

♪ OVER THERE ♪

STRATEGIC CHOICES AND PITFALLS IN COLLECTING JUDGMENTS
AND ENFORCING ARBITRATIONS AWARDS INTERNATIONALLY©

by

Kenneth B. Reisenfeld*
Scott Everett**
Haynes and Boone, LLP

STATE BAR OF TEXAS
COLLECTIONS & CREDITORS' RIGHTS
SAN ANTONIO, TEXAS • MAY 19, 2005 - MAY 20, 2005

CHAPTER 3

* Kenneth B. Reisenfeld is a Partner and Chairs the International Dispute Resolution Practice Group at Haynes and Boone, LLP. Mr. Reisenfeld also currently serves as the Chair of the ABA Section of International Law. He formerly served as Chair of its International Commercial Arbitration Committee. Mr. Reisenfeld has over twenty-seven years' experience representing the U.S. Government, foreign governments and U.S. and foreign corporations in litigation and arbitration of international commercial, investor-state, merger and acquisition, construction, energy and technology disputes in U.S. courts and before international arbitral tribunals. Haynes and Boone is an international corporate law firm with more than 450 lawyers in ten offices throughout Texas, Washington, D.C., New York, Moscow and Mexico City.

** Scott Everett is an attorney in the Business Reorganization/Bankruptcy Practice Group at Haynes and Boone, LLP. Mr. Everett's practice includes substantial work on international insolvency issues.



Partner

International Trade and Dispute Resolution

Washington D.C. Office
 1615 L Street, N.W.
 Suite 800
 Washington, DC 20036-5610
 Ph: 202.654.4511
 Fax: 202.654.4241
 Ken.Reisenfeld@haynesboone.com

Areas of Experience:

International Commercial Litigation and Arbitration, International Trade, Export Controls, Economic Sanctions, Antiboycott, FCPA, Enforcement Proceedings, Compliance Programs, Customs

Education

J.D., Harvard Law School, 1978; B.A. *With Honors*, Oberlin College, 1975; Phi Beta Kappa

Memberships

American Bar Association (Chair, Section of International Law); Former Chairman, International Commercial Arbitration Committee; former Chairman, International Trade Committee; International Bar Association (Liaison from ABA International Section); Institute for Transnational Arbitration (Advisory Board)

Kenneth B. Reisenfeld

Kenneth B. Reisenfeld heads the International Dispute Resolution Practice Group at Haynes and Boone, LLP, where he founded the Firm’s Washington, D.C. office over a decade ago. Mr. Reisenfeld has over twenty-seven years’ experience representing U.S. and foreign corporations and governmental entities in litigation and arbitration of international commercial, investment and technology disputes in U.S. courts and before international arbitral tribunals, including the International Chamber of Commerce Court of Arbitration, the London Court of International Arbitration, the World Bank–affiliated ICSID, the Iran-United States Claims Tribunal, the Dutch Arbitration Institute, and in state-to-state ad hoc proceedings. Mr. Reisenfeld currently serves as outside counsel to the U.S. Government in prosecuting its investment arbitration claims against the Government of India.

Mr. Reisenfeld is the Chair of the American Bar Association’s 13,000 member Section of International Law. He is an appointed member of the U.S. Department of State’s Advisory Committee on International Law and the Advisory Board of the Institute for Transnational Arbitration. Mr. Reisenfeld also currently serves as the ABA Section of International Law Liaison to the International Bar Association. He previously served as Chair of the ABA International Commercial Arbitration Committee and of the IBA Committee C1 (Trade and Customs). He also was a leader of the ABA’s Task Force on Revising the ABA/AAA Code of Ethics for Arbitrators. Prior to joining private practice in 1981, Mr. Reisenfeld was a judicial law clerk to U.S. District Court Chief Judge Frank J. Battisti (1978-1979), and an Attorney-Advisor to the U.S. Attorney General, U.S. Department of Justice (1979-1981).

Mr. Reisenfeld regularly serves as counsel or as an arbitrator in complex commercial, investment, technology and international law cases. Mr. Reisenfeld has been appointed by the U.S. Trade Representative to serve on Binational Panels under NAFTA and the U.S.-Canada Free Trade Agreement. He also is on the panel list for several arbitral institutions. Mr. Reisenfeld is a frequent speaker and author on international arbitration and litigation topics, including, most recently, “*The Usual Suspects’ - Six Common Defense Strategies in International Litigation,*” in *INTERNATIONAL LITIGATION MANUAL* (ABA Publishing 2005); “*International Lawyers: A Bridge to the Future,*” in *THE INTERNATIONAL LAW NEWS*, (forthcoming Spring 2005); *International Perspectives on Arbitration in Iraq and the Middle East* (2004); *New Developments in Impartiality and Independence of Arbitrators: The Recently Adopted ABA/AAA Code of Ethics for Arbitrators* (2004); *Recent Developments and Ethical Issues in International Arbitration* (2004); *Litigation Risks for Corporations and their Counsel from Illicit Payments* (2003); and *Strategic Choices in International Litigation and Arbitration* (2002).

Mr. Reisenfeld received his law degree from Harvard Law School (J.D. 1978) and his undergraduate degree from Oberlin College (B.A. 1975, *with Honors*).



Scott W. Everett

scott.everett@haynesboone.com

Mr. Everett's practice is focused in the areas of business reorganization and bankruptcy.

Mr. Everett:

- Represents debtors, creditors, and trustees in all types of bankruptcy and insolvency proceedings.
- Assists clients acquiring financially troubled businesses, including distressed oil and gas interests.
- Works for oil and gas companies undergoing business reorganization.
- Advises international and foreign corporations concerning the forms of bankruptcy relief available in the United States, including Chapter 11 reorganization or a more limited ancillary proceeding.

Attorney

[Business Reorganization/Bankruptcy, International](#)

[Dallas Office](#)

901 Main St.
Suite 3100
Dallas, TX 75202
ph: 214.651.5053
fax: 214.200.0612

Areas of Experience:

Oil and gas bankruptcies and workouts
International insolvency issues

Education

J.D. Texas Tech University, 1996, magna cum laude; Research Editor, The Texas Tech Law Review; member of Order of the Coif
B.A. University of Colorado at Denver, 1992, summa cum laude

Admitted to Practice

United States District Courts for the Northern, Southern, Eastern, and Western Districts of Texas

Memberships

State Bar of Texas; Dallas Bar Association; American Bankruptcy Institute; John C. Ford American Inn of Court; Turnaround Management Association

Judicial Clerkship

Law clerk to the Honorable Ronald B. King, United States Bankruptcy Court for the Western District of Texas, 1996 to 1998

Over There ***

Johnnie, get your gun,
 Get your gun, get your gun,
 Take it on the run,
 On the run, on the run.
 Hear them calling, you and me,
 Every son of liberty.
 Hurry right away,
 No delay, go today,
 Make your daddy glad
 To have had such a lad.
 Tell your sweetheart not to pine,
 To be proud her boy's in line.
 (chorus sung twice)

Johnnie, get your gun,
 Get your gun, get your gun,
 Johnnie show the Hun
 Who's a son of a gun.
 Hoist the flag and let her fly,
 Yankee Doodle do or die.
 Pack your little kit,
 Show your grit, do your bit.
 Yankee to the ranks,
 From the towns and the tanks.
 Make your mother proud of you,
 And the old Red, White and Blue.
 (chorus sung twice)

Chorus

Over there, over there,
 Send the word, send the word over there -
 That the Yanks are coming,
 The Yanks are coming,
 The drums rum-tumming
 Ev'rywhere.
 So prepare, say a pray'r,
 Send the word, send the word to beware.
 We'll be over, we're coming over,
 And we won't come back till it's over
 Over there

*** America's best-known World War I song, *Over There*, was written by George M. Cohan.

Table of Contents

I. Introduction..... 1

II. Strategic Choice of Forum 1

III. Jurisdiction and Service of Process: Establishing Entitlement to or Challenging
a Chosen Forum 8

IV. Forum Shifting Strategies: Forum Non Conveniens, Parallel Proceedings, and
Anti-Suit Injunctions..... 14

V. Pros and Cons of Arbitration 18

VI. Recognition and Enforcement of Judgments and Arbitration Awards in
Specific Countries..... 21

VII. Impact of Insolvency Proceedings on Remedies Strategy—Section 304 and
the New Chapter 15 of the U.S. Bankruptcy Code 31

I. Introduction

Send the word: The Yanks are coming. We'll be over, we're coming over, and we won't come back till it's over Over There. These lyrics from America's best-known World War I song inspired our troops and the rest of the nation as America enthusiastically entered the war.

Attorneys seeking to obtain, enforce, and collect judgments or arbitration awards internationally should march to a much different tune, however. Litigating and collecting the Yankee way without considering applicable foreign laws, policies, and procedures, may lead to little or no recovery in those cases where the defendant has few assets in the U.S. but substantial properties Over There.

This article provides, in outline format, a broad brush review of the strategic choices—and pitfalls—encountered in international commercial litigation and collection. This article also discusses the relative difficulties of enforcing judgments and international arbitration awards in five countries. Finally, this article discusses how foreign insolvency proceedings will affect collection efforts Over There and at home.¹

II. Strategic Choice of Forum

A. General

1. There are a dazzling array of potential issues in any international dispute, each of which can heavily affect the outcome of the dispute. Perhaps more than any single feature, the creativity and options available for selecting or shifting the forum differentiate domestic from international litigation.
2. In this section of the paper, we will first identify some of the primary factors that should be taken into account when deciding on a forum or in deciding whether to avoid a forum chosen by your adversary. Additionally, these factors should be taken into account when a corporate lawyer is negotiating a deal and is trying to decide whether to include an express forum selection clause.
3. Threshold decisions may be outcome determinative; any mistakes made initially could affect substantive and procedural options and outcomes down the road.
 - a. For example, if a foreign defendant is improperly served, any resulting judgment might not be enforced against the defendant in the country where its assets are located. ***Always remember, unless you are familiar with foreign country procedures, you must work closely with foreign counsel to determine the proper procedure for dealing with foreign parties, witnesses, or proceedings.*** Even when great care is taken, surprises will inevitably occur:
 - i. Our Firm was lead counsel in a Dutch arbitration case on behalf of a large Dutch company with arbitration in the Netherlands. Local counsel failed to tell us about an unwritten local practice both in litigation and arbitration for counsel to tender to the

¹ The views expressed in this article do not constitute legal advice and do not necessarily reflect the opinions of Haynes and Boone, LLP or even the authors. This article is designed solely to give its readers a head start in doing their own research and analysis.

