foreigner owed money in England, and any ship of his came into a British harbor, or any goods of his were found in these realms, they

36. FED. R. CIV. P. B. The Rule states in part:

With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district.

Id.

37. *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 487, 490 (1825).

38. *Atkins v. The Disintegrating Co.*, 85 U.S. (18 Wall.) 272, 303 (1873).

39. 7A J. MOORE & A. PELAEZ, MOORE'S FEDERAL PRACTICE ¶ B.02 at B-51 (2d ed. 1983) [hereinafter MOORE'S FEDERAL PRACTICE].

were seized by his creditors; and by this means the English creditor had an easy remedy for his debt, and the foreign merchant acquired more credit in England, when it was so easy to find remedy against him: for this process of attachment of goods went not only against those in the actual possession of himself, his factors or agents, but also against those in the hands of his debtors. . . . This salutary proceeding has in latter times gone into disuse in England, and great is the mischief accruing to commerce from the want of it.['] . . . It was probably under these views of the great utility of the process of attachment, that the Supreme Court thought proper not only to adopt it, but to increase its efficiency by directing its incorporation, in the first instance, with the warrant of arrest.⁴⁰

The circumstances of *Reibor* thus presented the court with two issues: the threshold issue of the effectiveness of the attachment writ on after-acquired property, and second, the attachability of the electronically transferred CHIPS credits.⁴¹ Although *Reibor* served process of the garnishment upon each garnishee twice,⁴² the Second Circuit affirmed the district court's finding that at the time process was served on both garnishees, "neither had in its possession any property of the defendant. . . . Consequently, the levies of attachment were absolutely void when made."⁴³ In its affirmance, the Second Circuit agreed with the district court that "the precedent in federal admiralty law is so thin that we should turn to state law more directly on point."⁴⁴ The court thus relied on New York attachment provisions⁴⁵ to invalidate the attachments, and, therefore, did not reach the further issue of the attachability of CHIPS credits.⁴⁶

40. A. CONKLING, *THE ADMIRALTY JURISDICTION, LAW AND PRACTICE OF THE COURTS OF THE UNITED STATES* 478-79 (1848), quoted in 7A MOORE'S FEDERAL PRACTICE, *supra* note 39, ¶ B.02 at B-52 n.5. For a recent discussion on the authority of the federal judiciary derived under Rule B(1), see *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. De Navegacion*, 773 F.2d 1528, 1531-36 (11th Cir. 1985).

41. 759 F.2d at 265.

42. See Joint Appendix at A25-A37, *Reibor Int'l Ltd. v. Cargo Carriers (Kacz-Co.) Ltd.*, 759 F.2d 262 (2d Cir. 1985).

43. *Reibor*, No. 83-793, slip op. at 3. See also *supra* notes 15-19 and accompanying text.

44. 759 F.2d at 266.

45. N.Y. CIV. PRAC. LAW § 6214(b) (McKinney 1980). The district court recognized that "questions of banking are matters for state regulation." *Reibor*, No. 83-793, slip op. at 4. The court of appeals agreed and concluded that "[i]t is only appropriate therefore that we look to the New York law of attachment for guidance." 759 F.2d at 266. See discussion *infra*, notes 76-103 and accompanying text.

46. 759 F.2d at 268-69.

This comment will suggest an alternative view, that the court of appeals's opinion was fraught with a hypertechnical interpretation of the law which is in marked contrast to the traditional goals and application of federal admiralty law. Accordingly, this comment will contend that Federal law should govern the attachment, and that under a traditional application of the admiralty law the service of process was sufficient to require garnishment. Allowing that threshold result, the comment will further examine the attachability of CHIPS credits. Given the predicted future growth of electronic fund transfers in general, and CHIPS in particular,⁴⁷ it is likely that plaintiffs will increasingly seek to utilize the maritime remedy of attachment against the electronic transfer of funds. The issues involved in *Reibor* will be brought to judicial attention time and again and the question will be raised: how should electronic fund transfers, here in the form of CHIPS credits, be treated under Rule B, the maritime remedy of attachment? Although there are compelling arguments on both sides of this issue, this comment will suggest that CHIPS credits should indeed be attachable.

I. ATTACHMENT OF AFTER-ACQUIRED PROPERTY

In its arguments before the court of appeals, *Reibor* sought to sustain the garnishments as "having intercepted funds as they made their way through New York."⁴⁸ *Reibor* first argued that "under federal maritime law a Rule B attachment is and stays valid until the garnishee answers, whether or not the garnishee possesses the property at the time of service."⁴⁹ In support of this proposition, *Reibor* cited three cases,⁵⁰ which, as the court of appeals correctly pointed out, "only obliquely graze the issue"⁵¹ of attachment of after-acquired property. Consequently, the court, with varying degrees of ease, was able to distinguish all three cases.⁵²

47. CHIPS, *supra* note 24. The NYCHA has predicted "future growth . . . in the system's importance to international banking." *Id.*

48. 759 F.2d at 265.

49. *Id.*

50. *Iran Express Lines v. Sumatrop, AG*, 563 F.2d 648 (4th Cir. 1977); *American Smelting & Ref. Co. v. Naviera Andes Peruana, S.A.*, 208 F. Supp. 164 (N.D. Cal. 1962), *aff'd sub nom.*, *San Rafael Compania Naviera, S.A. v. American Smelting & Ref. Co.*, 327 F.2d 581 (9th Cir. 1964); *DK Mfg. Co. v. S.S. Titan*, 1964 A.M.C. 78 (S.D.N.Y. 1963).

51. 759 F.2d at 265.

52. *DK Mfg.* for example, considered *after-identified* property, not property *acquired* after the service of the writ. 1964 A.M.C. at 79-80. Thus, the property of the defendant was "under the control" of the garnishee bank at the time of service of the attachment writ, but these funds were identified as such only sometime later. *Id.* at 80.

The *Reibor* court also considered the circumstances of *American Smelting*, 208 F.

As the court recognized, there are few, if any, cases on this narrow issue. Nonetheless, other bases of decision exist, concededly without the precedential value of case law directly on point, but which support a finding that federal law would allow attachment of after-acquired property.

In its finding that an attachment is valid only when, inter alia, "the goods or credits [are] presently within the district,"⁵³ the district court had relied specifically on the language of Rule B and generally on Moore's Federal Practice. Rule B states: "[A] verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects *in the hands of garnishees* . . ."⁵⁴ Moore's Federal Practice, however, does not construe the emphasized phrase as narrowly as the district court did. Rule B, wrote Professor Moore, permits attachment, inter alia, when "such goods or credits of the defendant are presently within said district, or *there is a likelihood that they soon will be there*."⁵⁵ In this case, Reibor served its processes of attachment and garnishment on RBC and MHT four hours and three days, respectively, before the CHIPS transfer passed through each bank.⁵⁶ At the very least, the time lapse of four hours, and perhaps of three days, should fall within the acceptable time frame for attachment of after-acquired property described by Professor Moore.

