CO-PUBLISHED EXTRATERRITORIAL SURVEY

Extraterritorial Survey

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Georgina Philippou of IOSCO explains how she is encouraging the body’s members to cooperate

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Hong Kong
Mark Yeadon and Vishal Melwani, Eversheds

Iceland
Geir Gestsson and Anna P Rafnsdóttir, Jonsson & Hall Law Firm

Mauritius
Vimalen J Reddi and Karuna Davay, 5 St James Court

Morocco
Dr Kamal Habachi and Salima Bakouchi, HB Law Firm

Nigeria
Babatunde Ogungbamila and Ejeme Emerole, Olisa Agbakoba & Associates

Norway
Gaute Gjeisnten and Leif Petter Madsen, Wikborg Rein

United Kingdom
Nicholas Herrod, Dylan Matthews and Karen Birch, Allen & Overy

United States
Andrew Rhys Davies and Nicolette Ward, Allen & Overy
Extraterritorial regulation is growing at an unprecedented rate. Legal systems are spreading: some estimates suggest that three quarters of the world’s countries have made major changes to their corporate and bankruptcy laws alone in the past 15 years.

As the complexity and volume of law increases, corporates, financial institutions and individuals are all vulnerable to liability in foreign markets. The result is that individuals virtually anywhere can now be pulled into local litigation – some of which is deeply unpleasant.

Following last year’s highly successful Extraterritorial Regulation Survey, and feedback from in-house readers, IFLR, working with Allen & Overy’s Philip R Wood, has refined the process of benchmarking extraterritorial regulation. The IFLR Extraterritorial Survey measures activity within civil claims and foreign parties’ susceptibility to being captured in local courts.

This survey is split into three sections:
1. Contracts
2. Torts/civil wrongs
3. Insolvency

Each section features a ‘tick’ table and single supporting question. This table outlines the degree of involvement a foreign party must have in a jurisdiction to incur extraterritorial breaches in the relevant area. We have rated each jurisdiction’s reach with a colour coding system below.

**RED** If a jurisdiction’s extraterritoriality is activated with foreign involvement in 6 or more of these scenarios, then a red rating will be issued. Red indicates a rigorous, strict approach to extraterritoriality.

**YELLOW** If a jurisdiction’s extraterritoriality is activated with foreign involvement in between 3 and 6 of the scenarios then a yellow symbol will be issued. Yellow indicates a moderate approach.

**GREEN** If a jurisdiction’s extraterritoriality is activated by foreign involvement in fewer than 3 of the below scenarios then a green symbol will be issued. Green indicates a passive, hands-off approach to extraterritoriality.

The survey results are summarised below, in an at-a-glance table across all participating jurisdictions.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Contracts</th>
<th>Torts/delicts</th>
<th>Insolvency</th>
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<tbody>
<tr>
<td>Hong Kong</td>
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<td>Nigeria</td>
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<td>Norway</td>
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<td>US</td>
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</tbody>
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Participating firms

**HONG KONG**

- Eversheds

**ICELAND**

- Jonsun & Hall Law Firm

**MAURITIUS**

- 5 St James Court

**MOROCCO**

- Law Firm

**NIGERIA**

**NORWAY**

**UK**

**US**

- Allen & Overy
- Allen & Overy
- Wikborg Rein
- OA&A
- Chinese Advocates & Associates
Talk to enforce

With extraterritoriality on the rise, regulatory cooperation has never been so important. Georgina Philippou of IOSCO explains how she is encouraging the body’s members to cooperate

Back in May 2002, the International Organisation of Securities Commissions (IOSCO) decided that its signatories needed to talk more. Against the backdrop of growing cross-border securities markets and, by its own admittance, a nerviness bought on by the September 11 attacks and the need for cooperation globally, the body drew up its Multilateral Memorandum of Understanding (MMoU).

The document outlines the ways in which securities regulators must share information with other signatories with the aim of raising the standards of enforcement in securities cases. It’s been a great success, but work still needs to be done. Georgina Philippou, chair of IOSCO’s Committee 4 on enforcement and the exchange of information and co-chair of the MMoU screening group, has been leading the body’s efforts. Here, she reveals the body’s progress and targets for the future.

What are IOSCO’s priorities in encouraging extraterritorial cooperation among regulators?

It is very difficult these days to conduct an investigation into a major firm without there being some sort of cross-border angle to it. IOSCO’s vision is to be a global reference point for securities regulation and our MMoU sits at the centre of that. IOSCO is looking for collaboration, cooperation and consistency and the MMoU is one way we can achieve those things within a framework that allows for international variances.