Clerk of the panel a complete written statement of your oral argument; counsel then reads the statement to the panel; this came as a surprise as one of our attorneys had intended to talk from notes and respond to issues that the arbitrators appeared to be interested in; needless to say, the Panel got a good chuckle when we handed up a copy of the attorney's illegible handwritten notes; fortunately, the Panel liked the spontaneity of his argument and his rebuttal of opposing counsel's positions, which opposing counsel could not replicate while reading his prepared statement.

- B. Nine Principal factors that should be carefully evaluated before an Overall Strategy is concluded, a forum is selected, and a lawsuit is commenced. These factors need to be reviewed not only with respect to the client's home forum, but also with respect to every potentially alternative forum.
1. Enforcement of judgment in forum with defendant's assets
 - a. Corporate lawyers are often stunned to learn that there presently exists no multilateral convention, to which the U.S. is a party, ensuring the enforcement abroad of a judgment rendered by state or federal courts in the U.S.
 - i. The Hague Conference tried for many years to work on this, but the effort has foundered due to concerns over broad U.S. concepts of jurisdiction and large U.S. jury awards.
 - b. Accordingly, enforcement proceedings abroad generally are based upon the court's application of principles of comity – deference to sister country courts; but comity is often overcome by concerns over the broad extension of U.S. jurisdiction (in conflict with those existing in the enforcing country), by concerns about the means of service of process (particularly if mail service had been used in the U.S. action or if the foreign party had not been served and took a default), or by concerns about whether the U.S. judgment violates the foreign country's public policy (particularly if it is based upon statutory causes of action like RICO, DTPA, antitrust; or if the judgment includes treble or punitive damages).
 - c. The best way to avoid enforcement concerns is to commence your lawsuit in a forum where the defendant's assets may be found.
 - d. A second alternative, albeit not a fail safe, is to ensure that the U.S. action is premised upon jurisdiction principles acceptable in the enforcing country; that service of process comports with international norms, Hague Service Convention (if the enforcing country is a signatory), and enforcing country laws; and that extraordinary causes of action and remedies are not included in the judgment.
 - e. The reverse situation is not as bad. Foreign court judgments will often be recognized and enforced in U.S. courts pursuant to the Uniform

Foreign Country Money-Judgment Recognition Act (“FCMJRA”), which is adopted by 30 states, including Texas.²

- i. FCMJRA sets forth limited mandatory and discretionary grounds for non-recognition.
 - ii. FCMJRA eliminates any requirement that the foreign country would reciprocally enforce a U.S. court judgment.
 - (1). Nonetheless, several states, including Massachusetts and Georgia, have added reciprocity as a mandatory ground for nonrecognition.³
- f. If FCMJRA does not apply, then standards of the *Hilton v. Guyot*, 159 U.S. 113 (1895) Supreme Court case apply, which generally lead to recognition in the U.S. of foreign judgments that are final, based upon proper jurisdiction and notice of defendant, and not in conflict with any forum selection agreement.
- g. Bottom line: To ensure an enforceable judgment, you should consider bringing a court action in a jurisdiction where the defendant’s assets are located.
- i. Or, as mentioned later, consider providing for arbitration, which does have a treaty adopted by 135 nations which requires recognition of arbitral awards.
2. Parties’ pre-dispute agreement to forum selection clause
- a. Carefully review all potential agreements between the parties to determine if they have agreed to use a specific forum or manner of resolving the dispute.
 - b. Benefits of having an agreed method and location for disputes:
 - i. Predictability.
 - ii. Avoids race to the courthouse, and race to judgment.
 - (1). As discussed below, filing first gets you an advantage under the parallel-proceedings doctrine; but getting first to judgment is the ultimate goal; then you can bring an enforcement action in the preferred second court (*e.g.*, where assets are located) and apply *res judicata* or collateral estoppel to preclude relitigation of issues already decided.

² See TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001 – 36.008 (Vernon 1997).

³ See MASS. GEN. LAWS ANN. ch. 235 § 23A (West 2005); *McCord v. Jet Spray Int’l Corp.*, 874 F.Supp. 436, 439 (D. Mass. 1994) (interpreting the Massachusetts version of the FCMJRA); GA. CODE ANN. § 9-12-138 (West 2005).

- iii. May preserve benefits of chosen U.S. court situs or arbitration.
 - iv. May diminish costs of multiple parallel actions.
 - c. Benefits of not having an agreed method and location for disputes:
 - i. Maximum flexibility at the time of dispute.
 - ii. Even if you are in the position of a defendant, you can file for a negative declaration to determine lack of liability; this is permissible in many foreign countries, particularly England.
3. Availability of procedural safeguards and powers in forum to be selected
- a. There are vast differences between litigation practiced in the U.S. and in foreign jurisdictions. It is not surprising that every plaintiff tries to maintain a U.S. situs for litigation and nearly every defendant tries to avoid a U.S. forum.
 - i. As English Judge Lord Denning once said, “As moths are drawn to the light, so is a litigator drawn to the US.”
 - (1). The U.S. is unique amongst countries in world in liberality of powers of litigators and courts and generosity of damage awards.
 - (2). Much depends upon the distinction between common law and civil code traditions, but some are uniquely American.
 - ii. Only in America do you find:
 - (1). Contingency lawyers.
 - (2). Statutory remedies providing treble or extraordinary damages.
 - (3). Punitive damages.
 - (4). Right to jury trials.
 - (5). Class actions.
 - (6). Broad concepts of “general jurisdiction” based upon the presumed presence of foreign entities doing business in a state.
 - (7). Lack of disincentives to bring suit, such as the British loser-pay system.

-
- (8). Lawyer control of discovery process and cross-examination of witnesses.
- b. Common law v. Civil Code countries
 - i. Many of the advantages of the U.S. system to plaintiffs are based upon Civil code/common law distinctions.
 - (1). This is important to understand as you work with foreign clients or witnesses who are not familiar with the U.S. system; it takes substantial time to educate and translate our system to a foreign client.
 - (2). Civil Code countries have an inquisitorial system of evidence collection; the judge takes responsibility, asks questions of witnesses, asks for specific documents, retains experts, and summarizes evidence without use of transcript. These are viewed as judicial acts, and anyone trying to undertake them encroaches upon the judicial sovereignty of the court, and could be charged with criminal penalties in Switzerland and Germany, even if done with consent of parties. Important differences in civil code countries:
 - (a). No right to cross examine witnesses by lawyers.
 - (b). No depositions.
 - (c). Witness preparation is severely limited because it is viewed as witness interference.
 - (3). Another fundamental difference is the weight and credibility given to certain evidence in civil code countries. Great weight is placed on written documents, not on oral testimony. The assumption is that all witnesses are lying.
 - (4). Another difference: responses to unfavorable documents or information.
 - (a). In Civil code countries, each side presents its best case; they do not disclose harmful or ambiguous documents; no cross examination opportunity to diminish importance of testimony.
 - (b). Civil code defendants, accordingly, are not as likely to produce documents that are unhelpful or harmful.

-
4. Availability of causes of action
 - a. Contract/tort/statutory cause of action (DTPA; RICO; FCPA; securities law; antitrust).
 - b. England is a very favorable forum for defamation actions.
 5. Availability of remedies
 - a. Interlocutory relief (attachment or injunction); important where there is a question of solvency of adversary or to protect IP rights.
 - i. Generally, you need to bring an action where the conduct is to be affected; where you need the court's power to carry out orders.
 - (1). Foreign courts are unlikely to enforce a U.S. attachment or injunction.
 - (2). Similarly, U.S. courts are not inclined to enforce a pre-trial "Mareva Injunction," which is commonly granted by UK courts to protect assets before trial.⁴
 - b. Treble or punitive damages
 - i. The avoidance of these remedies is often a key strategic goal.
 - (1). Our Firm was able to obtain a dismissal or settlement once we eliminated these remedies in two actions against German companies.
 - (a). In one, we prevailed in having the U.S. court apply German law, including its abhorrence of punitive or treble damages.
 - (b). In another, we successfully convinced the court to dismiss on grounds of forum non conveniens, sending the case to Germany as the alternative forum. The dispute soon evaporated.
 6. Amenability of parties to jurisdiction and service in the forum (discussed below)
 7. Availability of discovery
 - a. Must assess where witnesses and documents are located.
 - b. Consider what discovery is needed to prove up your case.

⁴ *Grupo Mexicano Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999).

- c. If foreign court situs, consider using 28 U.S.C. § 1782, which permits U.S. discovery in the district in which a person resides or is found in support of a foreign or international lawsuit.
 - i. NB- no requirement of reciprocity.
 - d. Also consider the Hague Evidence Convention. http://travel.state.gov/law/info/judicial/judicial_689.html
8. Potential cultural and language conflicts affect forum selection
- a. Preparing foreign business persons to be witnesses in U.S. proceedings is a challenge; takes sensitivity and time; sometimes better to bring or defend action in their home country.
 - i. In U.S. courts, you must prepare witnesses for confrontation; without a lot of preparation, foreign witnesses' responses are indirect or obfuscating; many, particularly Japanese business persons, have difficulties in answering questions with a simple yes or no.
 - b. Language
 - i. Consideration for location of action; if all documents and witnesses are in foreign language.
 - ii. Expensive and imprecise to translate.
 - (1). We finished a trial a few years ago where hundreds of exhibits were translated.
 - (a). Even with "official translator" there were disagreements.
 - (b). Ferreted out agreements and disagreements by issuing request for admissions.
 - (c). Where disagreements continued, required testimony by witnesses and translator regarding proper translation of critical terms.
 - (2). Agreed to procedure where both sides could object to the interpreter's contemporaneous translations during trial.
 - iii. Significantly increases costs and time estimates for depositions and trial.
 - iv. Sometimes puts litigator in difficult position of telling client (an executive of a large corporation) that his English is not good enough for court; because if he testifies in English, then he must answer cross-examination questions in English; sometimes could

be better to use an interpreter to ensure correct expressions and give witness more time to consider answers.

9. Representation of governments, governmental agencies or instrumentalities
 - a. Special considerations under the Foreign Sovereign Immunities Act; defines whether entity is immune; if not, proper location for jurisdiction, manner of service of process and scope of permissible claims.

C. Draft Hague Convention on Exclusive Choice of Court Agreements

1. The Hague Conference on Private International Law will convene a diplomatic conference in June 2005 to conclude negotiation of a draft Hague Convention on Exclusive Choice of Court Agreements.
2. The aim of the draft Convention is to facilitate the recognition and enforcement of civil and commercial judgments that are based on an exclusive choice of court agreement (forum selection agreement). The premise of the Convention is that if an exclusive choice of court agreement is valid in accordance with the law of the chosen forum, the resulting judgment given by the chosen court should be recognized and enforced in any contracting party to the Hague Convention.

III. **Jurisdiction and Service of Process: Establishing Entitlement to or Challenging A Chosen Forum**

A. General

1. Next, we will review the means of establishing and challenging the forum chosen to hear the dispute, including issues of proper service of process and personal jurisdiction; each of these provide fertile ground for creative defensive maneuvers when representing foreign defendants.

