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Civil Disclosure and Freezing Orders: Recovering Property from Overseas

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I. Introduction[1]

The prevailing emphasis at this Symposium is on the use of treaties, the Hague Conventions on Taking Evidence or Service of Process,[2] letters rogatory, mutual legal assistance treatises, memoranda of understanding between nations and the forfeiture laws of the United States and other nations.

Frequently, in the context of the United States, foreign litigants, both governmental and private parties, overlook the far broader, more easily invoked and utilized *civil* rules of procedure and *civil* process. These civil rules are available to foreign litigants and tribunals through *direct* application and use.

No letters rogatory, no treaty provisions, no assistance from the U.S. government are required for "any interested person" to invoke these rules and to ask a U.S. federal court to appoint someone *chosen by the applicant* to conduct discovery of documents, take testimony from individuals, or prosecute an action for recovery of assets and property to satisfy foreign judgments.

Most important, a proceeding *need not* be "pending" in the foreign court. The only requirement is that the evidence gathered be for use in a foreign proceeding that is imminent or likely to commence in the near future. U.S. *civil* proceedings, properly utilized, can be a fast track—a

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1. The legal system in the United States consists of both a federal and a state level of judiciary proceedings. The federal level, absent a definitive ruling by the U.S. Supreme Court, often produces decisions and rulings that vary between the thirteen U.S. Circuit Courts of Appeals and, within the Circuits, may differ among the lesser federal district courts. Likewise, the laws of the 50 sovereign states vary. Therefore, this article is designed to provide general, overall information and is not intended to be, nor should it be, relied upon as definitive legal advice with regard to any particular case.

2. *See, e.g.*, Convention on the Taking of Evidence Abroad in Civil or Criminal Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444; Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Criminal Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163.

super highway—to the result that more formalistic avenues may slow to the pace of an evening rush hour in a major city.

This article will discuss several of these rules and will describe other related procedures for discovery, freezing of assets, and recovery of property in the United States.

II. Foreign Discovery: Section 1782 of the Judicial Procedure Code

Litigants in nations outside the United States [hereinafter foreign litigants] can take advantage of the liberal discovery procedures available to litigants in the United States without the burdens of lengthy procedures and bureaucratic rules. In 1964, Congress passed a series of laws to "improve judicial procedures for serving documents, obtaining evidence, and proving documents in litigation with international aspects . . . ."[3] The Chairman of the Commission responsible for the new laws stated that the Commission hoped "that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures."[4]

As part of this omnibus legislation, Congress amended section 1782 of the Judicial Code to the U.S. Code.[5] Section 1782 provides foreign litigants with a means of obtaining evidence in the United States for use in foreign proceedings. Unlike the more formal procedures associated

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3. S. REP. No. 1580, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782 [hereinafter SENATE REPORT].

4. *Id.* at 3794.

5. 28 U.S.C. § 1782 (1988). Section 1782 provides:

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal *or upon the application of any interested person* and may direct that testimony or statement be given, or the document or other thing be produced, *before a person appointed by the court.* By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the *practice and procedure*, which *may be in whole or in part the practice and procedure of the foreign country or the international tribunal*, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

Id. (emphasis added).

with the Hague Convention on Taking Evidence,[6] section 1782 provides a far less cumbersome procedure for obtaining evidence in the United States.[7] Indeed, as one court recently observed, "[t]he evolutionary process from the 1855 [version of section 1782] to the current statutes . . . has generally been one of increasingly broad applicability."[8]

Although Congress, the courts and commentators all agree that section 1782 was intended to provide foreign litigants with liberal access to evidence in the United States, there is some disagreement on specific aspects of the statutory scheme. The next part of this paper, after describing the general contours of the statutes, addresses these open issues.[9]

A. What are the General Contours of Section 1782?

Section 1782 allows foreign litigants to obtain either oral or tangible evidence located in the United States for use in a "*proceeding in a foreign or international tribunal.*"[10] The statute provides three means by which a foreign litigant can obtain evidence. First, the traditional process of obtaining a letter rogatory may be utilized.[11] Second, a "request" may be made by a foreign or international tribunal.[12] Third, and most notably, "*any interested person*" may make a direct "application" to a district court[13] in which the desired evidence may be found.[14] This latter feature of section 1782 significantly lessens the

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6. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. pmbl.

7. Brian Eric Bomstein & Julie M. Levitt, *Much Ado About 1782: A Look at Recent Problems With Discovery in the United States for Use in Foreign Litigation Under 28 U.S.C. § 1782*, 20 U. MIAMI INTER-AM. L. REV. 429, 433 (1989).

8. In re Gianoli, 3 F.3d 54, 57 (2d Cir. 1993). *See also* In re Letter Rogatory from the Justice Court, District of Montreal, Canada, 523 F.2d 562 (6th Cir. 1975) (tracing history and purpose of the predecessor statutes to section 1782).

9. *See generally* Morris H. Deutsch, *Judicial Assistance: Obtaining Evidence in the United States Under 28 U.S.C. § 1782 for Use in a Foreign or International Tribunal*, 5 B.C. INT'L & COMP. L. REV. 175 (1982).

10. 28 U.S.C. § 1782(a) (1988)(emphasis added).

11. *Id.*

12. *Id.*

13. The U.S. federal court system is divided into three levels. At the highest level is the U.S. Supreme Court. Below the Supreme Court are 13 circuits, 11 of which are numbered one through eleven, and the other two are the District of Colombia Circuit and the Federal Circuit. In each circuit is a Court of Appeals, hereinafter referred to as, for example, the "Eleventh Circuit". Each circuit is also comprised of trial courts called District Courts. A circuit may contain more than one district, in which case the districts are further divided by geographical location (e.g. the Southern District of New York).

14. 28 U.S.C. § 1782(a) (1988) (emphasis added).

burden a foreign litigant must bear in order to obtain evidence located in the United States. While letter rogatories can still be submitted, a foreign litigant is under no obligation to go through the tortured process of obtaining one to derive the benefits of section 1782.

The statute does not provide any guidelines that a district court must follow in deciding whether to grant a request. The district court is given complete discretion. The legislative history, however, suggests the following:

> In exercising its discretionary power, the court may take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country, or in the case of proceedings before an international tribunal, the nature of the tribunal and the character of the proceedings before it.[15]

This complete discretion has led to some of the disagreement in the federal courts regarding under what circumstances the statute applies.

After a district court decides to grant the request, the court issues an order directing that the appropriate evidence be obtained.[16] The statute provides that either the court or a person appointed by the court can supervise this process.[17] In addition, the court is given wide latitude in prescribing the process by which the evidence is obtained.[18] The court can mandate that the rules governing the procedure for gathering the evidence shall be either the rules of the foreign litigation, the federal rules of civil procedure, or any combination thereof.[19] In short, the court can be given "complete discretion" to determine the appropriate manner in which to obtain the requested evidence.[20]

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15. SENATE REPORT, *supra* note 3, at 3788. Although this language seems to suggest that district courts should consider granting requests only to litigants from foreign countries that have foreign assistance statutes similar to section 1782, this is not the case. *See, e.g.*, In re Application of Maley Hungarian Airlines, 964 F.2d 97 (2d Cir. 1992) ("Congress intended . . . that 28 U.S.C. § 1782 would provide an avenue for judicial assistance to foreign or international tribunals whether or not reciprocal agreements existed."), *cert. denied sub nom.*, United Technologies Int'l v. Maley Hungarian Airlines, ___ U.S. ___, 113 S. Ct. 179 (1992); John Deere Limited v. Sperry Corp., 754 F.2d 132, 135 (3d Cir. 1985) (reasoning that the purpose behind section 1782 was to stimulate reciprocity and holding that while this does not prohibit a court from giving absence of reciprocity "some consideration in the exercise of its discretionary power," it does not "require reciprocity as a predicate to the grant of a discovery order").

16. 28 U.S.C. § 1782 (1988).

17. *Id.*

18. *See id.*

19. *Id.*

20. SENATE REPORT, *supra* note 3, at 3789.

B. *Must the Foreign Litigation be Pending?*

An ongoing source of controversy is whether a foreign proceeding must be pending at the time a request for evidence is made to a district court. The language of the statute before the 1964 amendments provided that evidence could only be used "for use in any judicial proceeding *pending* in any court . . . ."[21] Notably, the 1964 amendments deleted the word "pending".[22] Thus, as the Reporter to the Commission that drafted the amendments noted, "it is not necessary . . . for the proceeding to be pending at the time the evidence is sought, but only that the evidence is *eventually* to be used . . . ."[23] The issue becomes, therefore, how eventual the proceeding before a district court can grant the request.