The MMoU is essential to IOSCO’s vision and strategy; it is one of our top priorities and it’s a real flagship of its work. It can easily be measured: you can look how many signatories there are, how many times it has been used and how enforcement is changing.

Last year you adopted measures to encourage non-signatory members to sign the MMoU. Could you explain a little of how this works in practice?

The underlying principle of the MMoU can be described very simply: signatories should provide each other with the fullest assistance permissible. When jurisdictions sign up to the MMoU they sign up to comply with the spirit as well as the letter.

The MMoU is designed to raise standards of enforcement and international cooperation, and facilitate that cooperation, in order that we can conduct investigations more effectively – that’s its main purpose.

In order to get there IOSCO’s screening group screens applications to sign the MMoU. When we do that we ask a series of questions which are essentially around ensuring that a securities regulator can access essential information such as transaction and beneficial ownership information. Secondly, we ensure that it can share that information with other regulators without any obstacles. You have to be able to share the information even if you haven’t got your own ongoing investigation. Something like secrecy or blocking laws would be an impediment to signing the MMoU too.

On top of that, we ask that applicants can keep requests confidential. So an impediment to signing an MMoU might be that a regulator has to inform its government department or ministry that it has received a request from a foreign regulator.

We examine underlying legislation and talk to the applicant regulator. If a jurisdiction cannot sign the MMoU, that might not be the end of the matter. We might have ongoing discussions with them as they put in place legislative changes. We will give them technical assistance and carry out preliminary assessments of proposed new legislation just to keep them on the right path and help them reapply to a new standard that would help them meet the requirements of the MMoU.

At the moment there are over 100 signatories and about 20 jurisdictions that are on what we call Appendix B. Jurisdictions on Appendix B do not yet meet the requirements of the MMoU but they have given us a commitment that they will put in place any changes necessary to bring them up to the standards required of the MMoU, and have a plan in place. Those 20 jurisdictions all aim to be full signatories sooner or later.

What progress have you witnessed since the announcement last September?

The MMoU has been around for years, but last September we announced graduated additional measures for encouraging member jurisdictions that were not signed up to the MMoU to get themselves in a position where they could. Those measures essentially remove rights and responsibilities for any members who are not signatories.

The first measure that we introduced in September 2013 was that any non-signatory couldn’t nominate candidates for election or appointment for leadership positions. In March 2014, we then introduced a measure stating that those non-signatory members who are in leadership positions had to step down.

Building up from that, in June 2014, the third measures came into place. If you are a non-signatory member, you cannot participate in policy committees. And finally by September 30 this year a non-signatory will have their voting rights taken away. The idea is to move those 20 Appendix B members to signature as quickly as possible.

And what effect has the MMoU had in the world of international enforcement?

We are getting more and more signatories to the MMoU. Since the graduated additional measures were introduced six new signatories have come on board.

We ask all of our 120 IOSCO members every year whether they have used the MMoU, and if so what for, and how many times. In 2013, there were over 2300 requests
for information made under the MMoU by members, and that goes up every year. Most of them are in connection with insider dealing, but there are also investigations into other market abuse activities. That is a huge number of requests and it shows that this isn’t an academic exercise, it really matters.

What are the key factors that prevent regulators’ willingness to participate in international information exchange?

Each application is different, although there are things that crop up time and time again. In terms of legal and technical barriers to complying, there are probably three main issues. One is the ability to obtain information from any person. You will sometimes find that regulators have a suite of powers that they can only use in respect of the firms and individuals that they regulate. If an unregulated person – we use the analogy of the ‘pizza delivery man’ – was involved in an insider dealing, some regulators could not require information from him. If they can only require information from the brokers or bankers that they regulate, that isn’t good enough because that’s a real gap in terms of coverage.

The other problem that we find is getting access to banking information. In jurisdictions where a central bank regulates banking we still expect the securities regulator to be able to obtain banking information, even if via their central bank. An issue with a number of Appendix B jurisdictions is that they don’t have access to banking information.

The third issue is around confidentiality. We expect regulators to be able to preserve the confidentiality of requests made under the MMoU: the fact of the request and the subject matter. Again, with some non-signatories, that’s an issue. We can sometimes find workarounds on these issues, but those are the three key challenges which we find.

Which jurisdictions’ securities regulators have you been particularly impressed with the growth or willingness to share information and cooperation since you began the role?

I am generally really impressed with the willingness of jurisdictions to go through major change programmes, to lobby their parliaments for legislative change and to push that through as quickly as possible. As you can imagine that’s not an easy thing to do. Some of them have had great success. They do it with our help, but the huge effort some jurisdictions have put into achieving the standards of the MMoU has impressed me.