Reibor advocated a workable but legally unsupported standard for effective attachment of after-acquired property, contending it is the

Supp. 164, which involved three writs of attachment on the same property, served June 5, 8 and 11, all by Schirmer Stevedoring Company. 759 F.2d at 265. Notwithstanding the fact that that court was determining the priority of competing attachments against a bankrupt, and was thus distinguishing the writs for that purpose only, see 208 F. Supp. at 171, the *Reibor* court concluded that "[i]f the June 5 writ had reached after-acquired property, the later writs would not have had any bearing on the case." 759 F.2d at 265-66. The *Reibor* court, incidentally, might have taken a lesson from the affirming Ninth Circuit in *American Smelting*, which upheld the validity of the June 5 attachment (for reasons not involving after-acquired property), while expressly avoiding a "hyper-technical construction" that would have invalidated the attachment. See 327 F.2d at 588.

Notably as well, the *Reibor* court disregarded the opinion of Judge Broderick in *A/S Kristian Jebsens Rederi v. Al-Haddad Bros. Enters., Inc.*, 84 Civ. 7070 (S.D.N.Y. October 10, 1984), in which he upheld the validity of an attachment of the proceeds of a letter of credit, even though the required draw down documents were not submitted to the bank until after the writ was served. Judge Broderick wrote: "I don't think there is anything unique in the concept that attachment can run to proceeds to be received as well as assets previously held. This is an admiralty action or claim. The attachment provisions with respect to admiralty claims are to be liberally construed." *Id.*, cited in *Reibor* Brief, *supra* note 4, at 15.

53. *Reibor*, No. 83-793, slip op. at 3.

54. FED. R. CIV. P. B(1) (emphasis added).

55. 7A MOORE'S FEDERAL PRACTICE, *supra* note 39, ¶ B.03 at B-105 (emphasis added).

56. See *supra* notes 15-19 and accompanying text.

usual course of conduct in the maritime community: "A much more logical line to draw is to permit attachment of after-acquired property up to the time the garnishee answers the interrogatories [pursuant to Rule B(3) (a)]. This is, in fact, the present practice in the international maritime community."⁵⁷ Such a "gentlemen's agreement" presumably accounts for the dearth of case law on the issue.⁵⁸ Supporting Reibor's position, however, is the historical judicial treatment of maritime attachment and garnishment, which may be reasonably construed to allow effective attachment of after-acquired property. This judicial treatment may suggest that garnishors, in order to effect an attachment, should not be required to serve process at the precise moment electronic impulses "conveying" the sought-after funds pass through the garnishee banks.⁵⁹

57. Appellant's Reply Brief at 7, *Reibor Int'l Ltd. v. Cargo Carriers (Kacz-Co.) Ltd.*, 759 F.2d 262 (2d Cir. 1985) [hereinafter *Reibor Reply Brief*]. See also, Kohn, *Circuit Court Places Curb on Maritime Attachments*, N.Y.L.J., Apr. 18, 1985, at 1 col. 3, wherein Mr. Kohn reported:

According to those familiar with the issue, admiralty lawyers always have relied on an attachment being effective while awaiting the reply in court of a garnishee, generally a bank, which may take twenty days. During that time, the garnishment has been thought effective, even if the assets arrive after the attachment first is served.

Id.

58. See *infra* notes 77 and 103 and accompanying text for a discussion on the response of the court to this practice.

59. Given the procedure of CHIPS, under Judge Stewart's strict requirement for effective attachment, see *Reibor*, No. 83-793, slip op. at 3, it is arguable that attachment against a receiving bank, such as RBC, is effective only if made after the settlement of Clearing House funds has occurred and the receiving bank has in fact received the funds which had earlier in the day been promised. At the time MHT made its payment message to CHIPS to credit RBC, those instructions as to MHT became irrevocable. See CHIPS Rules, *supra* note 24, Rule 2. Although RBC was advised, at that moment, of a credit from MHT, *supra* note 30, settlement of the funds was not effected until around 6:00 p.m., *supra* note 35. Such a strict requirement, however, improperly ignores customary banking practices: as was the case with RBC, many receiving banks will dispose of the funds they have only been advised of, before settlement at the end of the day. See *supra* note 19. See also, Scott, *Corporate Wire Transfers and the Uniform New Payments Code*, 83 COLUM. L.R. REV. 1664 (1983) [hereinafter *Scott, Corporate Wire Transfers*]. One additional issue that arises in this context is the effectiveness of attachment as against the sending bank, here MHT, after it sends its generally irrevocable payment message but before it settles its accounts at the end of the day.

These issues and others expressly unaddressed by the court of appeals, see 759 F.2d at 268-69, clearly indicate that the typical CHIPS transaction does not neatly fit the definitions of "after-acquired property" or defendant's credits "in the hands of garnishees." Indeed, due to the nature of CHIPS, a significant difficulty arises, for purposes of Rule B, in determining when the property sought to be attached is in the hands of garnishee banks. Although efforts are under way to "regulate the myriad issues that arise in connection with the transfer of funds by wire," Scott, *Corporate Wire Transfers*, *supra*,

A. Federal Judicial Treatment of the Maritime Attachment Remedy

The essential purposes of the maritime attachment remedy are well settled.⁶⁰ In the event the defendant is not to be found within the district, as Reibor verified in this case,⁶¹ the remedy in its modern exercise serves a dual purpose: first to obtain in personam jurisdiction over the defendant by attachment of his property within the district, and second to assure satisfaction of any decree in plaintiff's favor.⁶² The Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, of which Rule B is a part, were promulgated in 1966.⁶³ Rule B(1) was drafted to preserve "the tradi-

at 1679, the historical application of the maritime attachment remedy, and other bases of decision discussed *infra*, offer workable alternatives to the court's strict construction.

Recognizing "the fact that the Uniform Commercial Code (UCC) did not cover electronic funds transfer transactions could create a serious problem in our legal system," Scott, *An Introduction to the Uniform New Payments Code*, in *UNIFORM NEW PAYMENTS CODE 1* (P.E.B. Draft No. 3, 1983) (Permanent Editorial Board for the Uniform Commercial Code), the Code drafters attempted to devise a statutory framework applicable "to any orders payable by or at, or transmitted by or to an account institution." *Id.* at 4.

Section 426 of the Code is designed to deal with situations involving the rights of third parties, particularly attachment, where otherwise preferable contractual relationships are inapplicable because "one would not know which potential attachors to deal with in advance." *Id.* at 42. The section states in relevant part:

(1) A claim to an account is asserted by . . .

(b) the service of legal process . . .