The Eleventh Circuit, the first court to directly address this issue, held that a "district judge should satisfy himself that a proceeding is *very likely to occur.*"[24] The court did not want section 1782 to become a vehicle for fishing expeditions or harassment.[25]

This standard was subsequently adopted by the Second Circuit.[26] The court, while noting the Reporter's[27] comment that the evidence must "*eventually*" be used, repeatedly emphasized that this was not enough.[28] Notably, the appellate court reversed the district court's adoption of a standard whereby requests would be granted whenever a proceeding was "*probable.*"[29] In sum, the court reasoned:

> Though we will not insist that proceedings be "pending," we think it prudent, in the absence of any indication as to why Congress deleted the word "pending" and in view of the distinct possibility that the deletion might have been inadvertent, to require that adjudicative proceedings be imminent—very likely to occur and soon to occur.[30]

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21. Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949 (emphasis added).

22. *See* 28 U.S.C. § 1782 (1988).

23. Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 (1965) (emphasis added).

24. In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied sub nom.*, Azar v. Minister of Legal Affairs of Trinidad and Tobago, 488 U.S. 1005 (1989) (emphasis added).

25. *Id.*

26. In re Request for International Judicial Assistance for the Federative Republic of Brazil, 936 F.2d 702, 706 (2d Cir. 1991).

27. *See supra* note 23 and accompanying text.

28. *Federative Republic of Brazil*, 936 F.2d at 705-07.

29. *Id.*

30. *Id.* at 706.

Although the D.C. Circuit, in an opinion by then Judge Ginsburg (and now U.S. Supreme Court Justice), cited with approval to the decision in the Eleventh Circuit, the court held "that judicial proceedings in a tribunal must be within reasonable contemplation".[31] According to the Second Circuit, the difference between "reasonable contemplation" and "very likely to occur" is more than semantics. The Second Circuit noted this difference and opined that the former standard is "more relaxed" than the latter.[32] Nonetheless, a case in which a foreign proceeding was within "*reasonable contemplation*" but not "*very likely to occur*" has yet to arise. The Second Circuit's comment, rather than suggesting that the two standards are distinct, may have simply been a means of emphasizing its view that the proceeding must be imminent.

C. Is Discoverability of the Requested Evidence in the Foreign Country a Prerequisite to Obtaining Evidence in the United States?

An issue that has more directly divided the federal courts is whether a finding that the requested evidence would be discoverable pursuant to the laws of the foreign litigation is necessary before a section 1782 request can be granted.[33] One line of cases holds that such a finding is a prerequisite to the issuance of an order. A second line of cases holds that while this is an issue a district court may consider in reaching its decision, it is not a *sine qua non*.

The Eleventh Circuit explicitly held that "[w]hile a district court generally should not decide whether the requested evidence will be admissible in the foreign court, the district court must decide whether the evidence would be discoverable in the foreign country before granting assistance."[34] The court did not discuss its reasons for this view and its reliance on two decisions in other courts has been severly criticized.[35]

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31. In re Letter of Request from the Crown Prosecution Service of the United Kingdom, 870 F.2d 686, 691 (D.C. Cir. 1989).

32. *Federative Republic of Brazil*, 936 F.2d at 706.

33. *See generally* Lawrence A. Newman & Michael Burrows, *U.S. Discovery for Foreign Litigants*, N.Y.L.J., July 29, 1994, at 2.

34. *Trinidad and Tobago*, 848 F.2d at 1156 (citing John Deere Ltd. v. Sperry Corp., 754 F.2d 132, 136 (3d Cir. 1985)); In re Court of the Commissioner of Patents for the Republic of South Africa, 88 F.R.D. 75, 77 (E.D. Pa. 1980)).

35. *See* In re Gianoli, 3 F.3d 54, 60-61 (2d Cir.), *cert. denied* ___ U.S. ___, 114 S. Ct. 4431 (1993). Interestingly enough, in the decision in the District of Colombia Circuit, then Judge Ginsburg cites language in both *Trinidad and Tobago* and *John Deere* that stands for the proposition that evidence must be discoverable in a foreign country before it can be obtained under section 1782. *See* In re Letter of Request from the Crown Prosecution Service of the United Kingdom, 870 F.2d 686, 693 n.7 (D.C. Cir. 1989). Appellants in *Gianoli* cited *Crown Prosecution* as a case in which a court had held that discoverability was necessary. The *Gianoli* court, however, reasoned that in *Crown Prosecution* these two cases were cited not to establish the existence of a discoverability

The First Circuit, reversing a district court decision to the contrary, also held that evidence sought in the United States must be discoverable under the laws of the foreign country.[36] The court cited the decision in the Eleventh Circuit, but explored the underlying policy issues in greater detail.[37] First, the court was concerned that a U.S. litigant

> in a foreign country with limited pre-trial discovery will be placed at a substantial disadvantage vis-a-vis the foreign party. All the foreign party need do is file a request for assistance under section 1782 and the floodgates are open for unlimited discovery while the United States party is confined to restricted discovery in a foreign jurisdiction.[38]

Second, the court did not want the foreign litigants to be able to use section 1782 to "circumvent foreign law and procedures."[39] The court reasoned that Congress could not have intended to place itself on a collision course with foreign tribunals and legislatures that have carefully chosen the procedures and laws best suited for their concepts of litigation.[40]

The Second Circuit declined to follow the holdings of these two courts and explicitly held that "section 1782 does not contain a requirement. that the material requested in the district court be discoverable under the laws of the foreign jurisdiction."[41] The court criticized the reasoning of the First Circuit.[42] The court focused on the permissive language in the applicable legislative history[43] and the clear statement contained therein that section 1782 "leaves the issuance of an appropriate order to the discretion of the court . . . ."[44] In addition,

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requirement, but rather in the context of a discussion regarding the appropriate evidence taking procedures under section 1782. *Gianoli*, 3 F.3d at 60 n.1.

36. In re Asta Medica, 981 F.2d 1, 7 (1st Cir. 1992), *cert. denied sub nom.* Fonden v. Aldunate, ___ U.S. ___, 114 S. Ct. 443 (1993).

37. *Id.* at 5-6.

38. *Id.* at 5.

39. *Id.* at 6.

40. *Id.*

41. *Gianoli*, 3 F.3d at 62. Two recent decisions in the Southern District of New York have interpreted this rule. *See* In re Euromepa, 155 F.R.D. 80, 84 n.2 (S.D.N.Y. 1994) (rejecting 1782 application as an "unwarranted intrusion" into French law); In re Technostroyexport, 853 F. Supp. 695 (S.D.N.Y. 1994) (rejecting 1782 application because applicant had not obtained approval from arbitrator as required by foreign law). These decisions indicate that while the Second Circuit has rejected a discoverability rule, foreign law is not irrelevant to a decision under sectoin 1782.

42. *Gianoli*, 3 F.3d at 60.

43. *Id.* at 59 (citing In re Application of Malev Hungarian Airlines, 964 F.2d 97 (2d Cir.), *cert. denied sub nom.*, United Technologies Int'l v. Malev Hungarian Airlines, ___ U.S. ___, 113 S. Ct. 179 (1992)).

44. *Id.* at 60 (quoting SENATE REPORT, *supra* note 3, at 3788).

the court noted the overall liberalizing features of the 1964 amendments.[45] According to the Second Circuit, these three factors indicate that

> [w]hile district judges may well find that in appropriate cases a determination of discoverability under the laws of the foreign jurisdiction is a useful tool in their exercise of discretion under section 1782, . . . no such threshold requirement exists in the statute.[46]

D. What is a "Foreign or International Tribunal"?

Prior to the 1964 amendments, section 1782 provided that assistance from a U.S. court was only available when evidence was to be used in a foreign "*court.*" The amendments changed the word "court" to "*tribunal*" so as to reflect the growth of administrative and quasi-judicial proceedings all over the world . . . .[47] Congress intended to "make it clear that assistance is not confined to the proceedings before conventional courts."[48] As is often the case, however, the path from congressional intent to judicial practice is paved with ambiguity and uncertainty. In the cases at the margins, courts have struggled to determine clearly and consistently whether a given proceeding is before a "tribunal" within the meaning of section 1782.[49]

In an early decision by the late eminent Judge Henry Friendly of the Second Circuit, the court was called upon to decide whether the Indian Income-Tax Office was a tribunal under section 1782.[50] According to the Supreme Court of India, the accessors in the Office "are administrative authorities whose proceedings are regulated by statute, but whose function is to estimate the income of the taxpayer and to assess him to tax on the basis of that estimate . . . [T]he proceeding [does not have] the character of an action between the citizen and the State."[51] In holding that the Office was not a proper tribunal, Judge Friendly, reasoned that section 1782

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45. *Id.* at 59.

46. *Id.* at 60.

47. *See generally* Bruce L. McDaniel, *What is a Foreign "Tribunal" Within 28 U.S.C.S. § 1782 (As Amended in 1964) For Use in Which a District Court May Issue Discovery Orders in Response to Letters Rogatory*, 46 A.L.R. FED. 956 (1980).

