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Should We File It Here or There? Venue Options in Cross-Border Cases

Hosted by the International and Young & New Members Committees

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CONCURRENT SESSION

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1. Chapter 15 Basic Definitions

a. A "**foreign proceeding**" means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation. 11 U.S.C. § 101(23)

   i. Courts use a seven-part test to interpret § 101(23): These elements are (i) the existence of a proceeding; (ii) that is either judicial or administrative in nature; (iii) that is collective in nature; (iv) in a foreign country; (v) authorized or conducted under a law related to insolvency or the adjustment of debts; (vi) in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and (vii) which proceeding is for the purpose of reorganization or liquidation.

b. "**Foreign representative**" is defined in section 101(24) of the Bankruptcy Code as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding."

   i. This definition of foreign representative does not require that the individual be appointed by a foreign court or other judicial body. Instead, it is sufficient that the foreign representative be authorized to act "in the context" of a foreign bankruptcy proceeding, such as by resolution of the debtor's board of directors authorizing the

representative to commence foreign bankruptcy proceedings on the debtor's behalf.

c. "**Debtor**": Subsection 1502 states: "For the purposes of this chapter, the term—"debtor" means an entity that is the subject of a foreign proceeding."

d. "**Establishment**": Subsection 1502(2) defines "establishment" as "any place of operations where the debtor carries out a nontransitory economic activity." Its purpose is to limit foreign nonmain proceedings that may be recognized to those pending in a country where the debtor has a place of business.

e. "**Foreign Main Proceeding**": Subsection 1502(4) defines "foreign main proceeding" as "a foreign proceeding pending in the country where the debtor has the center of its main interests."11Link to the text of the note While "center of main interests" is not defined, section 1516(c) contains a presumption that, in the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is the center of its main interests.

   i. Several courts have applied a list of "factors," originally articulated in *In re SphinX, Ltd.*, 2006 Bankr. LEXIS 2078 (Bankr. S.D.N.Y. Sept. 6, 2008, to the determination of COMI: "the location of the debtor's headquarters; the location of those who actually manage the debtor (which conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes."

f. "**Foreign Nonmain Proceeding**": Subsection 1502(5) defines "foreign nonmain proceeding" as "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment." A foreign proceeding premised only on the presence of assets in the foreign country is not eligible for recognition and can have no extraterritorial effect.

2. **Corporate Restructuring & Insolvency in Non-U.S. Jurisdictions**

a. United Kingdom: Governed by the Insolvency Act of 1986 and the Insolvency Rules 2016 (effective April 6, 2017), plus the Companies Act 2006 and the Company Directors' Disqualification Act 18

   i. Administration – a company may go into administration only if it is insolvent or likely to become insolvent (unless a QFCH commences the administration)

1. In-court: Creditor(s) of the company, the company itself, or its directors may apply for a court order for a company to go into administration

2. Out-of-court: Either a company or its directors, a party with a floating charge (e.g., a bank or other commercial lender knows as a "qualifying floating charge holder" or "QFCH") may put a company into administration by filing with the court a notice of appointment and certain supporting documents

3. Jurisdiction: Which companies may enter into administration?

    a. Companies registered in the UK under the Companies Act 2006

    b. Companies incorporated in a state within the European Economic Area ("EEA")

    c. Companies incorporated outside the EEA but having its center of main interests in a state within the EEA

    d. Companies requested to enter into administration (under section 426(4) of the IA 1986) by the court of a relevant country or territory in which the company is incorporated

ii. Scheme of Arrangement

1. Commencement:

    a. A company may commence a scheme of arrangement by filing with the Companies Court a claim form, witness statement and evidence in support of its application for first court hearing

    b. Before the convening hearing, the company must file the "Court Bundle" and "Skeleton Argument," including expert reports, near final draft Explanatory statement, and Scheme Document must be filed with the court

2. Convening Hearing: the court holds a hearing to convene scheme meetings and review creditor classes

    a. Creditor Meetings

b. Update the Court Bundle and file Skeleton Argument for Sanction Hearing

3. Sanction Hearing: hearing to determine fairness of scheme

a. Scheme must be approved by at least 75% in value of each class of voting members or creditors

b. Immediately after the Sanction Hearing, all court orders must be filed with the Registrar to become legally effective