Are you sufficiently resourced to help applicants in that respect?

I think we make the best use of the resources that we have. Help for applicants comes from Committee 4 and the Screening Group, as well as the IOSCO Secretariat based in Madrid. There are MMoU experts in the Secretariat who are dedicated to working with Committee 4 and the Screening Group.

What’s the biggest challenge you face in your role as chair of IOSCO’s committee on enforcement?

I’ll certainly have a big party when every single member of IOSCO is an MMoU signatory. We have 20 still to work with, and nowadays every new IOSCO member has to be able to sign the MMoU: there is no Appendix B option. There is also another piece of important work, which is the dialogue that we have with non-members. When we identify a non-member jurisdiction in some corner of the world that isn’t a member but is important to us in terms of enforcement and we find there are cooperation issues, we will initiate dialogue with them. We will set up a working group and explain to the jurisdiction that they have a part to play in the network of international regulators and explore with them what the issues are and whether they can be resolved with or without legislative change. That dialogue is very challenging. It’s a very long game. But there are examples of regulators who started like this and are now signed up to the MMoU.

When you talk about assisting that national regulator with lobbying, how do IOSCO help with that?

We don’t actively directly lobby as IOSCO. But we will advise applicants on legislation that would meet the standards of the MMoU. We will help them with arguments around why the MMoU is important in the context of international investigations. We’re behind the scenes but we’re playing a very important part.
The challenges of pursuit

Mark Steward, executive director of enforcement at the SFC, on why the regulator’s ability to enforce depends on its handling of extraterritoriality

Hong Kong’s status as Asia’s financial hub makes enforcement of its securities laws a truly cross-border operation. So it’s lucky that the Securities and Futures Commission’s (SFC) head of enforcement, Mark Steward, has proven to be such a tenacious operator in his eight years in the position. From his pursuit of thorough remediation policies to a focus on corporate governance issues, Steward has raised the city-state’s standards immeasurably. Here, he shares his thoughts on the challenges facing the regulator’s enforcement division.

What are the challenges facing the SFC – and Asian regulators generally – in successful extraterritorial enforcement? ‘Think globally, act locally’, the old 1970s graffiti, is now the mantra for market regulators. Most of our enforcement work is now cross-border and our ability to enforce our laws now depends on our ability to manage and solve the problems generated by this kind of complexity. The biggest growth in recent years has been the interactivity within this region: excluding China, the number of requests for assistance in enforcement cases with Singapore, Malaysia, Japan, South Korea, etc has increased by more than 60%.

The biggest challenges? First, limitations on the availability of remedies against defendants outside the jurisdiction compared to those within the jurisdiction can lead to inconsistent outcomes for the same kind of misconduct. Secondly, misconduct across multiple jurisdictions creating the risk of multiple actions – the system for cooperation works well when liability is located in only one place, but there is no ‘forum conveniens’ protocol for multi-jurisdictional misconduct. This gives rise to double jeopardy issues not only for those in the enforcement cross-hairs but also for regulators. There are many challenges and new ones are emerging all the time in this growing area.

With the dust now settled on the Tiger Asia case, will we see the SFC rely on section 213 to help it achieve financial recoveries for investors across a broader range of breaches of the Securities and Futures Ordinance (SFO)? Investors will have more confidence in financial markets, like Hong Kong’s, that are effective not only in detecting and taking action against wrongdoers but also in remediating misconduct. We have pursued a remediation policy for a long time now, not only through section 213 cases but also in our corporate governance and intermediary misconduct programmes. Loss caused by misconduct should not just sit where it lies. So, we also see our job as dealing with the consequences of misconduct and not just dealing with the wrongdoer. So yes, this approach will continue.

Corporate governance appears to be a priority across developed markets and the SFC has had major successes. What else needs to improve within the area? Corporate governance is not just about the fraud issue. Effective board performance, continuous disclosure, financial reporting, undisclosed connected transactions – all of these are issues that have appeared in our recent corporate governance cases.

How receptive do you think the market is to your pursuit of sponsor liability and does there need to be a process of education for sponsor banks? I think sponsors have a good understanding of what is required. Due diligence is not a new concept. Recently, we took issue with a sponsor over a key question that we felt should have been asked by the sponsor but it wasn’t. I asked whether the question would have been raised if the sponsor was buying the business himself. He said yes. I think sponsors need to think about their work from the perspective of a purchaser, kicking the tires, doing all the things investors might want to do if they had the chance.

Following the implementation of new requirements on electronic trading under the SFC’s Code of Conduct, can we expect a larger focus on the monitoring of algorithmic trading in 2014? Yes, although we have been looking at this area for a long time anyway; this is why the new rules were brought into effect.