B. Goal

1. To enhance the likelihood of successfully enforcing a judgment, a plaintiff will try to initiate suit where the defendant's assets are located. Establishing jurisdiction, and fighting jurisdiction, over foreign entities is a creative preliminary battle which, in some cases, becomes a case within a case.
2. If a plaintiff does not bring suit in a forum with the assets to secure enforcement of any judgment, then a foreign defendant also has the option of taking a default judgment and waiting to wage battle during the subsequent action brought in its home courts seeking enforcement. If the plaintiff did not follow the law of defendant's home country, then the plaintiff may have difficulty in prevailing in the enforcement action.

C. Jurisdiction

1. As they do with domestic parties, U.S. courts must possess both subject matter and in personam jurisdiction over a foreign defendant.⁵ The plaintiff has the burden of proving that personal jurisdiction exists.
2. Assertions of jurisdiction must be based upon statutory authority (often the state long-arm statute or Federal Rules of Civil Procedure (“FRCP”)) and must be consistent with the due process clause of U.S. Constitution.⁶
 - a. Generally, there are two types of long-arm statutes: those that list certain activities that will subject a defendant to jurisdiction; and others that authorize jurisdiction to the fullest extent permitted under the Constitution.⁷
3. U.S. concepts of jurisdiction broadly include concepts of general jurisdiction, which are such “continuous and systematic” contacts with a forum such that an entity would be amenable to all claims in the forum; and those based upon “specific” jurisdiction, where the entity is amenable only to claims that specifically arise out of the defendant’s contacts with the forum.⁸
 - a. Foreign countries object to our concept of “General Jurisdiction,” which may be asserted on basis of nationality, domiciliary, residence, incorporation or registration to do business, waiver or consent, continuous and systematic activities, or transitory or tag jurisdiction based upon personal service of defendant in the forum.
 - b. To meet due process standards articulated in *International Shoe* and its progeny,⁹ specific jurisdiction requires that the defendant have sufficient minimum contacts with the forum such that maintenance of a suit would not “offend traditional notions of fair play and substantial justice.”
 - i. Recent cases suggest that the defendant must have “purposely availed” itself of the protections and benefits of the forum.¹⁰

⁵ See *Omni Capital Int’l, Ltd. v. Rudolph Wolff & Co.*, 484 U.S. 97, 103-04 (1987) (discussing the source of the subject matter jurisdiction requirement (Article III of the Constitution) and of the personal jurisdiction requirement (the Due Process Clause)).

⁶ See *id.* at 103-04.

⁷ Compare TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997) (listing specific acts that subject a defendant to personal jurisdiction in Texas) with LA. REV. STAT. ANN. § 13:3201(B) (West 2004) (listing a few examples of activities subjecting a defendant to personal jurisdiction in Louisiana, but then stating that “a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States”).

⁸ See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-15 & n.9 (1984); *Religious Tech. Ctr. v. Liebreich*, 339 F.3d 369, 374-75 (5th Cir. 2003).

⁹ See *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹⁰ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

- ii. Merely placing products in “stream of commerce” generally is not sufficient; there must be additional, intentional conduct directed at the forum.¹¹ But the threshold is very low—placing products into a targeted market through an established distribution chain is sufficient or designing, advertising, or marketing product through a distributor or sales agent is generally enough minimum contacts.
- c. Key Issues to watch here:
 - i. Plaintiffs try to assert jurisdiction over foreign parent companies by virtue of activities of subsidiaries in the U.S. forum and claim jurisdiction based upon alleged alter-ego relationship between parent company and subsidiary.¹²
 - (1). Standards for piercing veil are less stringent for purposes of jurisdiction than for establishing liability.
 - (2). However, mere ownership of a U.S. subsidiary should not be sufficient to make a foreign parent company amenable to jurisdiction.
 - (a). A few years ago, we fended off a retaliatory lawsuit in Virginia courts initiated by a former president of an American subsidiary of one of Mexico’s largest food companies; after we had sued the president on behalf of the U.S. subsidiary; he sued the Mexican parent company and directors.
 - (b). We successfully had the suit dismissed on grounds of lack of jurisdiction and ineffective service.
 - (c). Maintaining a winning defense to this assertion of jurisdiction requires vigilant protection of corporate formalities of U.S. subsidiaries to prevent U.S. court liability of foreign parent.
 - ii. Plaintiffs also try to assert jurisdiction over foreign parent based upon presence of sales representatives or distributors in the U.S. forum; jurisdiction is then claimed based upon alleged agency relationship.
 - (1). Foreign companies must be careful to ensure that sales representatives are expressly not empowered to be agents or accept service of process for the parent; if the

¹¹ *Asahi Metal Indus. Co. v. Sup. Ct. of Calif., Solano County*, 480 U.S. 102 (1987).

¹² See *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154 (5th Cir. 1983).

principal has knowledge and consents to the agent's actions and has sufficient control over them (*e.g.*, by making pricing decisions), then the agent/sales representative could create jurisdiction in the U.S. on behalf of parent.

- iii. Two hot areas in jurisdiction:
 - (1). Using conspiracy as a basis for jurisdiction based upon allegations that the defendant participated in a RICO conspiracy and by taking “a substantial act” in furtherance of the conspiracy in the forum.¹³
 - (2). Websites—two tests:
 - (a). *Zippo Manufacturing* test, which looks at the “sliding scale” of how interactive a website is with respect to residents in a forum.¹⁴
 - (b). More recent cases modifying *Zippo* scale and reviewing the amount of sales generated in the state by or through the website and the number of times website is accessed by residents of the forum.¹⁵

D. Service of process

- 1. Proper service of process is necessary to establish jurisdiction.
- 2. If you have any questions or want further insight, we can refer you to an article written in 1990 describing service strategies, albeit before the 1993 amendments, which clarified Rule 4 as it relates to service on foreign entities.¹⁶
- 3. What you need to know:
 - a. The sanctions set forth in FRCP 4 to encourage waiver of service do not apply to foreign defendants; therefore, they have no obligation to waive; in fact, waiver could be deemed ineffective service in an enforcement action in the foreign country.
 - b. The Supreme Court case of *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988) held that for the 52 signatory countries

¹³ See, *e.g.*, *In re Vitamins Antitrust Litig.*, 120 F.Supp.2d 58 (D.D.C. 2000) (holding that the defendant's prior plea of guilty to a Sherman Act violation was not sufficient to establish personal jurisdiction under the Illinois long-arm statute).

¹⁴ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 92 F.Supp. 1119 (W.D. Pa. 1997).

¹⁵ *Dagesse v. Plant Hotel*, 113 F. Supp.2d 211 (D.N.H. 2000).

¹⁶ Kenneth B. Reisenfeld, *Service of United States Process Abroad: A Practical Guide to Service Under The Hague Service Convention and the Federal Rules of Civil Procedure*, 24 INT'L LAW. 55 (1990).

(currently 52), the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the “HSC”) was mandatory “on all occasions where process must be transmitted abroad.” In that case, service was proper within the state of Illinois under its long-arm statute on an alter ego subsidiary; therefore, the HSC did not apply. Also, it would not apply if substituted service was made on the Secretary of State in accordance with state law AND service is deemed effective UPON RECEIPT of the Secretary of State. HSC would apply if the alter ego and agent tests are not satisfied or if the state long arm itself REQUIRES the secretary to transmit the service to the foreign entity for the substituted service to be effective.

- i. We have been successful in challenging mail service on the secretary of state in Florida where the secretary mailed the service to a German company without complying with the HSC.
- c. Challenging improper service can be an effective weapon to slow down a plaintiff AND to protect your right to later challenge any judgment in an enforcement proceeding abroad. A service defense strategy is particularly effective (a) if the defendant hails from a country that is not a party to the HSC, thereby requiring the plaintiff to attempt to serve using letters rogatory or pursuant to the laws of the receiving country to be effective, or (b) if the defendant hails from one of the countries that is a HSC signatory, but which has lodged a reservation prohibiting service by mail or by process server (Rule 10(a) and 10(b)) or requiring translation of all papers to be served.
- i. Germany is a good example of a country with such restrictions. At least 18 of the 52 HSC countries expressly disallow mail service and at least 2 others, Japan and Mexico, disallow it through vague reservations or declarations. These features slow down an unwitting plaintiff and raise the cost of going forward.
 - ii. Japan is an interesting case because its reservation is silent; but it submitted a Declaration to the Hague Conference, which essentially said that mail service would not be deemed valid. U.S. courts have split on this issue.¹⁷ Bottom line: You need to be careful and NOT use mail service to Japan, unless you have researched what circuit you are in.
 - iii. As of June 2000, Mexico is now a signatory to the HSC, but it is still ineffective for enforcement in Mexico if service is performed by mail or by process server. If you want to be able to enforce a judgment in Mexico, the only proper method of service is by letters rogatory.

¹⁷ Compare *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989) (service by mail in Japan is not effective under the Hague Convention) with *Ackerman v. Levine*, 788 F.2d 830, 839 (2d Cir. 1986) (service by mail is effective under the Hague Convention).

-
- iv. Canada—A relatively recent case concluded that personal service upon a Canadian corporation’s officer at the business address of the corporation satisfied the HSC because Canada has not lodged a reservation prohibiting service by process server.¹⁸
 - d. If you are serving a foreign party in a country that is a signatory to the HSC, first review its reservations, then if not prohibited, serve by mail, and through the country’s Central Authority.
 - e. If you are serving in a country that is not a signatory to the HSC, we recommend that you try to use the Inter-American Convention on Letters Rogatory for the OAS country members, and simultaneously try mail service. Also, check with local counsel to find methods consistent with the receiving country’s laws.
 - f. INTERESTING ISSUES: Some states have somewhat surprising and anomalous laws and rules regarding service of process. Be aware of any aberrations from the norm that might affect your litigation. For example, if an ultimate judgment will be enforceable in Texas, there is less bang for your buck in challenging service in Texas.
 - i. FRCP 4(h) provides that you can serve statutory agents for foreign corporations as defined under state law.
 - ii. In Texas, you can generally rely upon the Texas long-arm statute, and serve the Secretary of State as the statutory agent for the foreign company.¹⁹
 - iii. Here is the UNIQUE Part. If a foreign party enters a special appearance to move to quash service, then under TRCP 122, the defendant is deemed to have entered a general appearance and it is then obligated to answer as though it had been served in the state on the date of the court’s order.²⁰
 - (1). We suspect that this provision is susceptible to a due process challenge. Nonetheless, if enforcement can be accomplished against assets in the U.S., then it does not pay to challenge service of process in Texas, even if defective.
 - (2). If you need to enforce abroad, DO NOT rely upon constructive service on the Secretary of state.