(2) Any claim described in subsection (1) is timely to terminate, suspend or modify the payor account institution's right or duty to pay an order or to charge its customer's account if it is asserted early enough for the account institution to act thereon in a reasonable time before the account institution has done any of the following:

(a) accepted or certified the order;

(b) paid the order in cash;

(c) become liable for the order under subsection (3) of Section 420 or Section 423; or

(d) exercised its right of setoff.

Id. at 305.

60. See, e.g., *Swift & Co. Packers v. Compania Columbiana del Caribe, S.A.*, 339 U.S. 684, 693 (1950); *Chilean Line Inc. v. United States*, 344 F.2d 757, 760 (2d Cir. 1965).

61. See *FED. R. CIV. P. B(1)*, which requires that plaintiff's complaint "be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district."

62. *Chilean Line*, 344 F.2d at 760; *Seawind Compania S.A. v. Crescent Line Inc.*, 320 F.2d 580, 581-82 (2d Cir. 1963).

63. 7A *MOORE'S FEDERAL PRACTICE*, *supra* note 39, ¶ B.01[1].

tional maritime remedy of attachment and garnishment,"⁶⁴ but certain changes were made from the previous practice, the effect of which was "to enlarge the class of cases in which the plaintiff may proceed by attachment or garnishment although jurisdiction of the person of the defendant may be independently obtained."⁶⁵ Moreover, the attachment remedy is frequently relied upon to provide the plaintiff with security to assure satisfaction in the event of a judgment in the plaintiff's favor.⁶⁶ This discussion will address the ramifications of using Rule B to further the dual purposes noted above; it will not consider other issues implicated by the use of the rule.⁶⁷

A significant characteristic of maritime attachment is the flexibility historically exercised by admiralty courts.⁶⁸ The Second Circuit has noted the "decades of judicial liberality toward the use of writs of maritime attachment, a remedy which the Supreme Court has viewed with favor from the time of *Manro v. Almeida* . . ."⁶⁹ Professor Moore has similarly recognized the flexible judicial treatment of maritime attachment: "The feature most distinguishing maritime attachments from analogous state and federal proceedings is the former's broad application and lack of restrictions."⁷⁰ The Court of Appeals for the Eleventh

64. FED. R. CIV. P. B(1) advisory committee note (1966), reprinted in 7A MOORE'S FEDERAL PRACTICE, *supra* note 39, ¶ B.01[2].

65. *Id.*

66. See *supra* note 62; see also, e.g., *Construction Exporting Enters. v. Nikki Maritime Ltd.*, 558 F. Supp. 1372, 1375 (S.D.N.Y. 1983).

67. Reference is made here to other areas of concern with respect to the maritime attachment remedy. For example, Rule B has recently been constitutionally challenged in a number of courts on due process grounds. See, e.g., *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. De Navegacion*, 732 F.2d 1543 (11th Cir. 1984); *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982). The United States District Court for the Southern District of New York, in which *Reibor* was heard, recently considered Rule B(1) in conjunction with the Southern District's local Admiralty Rule 13 and found no constitutional defects. *Int'l Ocean Way Corp. of Monrovia v. Hyde Park Navigation, Ltd.*, 555 F. Supp. 1047 (S.D.N.Y. 1983). These constitutional concerns have been obviated, however, by recent amendments to Rules B and C, designed "to provide for judicial scrutiny before the issuance of any attachment or garnishment process [or any warrant of arrest]." See FED. R. CIV. P. B(1) advisory committee note (1985 amendments), reprinted in 7A MOORE'S FEDERAL PRACTICE, *supra* note 39, at 41-42 (Supp. 1985-86). For a discussion on the differences between in personam and in rem claims in an admiralty action, see *Belcher Co. of Ala., Inc. v. M/V Maratha Mariner*, 724 F.2d 1161 (5th Cir. 1984); G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY*, § 1-12 (2d ed. 1975).

68. See, e.g., 7A MOORE'S FEDERAL PRACTICE, *supra* note 39, at ¶ B.02.

69. *Maryland Tuna Corp. v. MS Benares*, 429 F.2d 307, 321 (2d Cir. 1970).

70. 7A MOORE'S FEDERAL PRACTICE, *supra* note 39, ¶ B.02 at B-54.

Professor Moore continues:

The sole prerequisites of maritime attachment are that there be a maritime

Circuit has recently recognized this tradition of judicial treatment, in the context of a due process challenge to Rule B, in *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottachi S.A. De Navegacion*.⁷¹ The court's analysis stressed the procedural flexibility of Rule B and, although directed at due process considerations, that analysis is equally applicable here. The *Schiffahrtsgesellschaft* court was persuaded by the analytical approach of the Fourth and Fifth Circuits in similar cases,⁷² in which those courts "relied upon the distinct legal foundation of admiralty law, the historical application of the . . . procedures [of Rules B and C,⁷³] and the transient nature of maritime property to scrutinize the procedural safeguards of Rules B and C under more lenient standards."⁷⁴ This judicial notion of flexibility and liberality may be construed as responsive to the issue of the effective attachment of after-acquired property, such that attachment should be deemed effective.⁷⁵

For this reason and others discussed throughout this comment, the court should have relied on Federal admiralty law to find the attachment effective against after-acquired property. The court however, relying instead on state law, did not agree.⁷⁶

B. Propriety of Reliance on State Law

The court of appeals agreed with the district court that "the precedent in Federal admiralty law is so thin that we should turn to state law more directly on point."⁷⁷ The court added: "We clearly have this

cause of action for which an action in personam is available and that the defendant cannot be found within the district of the court wherein the cause is commenced—and, this has been construed as meaning that he cannot be "found" both for purposes of obtaining in personam jurisdiction and for effectuating service of process. Unlike many statutes providing for attachment, it matters not that the defendant may be a "resident" of the district or that the cause of action did not arise therein Once the minimal prerequisites above referred to have been fulfilled, an admiralty claimant has traditionally been permitted to proceed with a maritime attachment.

Id. at B-54, 55.

71. 732 F.2d at 1546-48.

72. *Amstar Corp. v. S/S Alexandros T.*, 664 F.2d 904 (4th Cir. 1981); *Merchants Nat'l Bank of Mobile v. Dredge General G.L. Gillespie*, 663 F.2d 1338 (5th Cir. 1981), *cert. dismissed*, 456 U.S. 966 (1982), *cited with approval in Schiffahrtsgesellschaft*, 732 F.2d at 1546.

73. *See Belcher Co. of Ala.*, 724 F.2d at 1163-64; GILMORE & BLACK, *supra* note 67. Rule C deals with in rem actions.

74. 732 F.2d at 1547.

75. *See supra* note 57 and accompanying text.

76. 759 F.2d at 266.