4. Jurisdiction: Which companies may enter into schemes of arrangement?

a. Companies that are liable to be wound up under the IA 1986 (§ 895(2), CA 2006)

b. Unregistered (including foreign companies) companies that may be wound up under the IA 1986 (§ 221)

c. English Court jurisdiction requires a "sufficient connection" to England and Wales

b. Singapore

i. Parliament introduced the Insolvency, Restructuring and Dissolution Bill ("Bill") on October 1, 2018, which Bill shall govern both personal and corporate restructuring and insolvency proceedings

1. Singapore (together with 42 other countries) recently adopted UNCITRAL Model Law on Cross-Border Insolvency as Singapore law: abolished favoring of local creditors in liquidation of registered foreign companies

2. Bill restricts enforcement of ipso facto clauses

ii. Schemes of Arrangement

1. Automatic stay on filing of a stay application (new feature)

2. Automatic stay includes a worldwide, in personam stay against a wide range of acts

3. Stay as to companies not undergoing schemes if related entity is going through a scheme of arrangement

4. Ability to cram down dissenting classes of creditors

5. pre-packaged, expedited schemes may be implemented with prior negotiations with creditors, but without a full meeting of creditors

iii. Judicial Management – distressed company that has a reasonable probability of rehabilitation, or of preserving all or part of its business, is granted a moratorium against all claims made by creditors for a requested period and placed under the management of a court-appointed officer; a company to be placed under judicial management by obtaining a resolution of its creditors, without the need to seek court approval for a judicial management order.

1. Companies must now demonstrate that they are 'likely to become' unable to pay their debts instead of 'will be' unable to pay their debts

2. Judicial management regime will be available to foreign companies with a sufficient connection to Singapore

3. introduction of an amendment to sanction any scheme proposed from more than 50% in number and more than or equal to 75% in value of creditors, as opposed to only 75% in value

4. introduction of a requirement for secured creditors which oppose an application to show that making a judicial management order will cause disproportionately greater prejudice to them than the prejudice caused to unsecured creditors if the judicial management order is not made

iv. Winding up Proceedings – courts will be specifically empowered to terminate a winding up in addition to staying winding-up proceedings

v. Company dissolution – early dissolution of a company where it is being wound up and the Official Receiver is the appointed liquidator

vi. Secured creditors of an insolvent company that is being wound up to realize their security within 12 months after the winding up's commencement, or such further period as the liquidator may determine, in order to be entitled to any interest in respect of their debt

c. Japan

i. In-court liquidation:

1. Pursuant to the "Bankruptcy Act" similar to chapter 7 of the U.S. Bankruptcy Code (court-appointed trustee involvement)

2. Special liquidation procedures under the "Companies Act" (no trustee appointed)

ii. In-court restructuring:

1. Civil Rehabilitation Act (usually involves a debtor-in-possession, entry of a preservation order and appointment of a supervisor, unsecured creditors' rights typically impaired)

2. Corporate Reorganization Act (intended for larger public companies, features entry of a provisional administrative order and appointment of a provisional administrator and court-appointed trustee)

3. Interesting features of in-court restructuring proceedings

a. No "automatic stay"

b. Corporate reorganization proceedings involve appointment of two trustees: legal trustee and business trustee (i.e., the debtor)

c. Avoidance powers: vested with court-appointed supervisor (civil rehabilitation proceedings)

d. Turnaround ADR

i. out-of-court debt adjustments

ii. requires unanimous consent by creditors

e. "Sponsors" in rehabilitation or reorganization proceedings

i. appointed by private arrangement or bidding

ii. legal disputes relative to sponsors typically involve pre-packaged sponsors, breakup fee issues, and first right of refusal

d. China

i. Enterprise Bankruptcy Law of the People's Republic of China

1. Effective as of June 1, 2007

2. Only involves "enterprise legal persons"; no "consumer bankruptcy" procedures for individual liquidation

ii. Restructuring/Reorganization

1. Insolvent corporate entities (other than partnerships) eligible to file a voluntary petition and wait for court to accept the bankruptcy application while continuing to operate

2. Administrator appointed upon granting of application for bankruptcy.

3. Creditors prevented from collection or other activity once application is accepted

4. Administrator classifies creditors who then have an opportunity to vote on reorganization plans, liquidation report, or proposed distribution of repayments

iii. Liquidation: value and distribute assets to creditors and shareholders

1. commenced by corporate debtor entity or creditors or converted from reorganization proceeding to liquidation proceeding