¹⁸ *Dimensional Communications, Inc. v. Oz Optics Ltd.*, 218 F.Supp.2d 653, 657 (D.N.J. 2002).

¹⁹ See TEX. CIV. PRAC. & REM. CODE ANN. § 17.004 (Vernon 1997).

²⁰ *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 202 (Tex. 1985).

IV. Forum Shifting Strategies: Forum Non Conveniens, Parallel Proceedings, and Anti-Suit Injunctions

A. General

1. Assuming that there may be several potential fora that could be used to resolve a dispute, we will look at “forum shifting strategies,” including principles of forum non conveniens, parallel proceedings, and antisuit injunctions.
2. Even if jurisdiction and service on a foreign defendant are proper, you can undertake strategies to select or avoid a particular forum like the U.S.

B. Forum Non Conveniens (FNC)

1. This doctrine presupposes that there are 2 or more fora in which the defendant is amenable to process.
2. Although there is a strong presumption in favor of the plaintiff’s choice of forum, particularly if the plaintiff is a domiciliary of the forum, a court has broad discretion to dismiss an action in favor of another available forum if a two-prong test is satisfied:

a. First, the defendant must establish that there is an alternative “adequate” forum.

i. It is not essential that the alternative forum provide the same causes of actions or remedies.²¹

(1). We succeeded in dismissing a case in favor of Germany where the plaintiff was not entitled to punitive and treble damages, but where all the actions complained of occurred.

ii. It is not essential that the alternative forum provide the same procedural protections, like trial by jury or broad discovery.²²

(1). But India, with a 25-year backlog, was not considered an adequate alternative forum.²³

iii. Political unrest and lack of safety may be grounds to prove that the foreign courts are not adequate (*e.g.*, Nigeria, Croatia, Iran).

b. Second, the defendant must show the balance of public interest and private factors favor the alternative forum.

²¹ *Piper Aircraft Co. v. Hartzell Propeller, Inc.*, 454 U.S. 235, 254 (1981).

²² *Id.* at 251-52 & n.18.

²³ *Bhatnagar v. Surrendra Overseas, Ltd.*, 52 F.3d 1220, 1227 (3d Cir. 1995).

3. Courts have begun to provide conditional dismissals, which condition a FNC dismissal on—
 - a. Waiver of any statute of limitations.
 - b. Parties’ consent to jurisdiction in foreign forum.
 - c. Availability of witnesses and documents.
 - d. Even agreement by foreign defendant to pay any judgment rendered by the foreign court.²⁴
- C. Parallel proceedings in foreign country
1. Even if you have filed a motion to dismiss for FNC, you should also consider commencing a parallel proceeding in a more hospitable foreign forum. A defendant can seek a negative declaration of no liability.
 - a. Benefits of commencing such a parallel proceeding:
 - i. Race to judgment; if you get the first judgment, you can seek *res judicata* or collateral estoppel effect in first forum.
 - (1). Preclusion standards for international issues are similar to those for domestic issues, with 5 additional factors which are essentially similar to those consider for FNC.²⁵
 - ii. Puts pressure on plaintiff; now he needs to defend in two fronts.
 - iii. Permits opportunity to get discovery in second forum, and through use of 28 U.S.C. § 1782, can proceed with discovery in the U.S., too.
 - b. Negative consequences of commencing parallel proceeding:
 - i. Judge in U.S. action may not take it kindly, and may expedite schedule.
 2. Once the second proceeding is commenced, you can either move to stay or dismiss the first proceeding or seek an anti-suit injunction enjoining the parties in the first action from proceeding.

²⁴ *Perez & Compania (Cataluna), S.A. v. M.V. Mexico I*, 826 F.2d 1449, 1453 (5th Cir. 1987).

²⁵ See *Diorinou v. Mezitits*, 237 F.3d 133, 143 (2d Cir. 2001) (noting that the principles of international comity allow for a foreign judgment to have a preclusive effect); Robert C. Casad, *Issue Preclusion and Foreign Country Judgments; Whose Law?*, 70 IOWA L. REV. 53, 61 (1984) (noting that the policy bases for the recognition of foreign country judgments include the policies of: (1) economic and judicial resources; (2) fairness to private litigants; (3) fostering a desirable international order; (4) promoting acceptance abroad of domestic judgments; and (5) encouraging the initial selection of the most appropriate forum for litigation of the case).

- a. Motion to stay or dismiss on grounds of abstention and international comity
 - i. Court will review the same public interest and private factors as in an FNC analysis, with the additional factor of the temporal sequencing of the filing of the actions. This factor is not always given weight because the real issue is not which action was started first, but which action is likely to reach a judgment first.²⁶
- b. Anti-suit injunction
 - i. Made famous in Laker Airways battle with Sabena airways in 1994, when both the U.S. and British courts issued anti-suit injunctions against further actions in the other case. Stalemate.²⁷
 - ii. It is an injunction against someone subject to the court's jurisdiction enjoining the party from prosecuting the other lawsuit; it is enforced through the court's contempt powers.
 - iii. Threshold standards:
 - (1). Same parties.
 - (2). Resolution of second case would be dispositive of action to be enjoined.
 - iv. Circuit split on factors to be assessed.
 - (1). Restrictive, Comity Standard: a strict comity test based upon a respect for the actions of another court is adopted by 2nd, 3rd, 6th and DC Circuits.²⁸ This approach accords appreciably greater weight to considerations of international comity.
 - (a). Injunctions are rarely issued using this standard; this standard permits both courts proceed to judgment unless an injunction is necessary:
 - (i). To protect the court's jurisdiction.
 - (A). In Laker, the English High Court action was commenced for the primary purpose of

²⁶ *Cent. States, S.E. & S.W. Areas Pension Fund v. Paramount Liquor Co.*, 203 F.3d 442, 444-45 (7th Cir. 2000).

²⁷ *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

²⁸ *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 126 (3d Cir. 2002); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992); *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984).

enjoining the U.S. action; the U.S. court, therefore, had to protect its jurisdiction.

- (ii). To protect evasion of important public policies.
- (2). Liberal, vexatiousness Standard: a more relaxed test that reviews many factors, the most important of which is the vexatiousness or oppressiveness of the non-U.S. litigation. This standard is applied by 5th, 7th, and 9th Circuits.²⁹
- (a). Fifth Circuit stated, “we decline to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action.”³⁰
 - (b). In *Kaepa*, the Japanese defendant had agreed to jurisdiction in Texas courts, had appeared, removed to federal court, and had engaged in extensive discovery before commencing a parallel action in Japan. The court was miffed with duplication of effort, and inconvenience, expense and vexation.
- (3). Totality of Circumstances Standard: The First Circuit has rejected the comity standard as too conservative and the vexatiousness standard as too liberal. Instead, it held that a court should examine the totality of the circumstances in deciding whether a particular case warrants the issuance of an international antisuit injunction. “If, after giving due regard to the circumstances (including the salient interest in international comity), a court supportably finds that equitable considerations preponderate in favor of relief, it may issue an international antisuit injunction.”³¹

²⁹ *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996); *Philips Med. Sys., Int'l, B.V. v. Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993) (pronouncing itself inclined toward this view); *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 855-56 (9th Cir. 1981).

³⁰ *Kaepa, Inc.*, 76 F.3d at 627.

³¹ *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 19 (1st Cir. 2004).

V. Pros and Cons of Arbitration**A. General**

1. We now turn to the pros and cons of choosing arbitration over litigation in international disputes. In addition to the primary factors in forum evaluation detailed above, these factors should be taken into account when deciding whether to include an arbitration clause when negotiating a deal.
2. What follows is a review of some of the principal considerations that should be undertaken before deciding to arbitrate or include an arbitration clause when drafting a contract.

B. Factors favoring arbitration**1. Enforceability**

a. Unlike court judgments, arbitral awards are enforceable under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”).

b. Over 135 countries, including the U.S. in the Federal Arbitration Act (9 U.S.C. §§ 201-208), have acceded to the New York Convention. As long as the arbitration took place in a Convention country and enforcement is attempted in a Convention country, an obstructing defendant has only limited grounds to try to avoid enforcement.

i. Under Article V (as enforced by 9 U.S.C. § 207), recognition and enforcement may be refused only upon submission of proof that:

(1). Arbitration agreement is invalid.

(2). Defendant was not given proper notice.

(3). Award deals with disputes outside agreement to arbitrate.

(4). Composition of arbitral panel or arbitral procedure was not in accord with agreement to arbitrate.

(5). The award has not become binding or has been set aside or suspended.

ii. Award may also be denied enforcement if:

(1). Subject matter of dispute is not capable of settlement by arbitration under law of enforcing country.

(2). Award would be contrary to public policy of enforcing country.

-
- c. Key: appeals and awards may not be challenged on the merits.
2. Selection of arbitral panel
 - a. Pro: Being able to select the panel is a major benefit, particularly if there is a concern with getting a specialized panel; another benefit is the ability to choose a Party-Appointed arbitrator who shares common characteristics with your client, but remains neutral, independent and maximally influential over Chair of the Panel.
 - b. Con: Most well respected arbitrators are very busy and cannot commit to long hearings; therefore, schedule gets attenuated. Also, the selection process can slow commencement of the case on the merits.
 3. Confidentiality
 - a. Unless put under seal, court actions are, by their nature, public.
 - b. By contrast, arbitrations are thought to be private, but inherent limits on the confidentiality of the proceeding have often been misunderstood. In arbitrations that involve a state party, there is a move towards greater transparency. It is becoming more common for awards, and often even the arbitration itself, to be made public (this is particularly true of NAFTA arbitrations).
 - c. With the exception of the World Intellectual Property Organization (“WIPO”) rules, none of the other arbitral institutions have rules ensuring that the award and information presented to a panel will be kept confidential by all parties. Institutions and arbitrators are duty bound not to disclose. But parties and witnesses are not prevented from releasing information, unless the arbitration clause or the panel adopts specific rules dealing with confidentiality. This is a drafting issue; you should include a confidentiality clause in your arbitration clause. Nonetheless, by contrast to court proceedings, this is an advantage for arbitration.
 4. Flexibility
 - a. Parties can control the nature of the proceeding, including, for example, the extent to which discovery should occur. Most arbitrations with civil law arbitrators will be governed by the IBA Rules on the Taking Evidence in International Commercial Arbitration, which generally permits document discovery of specific and material requests, but precludes depositions.
 - b. Parties in the panel can generally control the extent of expert testimony and may not require discovery of the underlying factual basis for the testimony.