Last year saw record fines in the US and UK and a jump in enforcement actions by the SFC in Hong Kong. Is there a global trend for increased enforcement? Our programmes are designed to extend our coverage and to detect misconduct in every corner of the market. Certainly in Hong Kong there is a trend for greater use of our enforcement functions and more detection will lead to more cases. The workload within the enforcement division of the SFC has increased substantially – about 130 investigations per year in 2007 to over 500 nowadays. I don’t see any let up.

About the contributor

Mark Steward
Securities and Futures Commission

Mark Steward is a member of Hong Kong’s Securities and Futures Commission (SFC). He is also an executive director with responsibility for the enforcement division. That division is responsible for the surveillance of the securities and futures markets to identify unacceptable conduct, investigating statutory offences and breaches of the legislation enforced by the SFC, and disciplining licensed persons and initiating prosecutions where appropriate.
### SECTION 1: CONTRACTS

- The contracts concerned are mainly loan contracts, guarantees, derivatives and other financial contracts.

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<thead>
<tr>
<th>JURISDICTION</th>
<th>CONTRACTS</th>
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<tbody>
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<td>1. Local presence of defendant</td>
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<tr>
<td>2. Local presence of director of corporate defendant</td>
<td>*</td>
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<tr>
<td>3. Local branch, even if claim unconnected to branch</td>
<td>*</td>
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<tr>
<td>4. Defendant does business locally, eg enters into contracts or has meetings</td>
<td>✓</td>
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<tr>
<td>5. Contract made locally</td>
<td>✓</td>
</tr>
<tr>
<td>6. Contract governed by local law</td>
<td>✓</td>
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<tr>
<td>7. Contract performable locally</td>
<td>✓</td>
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<tr>
<td>8. Local nationality or domicile of plaintiff</td>
<td>*</td>
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<tr>
<td>9. Local assets, however small</td>
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**Expand on your jurisdiction’s treatment of contract breaches. This includes, where applicable, explanation of courts’ discretion and the types of contract that would apply.**

**About the author**

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Mark Yeadon is a partner based in Hong Kong. He is the head of the Asia litigation and dispute management practice. Before joining the firm in 2010, he was a partner of Slaughter and May. He has practised in Hong Kong for the last 22 years, having spent his early career in London. He is admitted in both England and Wales and Hong Kong and he is a qualified mediator.

He specialises in the resolution of commercial disputes by arbitration, mediation and court proceedings as well as advising on the conduct of, and response to, regulatory and other types of inquiry and investigation. He has advised clients throughout Asia on a wide range of commercial and financial disputes, and in particular matters arising out of complex financial transactions including derivatives, commercial contract breaches, negligence, fraud, shareholder disputes and breaches of directors’ and employees’ duties.

Yeadon is currently advising the Hong Kong regulator of broadcasting and telecoms on the key issues affecting these industries, including the application of rules against anti-competitive conduct.

He is listed as a leading individual for dispute resolution in various legal directories and has been described as “excellent and practical” and “thorough and diligent”.

In this summary we consider (1) the wide discretion the court has to decide whether Hong Kong is the most appropriate forum (the forum conveniens) for hearing a claim for breach of contract and, (b) the circumstances in which a contractual claim can be served on a foreign defendant.

1. **Hong Kong as the forum conveniens**

   The Hong Kong court has a wide discretion as to whether Hong Kong is the most natural and appropriate jurisdiction (the forum conveniens) for a trial of a claim in contract.

   The Hong Kong court will generally respect valid contractual agreements specifying the jurisdiction in which a dispute on the contract is to be resolved. For example, a contract between non-Hong Kong companies but which specifies Hong Kong jurisdiction will generally be heard by the Hong Kong court.

   In the absence of a contractual agreement as to jurisdiction, the Hong Kong court must be satisfied that the contract has a substantial connection with Hong Kong. The court will likely take into account all of the factors listed in the table above in determining the jurisdiction with which the contract has a substantial connection; we have ticked the four factors which we consider are likely to be key.

2. **Service of contract proceedings on a foreign defendant**

   **(a) Service in Hong Kong**

   If Hong Kong is the forum conveniens it may be possible to serve a foreign defendant in Hong Kong in certain circumstances where there is:

   - the local presence of an individual defendant (Box 1);
   - the local presence of a director of a corporate defendant (Box 2); or,
   - a corporate defendant that is registered as an overseas company in Hong Kong (Box 3).