2. court-designated bankruptcy administrator supervises liquidation proceedings and controls the debtor's affairs

3. bankruptcy administrator drafts plan for disposal of debtor's assets and submits plan to creditors' meeting for discussion

iv. Reconciliation (Compromise Arrangement Intended for Smaller Enterprises)

1. Corporate debtor applies for compromise arrangement and renegotiates terms with creditors to create a reconciliation plan binding on all creditors once approved by creditors and court

2. Rare in practice

e. South Korea

i. Debtor Rehabilitation and Bankruptcy Act ("DRBA") enacted April 1, 2006

ii. First specialized bankruptcy and restructuring court established March 2017 to hear: rehabilitation cases, bankruptcy cases, individual rehabilitation cases; derivative cases from main proceedings, e.g., claims objections and avoidance actions

iii. Courts authorized to hear: rendering decisions regarding case commencement and conclusion; appointment/dismissal of administrators trustees and examiners; approval of rehabilitation plans; approval of asset sales/M&A-related approvals

iv. M&A activity under rehabilitation proceedings require court approval, but "Stalking Horse Bids" and modeled on US "363 Sales" method

3. **Update on recent important/noteworthy cases in which multi-national company has used chapter 11 and/or 15 to reorganize or liquidate.**

a. In re Avanti Communications Group PLC, 582 B.R. 603 (Bankr. S.D.N.Y. 2018).

i. *Issue.* Whether a U.S. bankruptcy court should recognize and enforce a foreign scheme of arrangement order that would bind non-voting impaired creditors to non-debtor third party releases?

ii. *Facts.* The debtor was a public company in the UK with over $1B in debt, $557MM of which was issued as notes (the "2023 Notes") pursuant to an Indenture (the "2023 Indenture"). Under a scheme of arrangement approved by a UK court, all of the debtor's obligations under the 2023 Notes were converted to equity in the debtor, and certain creditors (including the holders of the 2023 Notes) would release non-debtor third-party guarantors from any obligations arising in connection with the 2023 Notes and the 2023 Indenture. Creditors holding 98.3% of the 2023 Notes voted in favor of the scheme of arrangement, and none of the holders of the 2023 Notes voted against the scheme of arrangement. A foreign representative of the debtor sought recognition and enforcement of the UK scheme of arrangement.

iii. *Holding.* So long as the foreign scheme of arrangement provides creditors with a full and fair opportunity to be heard in a manner consistent with U.S. due process standards, principles of comity

permit a U.S. bankruptcy court to recognize and enforce foreign schemes of arrangement that provide for non-debtor third-party releases against non-voting impaired creditors.

iv. *Compare to* In re Vitro SAB de CV, *701 F.3d 1031 (5th Cir. 2012).* The Avanti court distinguished its ruling from the Fifth Circuit's holding in Vitro, which refused to enforce the order of a Mexican bankruptcy court that novated guarantee obligations of a debtor's non-debtor subsidiaries as violative of the considerations and safeguards of section 1507(b) where, among other issues, the plan provided for only one class of unsecured creditors, and the creditor votes necessary to approve the plan were achieved only by counting the votes of the non-debtor subsidiaries (i.e., insiders) whose guarantees were being released.

b. In re B.C.I. Fins. Pty Ltd. (In Liquidation), 583 B.R. 288 (Bankr. S.D.N.Y. 2018).

i. *Issue.* Whether either of the following constitutes "property in the United States" of a foreign debtor for purposes of § 109(a): (a) a $1,250 retainer deposited with a U.S. law firm after the commencement of a foreign main proceeding, where such deposit may have been part of a scheme to manufacture eligibility for relief under chapter 15; and (b) claims initiated in a foreign forum and governed by that forum's law against foreign defendants who moved to the US following commencement of the foreign main proceeding.