48. *Id.*

49. *Id.*

50. In re Letters of Rogatory Issued by the Director of Inspection of the Government of India, 385 F.2d 1017 (2d Cir. 1967).

51. *Id.* at 1020.

> is not so broad as to include all of the plethora of administrators whose decisions affect private parties and who are not entitled to act arbitrarily, and one useful guideline is the absence of any degree of separation between the prosecutorial and adjudicative functions.[52]

This lack of separation is an indication of "an institutional interest in a particular result [ ]"[53] and that a particular proceeding is not a tribunal within the meaning of section 1782.

Almost thirteen years after this decision, the Second Circuit turned to Judge Friendly's reasoning to decide whether the office of the Superintendent of Exchange Control of the Republic of Columbia was a tribunal within the meaning of section 1782.[54] The court again focused on the adjudicatory nature and impartiality of the Superintendent's functions. The Superintendent was "charged to act in the government's interest to enforce the law. . . . He has extraordinary powers to order and conduct far-reaching investigations. Upon completion of his investigation, he is empowered to determine whether violation of the law has occurred."[55] Based upon these functions, the court held that the Superintendent had an "institutional interest" that was "inconsistent with the concept of impartial adjudication intended by the term 'tribunal.'"[56]

A district court in California adopted similar reasoning in holding that the Court of Queen's Bench for Manitoba, Canada was not a tribunal within the meaning of section 1782.[57] The Manitoba Court was empowered to "inquire into, ascertain and report upon . . . facts and circumstances . . . [and] to make recommendations . . . ."[58] In contrast, the court held that section 1782 was intended to apply only to *"foreign bo[dies that] exercise adjudicative power and have an adjudicative purpose"*.[59] In sum,

> [t]he legislative history does not indicate . . . that it was the purpose of Congress or the Administration to broaden the scope of international cooperation beyond the activities of courts and other

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52. *Id.* at 1021.

53. *Id.* at 1020.

54. Fonesca v. Blumenthal, 620 F.2d 322 (2d Cir. 1980), *rev'd sub nom.* 734 F.2d 944 (2d Cir. 1984), *cert. denied* 469 U.S. 882. *See also* In re Letters of Request from the Government of France, 139 F.R.D. 588 (S.D.N.Y. 1991) (discussing the holdings of *In re India* and *Fonesca* as they apply a *juge d'instruction* of the Court of Higher Instance of Paris).

55. *Fonesca*, 620 F.2d at 323-24.

56. *Id.*

57. In re Letter of Request to Examine Witnesses From the Court of Queen's Bench for Manitoba Canada, 59 F.R.D. 625 (N.D. Cal.), *aff'd* 488 F.2d 511 (9th Cir. 1973).

58. *Id.* at 629.

59. *Id.* (emphasis added).

quasi-judicial entities to encompass bodies whose primary functions are investigative.[60]

These decisions appear to focus on at least two factors in deciding whether a given foreign body is a tribunal. The Second Circuit has historically examined the impartiality of the proceeding and the Eleventh Circuit has focused on the degree to which the foreign body is engaged in the investigatory work. Given the lack of definition or guidance in the statute and legislative history, these factors are far from exclusive. As such, courts will continue to refine the terms of the debate as more cases arise.

E. Summary

In spite of occassional disagreement and ambiguous statutory terminology, it is clear that Congress amended section 1782 to provide a liberal framework for assisting foreign litigants. The courts are attempting to devise a standard within that framework for deciding whether to grant a given request. The disagreements, in some respects, are driven by the lack of any clearly enunciated congressional standard. The standards created by the courts, although varying slightly from circuit to circuit, are consistent with the overall liberalizing nature of the 1964 amendments. Foreign litigants, including foreign governments should not hesitate to invoke section 1782 where a case is pending or is reasonably foreseable to the immediate future, in a foreign tribunal.

III. Alternative Discovery Procedures: Section 304 of the U.S. Bankruptcy Code and Section 21(a)(2) of The Securities and Exchange Act of 1934

Although section 1782 is by far the most frequently invoked means of obtaining evidence in the United States, other methods exist. For example, section 304 of the Bankruptcy Code, discussed in greater detail below, allows a foreign litigant to commence a proceeding in the United States ancillary to a foreign bankruptcy proceeding. The court in which this ancillary proceeding is brought can, among others, "order other appropriate relief."[61]

In a case before the Southern District of Texas, on appeal from bankrupcty court, a Trustee in a Canadian bankruptcy commenced a section 304 proceeding to obtain evidence located in the United States.[62]

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60. *Id.*
61. 11 U.S.C. § 304(b)(3) (1988).
62. Angulo v. Kedzep Ltd., 29 B.R. 417 (S.D. Tex. 1983).

In affirming the district the bankruptcy court's order, the district court, noting that no other court had addressed the issue, reasoned that

> [t]he scope of section 304 as seen in the language of the statute and its legislative history is broad and flexible enough to allow for an ancillary suit to be filed for the purpose of discovery. Allowing discovery will best assure an economical and expeditious administration of [this] estate, consistent with . . . comity.[63]

Notably, appellants argued that the Trustee should have sought discovery through section 1782. The court, however, rejected this argument and held that section 1782 "does not preclude other methods of discovery".[64]

Another example of an alternative means of obtaining evidence located in the United States, while not for private litigants, can be found in section 21(a)(2) of The Securities and Exchange Act of 1934.[65] Adopted by amendment in 1988, this section authorizes the U.S. Securities and Exchange Commission (SEC) to provide assistance to foreign securities authorities.[66] *The SEC may comply with the request "without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States".*[67] The statute only requires the SEC to consider whether (1) the requesting authority provides reciprocal assistance and (2) the requested assistance would "prejudice the public interest of the United States".[68]

In a recent letter to the Assistant Attorney General of the Antitrust Division of the Department of Justice, the SEC's Director of International Affairs commented on the experience of the SEC with section 21(a)(2).[69] The Director stated that section 21(a)(2), much like section 1782, "provided a powerful incentive for foreign authorities to seek similar legislation that could be used to assist the SEC."[70] Indeed, according to the Director, legislation similar to section 21(a)(2) is now in force in at least seven countries.[71] In addition, the SEC has fifteen

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63. *Id.* at 419 (quoting 11 U.S.C. § 304(c)). Other courts, while not citing this decision, have allowed a section 304 petitioner to obtain discovery under section 304. *See, e.g.*, In re Brierley, 145 B.R. 151, 169 (Bankr. S.D.N.Y. 1992); In re Gee, 53 B.R. 891, 898-99 (Bankr. S.D.N.Y. 1985).

64. *Angulo*, 29 B.R. at 410.

65. 15 U.S.C. §§ 78(a)-80(c)(3) (1988 & Supp. 1993).

66. *Id.* § 78(u)(a)(2).

67. *Id.* (emphasis added).

68. *Id.*

69. Letter from Michael D. Mann to Diane P. Wood, Fed. Seç. L. Rep. (CCH) ¶ 76,860 at 78552 (June 13, 1994).

70. *Id.*

71. *Id.* The Director cited the United Kingdom, France, the Netherlands, Japan, Australia,

Memoranda of Understanding with foreign regulatory agencies that provide a framework for the exchange of information.[72] Overall, the Director believes that section 21(a)(2) "has greatly enhanced the regulator's ability to carry out its enforcement function by making it more difficult to hide behind the borders of another jurisdiction to avoid detection and prosecution of offenses."[73]

A. Section 304 of the Bankruptcy Code: Freeze Orders & Recovery of Property

The Bankruptcy Code, much like many other areas of U.S. law, has been influenced by the internationalization of business and finance. The failure of a large West German commercial bank, *Bankhaus I.D. Hestatt*, in 1974 made clear the extent to which insolvencies are no longer confined to national borders. This bank failure, and the resulting international search for assets, has been cited as one of the reasons Congress added section 304 to the Bankruptcy Reform Act of 1978.[74]

Section 304 was intended "to prevent piecemeal distribution of assets in the United States by means of legal proceedings initiated in domestic courts by local creditors."[75] It allows an appropriate foreign representative to a foreign bankruptcy to bring an ancillary action in the U.S. court.[76] Prior to the enactment of section 304, while a foreign

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Mexico, and certain provinces of Canada.

72. *Id.*

73. *Id.* at 78,553.

74. Terri P. Finister, Comment, *1989 Developments and the Conflicts Arising Under Section 304*, 6 BANKR. DEV. J. 345, 345-46 (1989); Anne Norby Nielsen, Comment, *Section 304 of the Bankruptcy Code: Has it Fostered the Development of an "International Bankruptcy System"?*, 22 COLUM. J. TRANSNAT'L L. 541, 547-48 (1984).

75. In re Koreang, Controle Et Revision S.A., 961 F.2d 341, 348 (2d Cir. 1992), *cert. denied* ___ U.S. ___, 113 S. Ct. 188 (1992).