-
5. Cost
 - a. Arbitrations are generally thought to be faster and cheaper, but large cases often have an extraordinary amount of pre-trial discovery, albeit less than court litigation due to general abhorrence of most foreign arbitrators to fishing expeditions and depositions.
 - i. Nonetheless, arbitrations may be more costly if the parties and panel cannot agree to bifurcate and permit hearings devoted to summary judgment. Such hearings are not expressly provided for under many constitutional rules.
 - b. Also, parties must pay the high cost of renting facilities and hiring judges. Costs can be especially large if the parties select high priced arbitrators and International Chamber of Commerce (“ICC”) administration.
 - c. Still: slight advantage for arbitration.
 6. Interim measures
 - a. Particularly for IP disputes, concerns are raised whether the arbitral panel will vigorously protect against unauthorized releases of IP, such as trademarks. Answer: Parties should expressly provide for injunctive relief in the arbitration agreement. But even if the agreement contains no such provision, the parties generally can go to court before the panel is empowered. Thereafter, arbitrators will have the inherent power to enjoin, although they may be slower to do so. IP companies are just now coming around to adding arbitration clauses in tech contracts. It will take time for WIPO to gain confidence in the community.
 7. Speed/Finality
 - a. Large three-arbitral-panel arbitrations using well known arbitrators often will take as long or longer to proceed than court cases in quick dockets, like the rocket docket of Northern Virginia.
 - b. Sometimes there are considerable delays in forming the panel and dealing with initial challenges.
 - c. Major savings in speed is obtained, however, by eliminating appeals and potential remands, which are normal part of the litigation process.
 8. Moderate results
 - a. Jury trials and punitive damages can richly reward a successful plaintiff. Arbitration awards are more likely to be moderated even though, unless expressly limited by the parties, arbitral panels are empowered to award punitive damages. ANOTHER drafting issue for corporate lawyers.

- b. Panels tend to consider all claims, defenses, and claims for setoff no matter how frivolous. In the U.S., such claims can be deleted through motions to dismiss and motions for summary judgment. Although no major international arbitral institution expressly provides for summary judgment, they can be requested by parties. The request is more likely in large cases than in small cases, which means that parties can put on proof on frivolous claims, and get some set-offs as a result.
 - c. Split the baby is a risk.
9. Mistakes
- a. Some large companies do not want to sacrifice the right to correct mistakes in an appeal. Therefore, they will not submit large commercial disputes to binding arbitration.

VI. Recognition and Enforcement of Judgments and Arbitration Awards in Specific Countries

A. Recognition and Enforcement of Judgments

1. General

- a. This part of the paper discusses the procedures and prospects for recognition and enforcement of a U.S. judgment in Indonesia, China, Japan, Korea, and Singapore.
- b. *Recognition* of a U.S. judgment by a foreign jurisdiction means the acknowledgement by a foreign court that the U.S. judgment qualifies for legal effect in that country, while a foreign court's *enforcement* of a U.S. judgment is the act of carrying out the mandate prescribed by the U.S. judgment.
- c. Whether or not a foreign judgment will be recognized and enforced in a particular jurisdiction, while often a statutory matter, also is largely a question of the foreign jurisdiction's public policy.

2. Indonesia

- a. Indonesian courts do not enforce the judgments of foreign courts. Specifically, Section 436(1) of the Code of Civil Procedure provides that "except as provided in Article 724 of the Commercial Code and in other legislation, judgments rendered by foreign courts may not be executed in Indonesia."³² The Code of Civil Procedure further provides that such cases may be commenced, retried and decided in an Indonesian court.³³ Article 724 refers to Indonesian Maritime law, and there is no "other legislation" governing the enforcement of foreign judgments.³⁴

³² Anef T. Surowidjojo, *Indonesia*, 2 ENFORCEMENT OF MONEY JUDGMENTS IDO-3, IDO-4 (Juris. 2003).

³³ *Id.*

³⁴ *Id.*

- b. Commentary by Indonesian Supreme Court judges indicates that enforcement of a foreign judgment could only occur in Indonesia pursuant to a bilateral treaty on enforcement with the jurisdiction that issued the judgment; to date, however, no such bilateral treaty with any foreign country exists.³⁵
- c. As a result, a judgment creditor would have to initiate and litigate a new proceeding in the appropriate Indonesian court. Furthermore, to the best of our knowledge, there are no reported cases involving efforts to enforce a U.S. money judgment in an Indonesian court.
- d. Even if a statutory basis for the recognition and enforcement of a foreign judgment did exist in Indonesia, the Indonesian courts, nevertheless, could refuse to recognize and enforce a U.S. judgment against the judgment debtor on public policy grounds. For example, if the judgment debtor is a company with significant business operations and employees in Indonesia, the continuation of such a company as viable Indonesian businesses could be a significant issue for the Government of Indonesia due to its role in the Indonesian economy. Thus, the satisfaction of a U.S. judgment against the judgment debtor could be viewed by the Indonesian courts as detrimental to the debtor and in turn, Indonesia.

3. China

- a. In order to enforce a U.S. judgment, the Chinese Civil Code requires that a party seeking recognition and enforcement of a foreign judgment re-initiate the lawsuit at a competent Chinese Court if there is no bilateral treaty with China for the mutual enforcement of foreign judgments, no multilateral treaty to which both China and the foreign jurisdiction are parties, or if the foreign country does not satisfy the Chinese requirement for reciprocity.³⁶
- b. China has not entered into any treaties with the United States, or any other country, on mutual recognition and enforcement.³⁷ Moreover, China apparently has never acknowledged the existence of a reciprocity relationship with any foreign country.³⁸ We have not located any definitive sources demonstrating success by a U.S. entity attempting to enforce a U.S. money judgment in China.
- c. Therefore, it probably would be necessary for a judgment creditor to file a new lawsuit in China in order to attempt to have a U.S. judgment recognized and enforced by a Chinese court. Moreover, like Indonesian

³⁵ *Id.* at IDO-5.

³⁶ Jingzhnl Tao, *People's Republic of China*, 1 INT'L EXECUTION AGAINST JUDGMENT DEBTORS CHI-1, CHI-5 (Oceana 2002) (citing the Supreme People's Court's Opinions Regarding Several Questions on the Implementation of Civil Procedure Law, adopted by the Judicial Committee of the Supreme People's Court at the 528th Meeting on July 14, 1992).

³⁷ *Id.* at CHI-1.

³⁸ *Id.* at CHI-6.

courts, Chinese courts might find public policy grounds to deny Chinese enforcement against the judgment debtor even if the proper legislative bases and judicial precedent existed with respect to the treatment of foreign judgments.

4. Japan and Korea

- a. The possibility of successfully proceeding against a judgment debtor in Japan and Korea based upon a U.S. judgment is more favorable than in Indonesia and China.
- b. Article 203 of the Korean Code of Civil Procedure dealing with the recognition and enforcement of foreign judgments was modeled after Article 118 of the Japanese Code of Civil Procedure counterpart, and the language contained in each is very similar. Therefore, because many of the principles for recognition and enforcement of foreign judgments are very similar in Japan and Korea, we will discuss these two countries jointly in this section, highlighting any areas where differences may exist.
- c. Only final and conclusive foreign judgments will be recognized in Japan and Korea. Although the phrase “final and conclusive” is not defined by statute, one Korean court has stated that a foreign judgment will be considered final if there exists no possibility of further appeal pursuant to a normal appeal procedure under the laws of the country rendering the judgment.³⁹ A U.S. judgment creditor would have the burden of proving that under the applicable U.S. law all appeals had been exhausted or that the periods for appeal had passed.
- d. In addition, all four of the following requirements of the applicable civil code must be met for a judgment to be recognized and deemed enforceable in Japan or Korea:
 - i. Jurisdiction: jurisdiction of the U.S. court cannot be inconsistent with Japanese or Korean laws, regulations or treaty, as the case may be.
 - ii. Service of Process: proper service was made or the defendant had responded to the lawsuit without being served.
 - (1). Consult the service requirements of the foreign jurisdiction and comply with these requirements as well in order to prevent any contention that service was improper.

³⁹ Doo-Sik Kim, *Korea*, 2 INT’L EXECUTION AGAINST JUDGMENT DEBTORS KOR-1, KOR-6 (Oceana 2001) (citing Seoul East District, Case Number 93 KAHAB 19069, February 10, 1995).

-
- (2). Both Japan and Korea are parties to the HSC. Thus, as long as the judgment debtor is properly served according to the requirements of the HSC, there should be no grounds for contesting service.
- iii. Public Policy: the foreign judgment does not violate the “good morals and social order” of Japan or Korea, as the case may be.
- (1). In Korea and Japan, as elsewhere, defining what constitutes the good morals and social order is left to the discretion of the courts. Judges are given wide, but not indiscriminate, latitude. However, in the case of Japan, commentators indicate that public policy issues should not be considered by the courts in cases involving contract money judgments.
- iv. Reciprocity: the applicable U.S. court would accord reciprocity with respect to enforcement of comparable judgments by Japanese or Korean courts, as the case may be.
- (1). In determining whether or not the reciprocity requirement of the applicable civil code has been met, the Japanese or Korean court likely would look to whether U.S. courts generally recognize and enforce Japanese or Korean judgments, rather than trying to determine whether a similar judgment by their court would be recognized in the U.S.
- (2). If the judgment debtor were to contest enforcement of the judgment based on lack of reciprocity, the judgment creditor would need to establish that reciprocity between the two countries in question exists by way of lawyers’ affidavits, foreign court decisions, and other evidence. Raising this challenge, therefore, would shift the burden of proof to the judgment creditor, which might provide a tactical advantage to the debtor.
- (3). While the doctrine of reciprocity may not be applied uniformly due to its discretionary nature, the trend in Japan and Korea is plainly in favor of reciprocity with U.S. courts. For instance, in 1994, the Tokyo District Court held that the requirements for recognition of foreign judgments under the New York Code of Civil Procedure were “not materially different” from those set forth in Article 200 of the Code of Civil Procedure. Also, the Korean Supreme Court affirmed a finding of the Seoul High Court that New York and Korea have reciprocity, based on the fact that New York courts had recognized a Korean judgment without reviewing its merits.