ii. *Facts.* Two prospective chapter 15 debtors were subject to ongoing liquidation proceedings in Australia in which the Australian liquidators brought successful claims for breach of duty against the debtors' former managers and directors. Following commencement of the Australian proceedings, two of the former managers who were found liable for breach of duty (the "Objecting Parties") moved from Australia to New York. The Australian liquidators filed a chapter 15 petition for recognition, and the Objecting Parties contested the petition on grounds that neither Australian debtor satisfied the debtor eligibility requirements of § 109(a). In response, the Australian liquidators argued that the debtors satisfied the "property in the United States" eligibility requirement of § 109(a) by virtue of two $1,250 retainers deposited with a U.S. law firm prior to the Chapter 15 petitions (but after commencement of the Australian proceedings) and/or because the claims against the Objecting Parties (the "Fiduciary Duty Claims") were located in the United States. The Objecting Parties asserted that the retainers were merely an attempt to manufacture eligibility

under § 109(a) and that the situs of the Fiduciary Duty Claims was Australia.

iii. *Holding.* Both the retainers and the Fiduciary Duty Claims constituted property that satisfied § 109(a). In regard to the retainers, the bankruptcy court observed that courts have routinely ruled that § 109(a) was satisfied with a minimal amount of property and that it would be contrary to the statute's plain meaning to impose a quantum requirement for "property" under § 109(a). The bankruptcy court also observed that whether property existed under § 109(a) did not include an inquiry into the circumstances surrounding the property, including the issue of manufactured eligibility for relief under Title 11. In regard to the Fiduciary Duty Claims, the bankruptcy court ruled that Australian substantive law applied to the issue of the claims' situs, and that, as with domestic law, a decision regarding foreign law may be made without absolute clarity as to the state of the foreign law. The bankruptcy court determined that Australian law looks to where the Fiduciary Duty Claims would be enforced and further found that the Fiduciary Duty Claims would be enforced in the United States where the Objecting Parties now resided. Also of note, the bankruptcy court acknowledged, but declined to rule on, the Liquidators' alternative argument that the Fiduciary Duty Claims' situs was in the United States because the bankruptcy court had both subject matter and personal jurisdiction.

c. CohnReznick LLP v. Foreign Representatives of Platinum Partners Value Arbitrage Fund L.P. (In re Platinum Partners Value Arbitrage Fund L.P., 2018 U.S. Dist. LEXIS 109684 (S.D.N.Y. June 29, 2018).

i. *Issue.* Whether a stay of discovery pending appeal is appropriate where a foreign debtor's representative seeks to use chapter 15 to engage in wide-ranging discovery permitted under the Bankruptcy Code but not under the laws applicable to the foreign main proceeding.

ii. *Facts.* Three Cayman-based hedge funds ("Funds") were placed into liquidation in the Cayman Islands in 2016, and certain of the liquidators were named as foreign representatives in subsequent Chapter 15 cases. The liquidators sought discovery on CohnReznick, which had provided audit services to the Funds in 2014 and 2015. CohnReznick objected to the subpoena and argued that the foreign representative's discovery rights were limited to what they would receive in their home forum and that an arbitration clause in its engagement agreement with the Funds precluded the foreign representatives from seeking pre-litigation discovery. The bankruptcy court entered an order compelling

CohnReznick to comply with the subpoena. CohnReznick appealed and moved for a stay of discovery pending appeal.

iii. *Holding.* A stay of discovery pending appeal was not appropriate because, among other considerations, CohnReznick was unlikely to succeed on its appeal. Even if CohnReznick had demonstrated that Cayman law prohibits the discovery sought by the liquidators' subpoena (the bankruptcy court noted that it had "not been provided with evidence sufficient to enable it to conclude that Cayman law prohibited the discovery sought in the Subpoena"), neither principles of comity nor foreign discovery weighed against granting the liquidators' motion to compel. Because Cayman courts are receptive to evidence obtained through U.S. discovery proceedings, comity weighs in favor of granting the motion.

d. In re Energy Coal S.P.A., 582 B.R. 619 (Bankr. D. Del. 2018).

i. *Issue.* Were the interests of certain US creditors of an Italian chapter 15 debtor sufficiently protected for the bankruptcy court to enter an order recognizing an Italian confirmed plan of reorganization that enjoined such creditors from seeking judgments against the debtor or its assets in the US where the choice-of-law and forum provisions in the creditors' contracts with the debtor deferred to Florida and disputes as to the nature of their claims would have to be litigated in the foreign forum?