76. 11 U.S.C. § 304 (1988). This section provides:

> (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:
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> (1) enjoin the commencement or continuation of:
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> (A) any action against—
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> (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 to enforce a lien against the property of such estate.
>
> (2) order the turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

representative could not tecnically bring a bankruptcy case in the United States, U.S. courts recognized the rights of foreign representatives under the doctrine of comity.[77] Section 304 codifies this practice and defines its scope and boundaries. In an oft-quoted passage from an early case, a district court reasoned that section 304 allows the courts "to broadly mold appropriate relief in near blank check fashion . . . ."[78] According to the legislative history accompanying section 304, the guidelines of the statute are

> designed to give the court maximum flexibility in handling ancillary cases . . . [T]he court [is] permitted to make the appropriate orders under all of the circumstances of each case, rather than being provided with inflexible rules.[79]

The transition from this clear intent to give the courts broad flexibility to application of the statute to specific instances has not always been one of clarity and precision. The flexible rules sometimes lead to inconsistent results. The next part of this paper explores the structure of section 304 and some of the issues that have arisen in its interpretation.

B. Section 304: General Contours

A section 304 proceeding does not create a full bankruptcy case, as an estate is not created.[80] Rather, it allows a U.S. bankruptcy court to order appropriate relief ancillary to a full bankruptcy case litigated in a foreign country. As a threshold matter, a section 304 ancillary can only be brought when a "foreign proceeding" has commenced and only upon application of a "foreign representative".[81] These seemingly innocuous

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(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 holders of claims against or interests in such estates;

(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.

77. 2 LAWRENCE P. KING, COLLIER ON BANKRUPTCY § 304.2 (1991).

78. In re Culmer, 25 B.R. 621, 624 (Bankr. S.D.N.Y. 1982).

79. S. REP. NO. 95-989, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 5785, 5821.

80. *See* 2 KING, *supra* note 77, § 304.01.

81. 11 U.S.C. § 304(a) (1988).

terms have, as will be discussed below, led to some confusion over who may bring a section 304 proceeding and when it may be brought.

Assuming that these threshold criteria have been met, section 304 allows a court to grant three forms of relief:

> (1) enjoin the commencement or continuation of any action, the *enforcement* of any *judgment* and the creation or enforcement of any *lien, against property involved in a foreign proceeding or against a debtor with respect to such property; (2) order turnover* of the *property of the foreign estate, or proceeds* of such property, *to the foreign representative*; or (3) "order other appropriate relief."[82]

In deciding whether to grant this relief, a court must consider the six factors enumerated in section 304(c). However, these factors only serve as guideposts that a court is free to balance as a given case demands. In addition, some of the factors are at odds with each other. One commentator has even gone so far as to say:

> The factors listed in Section 304(c) provide a morass of internally inconsistent and redundant principles. Not suprisingly, a workable standard in which requests for relief may be evaluated has simply not been devised.[83]

Inclusion of the word "debtor" in the definition of "foreign proceeding" is the source of the controversy. Sections 101(13) and 109 of the bankruptcy code, respectively, define the word "debtor"[84] and establish "[w]ho may be a debtor[.]"[85] Both sections use the word "person." "Person" is defined in section 101(41).[86] The issue is whether sections 101(13), 101(41), and 109 apply to section 304. That is, whether the definition of debtor contained in the Bankruptcy Code controls under what circumstance a section 304 proceeding may be brought.

Early cases seemed willing to apply section 109(a) to section 304.[87] Indeed, the language of section 109(a) seemed to compel such a result.[88] This willingness may have been because section 109(a) was

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82. 2 KING, *supra* note 77, § 304.03 (quoting 11 U.S.C. § 304(b)(3) (1988)). In addition to the relief available under section 304, two other sections of the Bankruptcy Code provide related forms of relief: (1) section 303 allows a foreign representative to file an involuntary case; and (2) section 305 allows a foreign representative to seek dismissal or suspension of a case. *See* 11 U.S.C. §§ 303, 305 (1988).

83. Nielson, *supra* note 74, at 559.

84. 11 U.S.C.A. § 101(13) (West Supp. 1994).

85. *Id.* § 109.

86. *Id.* § 101(41).

87. *See generally* Finister, *supra* note 74, at 351-52 n.47; 2 KING, *supra* note 77, § 304.02.

88. 2 KING, *supra* note 77, § 109.02.

not seen as restricting the ability to bring ancillary proceedings and it therefore was not in conflict with the broad equity purposes of section 304. Once the restrictive nature of section 109(a) was at issue, however, and the result of a case turned on this issue, courts were forced to directly address the problem. In these instances, the courts backed away from the earlier cases and did not apply section 109(a) to section 304.

For example, the Eleventh Circuit confronted this issue when a foreign decedent left property abroad and in the United States.[89] The decedent's liabilities exceeded his assets by some $55 million.[90] A foreign court appointed an administrator to oversee both the domestic and foreign assets.[91] At the same time, however, a Georgia court appointed an administrator to oversee the assets located in Georgia.[92] The foreign representative attempted to enjoin the probate proceeding in Georgia by filing a section 304 petition in bankruptcy court.[93] The bankruptcy court denied the petition holding that an insolvent decedent's estate did not qualify as a "debtor" under the Bankruptcy Code.[94] The district court affirmed and on appeal to the Eleventh Circuit, the court of appeals reversed.[95]

The court of appeals agreed with a long line of cases that held that an insolvent decedent's estate did not qualify as a "debtor" under the code, but disagreed with the lower courts that such a finding prohibited the bankruptcy court from entertaining a section 304 petition.[96] The court focused on an apparent anomaly:

> [A]lthough the inclusion of the term "debtor" in the definition of "foreign proceeding" suggests that the subject of the foreign proceeding must qualify as a "debtor" under U.S. bankruptcy law, *the Code expressly provides that the foreign proceeding need not even be a bankruptcy proceeding, either under foreign or United States law.* Moreover, "foreign proceeding" includes a proceeding "for the purpose of liquidating an estate"—yet, as we have seen, a decedent's estate does not qualify as a "debtor" under United States bankruptcy law.[97]

89. Goerg v. Parunago, 844 F.2d 1562 (11th Cir. 1988), *cert. denied* 488 U.S. 1034 (1989).
90. *Id.* at 1563.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Parunago*, 844 F.2d at 1564.
95. *Id.* at 1564, 1568.
96. *Id.* at 1566.
97. *Id.* at 1566-67 (emphasis added).

This tangled mass of interlocking and seemingly contradictory statutory provisions left the court in a quagmire. The stable ground upon which the court based its holding was a "well-established canon of statutory construction."[98] Namely, "that '[a] statute susceptible of more than one meaning must be read in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen.'"[99] The court noted the clear intent of Congress "to help further the efficiency of foreign insolvency proceedings . . . ."[100] Also, the court reasoned that "in light of the comity concerns that induced Congress to enact section 304, it would make eminent sense for Congress to define expansively the class of foreign insolvency proceedings for which ancillary assistance is available."[101] For these reasons, the court held that a "debtor need only be properly subject, under applicable foreign law, to a proceeding commenced 'for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.'"[102]

The insolvency of the late Robert Maxwell in *In re Brierly* created another situation in which a court confronted this issue.[103] The case was handled by Bankruptcy Judge Tina L. Bozman in the Southern District of New York in 1992. In an odd twist of fate, Judge Bozman had written an opinion seventeen years earlier[104] that had come to be relied upon for the proposition that the Bankruptcy Code determined whether a debtor was qualified to bring a section 304 proceeding.[105] This earlier proposition, however, was only dicta, and Judge Bozman, addressing the issue directly in the *Brierly* litigation, reached the exact opposite conclusion. In the *Brierly* litigation, the court reasoned that since a foreign representative does not commence a full bankruptcy proceeding under section 304, it would be inappropriate to require that a foreign representative qualify as a "debtor" under the Code.[106] Because of this, "most of the perceived lack of clarity in the statutory provisions evaporates."[107] Noting, however, that this creates a situation where the world "debtor" has two different meanings, one

98. *Id.* at 1567.

99. *Parunago*, 844 F.2d at 1567 (quoting Schultz v. Louisiana Trailer Sales, Inc., 428 F.2d 61, 65 (5th Cir.), *cert. denied sub. nom.* Louisiana Trailer Sales v. Hodgson, 400 U.S. 902 (1970)).

100. *Id.* at 1568.

101. *Id.*

102. *Id.* (quoting 11 U.S.C. § 101(23) (1988)).

103. In re Brierly, 145 B.R. 151 (Bankr. S.D.N.Y. 1992).

104. *See* In re Gee, 53 B.R. 891 (Bankr. S.D.N.Y. 1985).

105. *See, e.g.*, In re Lines, 81 B.R. 267 (Bankr. S.D.N.Y. 1988) (in dicta, citing In re Gee for this proposition).

106. *Brierly*, 145 B.R. at 159-60.