77. *Id.*

option where we find it appropriate.”⁷⁸ In asserting this option, the court offered as support *California ex rel. State Lands Comm'n v. United States*,⁷⁹ wherein the Supreme Court had stated: “It may be determined as a matter of choice of law that, although federal law should govern a given question,⁸⁰ state law should be borrowed and applied as the federal rule for deciding the substantive legal issue at hand.”⁸¹

In the past, the Supreme Court has addressed the propriety of reliance by Federal courts on state law in deciding Federal questions.⁸² The Court has recognized, as did the Second Circuit, that “[c]ontroversies . . . , although governed by federal law, do not inevitably require resort to uniform federal rules.”⁸³ As characterized in *United States v. Kimbell Foods*, “[w]hether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy ‘dependent upon a variety of considerations always relevant to the nature of

78. *Id.* (footnote omitted). The omitted footnote made reference to *Maryland Tuna*, 429 F.2d at 321, which discusses in strong language the independence of maritime attachment from state law. See discussion *infra* at note 97 and accompanying text.

79. 457 U.S. 273 (1982).

80. *Cf. Maryland Tuna*, 429 F.2d at 321 (“The remedy under Rule B(1) is completely independent of state law . . .”). For a discussion on the governance of federal law to issues of maritime attachment, see *infra* notes 101 *et seq.* and accompanying text.

81. 457 U.S. at 283.

82. See *id.*; see also *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 671-72 (1979); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-29 (1979); *United States v. Standard Oil Co. of Cal.* 332 U.S. 301, 309-10 (1974). See generally Mishkin, *The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

83. *Kimbell Foods*, 440 U.S. at 727-28. It should be noted that these cases generally deal with controversies involving specific federal interests, agencies or programs. See *e.g.*, *Wilson*, 442 U.S. at 657 (action to quiet title to land claimed by the Omaha Indian Tribe, supported by the United States as trustee of the Tribe’s reservation lands); *Kimbell Foods*, 440 U.S. at 718 (priority of contractual liens arising from certain federal loan programs); *Standard Oil*, 332 U.S. at 301 (suit by the United States to recover on a claim arising out of injuries sustained by a soldier, the expenses for which were borne by the United States). Admittedly, the remedy of maritime attachment is not as such part of a federal agency or program. This comment submits nonetheless that the reasoning of the Supreme Court is applicable to maritime attachment, and that challenges to that submission based on nonpertinence must fail, for two reasons. First, the *Reibor* court itself relied on *State Lands Comm’n* (which, in turn, relied on this trend of cases, see 457 U.S. at 283), although the *Reibor* court neglected to consider the rationale for relying on state law as developed in these cases. See 759 F.2d at 266; see also discussion *supra* note 77 and accompanying text. Second, given the strong tradition of Federal governance of admiralty issues, see discussion *infra* at notes 36-40 and 60-74 and accompanying text, it is virtually a premise that maritime attachment as codified in Rule B implicates a federal interest sufficient to justify the application of the tests of *Kimbell Foods* and *Standard Oil*.

the specific governmental interests and to the effects upon them of applying state law.’”⁸⁴ Such considerations include the need for uniformity,⁸⁵ the question of whether Congress has taken no action to change long-settled ways of handling the problem,⁸⁶ the question of whether application of state law would frustrate specific objectives of the Federal program,⁸⁷ and lastly, the “extent to which application of a federal rule would disrupt commercial relationships predicated on state law.”⁸⁸

1. Uniformity in Federal Admiralty Law

With regard to an ostensible need for uniformity in admiralty law, the nature of that law should be recognized. Federal judicial power is extended by the Constitution “to all Cases of admiralty and maritime Jurisdiction”⁸⁹ National uniformity in admiralty procedural practice extends back to the Supreme Court Admiralty Rules of 1844, which “codified and made uniform the prior practice.”⁹⁰ Lastly, in what has been termed “a classical exposition of the roles of Court and Congress in the admiralty field,”⁹¹ Chief Justice Hughes wrote in 1934: “The framers of the Constitution did not contemplate that the maritime law should remain unalterable. The purpose was to place the entire subject, including its substantive as well as its procedural features, under national control.”⁹²

With these considerations in mind, one may examine the reliance on state law by the *Reibor* court. As RBC indicated in its brief,⁹³ Supplemental Rule A authorizes resort to the “general Rules of Civil Procedure . . . except to the extent that they are inconsistent with these Supplemental Rules.”⁹⁴ Rule 64, in turn, allows that attachment remedies “are available under the circumstances and in the manner provided by the law of the state in which the district court is held. . . .

84. *Kimbell Foods*, 440 U.S. at 728, quoting *Standard Oil*, 332 U.S. at 310.

85. *Kimbell Foods*, 440 U.S. at 728; *Standard Oil*, 332 U.S. at 310.

86. *Standard Oil*, 332 U.S. at 310.

87. *Kimbell Foods*, 440 U.S. at 728. As discussed in note 83, *supra*, the maritime attachment remedy is not of a federal program per se, so the discussion will focus on the important federal interests implicated.

88. *Kimbell Foods*, 440 U.S. at 729.

89. U.S. CONST. art. III, § 2, cl. 1. See generally THE FEDERALIST No. 80 (A. Hamilton).

90. 7A MOORE'S FEDERAL PRACTICE, *supra* note 39, ¶ B.02 at B-53. For a brief discussion of the “considerable difference of practice” of maritime attachment before the promulgation of the 1844 Rules, see *id.* at B-53 n.8.

91. GILMORE & BLACK, *supra* note 67, § 9-49 at 694.

92. *Detroit Trust Co. v. The Barlum*, 293 U.S. 21, 43 (1934).

93. RBC Brief, *supra* note 18, at 9.

94. FED. R. CIV. P. A.

[except that] any existing statute of the United States governs to the extent to which it is applicable."⁹⁵ While the issue of applicability of Federal precedent, to the preclusion of reliance on state law, was argued by the parties,⁹⁶ one underlying factor should be borne in mind: reliance on state law to govern Rule B attachments could conceivably result in up to fifty varying applications of the Rule. Such a result would not comport with the foregoing discussion on the long recognized necessity for national uniformity in admiralty law. Indeed, this necessity is supported by the Second Circuit's statement against the application of state law to Supplemental Rule B(1), when it wrote in *Maryland Tuna* that "State law is irrelevant to the validity of process under Supplemental Rule B(1). . . . The remedy, under the terms of Rule B(1), is completely independent of state law and of any state attachment or garnishment procedures."⁹⁷ Thus, while reliance by a court on state procedure in an admiralty issue may be appropriate in other circumstances, here the historical context and judicial treatment of the admiralty law offers a strong policy favoring uniform standards.⁹⁸