   *(Although note that these factors on their own would generally not be sufficient to satisfy a Hong Kong court that it is the forum conveniens.)*

   **(b) Service outside of Hong Kong**

   If Hong Kong is the forum conveniens, the Hong Kong court may grant permission to a plaintiff to serve a foreign defendant out of the jurisdiction. In the context of a contractual claim, the most likely bases on which the Hong Kong court may, in its discretion, take jurisdiction over a foreign defendant would be where:

   - the contract was made by a party trading or residing in Hong Kong (Box 4);
   - the contract was made in Hong Kong (Box 5);
   - the contract is governed by Hong Kong law (Box 6);
   - the alleged breach of the contract took place in Hong Kong (Box 7);
   - the contract specifies Hong Kong jurisdiction (other); and,
   - the claim is for a debt which is secured over land or other property in Hong Kong (other).
SECTON 2: TORTS/DELICTS

- Torts or delicts include such wrongs as misselling financial products or misrepresentation in an offering circular.
- The table disregards EU or EEA and common jurisdictional rules.

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<thead>
<tr>
<th>JURISDICTION</th>
<th>TORTS/CIVIL WRONGS</th>
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<tr>
<td>1. Local presence of defendant</td>
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<td>2. Local presence of director of corporate defendant</td>
<td>*</td>
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<tr>
<td>3. Local branch, even if claim unconnected to branch</td>
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<tr>
<td>4. Defendant does business locally, eg enters into contracts or has meetings</td>
<td>✓</td>
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<td>5. Tort committed locally</td>
<td>✓</td>
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<td>6. Tort governed by local law</td>
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<td>7. Local nationality or domicile of plaintiff</td>
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<td>8. Local assets, however small</td>
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<td>9. Other</td>
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Expand on your jurisdiction’s treatment of torts or delicts. This includes, where applicable, explanation of courts’ discretion, further explanation of the applicable torts, or other relevant factors.

The reach of the Hong Kong courts in multi-jurisdictional tort claims involves complex procedural and substantive laws. Below we summarise the discretion the court has to decide whether Hong Kong is the appropriate forum (the forum conveniens) for hearing a tort claim and the circumstances in which a tort claim can be commenced against a foreign defendant.

(1) Hong Kong as the forum conveniens
(a) Torts committed in Hong Kong
Hong Kong will generally be the natural forum for torts that are committed in Hong Kong (Box 5). The governing law of the tort will generally coincide with the place where the tort is committed (Box 6).

(b) Torts committed outside of Hong Kong
The Hong Kong court will determine the forum with which the action has the most real and substantial connection. We have ticked the factors which we consider are likely to be key, but in exercising its discretion, the court will likely take into account:

- the place where the parties reside (Boxes 1, 2 and 7);
- the place where the parties carry out business and where loss was sustained (Boxes 3 and 4);
- whether the relevant act is actionable as a tort in Hong Kong (see below) (Box 6);
- the availability of witnesses (Boxes 1 and 7).

As to governing law, the general rule in Hong Kong is that in order for a tort claim to be brought in respect of acts taking place wholly or partly outside of Hong Kong, it must be actionable both under the laws of Hong Kong, and the law under which the relevant acts took place (known as the ‘double actionability’ rule). Where this would cause injustice, in exceptional cases, the court may decide that the proceedings in Hong Kong may be governed by the law of the country which has the most significant relationship with the acts committed and the parties.

(2) Service of tort proceedings on a foreign defendant
(a) Service in Hong Kong
If Hong Kong is the forum conveniens it may be possible to serve a foreign defendant in Hong Kong in certain circumstances where there is:

- the local presence of an individual defendant (Box 1);
- the local presence of director of a corporate defendant (Box 2);
- a corporate defendant that is registered as an overseas company in Hong Kong (Box 3).

* (Although note that these factors on their own would generally not be sufficient to satisfy a Hong Kong court that it is the forum conveniens.)

(b) Service outside of Hong Kong
If Hong Kong is the forum conveniens, the Hong Kong court may grant permission to serve a foreign defendant out of the jurisdiction. In the context of a tort claim, the most likely bases on which the Hong Kong court may permit service on a foreign defendant would be where the damage caused by the tort was (i) sustained (Box 4), or (ii) resulted from acts (Boxes 5 and 6), in Hong Kong.

About the author

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Vishal Melwani is a partner in the litigation and dispute management practice of Eversheds having previously worked for six years at Slaughter and May. Before qualifying as a solicitor he qualified as a Chartered Accountant, having trained in the audit department of PwC and later worked in a leading Hong Kong practice specialising in insolvency and forensic accounting.