107. *Id.* at 160.

under section 304 and the other under the rest of the Bankruptcy Code, the court followed the Eleventh Circuit and looked to the purpose behind section 304.[108] Examining the legislative history in the same light as the Eleventh Circuit, the court held that this difference was not fatal. In a further twist to this case, the court cited a Second Circuit decisions regarding section 1782 to support its holding.[109] The court reasoned:

> Reading together 11 U.S.C. § 304 and 28 U.S.C. § 1782 one cannot doubt that Congress meant to aid foreign tribunals, be the proceedings before them bankruptcies or litigations. If a litigant can take discovery in the United States just for the asking, there is no sensible reason to impose a requirement that a foreign representative seeking discovery [under section 304] must first prove that a foreign debtor could have been a debtor under our laws.[110]

C. How Does a Court Determine, Pursuant to Section 304(c), Whether to Grant Requested Relief?

The statutory factors that a court must consider under section 304(c), in providing great flexibility, also create a great deal of uncertainty. Complete discretion is a powerful tool. Results will vary greatly depending on any number of unanticipated considerations. Having said this, however, a review of a few decisions can provide a sense of the issues courts frequently find most significant.

1. The role of comity.—Prior to the passage of section 304, courts focused on comity[111] in deciding whether to defer to foreign bankruptcy proceedings.[112] Section 304(c), however, lists six factors for a court to consider.[113] This tension between tradition and flexible guidelines has created an ongoing debate in some of the federal courts

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108. *Id.*

109. *See id.* (discussing In re Application of Malev Hungarian Airlines, 964 F.2d 97 (2d Cir.), *cert. denied sub. nom.* United Technologies Int'l v. Malev Hungarian Airlines, 113 S. Ct. 179 (1992)).

110. *Id.*

111. In the most frequently cited case for the definition of comity, the Supreme Court defined it as:

> [T]he 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 protection of its laws.

Hilton v. Guvot, 159 U.S. 113, 114 (1895).

112. Finister, *supra* note 74, at 350-51.

113. *See supra* note 76 for the text of § 304(c) of the Bankruptcy Code.

regarding the weight that should be given to the comity factor in section 304(c)(5).

A series of bankruptcy court cases in the Southern District of New York have explored this issue. The earliest case in the district to address the issue reasoned that "[a]ll of the factors listed in Section 304(c) have historically been considered within a district court's determination whether to afford comity to a proceeding in a foreign nation."[114] Although this view of comity, which can be termed the incorporation view, seems to reason that the other factors in section 304 are part of the traditional comity analysis, this case has come to stand for the proposition that comity is the most important factor.[115]

Shortly after this decision, another bankruptcy court in the Southern District of New York more explicitly held that "[a]lthough comity is only one of six factors to be considered in determining whether to grant relief, it often will be the most significant, . . . where it serves as the crux of debtor's argument."[116] This reading of the statute views comity as a distinct factor among the six factors in section 304(c).

Perhaps these two views were harmonized by another recent bankruptcy decision in the Southern District of New York. Analyzing these prior cases, the court held:

> While it is true that neither the code nor its legislative history explicitly require that comity be afforded more weight than the other section 304(c) factors, neither does it provide that all of the factors must be given equal weight. Comity is inevitably the more significant factor since the other factors (except for the sixth element dealing with the fresh start theory) are inherently taken into account when considering comity.[117]

Although this passage explicitly holds that comity is the "more significant factor", it also seems to imply what logic should dictate. If the other factors are "inherently taken into account" in a comity analysis, then it makes little difference to say that comity is the most significant factor because a comity analysis, by definition, entails consideration of the other factors.

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114. In re Culmer, 25 B.R. 621 (Bankr. S.D.N.Y. 1982).

115. *See infra* notes 116, 117 and accompanying text.

116. *Gee*, 53 B.R. at 901.

117. In re Koreag, Controle et Revision S.A., 130 B.R. 705, 712 (Bankr. S.D.N.Y. 1991), *vacated on other grounds*, 961 F.2d 341 (2d Cir.), *cert. denied* ___ U.S. ___, 113 S. Ct. 188 (1992).

Nonetheless, at least one other court has specifically rejected the notion that comity is the most significant factor.[118] Presumably, a court, by rejecting comity as the most significant factor, must believe that the other statutory factors are not being given due weight in an analysis that focuses on issues of comity.[119] Perhaps the court was concerned with the view expressed in some Southern District cases that exceptions to the doctrine of comity should be narrowly construed where the foreign proceeding is in a "sister common law jurisdiction with proceedings akin to our own."[120]

2. *Analyzing Foreign Bankruptcy Law.*—To provide a more concrete basis upon which to understand how the various section 304(c) factors apply, it is useful to examine some competing cases.[121] This part of the article examines decisions in which courts have and have not allowed a foreign reprsentative to bring an ancillary proceeding.

In an early case from the bankruptcy court in the Eastern District of Michigan, the court refused to grant a trustee's application for a proceeding ancillary to a bankruptcy proceeding in Canada.[122] The Trustee's sought to enjoin all creditors from commencing any action against the debtor.[123] Hesse, the domestic party opposed to the motion, had won an arbitration award against a foreign debtor that was affirmed by a state court and had served writs of garnishments on the debtor.[124] Under U.S. law, Hesse was a lien creditor with a secured claim. Under section 304(c)(4), the distribution of the proceeds from the debtor's estate would not be "'substantially in accordance with the order prescribed by [the U.S. Bankruptcy Code].'"[125] The Trustee argued that comity should dictate that the court stay the arbitration award pending resolution of the Canadian bankruptcy proceedings. The court, however, disagreed, reasoning that the courts "must protect United States

118. *See* In re Papeleras, 92 B.R. 584, 594 (Bankr. E.D.N.Y. 1988) ("[I]t is best to consider all of the variables of § 304(c) in determining the appropriate relief in an ancillary proceeding.").

119. *See, e.g.*, In re Toga Mfg., Ltd., 28 B.R. 165 (E.D. Mich. 1983) (discussed *infra* notes 122-26 and accompanying text).

120. *See Gee*, 53 B.R. at 901.

121. In addition to the cases discussed in this section, a number of other cases have addressed this issue. *See, e.g.*, In re Papelaras, 92 B.R. 584 (Bankr. E.D.N.Y. 1988) (addressing Spanish law and dismissing an ancillary proceeding); In re Banco do Descuento, 78 B.R. 337 (Bankr. S.D. Fla. 1987) (discussing Ecudorian law and granting limited section 304 relief).

122. In re Toga Manfg., Ltd., 28 B.R. 163 (Bankr. E.D. Mich. 1983).

123. *Id.* at 162.

124. *Id.* at 164.

125. *Id.* at 169 (quoting 11 U.S.C. § 304(c)(4) (1988)).

citizens' claims against foreign judgments inconsistent with this country's well-defined and accepted policies."[126]

Similar reasoning was adopted by a district court in New Jersey.[127] A creditor of a debtor shipping company filed an involuntary liquidation proceeding in Australia and a Liquidator was appointed. The debtor had some property in the United States. The Liquidator filed a section 304 petition seeking to administer the U.S. assets under the umbrella of Australian bankruptcy law. The court denied the petition. While the court noted that "[t]here is no requirement that Australian law and the United States law be identical[,]"[128] the court held that "[b]oth the laws and the public policy of the United States will be violated if the case is permitted to proceed under Australian law."[129] Specifically, the court was concerned about the (1) ex parte nature of the winding up proceedings in Australia and (2) lack of substantive remedy of equitable subordination of insider's claims.[130]

Other cases have held that foreign law afforded U.S. creditors adequate protection and have granted section 304 petitions. For example, the bankruptcy laws of the Bahamas were held to be in "substantial conformity with [United States law]."[131] The court enumerated a number of aspects of Bahamian law that justified this holding.[132] These aspects included: (1) significant oversight of the winding-up proceedings by the Bahamas Supreme Court; (2) distribution of the estate in substantial similarity with the order and priorities prescribed by the Bankdrupty Code; and (3) notice and other reporting requirements. The court reasoned that "[w]hether or not Bahamian law is identical in application to American law, there is nothing inherently wicked, immoral or shocking to the prevailing American moral sense in

126. *Id.* at 170. This case has been the subject of much criticism, both by commentators and the judiciary. *See* In re Axona Int'l, 88 B.R. 597, 611 (Bankr. S.D.N.Y. 1988), *aff'd* 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed* 924 F.2d 31 (2d Cir. 1991); *see also* Cornfeld v. Investors Oversees Services, Ltd., 471 F. Supp. 1255 (S.D.N.Y. 1979) (affording comity to Canadian winding up procedures not on the basis of section 304, but on the basis that the procedures are consistent with those of the United States), *aff'd* 614 F.2d 1286 (2d Cir. 1979), *cited with approval in* In re Culmer, 25 B.R. 621 (Bankr. S.D.N.Y. 1982) (section 304 case). As addressed below, the modern trend, particularly in the Second Circuit, has been to grant section 304 petitions on a much lower burden of similarity than the court in *Toga* was willing to tolerate.