2. Congressional Inaction

The inaction of Congress to "change long-settled ways of handling"⁹⁹ a particular problem is also relevant to this discussion, insofar as the admiralty bar has uniformly interpreted Rule B "to permit attachment of after-acquired property up to the time the garnishee an-

95. FED. R. CIV. P. 64.

96. See 759 F.2d at 265-66. See discussion *supra* notes 48-52 and accompanying text.

97. *Maryland Tuna*, 429 F.2d at 321. The *Reibor* court felt it had the option to rely on state law "despite [the] strong language," *Reibor*, 759 F.2d at 266 n.3, of *Maryland Tuna*. The *Reibor* court continued: "Here, as a matter of federal law, we choose to follow the applicable state law. State law remains irrelevant to the validity of a maritime attachment because it is federal law that determines what attachments are valid." *Id.* The court is apparently drawing a distinction between the *validity* of attachments, which it concedes Federal law alone may govern, and the *effectiveness* of attachments, against which it here seeks to apply state law. Such a hypertechnical distinction, however, flies against both the spirit of *Maryland Tuna* and the broad and flexible application of Rule B historically accorded by the Federal judiciary. See discussion, *supra* notes 64-78 and accompanying text.

98. See generally Note, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U. CHI. L. REV. 823 (1976). "When a lack of uniformity would actually interfere with the functioning of a specific federal program [or interest, as this comment suggests, see *supra* note 83] . . . the interest in uniformity deserves weight according to the amount of interference." Note, *supra*, at 841.

99. 332 U.S. at 310. "Congress has undoubted power to regulate the practice and procedure of federal courts . . ." *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 9 (1941).

swers the interrogatories."¹⁰⁰

3. The Inter-relationship of Federal and State Objectives: Disruption of Banking Practices

Lastly, one may consider together the frustration of Federal interests if state law were applied, and conversely, the disruption of "commercial relationships predicated on state law"¹⁰¹ if a conflicting Federal rule were to be applied. The foregoing discussion on the strong Federal policy favoring uniformity is responsive to the former concern, despite the fact that it was cursorily addressed by the court.¹⁰² The latter concern, conversely, was the focal point of the court's justification for relying on state law.

The court rejected as inapposite the Federal precedent cited by *Reibor*, and justified its reliance on state law as "especially appropriate where, as here, 'a decision . . . contrary to the general rule of the state might have disruptive consequences for the state banking system.'"¹⁰³ Relying on New York law, the court proceeded to reject *Reibor's* contention that the garnishment writ should "remain effective until the garnishee answers, under Rule B(3) a period controlled by garnishee and not exceeding twenty days."¹⁰⁴ The court contended that it would be overly "burdensome to require a garnishee to choose between setting aside other priorities to answer promptly and remaining vigilant until an answer can be prepared."¹⁰⁵ The court concluded its reasoning by stating:

[T]he law of attachment could have considerable impact on international banking practices and indeed could force New York

100. *Reibor Reply Brief*, *supra* note 57, at 7. *See also supra* note 57 and accompanying text.

101. *Kimbell Foods*, 440 U.S. at 729.

102. *See, e.g., supra* note 97.

103. 759 F.2d at 266, quoting *Det Bergenske Dampskibsselskab v. Sabre Shipping Corp.*, 341 F.2d 50, 52-53 (2d Cir. 1965). The *Reibor* court contended: "New York being the situs for multiple transactions in world commerce, the New York banking system is particularly vulnerable to such disruption It is only appropriate therefore that we look to the New York law of attachment for guidance." 759 F.2d at 266. This assertion followed a line of reasoning offered by Judge Stewart in the district court opinion. He contended similarly that there is "little federal precedent," *Reibor*, no. 83-793, slip op. at 3, on the issue of effective attachment of after-acquired property, but then seemingly suggested that this is a banking issue, to be decided under state law. *Id.* at 4 ("questions of banking are matters for state regulation"). This raises the question, had there been sufficient Federal precedent on the issue of Rule B attachment of after-acquired property, would the district court still have looked solely to state law for banking purposes?

104. 759 F.2d at 267.

105. *Id.*

banks clearing foreign fund exchanges in U.S. dollars through CHIPS to search high and low for a period of up to twenty days to determine whether any transfer related to a maritime process of attachment or garnishment. Moreover, this search would be extremely and unfairly taxing because garnishee banks like MHT/NY and RBC/NY have no way to anticipate when they will transfer or receive a CHIPS credit The rule works, to be sure, to the detriment of an attaching creditor, but that is simply the way the law was intended to operate.¹⁰⁶

In its rationale, the court strove for an ostensibly pragmatic perspective, citing, in its view, the practical and expensive difficulties a garnishee would face in tracking down garnished credits. Worthy of note, however, is the fact that the court omitted any support for its portrait of the chaotic banking operations that allegedly would result should such attachment be allowed. More likely, the court-depicted scenario would not result, and the actual operation would be no more commercially burdensome than that allowed under current garnishment procedure.

Initially, one may consider the court's assertion that reliance on New York law was appropriate here, given the vulnerability of New York banking to disruption. Had there been clear Federal precedent allowing the attachment of after-acquired property, the court would have had to disregard apprehension of possible disruptive results.¹⁰⁷ The court, however, was able to address this issue, but seemed to ignore the effectiveness with which other banking credits have been attached. Clearly, bank accounts may be attached, yet there are no concerns voiced over any disruptions effected by these allowable attachments. In the present case, therefore, disruption alone is clearly insufficient to support reliance on state law. Moreover, there is no reason to believe that the state banking system was intended to receive the protection of a restrictive state attachment law in an admiralty context, particularly in view of the broad and flexible treatment historically accorded the maritime attachment remedy.

The court's distinction regarding the burdens that the banking system would face if the attachment of after-acquired CHIPS credits were allowed is specious. Given the realistic operation of the CHIPS

106. *Id.* at 268. This comment submits that this is not "the way the law was intended to operate." *Id.* Rule B is designed to protect the creditor's rights. See *infra* text accompanying note 147 and *supra* text accompanying note 40.

107. See *supra* note 103.

department of a bank,¹⁰⁸ there would be little burden on a garnishee bank to trace and be aware of a CHIPS credit; certainly, as suggested above, no more a burden than that posed by other attachable forms of property held by the garnishee bank. In order to allow an attachment of a CHIPS credit in the least burdensome manner,¹⁰⁹ however, certain prerequisites are conceded. Crucial to a nonburdensome attachment is the requirement that the item sought to be attached be properly identified.¹¹⁰ Thus, the attaching plaintiff must provide specific and detailed information in the writ so that the CHIPS credit may be easily traced and identified. Such information might include, but need not be limited to, an estimation of the time at which the transfer will be effected, the precise amount of the forthcoming transfer, its origin, its destination, the sending and receiving parties and their account numbers.