Melwani’s accounting background has added value to clients in a number of commercial disputes on which he has acted as a solicitor. In addition to being a Canadian Chartered Accountant and a Hong Kong Certified Public Accountant, he is also an associate member of the Hong Kong Institute of Arbitrators, a distinguished professional mentor of the Chinese University of Hong Kong Faculty of Law, and is on the panel of accredited general mediators of the Hong Kong Mediation Accreditation Association Limited.

He has been recognised by various legal directories as “a future star litigator”, with “strong black letter skills”, “attentive to detail” and “of high integrity”. He is consistently ranked as a leading individual for dispute resolution in Hong Kong.
**SECTION 3: INSOLVENCY – INDIVIDUALS OR CORPORATES**

- This table disregards consumer transactions.
- It also does not include EU or EEA and common jurisdictional rules, e.g., the EC Insolvency Regulation of 2002.

### JURISDICTION INSOLVENCY OF INDIVIDUALS OR CORPORATES

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<th>JURISDICTION</th>
<th>INSOLVENCY OF INDIVIDUALS OR CORPORATES</th>
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<tr>
<td>1. Local presence of the debtor (who is an individual/natural person)</td>
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<tr>
<td>2. Local presence of director of the debtor (who is not an individual/person)</td>
<td>Possible</td>
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<tr>
<td>3. Debtor has a local branch, even if creditor's claim is unconnected to branch</td>
<td>Possible</td>
</tr>
<tr>
<td>4. Debtor does business locally, e.g., contracts or meetings locally</td>
<td>Possible</td>
</tr>
<tr>
<td>5. Contract on which claim is based is made locally</td>
<td>Possible</td>
</tr>
<tr>
<td>6. Contract on which claim is based is governed by local law</td>
<td>Possible</td>
</tr>
<tr>
<td>7. Contract on which claim is based is performable locally</td>
<td>Possible</td>
</tr>
<tr>
<td>8. Local nationality or domicile of creditor</td>
<td>Possible</td>
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<tr>
<td>9. Debtor has local assets, however small</td>
<td>Possible</td>
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<tr>
<td>10. Other</td>
<td>Possible</td>
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**Insolvent winding-up of foreign companies**

The liquidation process in Hong Kong in respect of insolvent companies was traditionally used to wind-up the affairs of a company before dissolution. However, a recent trend is for provisional liquidators to be appointed in Hong Kong to try to effect the restructuring of a company with a view to avoiding dissolution, rather than simply to preserve assets as a pre-cursor to winding-up.

The Hong Kong court may exercise its discretion to allow a foreign company to be put into liquidation or provisional liquidation in Hong Kong if the following requirements are met:

1. There is a sufficient connection with Hong Kong.
   - This is a matter of the Hong Kong court’s discretion and is highly fact-sensitive. Previous decisions in Hong Kong show that any of the factors listed in boxes 2 to 9 could be sufficient to satisfy this test depending on the particular factual circumstances. However, in recent decisions the Hong Kong court has made clear that the most appropriate forum for the winding-up of a company is generally its place of incorporation. The Hong Kong court will only exercise jurisdiction over a foreign company when there are compelling reasons demonstrating sufficient connection with Hong Kong.

2. There is a reasonable possibility that the winding-up order would benefit those applying for it.
   - There is considerable overlap here with the sufficient connection test. The benefit to be derived from Hong Kong proceedings will be fact-sensitive.

3. The Hong Kong court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company’s assets.
   - The Hong Kong court has the power to dispense with this requirement where the foreign company’s connection with Hong Kong is sufficiently strong. The Hong Kong court is unlikely to initiate the liquidation of a solvent foreign company, unless there are exceptional circumstances.

**Bankruptcy of foreign individuals**

Bankruptcy proceedings may be initiated in Hong Kong against a foreign individual by the presentation of a bankruptcy petition if the debtor:

1. is domiciled in Hong Kong;
2. is personally present in England and Wales on the day on which the petition is presented (Box 1); or
3. at any time in the three years preceding the presentation of the petition:
   a. has been ordinarily resident, or has had a place of residence, in Hong Kong; or, b. has carried on business in Hong Kong.

**General note**

As a general note, whether or not the Hong Kong court will permit insolvency proceedings is highly fact-sensitive as to which the court has a wide discretion. It will not exercise that discretion if the proceedings would be futile in practical terms.

**Scheme of arrangement**

Although not a type of insolvency proceeding, the Hong Kong court has the power to approve a scheme of arrangement of a foreign company where there is sufficient connection with Hong Kong to make such approval desirable.