127. Interpool Ltd. v. KKL PTY Ltd., 102 B.R. 373 (D.N.J. 1988), *appeal dismissed*, 878 F.2d 111 (3d Cir. 1989).

128. *Id.* at 378 (citing In re Gee, 53 B.R. 891 (Bankr. S.D.N.Y. 1985)).

129. *Id.* at 378-80.

130. *Id.* at 378-80.

131. *Culmer*, 25 B.R. at 629.

132. *Id.* at 629.

[Bahamian law]."[133] In support of this position, the court pointed out that Bahamian law was based on the English Companies Act.

In a case in which the primary bankruptcy proceeding was occuring under British law, the *Brierly* litigation, the court explored this issue at some length.[134] The petition for an ancillary proceeding was "but one component of a large, transnational bankruptcy."[135] The court noted:

> Lurking in all transnational bankruptcies is the potential for chaos if the courts involved ignore the importance of comity. As anyone who has made even a brief excursion into this area of insolvency practice will report, there is little to guide practitioners or the judiciary in dealing with the unique problems posed by such bankruptcies. Yet it is critical to harmonize the proceedings in the different courts lest decrees at war with one another result.[136]

Having so noted, however, the court went on to reason that "one cannot simply 'feel' that comity is warranted. So we turn to a comparison of British and American insolvency law . . . ."[137] After taking notice of the sharing of a common law tradition and the long history of granting comity to proceedings in the United Kingdom,[138] the court extensively surveyed British insolvency law. The court concluded: "Nothing dictates that the foreign law be a carbon copy of our law; rather, the [British] Insolvency Act must not be repugnant to American laws and policies, which it manifestly is not."[139]

In sum, section 304(c) creates a tension between protecting the rights of U.S. creditors and giving deference to foreign proceedings.[140] In balancing these frequently competing concerns, courts will look to both the overall structure of the foreign law and the specific factual scenario a given case presents. Overall, as some of the cases indicate, the modern trend is to grant section 304 petitions under a much lower showing of similarity than early section 304 cases adopted.

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133. *Id.* at 631.
134. *Brierly*, 145 B.R. at 151.
135. *Id.* at 164.
136. *Id.*
137. *Id.*
138. *Id.* at 162 n.5.
139. *Brierly*, 145 B.R. at 151.
140. *See generally* Nielsen, *supra* note 74, at 560-73 (discussing difference between universality, including all creditors in one proceeding, and pluralism, giving primary emphasis to the needs of local creditors, in terms of section 304 cases).

D. Summary

In holding that the debtor in a foreign proceeding need not meet the statutory definition of a debtor under the Bankruptcy Code, and instead need only qualify as a debtor under the laws of the foreign jurisdiction, courts are expanding the availability of section 304. Similarly, by taking a more international approach to transnational insolvencies under section 304(c), courts are expressing a desire to unify international insolvency proceedings under one jurisdiction. The combination of these factors indicate the development of a trend in favor of broad application of section 304 relief.

IV. Recovery of Property

Foreign plaintiffs are often faced with a dual problem in today's global business environment. First, defendents' assets are frequently located in numerous places and defendants may try to move these assets to avoid paying potentially adverse judgments. Second, after obtaining a judgment in a foreign court, plaintiffs may find that judgment impossible to enforce because defendants do not have any assets in the foreign country. Two distinct but related provisions of New York law and the law of many other States, provide a means of overcoming these obstacles.

For the problem of movable assets, attachment proceedings, available in all states under varying circumstances, allow a plaintiff to prevent a defendant from shifting assets. Although frequently used to establish jurisdiction over a defendant, attachment also serves a security function by freezing assets pending judgment. Separate from this process, a plaintiff with a foreign judgment can convert it into a New York judgment and have it enforced by a New York court. Since the process for converting a foreign judgment may take time, plaintiffs in New York can move to attach assets on the grounds that a foreign judgment has been rendered. The next part of this article examines the procedures used to obtain these forms of relief and some of the more significant issues surrounding their application.

A. Attachment

Article 62 of New York's Civil Practice Law and Rules [hereinafter CPLR] governs the attachment procedure. Section 6201 lists five grounds upon which an attachment may be granted.[141]

141. N.Y. CIV. PRAC. L. & R. LAW § 6201 (McKinney Supp. 1994). Section 6201 provides:

Assuming that an attachment may properly be made against a defendant, section 6211 allows a plaintiff to make a motion for an order of attachment *ex parte*.[142] Depending on the grounds upon which this attachment is made, plaintiff must move within either five or ten days after the *ex parte* motion is granted to confirm the order of attachment.[143] Plaintiff must also notify defendant of the confirmation hearing. In either an *ex parte* motion or a confirmation proceeding, plaintiff must establish that: (1) There is a cause of action; (2) It is probable plaintiff will succeed on the merits; (3) There are proper grounds under section 6201 for the attachment; and (4) The amount demanded from defendant exceeds all counterclaims known to plaintiff.[144] In addition, plaintiff must post a bond.[145]

1. Jurisdiction.—In any action before a court in the United States, the court must have personal jurisdiction over the defendant. Since the Supreme Court's landmark decision in *International Shoe Co. v. Washington*,[146] the ability of all courts to obtain in personam jurisidction has been analyzed under the doctrine of minimum contacts. In addition to the constitutional standard, each state has its own law governing a state court's ability to obtain personal jurisdiction. A court must have jurisdiction over a defendant under both state law and pursuant to constitutional standards.[147] An attachment proceeding is not exempt

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An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a nondomicillary residing without the state, or is a foreign corporation not qualified to do business in the state; or
2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or
3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts; or

. . . .

5. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, *or on a judgment which qualifies for recognition under the provisions of article 53 [Recognition of Foreign Country Money Judgments]*.

Id. (emphasis added).

142. *Id.* § 6211(a).

143. *Id.* § 6211(b).

144. *Id.* § 6212(a).

145. N.Y. CIV. PRAC. L. & R. LAW § 6212(b) (McKinney 1978).

146. 326 U.S. 310 (1945).

147. There is, however, one important exception to this general rule. In 1993, the Federal Rules of Civil Procedure were amended. Rule 4, which governs service of process, was amended

from these requirements, and under New York law, particularly for foreign litigants, this analysis can often resemble a trip through the looking glass and into a different legal world.

A recent decision by the highest court in New York state, the New York Court of Appeals, provides an excellent example of the issues involved.[148] Plaintiff, an Italian banking corporation, loaned fifteen million dollars to defendant, a Bahamian banking corporation.[149] Plaintiff alleged that the defendant had not repaid the loan.[150] Neither party was authorized to do business in New York.[151] The money allegedly loaned to defendant was on deposit with defendant's correspondent in New York.[152] Plaintiff attempted to attach the money on deposit with defendant's correspondent bank.[153] The issue was whether a New York court, under these circumstances, could maintain jurisdiction over defendant when plaintiff conceded lack of in personam jurisdiction.

The roots of this problem have their origin in the doctrine of quasi-in-rem jurisdiction. Prior to another landmark Supreme Court decision, *Shaffer v. Heitner*,[154] a court that did not have in personam jurisdiction over a defendant could obtain quasi-in-rem jurisdiction if the defendant had any property located within the state in which the proceeding was to take place. *Shaffer* significantly changed, if not eliminated, this basis for obtaining jurisdiction. Basically, *Shaffer* held that the mere presence of property within a state is an insufficient basis upon which to assert jurisdiction over a defendant. Applying the teachings of *International Shoe*, the *Shaffer* court held that the same minimum contacts analysis necessary to sustain in personam jurisdiction applies to quasi-in-rem jurisdiction.

Although this would appear to eliminate the usefulness of quasi-in-rem jurisdiction, because minimum contacts necessary to obtain quasi-in-

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to provide for the exercise of personal jurisdiction over a defendant who is not subject to the jurisdiction of any state upon proper service of a summons. This excercise of jurisdiction must still be consistent with constitutional standards and plaintiff's claim must arise under federal law. *See* FED. R. CIV. P. 4(k)(2). The new rule allows a plaintiff to assert jurisdiction over a foreign defendant based on the totality of defendant's contacts with the United States. Previously, plaintiffs were unable to maintain jurisdiction over a defendant whose contacts with any one state were insufficient to assert jurisdiction under state law.

148. Banco Ambrosiano S.P.A. v. Artoc Bank & Trust Ltd., 464 N.E.2d 432 (N.Y. 1984).

149. *Id.* at 434.

150. *Id.*

151. *See id.*

152. *Id.*

153. *Banco Ambrosiano*, 464 N.E.2d at 434.