ii. *Facts.* A chapter 15 debtor subject to insolvency proceedings in Italy sought recognition of a reorganization plan confirmed by the Italian court that would enjoin creditors from seeking judgments against the debtor or its assets in the United States. Certain US creditors (the "Objecting Creditors") objected to the recognition motion on grounds that the Italian plan treated their claims as unsecured instead of administrative and that the plan failed to account for their set-off rights while proposing a 7% recovery. The Objecting Creditors offered several reasons why they should not be subject to the requested injunction, and the foreign representative addressed some of the Objecting Creditors' concerns. Most notably, the foreign representative conceded that the Objecting Creditors could liquidate their claims in U.S. Courts and receive a determination as to priority in the Italian court (the "Litigation Concession"), and the foreign representative acknowledged that funds had been set aside in the event the Objecting Creditors were determined to have a priority claim. However, the Objecting Creditors still maintained that choice-of-law and forum selection provisions that deferred to Florida (the "Florida Provisions") required a ruling from a Florida court and

that it was unfair to require them to incur expenses litigating in the Italian proceeding.

iii. *Holding.* The bankruptcy court ruled that the Objecting Creditors could be subject to the injunction and remain sufficiently protected because the Litigation Concession alleviated comity-related concerns and the Florida Provisions did not override the comity afforded foreign main proceedings vis-à-vis distributions on claims. The bankruptcy court did, however, question whether an affirmative claim brought by the debtor against the Objecting Creditors (as opposed to the Objecting Creditors' claims that would be subject to the claims administration process) would be subject to the Florida Provisions in light of the Objecting Creditors' set-off and/or recoupment rights, which the bankruptcy court held were undisturbed by the confirmation order in the Italian proceeding and the order granting the Recognition Motion.

4. **Practical considerations for a multi-national company contemplating potential use of, and preparing for, a chapter 11 or chapter 15 to effectuate a reorganization or liquidation.**

a. Considerations of filing concurrent chapter 11 and 15 proceedings (ex. Schletter).

i. Schletter Facts. A foreign parent company ("Foreign Parent") controlled a multinational group of entities focused on the development and production of solar mounting systems, including an American subsidiary primarily located in North Carolina ("Schletter"). Prior to the initiation of its Chapter 15 proceedings, the Foreign Parent undertook a restructuring process that culminated in the filing of a German bankruptcy proceeding to facilitate a global asset sale of its assets and subsidiaries. During this process, Schletter experienced substantial financial stress stemming from production issues that strained its relationship with its two main secured creditors (the "Secured Creditors").

The Foreign Parent and Schletter respectively filed petitions under Chapter 15 and 11 of the Bankruptcy Code within days of each other in the Bankruptcy Court for the Western District of North Carolina. Each debtor made initial representations that the global sale contemplated in the German proceeding would encompass Schletter's assets and equity interests. However, the sale ultimately did not include Schletter's assets or equity interests, and Schletter elected to pursue sale options independent of the Foreign Parent. In the meantime, the Secured Creditors objected to the continued use of cash collateral and requested that the Chapter 11 case be converted to a Chapter 7. The unsecured creditors

committee (the "Committee") in the Chapter 11 initially opposed the continued use of cash collateral, but ultimately lent its support to procedures for the sale of substantially all of Schletter's assets which were approved by the bankruptcy court.

A significant issue in the case involved the Committee seeking to perform a Rule 2004 exam on the Foreign Parent in the Chapter 15 case (the "Rule 2004 Motion"), alleging that the Foreign Parent should provide information about the marketing of Schletter's assets in the German proceeding. The Committee also argued, in the alternative, that there was cause to grant relief from stay (to the extent the Chapter 15 stay applied) so that the Committee could serve a subpoena in the German proceeding. The Foreign Parent objected to the Rule 2004 Motion on grounds that: (i) the Committee could not compel discovery as to the Foreign Parent in the Chapter 15 case because the Foreign Parent's assets were largely being administered in the German proceeding, not the Chapter 15 case; (ii) the Committee lacked standing because it was not a party to the Chapter 15 case; and (iii) comity prevented the Committee from serving the contemplated subpoena in the German proceeding because the Committee would not be able to obtain the requested discovery under German law. Through a short order that provided little detail on its reasoning, the bankruptcy court denied the Committee's discovery requests except to the extent the Schletter had agreed to provide certain information.

Schletter was able to consummate the sale of substantially all of its assets, and it is currently in the process of pursuing an orderly wind down, including managing WARN Act litigation brought by former employees.