- (4). A Korean lower court in 1995 found that reciprocity existed between Korea and California due to California's adoption of the Uniform Foreign Monetary Judgments Recognition Act (the "UFMJRA"), which, according to the court, satisfied the reciprocity requirement under the Code. Likewise, Japanese courts have found reciprocity with courts of the District of Columbia and California based upon the adoption of the UFMJRA in these jurisdictions. The UFMJRA, as adopted in New York, does not contain a reciprocity requirement. This is in contrast to Georgia, where reciprocity is a mandatory condition of recognition and enforcement, and Texas, where reciprocity is discretionary. The absence of a reciprocity requirement in a given state's UFMJRA increases the likelihood that a court in that state would recognize Japanese and Korean judgments and hence that Japanese and Korean courts would conclude that their respective reciprocity requirements have been satisfied.
- (5). Additionally, reciprocity among nations is often established by treaty obligations. Under the *Treaty of Friendship, Commerce and Navigation* (the "FCN Treaty") between the U.S. and Japan and between the U.S. and Korea,⁴⁰ each country affords the other's companies, national treatment and most favored nation treatment with respect to access to the courts. Finally, the doctrine of comity among nations or "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protections of its laws,"⁴¹ provides a common law basis for supporting reciprocity between countries in the recognition and enforcement of foreign judgments. Nevertheless, the principle of comity, while widely recognized in the U.S., has been applied somewhat inconsistently by U.S. courts in recognizing the judicial acts of foreign courts.
- e. Enforcement: The enforcement of a U.S. judgment in Japan and Korea is based on their respective legislation. A district court in Japan or Korea having general jurisdiction over the debtor would have jurisdiction to render the enforcement judgment. In doing so, the district court is not permitted to review the merits of the case; however, a lawsuit requesting an enforcement judgment would be dismissed if (i) the judgment were not final, or (ii) the judgment did not fulfill each of the conditions under

⁴⁰ *Treaty of Friendship, Commerce and Navigation*, Nov. 7, 1957, U.S.-Japan-Korea, 8 U.S.T. 2217.

⁴¹ *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139 (1895).

the respective Code of Civil Procedure, discussed above. An enforcement judgment may be appealed pursuant to the normal appeal procedures set forth in the Code. Once an enforcement judgment is obtained, execution can commence only after an enforcement statement is issued by a court official.

5. Singapore

- a. Pursuant to statute, Singapore courts automatically afford reciprocal treatment to judgments obtained in the supreme courts of the United Kingdom, as well as several other “British Commonwealth” countries where the Singapore government has determined that reciprocity of enforcement would be afforded Singapore judgments.⁴² Unfortunately, our sources indicate that there have been no recent, recorded attempts to recognize or enforce a foreign judgment from the United States or from any country outside of the “British Commonwealth.”⁴³ As such, it is not possible to predict whether a Singapore court might be willing to extend enforcement rights to a U.S. money judgment.

B. Recognition and Enforcement of Arbitration Awards

1. General

- a. The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), is the most significant multilateral treaty on the enforcement of international arbitral awards. The New York Convention has been ratified by 135 countries. Indonesia, China, the United States, Japan, Korea and Singapore, all are signatories, or contracting states, to the New York Convention.
- b. The New York Convention requires domestic courts in contracting states to recognize written arbitration agreements and to refuse to allow a dispute to be litigated when it is subject to a written arbitration agreement. It also requires domestic courts in contracting states to recognize and enforce foreign arbitral awards in a manner that is no more onerous than that applied to domestic arbitration awards.
- c. Thus, the New York Convention remits the parties to the domestic laws of the country of enforcement. As a result, if domestic arbitration awards are difficult to enforce, the New York Convention does not make the enforcement of foreign awards any easier.⁴⁴
- d. The New York Convention presumes the validity of the arbitral awards and places the burden of proving invalidity on the person opposing

⁴² Choon Chiaw Loo, *Singapore*, 3 INT’L EXECUTION AGAINST JUDGMENT DEBTORS SIN-1, SIN-8 (Oceana, 2002).

⁴³ Eugene Lim and Chin Sing Ping, *Singapore*, 3 ENFORCEMENT OF MONEY JUDGMENTS SIN-1, SIN-3 (Juris. 2004).

⁴⁴ Ramona Martinez, *Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: the “Refusal” Provisions*, 24 INT’L LAW. 487, 496 (1990).

enforcement. Also, pursuant to the New York Convention, awards need not be confirmed in the courts of the jurisdiction where the award was obtained before enforcement is sought abroad.⁴⁵

- e. Courts are divided on whether a United States district court can confirm and enforce a foreign arbitral award under the New York Convention by exercising *quasi in rem* jurisdiction over the arbitral debtor's assets in the forum even if the court does not have personal jurisdiction over the debtor.
 - i. Under *Shaffer v. Heitner*, 433 U.S. 186 (1977), personal jurisdiction is required to obtain a judgment, but not to confirm or enforce the judgment against the debtor's property.
 - ii. Several federal courts recently have held that a foreign arbitral award that is enforceable under the New York Convention is the equivalent of a judgment for purposes of *Shaffer*, and therefore jurisdiction to confirm the award may be based on a non-resident debtor's property in the jurisdiction. See *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002); *Italtrade Int'l USA, L.L.C. v. Sri Lanka Cement Corp.*, No. 00-2458, 2002 WL 59399 (E.D. La. Jan. 15, 2002); *CME Media Enters. B.V. v. Zelezny*, No. 01-Civ.-1733(DC), 2001 WL 1035138 (S.D.N.Y. Sept. 10, 2001).
 - iii. The Fourth Circuit has concluded, in contrast, that personal jurisdiction over the arbitral award debtor is required in every case. See *Base Metal Trading, Ltd. v. OJSC Novokuznetsky Aluminum Factory*, 283 F.3d 208, 213 (4th Cir.), *cert. denied*, 71 U.S.L.W. 3022 (2002).
- f. Article V(2)(b) of the New York Convention allows a contracting state to refuse recognition and enforcement of a foreign arbitral award if doing so would be "contrary to the public policy of that country." As discussed below, some of the applicable countries interpret this public policy defense more liberally than others.

2. Indonesia

- a. The enforcement record of Indonesian courts, overall, has not been favorable toward foreign arbitral awards. In 1984, the Indonesian Supreme Court refused to enforce a London arbitral award, asserting that while Indonesia was a contracting state under the New York Convention, Indonesian regulations implementing the New York Convention had not yet been promulgated and thus the arbitral award could not be enforced. Although such regulations were later promulgated and became effective in 1990, Indonesian courts have found other grounds to refuse enforcement. For example, soon after passage of the regulations, the Indonesian Supreme Court invoked public policy grounds in refusing to

⁴⁵ Gary Born, *INT'L COM. ARB. IN THE U. S.* 465 (Kluwer 1994).

enforce a London arbitral award against an Indonesian private person who imported sugar, based on a finding that sugar imports can only be conducted by the Indonesian government.⁴⁶ Although our research shows that at least three Indonesian enforcement orders have been issued since 1990, commentators caution that enforcement of foreign arbitral awards in Indonesia is difficult and time consuming.⁴⁷

- b. The Indonesian Supreme Court again interfered with an attempted enforcement of an arbitration award in the Himpurna and Patuha cases. Himpurna and Patuha, subsidiaries of the American company Mid-American Holdings, won awards in international arbitration proceedings against an Indonesian state electricity corporation. When the state electricity company failed to pay, Himpurna and Patuha commenced further arbitral proceedings against the Government of Indonesia to enforce the government's guarantee of the state electricity company's obligations. The Indonesia Supreme Court, in turn, issued an injunction ordering the suspension of the arbitration proceedings. The arbitral panel, ignoring the injunctions, went on to find that the actions of the Indonesian Supreme Court constituted a denial of justice and a violation of international law. The Arbitral Tribunal issued an award against the Government of Indonesia, but Indonesia never paid the award.⁴⁸

3. China

- a. To date, few enforcement attempts regarding foreign arbitral awards have been made in China. Two cases have been reported where enforcement was refused on grounds of defects in the arbitral proceeding.⁴⁹ Additionally, in 1993, Revpower Company Limited, a U.S. company, applied to a Shanghai court for recognition and enforcement of a \$4.9 million Stockholm Chamber of Commerce arbitral award against a Shanghai company. The Shanghai court refused to acknowledge receipt of the case, and only in 1996 after the U.S. government intervened on behalf of the U.S. company did the Shanghai court enforce the arbitral award.⁵⁰

4. United States

⁴⁶ Sudargo Gautama, *Indonesia*, 2 INT'L COM. ARB. IN THE U.S. IND-1, IND-32 (1998) (citing Case no.1205K/Pdt/1990 Supreme Court Decision of 14 December 1991, *E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto*).

⁴⁷ *Id.* at IND-33.

⁴⁸ *Himpurna California Energy Ltd. v. Indonesia, Interim Award of 26 September 1999 and Final Award of 16 October 1999*, 15 Mealey's Arbitration Report (February 2000) pp. A-1 – A-20 and B-1 – B-20, International Council for Commercial Arbitration, 27 Y.B. OF COM. ARB. 1, 11-432 (Kluwer 2000).

⁴⁹ Tang Houzhi and Wang Shengcshang, *People's Republic of China*, 1 INT'L HANDBOOK OF COM. ARB. CHI-1, CHI-37 (Kluwer 1998).

⁵⁰ Jingzhnl Tao, *People's Republic of China*, 1 INT'L EXECUTION AGAINST JUDGMENT DEBTORS CHI-1, CHI-25-26 (Oceana 2004).

- a. Courts in the United States pursue a consistent, well articulated policy of recognizing and enforcing foreign arbitral awards; in fact, arbitral proceedings are recognized and enforced by U.S. courts more readily than are foreign judgments.⁵¹ U.S. courts are bound by the Federal Arbitration Act, which affirms U.S. policy favoring enforcement of arbitration agreements and confirmation of arbitration awards. While United States courts have invoked public policy concerns, from time to time, to deny enforcement of a foreign arbitral awards, most U.S. courts have construed the public policy defense narrowly.⁵²
5. Japan
 - a. Japanese courts have a strong record of enforcing foreign arbitral awards under the New York Convention, and Japanese courts have been enforcing foreign arbitral awards since 1983.⁵³ With respect to arbitral awards granted in favor of U.S. companies, in 1987 a Japanese court enforced the award of an American Arbitration Association tribunal sitting in Hawaii, in favor of a U.S. company.⁵⁴ This case, as well as two other reported cases, were upheld pursuant to the Friendship, Commerce, and Navigation Treaty between Japan and the United States.⁵⁵ More recently, a Japanese court upheld an arbitral award granted by the China International Economic and Trade Arbitration Commission against a Japanese company, dismissing all arguments by the Japanese company that alleged procedural irregularities during the arbitral proceeding were a violation of Japanese public policy.⁵⁶ Also, there are no reported cases of a foreign arbitral award being denied by Japanese courts on grounds that the award is contrary to Japanese public policy.⁵⁷
 6. Korea
 - a. In December 1999, Korea revised its Arbitration Law to allow for the enforcement of foreign arbitral awards. Although we found no reported enforcement cases since enactment of the new Arbitration Law, legal specialists in Korea appear confident that Korean courts would abide by the spirit of the New York Convention in granting the recognition and enforcement of foreign arbitral awards “in so favorable a manner that foreign practitioners need probably not concern [themselves] about the

⁵¹ McLaughlin, Joseph, *Enforcement of Arbitral Awards under the New York Convention: Practice in U.S. Courts*, INT’L COM. ARB. at 275, 277 (1988).

⁵² R. Doak Bishop and Elaine Martin, *Enforcement of Foreign Arbitral Awards*, at 32-36.