154. 433 U.S. 186 (1977).

rem jurisdiction will also generally support in personam jurisdiction, the doctrine is still useful in New York. Because of an oddity in New York law, where the Constitution allows a New York court to exercise in personam jurisdiction but New York law does not, courts can use post-*Shaffer* quasi-in-rem jurisdiction to "fill that gap".[155] This was precisely what the New York Court of Appeals allowed the Italian bank to do.

The issue confronting the New York Court of Appeals was whether the presence, in New York, of the money the Italian bank loaned to the Bahamian bank was enough to support quasi-in-rem jurisdiction over the Bahamian bank for the purpose of attaching the money. The court held that it was. Specifically, the court reasoned that:

> This is not a case in which property is coincidentally located within the State's borders and forms the only relevant link to defendant, rather, [defendant's] account with [its correspondent bank] is closely related to plaintiff's claim. It is the very account through which [defendant] effectuated the transaction at issue . . . .[The factors in this case,]—the relationship between the cause of action and the property, the activities to be performed in New York under the parties' agreement, and [defendant's] other ties with New York—combine to render the exercise of quasi-in-rem jurisdiction appropriate in this case.[156]

This holding allows foreign plaintiffs to assert jurisdiction over defendants in New York for the purpose of attaching assets when the assets are related to the underlying cause of action. After assets have been attached, plaintiffs can proceed with litigation, either here or abroad, confident that if a plaintiff's verdict is rendered, funds will be available to satisfy the judgment.

2. Attachments to Secure Assets for Satisfaction of a Foreign Judgment.—Once a plaintiff's verdict has been rendered, in conjunction with converting the foreign judgment to a New York judgment, plaintff can attach defendant's New York assets pursuant to section 6201(5) of the CPLR.[157] Such an attachment has the benefit of insuring that assets will be available if a New York court recognizes the foreign judgment. Since this attachment is made only after a foreign judgment has been rendered, whereas most attachments are made on a pre-judgment basis,

155. *Banco Ambrosiano*, 464 N.E.2d at 435.
156. *Id.* at 436.
157. *See supra* note 141 and accompanying text.

an interesting issue arises as to what standard a court should use in evaluating this type of attachment application.

This issue was recently addressed by a court in the Eastern District of New York.[158] Plaintiff, a Japanese corporation, obtained a judgment against defendant, a New York corporation, in Japan. This judgment was on appeal at the time plaintiff sought attachment of defendant's New York assets. However, for the purpose of recognizing the foreign judgment, the judgment in Japan was final.[159]

Plaintiff sought an order of attachment and argued that as a judgment creditor it did not need to establish anything except that the judgment remained unsatisfied.[160] The court disagreed, but did not go so far as to require plaintiff to meet the same requirements as a plaintiff seeking a pre-judgment attachment.[161] The court noted that attachment is a drastic remedy and is only granted for the purposes of obtaining jurisdiction or securing assets.[162] In this case, the court held that since defendant was a New York resident, the only issue was whether the attachment was necessary for security purposes.[163] Because defendant presented substantial evidence that it had enough assets and revenue to satisfy the Japanese judgment, and plaintiff offered no evidence to the contrary, the court declined to confirm plaintiff's attachment.[164]

Nonetheless, this case does not eliminate the usefulness of a section 6201(5) attachment. Notably, defendant in this case was a New York resident with significant assets in the state. For foreign judgment creditors not in such a situation, section 6201(5) remains an extremely viable option. Indeed, this case lessens their burden by reducing the standard necessary to sustain an attachment.

B. Recognition of Foreign Country Money Judgments

U.S. courts have long recognized judgments of foreign countries. The adoption of approximately half of the states of the Uniform Foreign Country Money-Judgments Recognition Act [hereinafter Uniform Act][165] has codified this process. In New York, codification of the

158. Nippon Emo-Trans Co., Ltd. v. Emo-Trans., Inc., 744 F. Supp. 1215 (E.D.N.Y. 1990).

159. *See infra* note 172 and accompanying text (listing the factors considered by New York courts in determining whether to recognize foreign judgments).

160. *Nippon*, 744 F. Supp. at 1218, 1234-36.

161. *Id.* at 1234-36.

162. *Id.*

163. *Id.*

164. *Id.* at 1236.

165. UNIF. FOREIGN COUNTRY MONEY-JUDGMENTS RECOGNITION ACT, *cited in* AM. JUR.2D DESK BOOK item 282. *See* N.Y. CIV. PRAC. L. & R. LAW § 5301 (McKinney Supp. 1994) (table

Uniform Act in article 53 of the CPLR was intended less to liberalize the process of recognizing foreign country judgments and more to increase the recognition by foreign countries of judgments obtained in New York.[166] This long history is recognized by section 5307 of the CPLR, which provides that article 53 does not prevent the court from recognizing foreign country judgments in situations not covered by the statute.[167]

The process of obtaining recognition of a foreign country judgment has many advantages in today's international business environment. Namely, judgments obtained abroad can be given full effect whenever assets are located in the United States. However, the recognition of foreign judgments in New York, like any other provisions of law, is subject to varying interpretations. The next part of this article outlines the procedures for seeking recognition of a foreign judgment and some of the more problematic issues this process entails.[168]

Article 53 applies to "any foreign country judgment which is final, conclusive, and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal."[169] Such a judgment must grant a sum of money, and cannot include "a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters."[170] Assuming these conditions are established, "a foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim, or affirmative defense."[171]

The issues most frequently litigated in these motions turn on the various grounds upon which a New York court can refuse to recognize a foreign judgment. Section 5304 lists nine factors a court may consider in deciding whether to recognize a foreign judgment.[172]

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collecting cites and states that adopted the Act). It is important to consult the codification of the Act in each state because variations exist.

166. N.Y. CIV. PRAC. L. & R. LAW § 5301 (McKinney 1978) ("So liberal has New York case law been in the recognition of the judgments of foreign nations that the occasion for the use of Article 53 has been rare.").

167. *Id.* § 5307.

168. *See generally* Annotation, *Construction and Application of Uniform Foreign Money Judgments Recognition Act*, 100 A.L.R.3d 792 (1980).

169. N.Y. CIV. PRAC. L. & R. LAW § 5302 (McKinney 1978).

170. *Id.* § 5301(b).

171. *Id.* § 5303.

172. *Id.* § 5304. Section 5304 provides:

(a) **No recognition.** A foreign county judgment is not conclusive if:

1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

1. Jurisdiction.—Separate from the issue of whether the foreign tribunal had jurisdiction over the defendant is the issue of whether a New York court has jurisdiction over the defendant. Apparently, due to the language that was used in codifying the Act, New York is unique in having created this problem.[173] In other states, a foreign judgment is converted into a state judgment without having to bring an action in court. In these states, an application is made directly to the clerk of the court and a separate proceeding is not required.[174] New York, however, requires that an action be brought and thus raises the specter of personal jurisdiction.

This problem has been resolved judicially, although by a lower court in New York, so as to basically create the same rule the other states adopted by codification.[175] The solution chosen by the court requires us to revisit the doctrine of quasi-in-rem jurisdiction.[176]

The court first recognized that a plaintiff seeking to enforce a foreign country judgment must establish some basis of jurisdiction over the defendant.[177] In this case, plaintiff had obtained an *ex parte* order of attachment over defendant's property.[178] Apparently, the U.S. Supreme Court's decision in *Shaffer* was not considered in this early order because the court considered it in this case. It appeared that the property attachment did not have the kind of contacts necessary to support post-*Shaffer* quasi-in-rem jurisdiction. The court, however, reasoned that *Shaffer* "did not entirely emasculate the use of quasi-in-rem

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2. the foreign court did not have personal jurisdiction over the defendant.

(b) **Other grounds for non-recognition.** A foreign country need not be recognized if:

1. the foreign court did not have jurisdiction over the subject matter;
2. the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
3. the judgment was obtained by fraud;
4. the cause of action on which the judgment is based is repugnant to the public policy of this state;
5. the judgment conflicts with another final and conclusive judgment;
6. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or
7. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum in the trial of the action.

Id. § 5304.

173. Lawrence W. Newman & Michael Burrows, *Jurisdiction to Enforce Foreign-Country Judgments*, N.Y.L.J., Aug. 16, 1990, at 3.

174. *Id.*

175. *See* Biel v. Boehm, 406 N.Y.S.2d 231 (Sup. Ct. Suffolk County 1978).

176. *See supra* notes 154-56.

177. *Biel*, 406 N.Y.S.2d at 233.