This information would, upon proper service to the garnishee bank, be circulated to the various departments of the bank that may have property of the defendant. A search would then be made by each department for such property, relying on the identifying information contained in the writ. In the event of a writ against a CHIPS credit, with the requisite specific advance knowledge of forthcoming identifiable proceeds, the operators of the computer terminals at which CHIPS transactions are effected among member banks would need

108. The court's brief description of the operation of CHIPS was incomplete and in error. The court noted that, despite the completion of the transfers among member banks, "adjustments in the account books at the New York Federal Reserve Bank are not made until the next business day, . . . after the central computer has determined which banks owe, or are owed, what." 759 F.2d at 264 n.1. In fact, same-day settlement was effected October 1, 1981, Bennett, *supra* note 28, some three and one-half years before this case was decided. Such a mis-statement betrays the court's ignorance of the operation of CHIPS and, accordingly, seriously undermines the credibility of its pragmatic assertions, given the necessity of an accurate knowledge of CHIPS to those assertions.

109. The court's reasoning suggests that achieving the least burden for the garnishee is a primary concern of an attachment (notwithstanding the *type* of property sought to be attached). This discussion will illustrate that the burden is not great, and is indeed merely routine, such that the rejection as "burdensome" of attachment of after-acquired property is obviated.

Information provided herein on the practical demands that attachment would make on a CHIPS bank was provided to the author by the head of CHIPS operations for a CHIPS-member bank in New York City, in a personal interview on January 16, 1985 and a telephone interview on January 8, 1986. This individual did not wish to be identified, for the obvious reason that his statements are adverse to the interests of the New York banking community. An effort is thus made to present as complete a picture of CHIPS operations, and the effects thereon of attachment, as possible, to preclude rebuttal based on inaccuracy.

110. See *infra* note 123.

only be "on guard" for its receipt. With the requirement for sufficient advance information of CHIPS credits, there conceivably would be no difference between the burden the bank may have in searching for accounts under its control, though not sufficiently identified,¹¹¹ and the burden to be watchful for what presumably would be an imminently arriving CHIPS transaction. In short, the burden to search for poorly identified but currently held property, the attachment for which would be upheld,¹¹² is *at least* as great as the burden to be watchful for precisely identified but soon-to-be acquired property. Thus, the ground of undue burden on garnishee banks is inconsistently applied and therefore should be rejected.

Indeed, the real burden in this scenario rests with the attaching creditor to provide sufficient identifying information. Given the need for such information, there is little reason for the attaching creditor to seek an attachment of the CHIPS credit unless he has definite knowledge of the imminent transfer; otherwise the remedy will prove of little use to him. The burden is thus so substantial that the remedy is unlikely to be utilized frivolously.

The foregoing discussion has suggested that the *Reibor* court's reliance on state law was misplaced, and that attachment of the after-acquired CHIPS credit should have been allowed. Such a finding, however, would be only a threshold resolution, for there remains the much more problematic dispute, expressly unaddressed by the court,¹¹³ over whether a CHIPS credit constitutes attachable property.¹¹⁴

III. ATTACHMENT OF CHIPS CREDITS

Although this issue was central in the briefed arguments of the parties before the Second Circuit, few cases in fact define the Rule B(1) language of attachable "goods and chattels, or credits and effects" of defendants.¹¹⁵ The primary contention of garnishee MHT regarding

111. See e.g., *DK Mfg.*, 1964 A.M.C. at 79-80 (such after-identified accounts are properly attached, see *supra* note 51).

112. *DK Mfg.*, 1964 A.M.C. at 79-80.

113. 759 F.2d at 268-69.

114. Indeed, the court's hypertechnical opinion, characterized by a disregard of both the historical judicial treatment of Rule B and the actual operation of CHIPS, enabled it to avoid this tougher question.

115. See generally 7A MOORE'S FEDERAL PRACTICE, *supra* note 39, ¶ B.04. Professor Moore writes: "The law is clear that debts or credits located within the district and which are owed to a defendant who cannot be found therein may be garnished." *Id.* at B-160. This observation is qualified, however, by concerns on the question of situs and maturity of the debt. *Id.* at B-160-62. Such concerns are not relevant to this discussion, as the CHIPS credit sought to be attached in *Reibor* was located within the district.

the attachability of CHIPS transactions was that the CHIPS transfer was not attachable property of defendant Cargo Carriers, but was rather "an interbank transfer of funds belonging solely to the banks."¹¹⁶ Moreover, contended MHT, "the CHIPS transfer did not represent a[n attachable] debt owed by MHT/NY to Cargo [Carriers]."¹¹⁷ Garnishee RBC echoed this contention that New York branch banks acting as CHIPS participants do not themselves owe debts to the ultimate beneficiary. RBC asserted that it had no contractual liability to, or privity with, Cargo Carriers, but only to the sender of the payment instructions, MHT.¹¹⁸ RBC added that under the rules governing CHIPS,¹¹⁹ it "would be liable only to MHT for misapplying funds under MHT's instructions."¹²⁰ In reply, Reibor contended that CHIPS credits are property of the defendant and thus subject to attachment,¹²¹ and contended further that had one of the garnishees diverted the transferred funds, the garnishee would in fact be liable to Cargo Carriers.¹²² Although other issues were raised by the parties, this discussion will be limited to the issue of attachability of the CHIPS transfer.¹²³

One case which was relied upon to further the contentions of both Reibor and the garnishees was *Federal Deposit Ins. Corp. v. European Am. Bank & Trust Co.*¹²⁴ At issue was whether CHIPS transactions

116. Brief of Garnishee-Appellee Manufacturers Hanover Trust Co. at 18, *Reibor Int'l Ltd. v. Cargo Carriers (Kacz-Co.) Ltd.*, 759 F.2d 262 (2d Cir. 1985) [hereinafter MHT Brief]. Two cases relied upon by MHT in making this contention, *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 464 F. Supp. 989 (S.D.N.Y.), *aff'd*, 609 F.2d 1047 (2d Cir. 1979) and *Federal Deposit Ins. Corp. v. European Am. Bank & Trust Co.*, 576 F. Supp. 950 (S.D.N.Y. 1983), are discussed *infra* at notes 124-29 and accompanying text.

117. MHT Brief, *supra* note 116, at 21.

118. RBC Brief, *supra* note 18, at 19-20.

119. CHIPS Rules, *supra* note 24.

120. RBC Brief, *supra* note 18, at 20.

121. Reibor Reply Brief, *supra* note 57, at 11-13.

122. *Id.* at 13. The case principally relied upon by Reibor in making this contention, *Evra Corp. v. Swiss Bank Corp.*, 522 F. Supp. 820 (N.D. Ill. 1981), *rev'd*, 673 F.2d 951 (7th Cir. 1982), *cert. denied*, 459 U.S. 1017 (1983), is discussed *infra* at notes 133-37 and accompanying text.