⁵³ Doi Terou, *Japan*, 2 INT’L EXECUTION AGAINST JUDGMENT DEBTORS JPN-1, JPN-27 (Oceana 2004) (citing *Texaco Overseas Tankship Ltd. v. Okada Kaiun K.K.*, (Osaka District Court, 22 April 1983)).

⁵⁴ Doi Terou, *Japan*, 2 INT’L EXECUTION AGAINST JUDGMENT DEBTORS JPN-1, JPN-23 (Oceana 2004) (citing *Koori Webb USA, Inc. v. K.K. Ito Tekkoshu*, (Nagoya District Court, Ichinomiya Branch, 26 February 1987)).

⁵⁵ Doi Terou, *Japan*, 2 INT’L EXECUTION AGAINST JUDGMENT DEBTORS JPN-1, JPN-29 (Oceana 2004).

⁵⁶ 27 Y.B. OF COM. ARB. 1, 515-16 (Kluwer 2000).

⁵⁷ Terou, Doi, *Japan*, 2 INTERNATIONAL EXECUTION AGAINST JUDGMENT DEBTORS JPN-1, JPN-40 (Oceana 2004).

enforceability of arbitral awards in Korea.”⁵⁸ On the issue of refusing enforcement of a foreign arbitral award on public policy grounds, precedent indicates that Korean courts are reluctant to refuse enforcement except in extreme cases. For example, in 1995, the Korean Supreme Court upheld an arbitral award that applied Dutch law to the applicable statute of limitations, even though such statute of limitations contravened Korean domestic law.⁵⁹ Also, the Seoul Civil Court has stated that public policy grounds for vacating awards should be confined to violation of the Nation’s constitutional order or fundamental economic regulations.⁶⁰ Likewise, Korean courts have been loathe to dismiss foreign arbitral awards on procedural grounds. In upholding a foreign arbitral award contested on grounds of lack of proper notice of the arbitral proceeding, the Korean Supreme Court stated that a foreign arbitral award should be overturned on procedural grounds only if the party contesting the award was seriously deprived of an opportunity to defend itself in arbitral proceedings.⁶¹

7. Singapore

- a. Our research establishes that as of December 1994, more than 30 foreign arbitral awards had been enforced by Singapore courts, and also as of such date, there was no reported case where a Singapore court had refused to enforce a New York Convention award.⁶² Although few reported cases since 1994 are available, it appears that the Singapore courts’ general policy of supporting the enforcement of foreign arbitral awards has continued to the present. For example, in March 2002, the Singapore Court of Appeals denied a complainant’s claim that an Indonesian arbitral award had violated the UNCITRAL Mode Law on Arbitration, and enforced the Indonesian arbitral award.⁶³

⁵⁸ Chang, Moonchul, *New Korean Arbitration Legal Regime*, <http://user.chollian.net/~mcchang/commentary.htm>; see also, Dong-Hee, Suh, *Issues Related to Enforcement of Foreign Arbitral Awards in Korea: Honoring International Standards*, http://www.kcab.or.kr/kcaben/publication/P_News_vol8_1.htm.

⁵⁹ Chang, Moonchul, *Arbitration in Korea*, pages 5-6, <http://user.chollian.net/~mcchang/arbinkorea.htm>.

⁶⁰ *Id.*

⁶¹ *Id.* at 6.

⁶² Michael Hwang, Lawrence Boo and Amy Lai, *Singapore*, 4 INTERNATIONAL HANDBOOK OF COMMERCIAL ARBITRATION SIN-1, SIN-42 (Kluwer 2003).

⁶³ Freshfields Bruckhaus Deringer, *Asian Arbitration Briefing*, at 2-3 (July 2002).

VII. Impact Of Insolvency Proceedings On Remedies Strategy—Section 304 and the New Chapter 15 of the U.S. Bankruptcy Code

A. Overview

1. This section of the paper briefly addresses (a) how an insolvency proceeding in a foreign country involving the judgment debtor would affect the judgment creditor's collection efforts "Over There" and here at home, and (b) how the judgment creditor might be able to employ insolvency systems (primarily in the United States) to aid in collection efforts.

B. Insolvency Proceeding "Over There"

1. Get some help

- a. If your judgment debtor is at the end of its financial rope, you may face the unpleasant prospect of a foreign insolvency filing. Most countries have some type of insolvency system, and most of those systems provide for some type of stay against collection efforts.
- b. If you have not already done so, retain local counsel to help you file a claim and determine whether your judgment is merely a document suitable for framing, or instead whether it gives you a leg up on other creditors.

2. Japan

- a. Japan has three primary plenary insolvency proceedings: (a) bankruptcy, which is roughly equivalent to a U.S. Chapter 7 liquidation; (b) civil rehabilitation under the Civil Rehabilitation Law, which is roughly equivalent to a Chapter 11 in that it allows the debtor, as a debtor-in-possession, to reorganize its affairs; and (c) corporate reorganization under the Corporate Reorganization Law, which is similar to a civil rehabilitation, except that a trustee, not the debtor, takes control of the business reorganization. Civil Rehabilitation was originally designed for small to medium-sized businesses, but is now frequently used by large corporations. Corporate reorganization is available only to Japanese corporations.

3. China

- a. China has a bankruptcy system. The Enterprise Law of the People's Republic of China was adopted in 1986 by the Sixth National People's Congress. The statute is divided into six chapters, similar in nature to the different chapters of the U.S. Bankruptcy Code, governing the bankruptcy of enterprises. Voluntary and involuntary cases are permitted, with court approval. A bankruptcy estate is created by the filing of the petition, and creditors must file their claims within a specified time thereafter. The statute also contains provisions for

prioritized distributions and fraudulent conveyances. All bankruptcies begin as liquidations, but a two-year suspension may be requested for the enterprise to reorganize. China's current bankruptcy law is largely untested.

4. Korea

- a. The Korean insolvency regime is similar in many respects to the Japanese insolvency regime. The three primary insolvency laws include Bankruptcy (similar to a U.S. Chapter 7 or a Japanese bankruptcy), Composition (similar to a Japanese civil rehabilitation), and corporate reorganization (similar to a Japanese corporate reorganization). Foreign creditors are to be treated equally with domestic creditors provided that the law of the jurisdiction of the foreign creditor likewise treats Korean creditors equally.

5. Indonesia

- a. Indonesia has an amended Bankruptcy Law⁶⁴ that became effective on August 20, 1998. The Bankruptcy Law provides for two types of insolvency proceedings: Bankruptcy (Title 1 of the Bankruptcy Law), which is roughly equivalent to a U.S. Chapter 7 Liquidation; and Suspension of Payments (Title 2 of the Bankruptcy Law), which is roughly equivalent to a U.S. Chapter 11 Reorganization.
- b. Both a Bankruptcy and a Suspension of Payments share certain characteristics, including (a) a bankruptcy estate, which includes the debtor's assets available for the payment of creditors' claims; (b) a stay on creditors' rights to seize assets for certain periods during the Bankruptcy (90 days maximum) or Suspension of Payments (270 days maximum); (c) rights of secured creditors to receive adequate protection (e.g., cash payments, replacement liens) during the stay or to seek relief from the stay; (d) equal treatment (at least by the terms of the statute) of unsecured creditors, whether foreign or domestic, who share in recoveries pro rata; (e) rights of setoff; (f) preferred treatment for secured creditors and certain priority creditors; (g) meetings of creditors and possible formation of creditors' committees; (h) rules with respect to foreign collection efforts outside Indonesia; (i) avoidance powers to recover certain avoidable transfers; (j) estimation, allowance, and disallowance of claims; and (k) provisions for the rejection of certain executory contracts and unexpired leases.
- c. As discussed below, these characteristics would be important to U.S. bankruptcy court when determining whether to recognize and enforce an Indonesian insolvency proceeding.

⁶⁴ Most of the references to the Indonesian Bankruptcy Law cited herein were taken from JERRY HOFF, *INDONESIAN BANKRUPTCY LAW* (Indonesian Law and Practice Series: 2, Gregory J. Churchill ed., 1st ed. 1999), which includes a complete unofficial English translation of the Bankruptcy Law.

- d. As a practical matter, the Indonesian bankruptcy system is notoriously inefficient.
- C. Section 304 ancillary proceeding at home
- 1. General
 - a. If an insolvency proceeding were commenced by the judgment debtor in a foreign country, the representative of the debtor’s bankruptcy or insolvency estate might commence parallel insolvency proceedings in the United States to protect assets in the United States from ambitious creditors.
 - b. The representative of the debtor’s estate likely would file a limited § 304 ancillary proceeding (or after the effective date of recent bankruptcy legislation, described below, a Chapter 15 proceeding) to aid the primary foreign insolvency proceeding, but a plenary U.S. bankruptcy proceeding would not be out of the question.
 - c. Section 304 of the Bankruptcy Code enables a trustee, administrator, or other representative of an estate in a foreign proceeding to commence a limited ancillary action, as opposed to a plenary bankruptcy proceeding, in the United States in order to administer assets located in the U.S. and to prevent lawsuits and seizure assets by creditors in the United States.⁶⁵

⁶⁵ Section 304 provides as follows:

- (a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.
- (b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may–
 - (1) enjoin the commencement or continuation of–
 - (A) any action against–
 - (i) a debtor with respect to property involved in such foreign proceeding; or
 - (ii) such property; or
 - (B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
 - (2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
 - (3) order other appropriate relief.
- (c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with–
 - (1) just treatment of all holders of claims against or interests in such estate;

2. Eligibility
 - a. Most types of foreign bankruptcy or insolvency proceedings would qualify as a “foreign proceeding” under § 304.⁶⁶
3. Recognition
 - a. In determining whether to recognize a foreign proceeding under § 304, a U.S. bankruptcy court will consider several factors, including the following:
 - i. just treatment of all holders of claims against or interests in the foreign estate;
 - ii. protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
 - iii. prevention of preferential or fraudulent dispositions of property of such estate;
 - iv. distribution of proceeds of such estate substantially in accordance with the order prescribed by the Bankruptcy Code;
 - v. comity; and
 - vi. if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.⁶⁷
 - b. Thus a U.S. bankruptcy court, in determining whether to grant § 304 relief to a judgment debtor’s foreign representative, would not give categorical deference to the foreign proceeding on comity grounds. Rather, deference would be withheld where appropriate to avoid the

- (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of such estate;
- (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
- (5) comity; and
- (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 304.

⁶⁶ An out-of-court restructuring, on the other hand, would probably not qualify as a “foreign proceeding” because of the lack of judicial or administrative supervision. *See In re Tam*, 170 B.R. 838, 843-46 (Bankr. S.D.N.Y. 1994) (concluding that a liquidation of a Cayman Island corporation was not a “foreign proceeding” under § 304 because the liquidator operated free of supervision from the Cayman Island courts and regulatory agencies and virtually without creditor participation).