**The authors would like to thank Tim Browning, senior associate, who provided great assistance in putting together the chapter.**
Iceland
Geir Gestsson and Anna Þ Rafnsdóttir, Jonsson & Hall Law Firm

SECTION 1: CONTRACTS

- The contracts concerned are mainly loan contracts, guarantees, derivatives and other financial contracts.

JURISDICTION

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Expand on your jurisdiction’s treatment of contract breaches. This includes, where applicable, explanation of courts’ discretion and the types of contract that would apply.

Under general rules of Icelandic law, courts can, for example, oblige a defaulting party to fulfill its contractual obligations, award damages or discounts to plaintiffs, and nullify contracts in whole or in part. If a contract has provisions on remedies available to the parties in cases of contractual default, Icelandic courts have discretion to apply those provisions as well, as long as those provisions are consistent with national law.

The statute applicable to jurisdiction of Icelandic courts is the Act on Civil Procedure 91/1991 (the ACP).

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Geir Gestsson is a partner of Jonsson & Hall Law Firm. He graduated from the University of Iceland Law School in 2002. He obtained an LLM in International Business and Trade Law from Erasmus University in Rotterdam in the Netherlands in 2004 and graduated from that programme with honours, cum laude.

Gestsson has been with Jonsson & Hall since 2004, first as an associate and from 2008, as partner. His main area of practice is international business and trade law, with special emphasis on commercial litigation. His clients are mostly multinational companies, financial institutions and law firms.

When a case concerning a contractual breach has been filed before an Icelandic court, the defendant has the right to submit a defence brief with its counter-arguments to the court. Both parties have the right: to submit evidence to the court in support of their respective cases; to examine and cross-examine witnesses; and, to plead their cases orally. Judgments are generally handed down within four to eight weeks of the conclusion of the trial. District Court judgments are generally appealable to the Supreme Court of Iceland, which is the highest court in the country.

General comments for boxes 1-10: The general rule of Icelandic procedural law is that a case must be brought against a defendant in the jurisdiction where it is domiciled. The rule has certain exceptions, outlined below.

Box 1: Icelandic courts can have jurisdiction in contractual dispute cases where a defendant is domiciled abroad, if the defendant is present in the applicable court district when a subpoena is served and the subpoena concerns the defendant’s financial obligations to a plaintiff that has its legal domicile in Iceland, under article 32(4) of the ACP. There is no minimum period of stay in Iceland required for the defendant.

Box 2: The same rule applies as in box 1, when a director of a corporate defendant is present in the jurisdiction.

Box 6: The mere fact that a contract is drawn up in Iceland does not afford jurisdiction to Icelandic courts.

Box 8: Icelandic courts distinguish between applicable law provisions and jurisdictional provisions in contracts. Icelandic law being applicable is not enough in itself to afford jurisdiction to Icelandic courts. However, Icelandic courts might consider a provision on Icelandic law being applicable as one of several factors to take into account when assessing whether a contractual dispute case had sufficient links to Iceland to afford jurisdiction to Icelandic courts.

Box 7: According to article 35(1) of the ACP, on forum solutionis, a case may be brought in the forum where a contract is to be fulfilled.

Box 9: According to article 34 of the ACP, on forum rei sitae, a dispute case concerning real estate may be filed in the local district where it is situated.
Torts or delicts include such wrongs as mis-selling financial products or misrepresentation in an offering circular.

The table disregards EU or EEA and common jurisdictional rules.

A party can be held liable under general principles of Icelandic Tort Law, if another party (the plaintiff/claimant) proves that it suffered damage as a result of unlawful and intentional or negligent action or inaction of the other party. This may include mis-selling of financial products or misrepresentation in an offering circular.

When a tort case has been filed on behalf of a plaintiff before an Icelandic court, the defendant has the right to submit a defense brief with its counter-arguments to the court. Both parties have the right to submit evidence to the court in support of their respective cases. Both parties have the right to examine and cross-examine witnesses. Both parties have the right to plead their cases orally. Judgments are generally handed down within four to eight weeks of the conclusion of a trial. District Court judgments are generally appealable to the Supreme Court of Iceland, which is the highest court in the country.

In principle, in the case of both torts and delicts, the jurisdiction is based on the territoriality principle.

Expand on your jurisdiction’s treatment of torts or delicts. This includes, where applicable, explanation of courts’ discretion, further explanation of the applicable torts, or other relevant factors.

In principle, in the case of both torts and delicts, the jurisdiction is based on the territoriality principle.

Boxes 1 and 2: The general rule is that a tort case can be filed in the court district or districts where the tort was committed, under article 41 of the ACP. The rule has certain exceptions, as further outlined below.

Box 5: Icelandic courts have jurisdiction in cases where a tort is committed locally.