123. RBC strongly argued that the Process of Maritime Attachment and Garnishment served on it did not provide a sufficient description of the property sought to be attached, and thus as a matter of law the process could not effect an attachment of the CHIPS credit. RBC Brief, *supra* note 18, at 16-19; Reibor Reply Brief, *supra* note 57, at 8-11. For purposes of this comment it is assumed that the process contains a sufficient description to locate and garnish the property.

MHT argued at length that the debt owed Cargo Carriers was located in Madrid, not New York, and thus was not attachable. MHT Brief, *supra* note 116, at 26-30; Reibor Reply Brief, *supra* note 57, at 14-15. See *supra* note 115.

124. 576 F. Supp. 950. See also FDIC Act, 12 U.S.C. § 1813(1) (1976).

constituted deposits for the purpose of calculating FDIC insurance assessment payments. MHT construed *FDIC* as holding that "CHIPS transactions are deposits of the bank and represent assets of the bank."¹²⁵ While holding that CHIPS transactions are deposits to be considered in determining FDIC assessments, and that CHIPS instructions represent "a firm obligation to credit a commercial account. . .",¹²⁶ the *FDIC* court did not expressly address the *ownership* of those deposits, the necessary aspect for the present attachment analysis. An implication was raised by Reibor, however, that by holding that CHIPS payments are deposits to be insured by the FDIC for the benefit of third parties, those CHIPS transactions may be deemed attachable property of those third parties.¹²⁷

For its contention that "an interbank transfer [consists] of funds belonging solely to the banks,"¹²⁸ MHT relied on *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*¹²⁹ In *Delbrueck*, the plaintiff was a German banking partnership that charged its bank with negligence for failing to comply with its demand to revoke CHIPS transfers that the bank had made pursuant to the plaintiff's instructions earlier in the day. The issue in *Delbrueck*, the revocability of CHIPS transfers, necessarily involved a consideration of transfers between banks, but this is similarly not responsive to the issue of ownership of the transferred funds, which is the crucial aspect of the attachment considerations herein.

A third issue addressed by the parties in their arguments relating to the attachability of CHIPS transfers involved the rules governing CHIPS.¹³⁰ RBC contended that the CHIPS Rules relating to liability indicate that participating banks are liable only to each other.¹³¹ These rules, however, do not insulate participating banks from liability by third parties. By requiring the banks to, in effect, "settle among themselves,"¹³² the CHIPS Rules only insulate the NYCHA from involvement in and liability for any errors, whether caused by the system or by participating banks. To support its contention that the CHIPS credit was attachable property of the defendant, Reibor turned to the

125. MHT Brief, *supra* note 116, at 19.

126. 576 F. Supp. at 956.

127. Reibor Reply Brief, *supra* note 57, at 12-13.

128. MHT Brief, *supra* note 116, at 19.

129. 464 F. Supp. 989 (S.D.N.Y.), *aff'd*, 609 F.2d 1047 (2d Cir. 1979).

130. CHIPS Rules, *supra* note 24.

131. *See, e.g., id.* at Rules 13, 15; RBC Brief, *supra* note 18, at 20.

132. *See, e.g.,* Lingl, *Payment Systems Differ on EFT Risk Allocation*, *American Banker*, Sept. 22, 1983, at 12. *See also*, Scott, *Corporate Wire Transfers*, *supra* note 59, at 1673; Comment, *supra* note 24.

district court opinion in *Evra Corp. v. Swiss Bank Corp.*¹³³ In that case, a ship charterer sued Swiss Bank, a correspondent bank of its own bank, Continental Illinois, for failure to make a wire transfer payment, which resulted in the cancellation of a ship charter. By analogizing the facts in that case to article 4 of the U.C.C., the district court found that the bank was the plaintiff's agent and thus could be liable to the charterer for its negligence in the wire transfer failure.¹³⁴ Reibor carried this analogy further by contending that Cargo Carriers, as the ultimate beneficiary of the CHIPS transfers, would similarly have a cause of action against RBC and MHT, thus creating the sufficient interest of Cargo Carriers in the CHIPS credits to deem them attachable.¹³⁵

Although *Evra* was reversed on appeal to the Seventh Circuit,¹³⁶ that court did not expressly reverse the district court's U.C.C. article 4 analogy. The appellate court, however, did undermine the analogy by refusing to apply article 4 of the U.C.C. to electronic fund transfers.¹³⁷ Accordingly, Reibor's extension of that analogy is tenuous at best.

One final issue may be considered in determining the "ownership" of a CHIPS credit and its attachability. Irrevocability of the payment, and implications for determining its ownership, arise in *Reibor* in two contexts. First, insofar as the payment was made to the defendant pursuant to the irrevocable instructions in the letter of credit,¹³⁸ there is a suggestion that the funds constituting payment were the property of defendant throughout their transfer, since, as beneficiary, only it could revoke the credit.¹³⁹ This interpretation has been rejected in one case in the Southern District of New York, *Diakan Love, S.A. v. Al-Haddad*

133. 522 F. Supp. 820.

134. *Id.* at 828. See also, Comment, *Evra Corp. v. Swiss Bank Corp.: A Limitation on Recovery of Consequential Damages in an Electronic Fund Transfer*, 8 N.C.J. INT'L L. & COM. REG. 103, 105 (1982) ("Under U.C.C. § 4-201, a collecting bank's agency status with respect to the owner of an item is presumed prior to the final settlement of an item").

135. Reibor Reply Brief, *supra* note 57, at 13.

136. 673 F.2d 951.

137. *Id.* at 955 ("Maybe the language of article 4 could be stretched to include electronic fund transfers, see section 4-102(2), but they were not in the contemplation of the draftsmen"). Cf. *Delbrueck*, 609 F.2d at 1051, where the Second Circuit analogized U.C.C. "concepts" to electronic funds transfers, while holding that the U.C.C. is inapplicable because it does not specifically address the problem of electronic fund transfers; Comment, *supra* note 134, at 109 ("The majority of commentators have argued against the direct application of the U.C.C. to situations involving electronic fund transfers"). These sources and others serve especially to underscore the notably incomplete statutory framework applicable to electronic fund transfers. See generally, Scott, *Corporate Wire Transfers*, *supra* note 59.

138. See *supra* notes 6-8 and accompanying text.

139. U.C.C. § 5-106(2).

Bros. Enters., Inc.,¹⁴⁰ wherein the court noted that to "permit the attachment on theory that the letter [of credit] represents simply property of the beneficiary would ignore and confound the inseparable interests of other parties."¹⁴¹ Conversely, another case in the Southern District, *A/S Kristian Jepsens Rederi v. Al-Haddad Bros. Enters., Inc.*,¹⁴² expressly rejected the *Diakan Love* opinion.