178. *Id.*

jurisdiction, and indicated that there were certain exceptions to the general rule of unconstitutionality.[179]

One of these exceptions was for the enforcement of judgments rendered in other cases. The Court in *Shaffer* reasoned:

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State has jurisdiction to determine the existence of the debt as an original matter.[180]

Since this language applies to the sister-state judgments, however, the issue was whether it also applied to foreign country judgments. This court held that it did and reasoned:

> Without permitting the attachment and levy process as a basis for quasi-in-rem jurisdiction, the plaintiff, seeking to enforce a recognized foreign Country judgment, would be barred a forum unless he could gain a basis for in personam jurisdiction. Justice and fair play are not being served by permitting such a situation to exist.[181]

In sum, a plaintiff with a foreign country judgment must obtain jurisdiction over the defendant to enforce the foreign country judgment in New York. The plaintiff, however, need only establish pre-*Shaffer* quasi-in-rem jurisdiction. That is, the plaintiff does not need to establish a relationship between the assets, the forum and the litigation—mere presence of assets is sufficient to support jurisdiction.[182] This is to be distinguished from post-*Shaffer* quasi-in-rem jurisdiction, which requires minimum contacts, and is necessary to support an order of attachment before judgment is obtained.

2. Grounds for Non-recognition.—Assuming jurisdiction over the defendant is obtained, article 53 provides a number of grounds upon

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179. *Id.* at 234.

180. *Shaffer*, 433 U.S. 186, 210 n.36.

181. *Biel*, 406 N.Y.S.2d at 235. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. h (1987) ("[A]n action to enforce a judgment may usually be brought whenever property of the defendant is found, without any necessary connection between the underlying action and the property, or between the defendant and the forum.").

182. In addition to quasi-in-rem jurisdiction, there are two other methods for obtaining jurisdiction over a defendant. Personal jurisdiction can be obtained over a defendant if the defendant resides in the state in which the assets are located. Also, if a defendant is served while travelling in a state, minimum conctacts do not need to be established. *See* Burnham v. Superior Court, 495 U.S. 604 (1990).

which a court may, in its discretion, refuse to recognize a foreign country judgment.[183] The next section of this article reviews some of the decisions addressing these factors.

(a) Default Judgments.—Frequently, defendants forced to litigate cases in foreign nations do not appear and default judgments are entered against them. A default judgment in such a case is rarely of use to a plaintiff since a reason for defendant's absence is often the defendant's lack of contacts and property in the foreign state. The judgment creditor is thereby forced to seek recognition of the foreign judgment in a place where the defendant has assets. When these assets are located in the United States, plaintiffs may face courts that are particularly concerned with the potential inequities of recognizing a foreign default judgment.

For example, in a case decided in New York, defendant purchased an antique while on vacation in Vienna.[184] After plaintiff returned home to New York, defendant refused to pay plaintiff on grounds that the value and age of the antique had been misrepresented.[185] Two years later, defendant was served in New York with process issued from an Austrian Court.[186] When defendant did not appear, a default judgment was entered against him, and plaintiff moved pursuant to article 53 to have the Austrian default judgment recognized by New York.[187]

The court declined to recognize the Austrian judgment. The court reasoned:

> While we are cognizant of the desirability of affording recognition to foreign country judgments so that judgments obtained in our own courts will receive reciprocally favorable treatment abroad, the nature of defendant's solitary act in this case was so causal and incidental to the foreign forum that it could not possibly serve as a jurisdictional predicate sufficient to grant conclusive effect to the default judgment sued upon.[188]

Such a result, however, is not inevitable. A default judgment from Britain was upheld by a court in the Southern District of New York.[189]

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183. *See supra* note 172 and accompanying text.

184. Siedler v. Jacobson, 383 N.Y.S.2d 833 (Sup. Ct. App. Term 1st Dept. 1976).

185. *Id.* at 834.

186. *Id.*

187. *Id.*

188. *Id.* at 833 (citing Falcon Manufacturing Ltd. v. Ames, 278 N.Y.S.2d 684 (1967)).

189. Colonial Bank v. Worms, 550 F. Supp. 55 (S.D.N.Y. 1982); *see also* National Union Fire Ins. Co. v. People's Republic of the Congo, 729 F. Supp. 936 (S.D.N.Y. 1989) (recognizing default judgment obtained against defendant in England); Porisini v. Petricca, 456 N.Y.S.2d 888 (4th Dept. 1982).

Plaintiff, a Connecticut bank with offices in London, entered into a loan agreement with a Liberian shipping corporation.[190] Defendant, a Dutch national who lived in London at the time of the loan but who resided in New York at the time of the New York litigation, personally guaranteed the loan.[191] As part of the guarantee agreement, defendant agreed to appoint lawyers in England to accept service of process. The shipping company defaulted on the loan, and plaintiff demanded that defendant make payment.[192] Defendant failed to do so.[193]

Plaintiff served defendant's lawyers according to the terms of the guarantee agreement.[194] However, defendant never paid his lawyers' fees and the lawyers advised defendant that unless payment and instructions were received, a default judgment would be entered against the defendant.[195] Eventually, the lawyers took no action and a default judgment was entered against the defendant.[196]

Plaintiffs moved to have the judgment recognized under New York law and defendant, on one of numerous grounds, argued that the procedure used to obtain the default judgment was so unfair as to amount to a denial of due process. The court disagreed, observing that "English procedure comports with our own standards of due process."[197] Furthermore, the court focused on the facts of this case and reasoned:

> [Defendant] was given notice of the need to answer and had an opportunity to do so. He chose not to and later failed to pursue the proper procedures to attempt to have the judgment withdrawn or reversed. [Defendant] may now regret those decisions but the fact remains that the default judgment resulted from [defendant's] failure to provide for his own defense despite notice of the consequences of that failure and not from the denial of due process.[198]

The court also did not accept defendant's argument that his failure to defend in this action was based on lack of funds.[199] The court noted that defendant could have sought an extension of time to arrange alternative financing. In addition, the court observed that defendant was not a "hapless worker threatened with the loss of his job[,]" but rather

190. *Colonial Bank*, 550 F. Supp. at 57.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Colonial Bank*, 550 F. Supp. at 57.
196. *Id.* at 58.
197. *Id.*
198. *Id.* at 59.
199. *Id.* at 59 n.3.

a "sophisticated businessman, 'well able to defend [his] interests in court, as this litigation amply shows.'"[200]

(b) Due Process.—In addition to raising a due process argument against recognition of a default judgment, due process arguments can also be made to challenge the merits of a foreign judgment. Such an argument can be made on the basis of section 5304(a)(4), which allows a court to decline to recognize foreign judgments because they are "repugnant to the public policy" of a state.[201]

This issue was recently litigated in an interesting case in New York.[202] Plaintiff, an Indian national, won a libel judgment England against a news service.[203] A reporter for this news service had written a story about plaintiff, which was distributed in India, the United Kingdom, and New York.[204] The story discussed plaintiff's alleged role in a complicated scheme through which a Swedish arms company paid kickbacks to gain a munitions contract with India.[205] Plaintiff attempted to enforce the English judgment in New York, but defendant invoked section 5304(a)(4), arguing that recognition of the foreign judgment would be repugnant to the public policy of New York because of the First Amendment issues involved in the case.[206]

The court agreed with defendant that the judgment should not be recognized.[207] The court also noted that under English law, a libel plaintiff is not required to prove that the statement was false, nor is the plaintiff required to prove that a media defendant intentionally or negligently ignored proper journalistic standards.[208] Instead, the defendant has the burden of proving that the statement was true and of asserting that the applicable statutory defense.[209] In short, English law places the burden of proof on the defendant whereas U.S. law places the burden on the plaintiff.[210] Given these differences, the court concluded:

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200. *Colonial Bank*, 550 F. Supp. at 59 n.3.
201. N.Y. CIV. PRAC. L. & R. LAW § 5304(a)(4) (McKinney 1978).
202. *See* Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661 (Sup. Ct. N.Y. County 1992).
203. *Id.* at 662.
204. *Id.* at 661.
205. *Id.* at 661.
206. *Id.* at 662.
207. *Bachchan*, 585 N.Y.S.2d at 665.
208. *Id.* at 663.
209. *Id.*
210. *Id.* at 663.

> It is true that England and the United States share many common law principles of law. Nevertheless, a significant difference between the two jurisdictions lies in England's lack of an equivalent to the First Amendment to the U.S. Constitution. The protections to free speech and the press embodied in that amendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protection afforded the press by the U.S. Constitution.[211]

C. *Summary*

In the United States, almost half the states have adopted the Uniform Foreign Country Money-Judgments Recognition Act. In New York, recognition of foreign country judgments has a long history. In addition to the jurisdictional issues in foreign judgment recognition litigation in New York, plaintiffs may have to defend the process used to obtain the judgment in the foreign tribunal and, in some instances, the substantive foreign law upon which the judgment was obtained. Overall, however, given the strong desire in New York to have foreign courts recognize New York judgments, foreign judgments are frequently recognized by the courts.

Accordingly, if the party who obtained a foreign judgment concludes that the laws and judicial procedures of that nation are not inconsistent with the laws and Constitution of the United States, or of the state in which the property sought is located, resort to these various procedures would be worthwhile and may well prove to be profitable.

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211. *Id.* at 665.