5. **Practical considerations for the liquidating officer (or other responsible fiduciary/party) of a multi-national company contemplating potential use of chapter 11 or chapter 15 to recover assets and maximize creditor recoveries.**

a. Key is to understand what business issues need addressed to restructure the business (if possible) and then to understand the different jurisdictions available and how that affects the overall strategy for the companies.

i. If management and the board truly want to affect an operational restructuring of the business (and get third party releases) – chapter 11 is probably going to be a necessary part of the solution. Most every other jurisdiction around the world, there's some form of monitor infused in to the process – potentially impeding a management and board driven process.

1. Cayman Islands (Joint Provisional Liquidators)

2. U.K. (Liquidators)

3. Canada (CCAA Monitor)

b. Legal entity structure – which companies go in?

i. Hardly ever are professionals dealing with just one company, but rather a corporate group. Which entities have to file? Which would be nice to file? Which entities should stay out?

c. Unique operational factors that need to be considered in order to preserve value.

i. How do you deal with business whereby the North American headquarters and back office is in the U.S. the supply chain is in Mexico, assembly in Canada and I.P. is located in Germany? Some non-traditional solutions may take priority to ensure operations are sustained and overall enterprise value is preserved. Understanding the knock-on effect of shutting one of these valuable pieces down will affect overall business and drive value up/down will be key.

ii. Offshore drillers in recent cases having to deal with some very complicated issues with debt being governed under different laws. Complicated legal tax structures and cash management issues.

d. Understanding personal liability issues for officers and directors for companies in different jurisdictions around the world and how that may affect different behaviors.

i. Potential personal liability or criminal liability in (examples U.K. and German).

ii. Applying the Delaware standard is not universal and should be understood outside the U.S.

iii. Other cultural issues for consideration as you may be explaining chapter 11 alternatives to foreign companies looking to exit certain investments or dispose of certain assets.

6. **Locating and Recovery Assets in Foreign Jurisdictions**

a. The United States is not a party to any treaties or conventions regarding the foreign recognition of judgments entered by the courts of the United States. Furthermore, the statutory schemes providing a more expedited process for the foreign recognition of U.S. judgments, namely in the British Virgin Islands, the Cayman Islands, and Bermuda, do not recognize judgments from the United States as eligible for that expedited process. Procedures available to holders of U.S. judgments in foreign

jurisdictions include both attachment and recognition of the U.S. judgment. Because judgments may be rendered either on the merits or by default, special considerations are to be taken regarding each.

7. **No Support from International Treaties or Agreements**

a. The United States is not a party to any treaties or conventions on the recognition of foreign judgments. Instead the judgments of courts in the United States are reviewed for recognition and enforcement in accordance with provisions of the laws of the foreign country where such recognition and enforcement are sought. Currently, the applicability of a treaty to the enforcement of a foreign money judgment remains the exception rather than the rule. These courts follow the rule that, in the absence of a treaty, a foreign nation's judgment will not be enforced unless local law requirements are clearly met.

8. **Enforceability Abroad of U.S. Judgments.**

a. Generally, judgments in which the foreign defendant has appeared in a United States court and defended on the merits will be recognized and enforced by foreign courts. The enforcement of judgments abroad often involves both the obtaining of an order of attachment to secure the ultimate award of judgment and the commencement of recognition proceedings. Greater scrutiny is given to judgments obtained by default, taking into account whether due process was provided to the defaulting defendant.

b. In the absence of a treaty, enforcement of a foreign judgment will be determined by reference to the foreign country's internal law. Typically, the foreign country will hold a hearing to determine whether the judgment meets the local law requirements for enforcement, generally including the following inquiry:

i. That the court of origin had jurisdiction over the judgment debtor;

ii. That the judgment debtor was properly notified of the commencement of the court of origin's proceedings;

iii. That enforcement of the judgment would not violate local public policy; and

iv. That the foreign judgment is a final judgment.

c. In some, but not all, foreign jurisdictions a court will explore additional issues including: (a) whether reciprocity exists with the country of origin, (b) whether a prior inconsistent judgment exists, and (c) whether the court of origin applied the correct law under a proper conflicts of law analysis.