The second aspect of irrevocability in *Reibor* lies in the nature of the payment message sent by MHT into the CHIPS system: once the payment message is sent, it is deemed irrevocable as to the sending bank, which becomes obligated to settle the payment.¹⁴³ This obligation imposed by the CHIPS Rules on the sending bank to pay the amount to the receiving bank, however, does not necessarily extend into an obligation on the sending bank to pay the beneficiary. Presumably that obligation, as far as the circumstances of *Reibor* suggest, would fall on the receiving bank, RBC. Thus, from this narrow perspective, the obligation of a receiving bank to the beneficiary may be construed as attachable property of the beneficiary, whereas the obligation of the sending bank would not be so construed.

A review of the arguments proffered by the parties shows no clear and compelling support for any conclusion as to the attachability of CHIPS transfers. Indeed, it is at this point in the analysis of this issue that the lack of a legal framework that would address the rights and liabilities of all the parties involved is most evident. Resort, therefore, to the traditionally flexible application of the maritime attachment remedy, would suggest a characterization of such transfers as attachable property of the defendant.

CONCLUSION

While this discussion has indicated the abundant lack of a coherent legal framework that addresses the perplexing issues largely peculiar to international interbank electronic funds transfers,¹⁴⁴ particularly the attachability of CHIPS credits, it has suggested the alternative, policy-oriented concerns of the maritime attachment remedy that are pertinent to this issue. The historical justification, for example, of mar-

140. 584 F. Supp. 782 (S.D.N.Y. 1984).

141. *Id.* at 784. See also McLaughlin, *Commercial Law: Letters of Credit*, N.Y.L.J., Sept. 12, 1984, at 1, col. 1 (reviewing *Diakan Love*).

142. 84 Civ. 7070 (S.D.N.Y. Oct. 10, 1984), cited in *Reibor* Brief, *supra* note 4, at 15.

143. See CHIPS Rules, *supra* note 24, Rule 2 ("A payment message once released by a participant . . . constitutes the unconditional obligation of such participant to make payment . . ."); *Delbrueck*, 609 F.2d at 1051 (upholding the irrevocability of CHIPS transfers); Scott, *Corporate Wire Transfers*, *supra* note 59, at 1690.

144. See *supra* notes 59, 108, 115-137, 143 and accompanying text.

itime attachment suggests that it was to be an "easy and salutary remedy"¹⁴⁵ for creditors. As the Court of Appeals for the Eleventh Circuit has observed, "relevant commercial and legal considerations provide the backdrop for review"¹⁴⁶ of Rule B. Although the Eleventh Circuit evaluated the attachment of a vessel under Rule B, its observation regarding the ease of removal of a defendant's property from the jurisdiction of the court, to the frustration of creditors, is no less relevant here. That court called Rule B "the harbinger of more happy endings [The rule] restores order and attempts to protect the creditor's rights. It draws debtors from otherwise impenetrable fortresses."¹⁴⁷ Moreover, as this comment has pointed out, the maritime attachment remedy has historically been accorded a broad, flexible and liberal application in order to effect its purpose.¹⁴⁸

These observations, of course, should be considered in the context of competing practical circumstances. Foremost, perhaps, is the "chilling effect" that might result from the attachment of proceeds of letters of credit, predicted in the *Diakan Love* case.¹⁴⁹ Related to this is the narrower chilling effect on CHIPS transactions that could result, if the prediction of MHT holds true.¹⁵⁰

Considering the practical necessity, however, of the sufficient identification of the transfer to effect the garnishment, the concern of MHT is overstated. As suggested earlier,¹⁵¹ the burden is indeed upon the attaching creditor, to come up with the necessary information. The burden is difficult enough so that the number of attachments of CHIPS credits would not be of sufficient magnitude to chill the use of the system. Perhaps responsive to both concerns is the language of Supplemental Rule E(5), which governs the release of attached property.¹⁵² Rule E(5)(a) states that "whenever process of maritime attach-

145. See *supra* notes 39-40 and accompanying text; see also 2 A. BROWNE, A COMPENDIOUS VIEW OF THE CIVIL LAW, AND OF THE LAW OF ADMIRALTY 434 (1802), cited in *Maryland Tuna*, 429 F.2d at 321.

146. 732 F.2d at 1547.

147. *Id.* at 1548 (emphasis in original).

148. See *supra* notes 40, 59-74 and accompanying text.

149. 584 F. Supp. at 786 (If allowed to be attached, "the expectations supported by letters of credit [would] be unfulfilled Such letters will cease to perform their essential role in facilitating international trade, which as a result will be very substantially impaired").

150. MHT Brief, *supra* note 116, at 2 (Reibor's "disregard of the far-reaching and disruptive affect [sic] that attachment, under the circumstances of this case, would have on the financial community, and ignorance of the serious impact on international trade and commerce in New York that would follow, cannot be countenanced").

151. See *supra* text following note 112.

152. FED. R. CIV. P. E(5).

ment and garnishment . . . is issued the execution of such process shall be stayed, or the property released, on the giving of security . . . conditioned to answer the judgment of the court"¹⁵³ Given the ease with which attached property may be released, and the creditor's burden to identify the property, the dire warnings of chilling effects may be overstated.

Ultimately, the question rests on the dynamic role in financial transactions that CHIPS electronic funds transfers now play, and will continue to play in the future.¹⁵⁴ Reibor realistically contended that "[i]f the payment to Cargo Carriers had been passed through the same garnishees but had been in the form of a check or cash, no argument could be made that the funds were not subject to attachment."¹⁵⁵ Due to technological advances, such payments are now routinely made electronically: as such, should they remain immune to the liberal and flexible exercise of Rule B attachment? The Federal courts must be aware of evolving commercial realities: "We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns,"¹⁵⁶ wrote Chief Justice Hughes more than a half century ago. Such "new conditions" are amidst the commercial and maritime world today, and the resulting "new conceptions of maritime concerns" should be judicially recognized. Certainly, the *Reibor* court's unwarrantedly restrictive curb on maritime attachments, insofar as it places electronic fund transfers effectively beyond the reach of such levies, flies in the face of Chief Justice Hughes' counsel. Absent such judicial recognition, if electronic fund transfers such as CHIPS transactions continue to remain immune from the longstanding reach of maritime attachment, then the remedy and the historically recognized protections it seeks to afford will gradually but surely fade into unwarranted discontinuance.

Thomas E. Tyler

153. *Id.* E(5) (a). Security would be provided in the form of a special bond delivered into court.

154. *See supra* note 47.

155. Reibor Brief, *supra* note 4, at 16.

156. *Detroit Trust Co. v. The Barlum*, 293 U.S. 21, 52 (1934).