⁶⁷ 11 U.S.C. § 304(c).

violation of the laws, public policies, or rights of the citizens of the United States.⁶⁸ Note that reciprocity is not a requirement—that is, U.S. bankruptcy courts may recognize a foreign proceeding under § 304 even though courts of the foreign proceeding may refuse to recognize U.S. bankruptcy proceedings.

4. Section 304 powers

- a. If a U.S. bankruptcy court were to recognize a foreign proceeding under § 304, the court could enter relief that aids the foreign proceeding. The court may enjoin action against the debtor and its property; prevent the enforcement of any judgment against the debtor; prohibit any attempts to create or enforce a lien against the debtor; order turnover of the property of the debtor, or the proceeds of such property, to the foreign representative of the debtor’s estate; or order other appropriate relief.⁶⁹
- b. Section 304 is a limited proceeding, designed to function in aid of a foreign proceeding. Despite the limited nature of § 304, a U.S. bankruptcy court may grant broad relief.⁷⁰ In one case,⁷¹ for example, the debtor was undergoing Dutch liquidation proceedings when one of its creditors filed suit in Texas against the debtor’s nonbankrupt, wholly-owned subsidiary, seeking to recover on its claim through various alter ego and reverse veil-piercing theories. The debtor filed a § 304 petition, requesting injunctive relief to prevent the creditor from pursuing the claims against the subsidiary. On appeal, the court of appeals determined that the bankruptcy court should have enjoined the lawsuit because § 304 permits relief against actions seeking to recover property merely “involved in” the foreign bankruptcy. The debtor’s stock ownership in the subsidiary was a sufficient nexus to the foreign proceeding to warrant § 304 relief. Because the stock of the subsidiary was “involved in” the debtor parent’s Dutch liquidation proceeding, and because the injunction was otherwise appropriate under § 304(c), the court reversed and remanded for entry of a judgment permanently enjoining the alter ego and reverse veil-piercing suit. The relief granted with respect to property “involved in” the foreign proceeding was thus very broad.
- c. Under the reasoning of the *Schimmelpenninck* court, therefore, the foreign representative of the debtor’s bankruptcy estate could seek to enjoin a judgment creditor from pursuing collection activities against the debtor’s non-bankrupt subsidiaries with operations in the United States.

⁶⁸ *Hilton* 16 S.Ct. at 143.

⁶⁹ See 11 U.S.C. § 304(b).

⁷⁰ See *In re Board of Dirs. of Hopewell Int’l Ins. Ltd.*, 272 B.R. 396, 411-12 (Bankr. S.D.N.Y. 2002) (noting that a court in a § 304 proceeding is free to mold relief in “near blank check fashion”).

⁷¹ *Schimmelpenninck v. Byrne (In re Schimmelpenninck)*, 183 F.3d 347 (5th Cir. 1999).

D. Chapter 15 Ancillary Proceeding

1. The United Nations Commission on International Trade Law (“UNCITRAL”) adopted the Model Law on Cross-Border Insolvency at its annual meeting in May 1997. Application of the Model Law to cross-border insolvencies would produce these results: (1) creditors, regardless of nationality, will receive equal, nondiscriminatory treatment; (2) courts and representatives of insolvent estates will cooperate and communicate with each other to coordinate the administration of insolvent estates and the conduct of concurrent insolvency proceedings involving a common debtor; and (3) administrators of insolvent estates will have access to foreign courts to protect the assets of the debtor or the interest of creditors.
2. The National Bankruptcy Review Commission of the United States unanimously recommended that the United States adopt the Model Law into the Bankruptcy Code. The President recently signed legislation enacting Chapter 15 as part of the Bankruptcy Abuse and Consumer Protection Act of 2005 (also known as S. 256).
3. An important section of Chapter 15 will be § 1515. Section 1515 details the process for having a foreign proceeding recognized in the United States. The Bankruptcy Abuse and Consumer Protection Act of 2005 deletes § 304 from the Bankruptcy Code. Section 304 is replaced most directly by § 1515, but the new chapter as a whole will provide a much more detailed roadmap for dealing with foreign insolvency issues.

E. Plenary bankruptcy proceeding

1. Voluntary
 - a. If an insolvency proceeding were commenced by or against the judgment debtor in the foreign country, the representative of the debtor’s estate, in lieu of filing a more limited § 304 proceeding, may be able to file a plenary (non-ancillary) bankruptcy proceeding in the United States.
 - b. Section 109 of the Bankruptcy Code defines who may be a debtor under the various chapters of the Bankruptcy Code. Section 109(a) provides that a person may be a debtor under the Bankruptcy Code if the person “resides or has a domicile, a place of business, or property in the United States”⁷² A “person” is defined generally as an individual, partnership, or corporation.⁷³ Foreign corporations are therefore generally eligible for relief under the Bankruptcy Code.
 - c. To qualify for relief under a Chapter 11 reorganization, a debtor must have a domicile, place of business, or property in the United States. Because foreign companies are not incorporated in the United States, they would not have a domicile in the United States. The case law

⁷² 11 U.S.C. § 109(a).

⁷³ 11 U.S.C. § 101(41).

indicates that some courts, which take a broad view of “property,” might conclude that a foreign debtor’s stock in a U.S. company as sufficient to qualify the foreign debtor for relief under Chapter 11.⁷⁴ Bank accounts in the United States would constitute property.⁷⁵ One court has even concluded that a bankruptcy retainer paid by a foreign debtor to its U.S. counsel is sufficient “property” in the United States to qualify the foreign debtor for relief under Chapter 11.⁷⁶ It can be argued that the existence of accounts receivable in the United States would also provide the basis for Chapter 11 jurisdiction.

2. Involuntary

- a. It might be strategically advantageous for a judgment creditor to commence an involuntary bankruptcy proceeding in the United States against a debtor and/or one or more of its subsidiaries. For example, if assets were removed from the debtor by its controlling parties, these assets may be recovered under the avoidance provisions of the Bankruptcy Code.
- b. In addition, in certain circumstances, a bankruptcy proceeding in the United States would require the debtor to address its financial difficulties and provide structure for further negotiations with creditors. Conceivably, creditors could file a plan of reorganization for the debtor even if such a plan is opposed by the management of the debtor. It should be noted that once initiated, dismissal of an involuntary proceeding requires approval by the court after notice to creditors. If, in response to an involuntary case in the United States, the debtor file a parallel proceeding in a foreign country, the U.S. court may be required to determine what substantive avoidance law to apply.
- c. Following are the requirements for a successful involuntary filing in the United States:
 - i. Debtor Eligibility Requirements. The general eligibility requirements for a corporate debtor are identical for voluntary and involuntary cases (domicile, place of business, or property in the U.S.). Therefore, a judgment creditor would have to establish that the debtor has a domicile, place of business, or

⁷⁴ See *In re San Antonio Land & Irrigation Co.*, 228 F. 984, 990 (S.D.N.Y. 1916) (concluding in dicta that a Canadian debtor corporation's stock in a wholly-owned subsidiary, which was pledged to a New York trust company, its interim bond certificates for another wholly owned subsidiary, which were pledged to the same New York trust company, and its balance of \$8.06 in an account at the trust company, were all “property” in New York within the meaning of the Bankruptcy Act, predecessor to the Bankruptcy Code).

⁷⁵ See *In re Iglesias*, 226 B.R. 721, 723 (Bankr. S.D. Fla. 1998) (holding that a Chapter 7 Argentine debtor's bank account at a local Florida bank was property in Florida under § 109 and not at the residence of the depositor, Argentina); *In re McTague*, 198 B.R. 428, 431-33 (Bankr. W.D.N.Y. 1996) (concluding that a U.S. citizen that had resided in Canada for eleven years was eligible for Chapter 7 relief in New York on the basis that she had \$194 in a bank account in New York).

⁷⁶ See *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 39 (Bankr. D. Del. 2000).

property in the United States. In addition, for an involuntary case, the petitioning party must prove that the debtor is generally not paying its debts as they become due.⁷⁷ If, at the time of the involuntary filing, the debtor is paying pursuant to a workout agreement with most of its creditors, a U.S. bankruptcy court might conclude that the debtor is generally paying its debts as they become due. If, on the other hand, the debtor has not reached agreement with its creditors or is in default under a restructuring agreement, a U.S. court would likely conclude that the debtor is not generally paying its debts as they become due.

ii. Petitioning Party Requirements. If a corporate debtor has twelve or more creditors, an involuntary petition may be filed by “three or more entities” with noncontingent unsecured claims aggregating \$12,300, which claims are not subject to a bona fide dispute.⁷⁸

(1). The “three or more entities” language should be compared to other language in the Bankruptcy Code that focuses not on the number of creditors, but instead on the number of claims held by a creditor. For example, a class of claims in a Chapter 11 case may accept a plan of reorganization if creditors “that hold at least two-thirds in amount and more than one-half in number of allowed claims” vote to accept the plan.⁷⁹ The evident purpose in requiring at least three creditors with three claims (unless the debtor has less than a dozen creditors)⁸⁰ is to require at least some joint effort to launch an involuntary proceeding. Case law suggests that a judgment creditor would not be able to assign its three claims to three different affiliates for the purposes of satisfying the three-creditor rule. Therefore, the creditor probably would have to convince two other unsecured creditors to join in filing the involuntary petition.

d. Even if the debtor is eligible for an involuntary filing, the bankruptcy court can abstain from exercising jurisdiction or dismiss the Chapter 11 case pursuant to § 305 of the Bankruptcy Code if the interests of creditors and the debtor would be better served by such dismissal or if there is a foreign proceeding pending and the § 304 factors warrant dismissal or suspension. Support from a broad range of creditors for

⁷⁷ See 11 U.S.C. § 303(h).

⁷⁸ 11 U.S.C. § 303(b)(1).

⁷⁹ 11 U.S.C. § 1126(c).

⁸⁰ See *In re Mid-America Indus.*, 236 B.R. 640, 644 (Bankr. N.D. Ill. 1999) (“Thus, given the number of creditors herein [more than 12], § 303 requires *not only* that there be three creditors, but that each of the three creditors hold a separate claim.”) (emphasis added).

retention of the case will increase the chances that the court would not abstain or dismiss the proceeding.

F. Request for comity in commercial courts

1. If an insolvency proceeding were commenced by or against the judgment debtor in a foreign country, the representative of the debtor's estate, in lieu of filing a § 304 proceeding or a full-fledged bankruptcy, could simply request that commercial courts in the United States, on comity grounds, abstain from collection lawsuits against the debtor's assets or subsidiaries in the United States. Given the benefits and protections available under § 304, however, we think it is unlikely that the foreign representative of a debtors' estates would forego a § 304 filing.

1337453_10.DOC