Of these additional issues, the presence of reciprocity may be the most important.

d. In most cases the foreign court will not review the merits of the original action that gave rise to the judgment unless the judgment debtor alleges that the judgment was obtained by fraud or violates public policy of the foreign jurisdiction. However, nothing prevents the foreign court from examining the merits of the original action. And Weems suggests that courts appear to be doing so.

9. **Lack of Jurisdiction**

a. The lack of jurisdiction of the court of origin over the judgment debtor is perhaps the most noted reason for a foreign court's refusal to enforce a money judgment. Courts in different countries apply different tests of jurisdiction, including whether the local court would have had jurisdiction under the same facts or whether under standards of private international law. Furthermore, the court of origin's jurisdiction over the judgment debtor will not be recognized if that jurisdiction conflicts with the exclusive jurisdiction rules of the foreign country. For example, French courts have exclusive jurisdiction over cases involving French nationals, unless waived by the French national. Switzerland law in this regard is similar to French law. A number of other foreign courts have exclusive jurisdiction over land. However, contractual submission to jurisdiction (through forum selection clauses) or other evidence of a judgment debtor's intent to submit to jurisdiction, such as appearing and defending on the merits, will satisfy waiver of exclusive jurisdiction.

10. **Service of Process**

a. Service of process under the 1965 Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial matters is normally sufficient. But care must be taken with foreign countries who have requirements that differ or are in addition to compliance with the Hague Convention.

11. **Public Policy Considerations**

a. A number of public policy considerations may prevent foreign enforcement of a U.S. judgment including:

i. No enforcement if there exists no claim under local law;

ii. Misapplication of choice of law rules or application of wrong law, especially if the foreign court determines that its law and not that of the originated jurisdiction should have applied;

iii. Multiple damages judgments, i.e., double or treble damages are not generally allowed;

iv. Potential violations of local substantive law;

v. Pending cases between the parties and prior judgment issues;

vi. If the judgment is not "final" under the foreign jurisdiction's law of finality; and

vii. Statute of limitations issues related to the timing on bringing an enforcement of a foreign money judgment.

12. **Procedural Issues Regarding Enforcement**

a. A foreign money judgment that is otherwise enforceable under substantive law may also be hindered by procedural barriers to enforcement in the foreign jurisdiction. Such procedural issues include:

i. The foreign country may refuse to hear a case that solely involves a nonresident even if the nonresident judgment debtor has assets in the foreign country;

ii. The foreign country may require a government official or agency to approve or give an opinion on enforcement;

iii. An appeal from a non-enforcement may not be available to the losing party;

iv. Repatriation of funds from the foreign country may not be possible;

v. Potential losses from currency exchange rates;

vi. The potential for additional unforeseen hearings extending the collection time in the foreign country.

13. **Collection of US judgments in United Kingdom and its Overseas Territories**

a. In 2012, the English Supreme Court decided Rubin and another v. Eurofinance SA and Ors 2012 UKSC 46. Prior to Rubin, judgments entered in foreign insolvency proceedings (including United States' bankruptcy courts) were directly enforceable against defendants in the United Kingdom. In contrast, all other judgments entered by foreign courts were subject to predictable rules concerning if and whether they would be enforceable abroad.

b. Rubin held that judgment entered in foreign insolvency proceedings were not entitled to any different treatment from all other judgments. The enforceability of default judgments entered in insolvency proceedings are of particular importance post-Rubin. Because a default judgment occurs after a defendant has failed to appear in the insolvency proceeding, the enforcement of the default judgment must meet certain jurisdictional rules, namely the Dicey Rule, which states: "a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:

   i. First Case – If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.

   ii. Second Case – If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.

   iii. Third Case – If the person against whom the judgment was given submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.

   iv. Fourth Case – If the person against whom the judgment was given had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or the courts of that country.

c. As a result, it should be expected that a foreign defendant that is not present in the United States, who has not claimed or counterclaimed, who has not appeared to defend on the merits, and has not otherwise agreed to submit to the jurisdiction of the United States courts, would not be directly liable in the United Kingdom (and many other jurisdictions) for a United States judgment entered in either an insolvency proceeding or other proceeding. In order to remedy this problem, a separate proceeding would need to be commenced against the foreign defendant in a court that could exert either in personam jurisdiction over the foreign defendant or in rem jurisdiction over the foreign defendant's property and ultimately enter, on the merits, either an in personam or in rem judgment, as the case may be.