Box 4: Exceptionally, a tort case may be brought if tort harm is suffered in Iceland, despite the tort being committed abroad.
SECTION 3: INSOLVENCY – INDIVIDUALS OR CORPORATES

- This table disregards consumer transactions.
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Expand on your jurisdiction’s treatment of insolvent companies and individuals. This can include, where applicable, explanation of courts’ discretion, or other relevant factors.

According to Act no. 21/1991 on Bankruptcy (the Bankruptcy Act) the main types of procedures for legal or natural persons in financial difficulties are: a) licence for temporary cessation of payments (moratorium); b) composition with creditors (composition); and, c) bankruptcy proceedings (liquidation).

**Box 1:** The Bankruptcy Act covers rules on jurisdiction of Icelandic courts in cases that concern insolvency of domestic debtors (legal and natural persons). According to articles 8(1), 32 and 33 of the Act, applications for initiation of moratorium, composition or bankruptcy proceedings, must be sent to the district court where the debtor has legal domicile and civil cases would be brought against the debtor. It follows that Icelandic domicile of a debtor is a pre-condition for the jurisdiction of Icelandic courts.

A moratorium application must be brought before the district court where the debtor is domiciled. The applicant debtor cannot already be insolvent. The debtor is also required to propose realistic, lawful and practicable measures for debt restructuring.

A moratorium is temporary in nature. Upon expiry, the debtor will either be able to continue operations as a going concern (successful reorganisation) or apply for immediate initiation of bankruptcy proceedings (unsuccessful reorganisation). For the duration of the moratorium, the debtor is protected from enforcement measures of creditors, but asset disposals and major financial decisions are subject to the approval of a court-appointed moratorium agent.

A debtor applying to a court for permission to enter into composition agreement with creditors will, for example, attach a composition proposal to the court in question, a detailed list of its assets, and a written recommendation from at least 25% of its creditors. The debtor retains formal control of its assets, but asset disposals and major financial decisions are subject to the approval of a court-appointed composition agent.

A debtor can enter into bankruptcy proceedings, either of its own volition or by creditor request. A debtor may enter into bankruptcy proceedings in case of insolvency, that is, a non-temporary inability to pay debts as they fall due. The term applies to both illiquidity and balance sheet insolvency. While an estate is being wound up, it is fully protected from any civil suit, enforcement and attachments. However, creditors can lodge their claims with the estate during an advertised claim registration period. A court-appointed liquidator makes decisions as to the disposal of the estate’s assets, for example, acknowledgment or rejection of lodged claims. Claim disputes may be directed to Icelandic courts. Bankruptcy dispute cases are dealt with on an expedited basis by Icelandic courts.

**Box 9:** According to articles 6(1) and 6(2) of the Bankruptcy Act, authorisation for financial reorganisation or composition given to an individual/corporation in another state does not apply in Iceland, in the absence of a specific agreement to this effect, between Iceland and that state. As instructed, we have excluded the EU Winding Up and Reorganisation Directive no. 2001/24.

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Anna P Rafnsdóttir joined Jonsson & Hall as an associate in 2011. Her main areas of expertise include contract, corporate and international business law. She was admitted to the bar in Iceland in May 2012.

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Mauritius

Vimalen J Reddi and Karuna Davay, 5 St James Court

SECTION 1: CONTRACTS

- The contracts concerned are mainly loan contracts, guarantees, derivatives and other financial contracts.

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Expand on your jurisdiction’s treatment of contract breaches. This includes, where applicable, explanation of courts’ discretion and the types of contract that would apply.

Box 1: The general principle is that the action under contract in Mauritius must be entered before the District Court of either the domicile or place of residence of the defendant – there being 10 District Courts in Mauritius. Where the jurisdiction of the District Court, being the lower court, is ousted by statute, the action then will be heard before either the Intermediate Court or the Supreme Court of Mauritius. The general principle is found under articles 2 and 59 of the Mauritian Code de Procedure Civile.

Box 4: The Mauritian courts will exercise jurisdiction in a contract claim where the defendant is a company that is incorporated outside of Mauritius, but which is registered locally.

SECTION 2: TORTS/DELICTS

- Torts or delicts include such wrongs as mis-selling financial products or misrepresentation in an offering circular.
- The table disregards EU or EEA and common jurisdictional rules.

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Expand on your jurisdiction’s treatment of torts or delicts. This includes, where applicable, explanation of courts’ discretion, further explanation of the applicable torts, or other relevant factors.

Box 1: For actions in tort, once again, the general principle under articles 2 and 59 of the Mauritian Code de Procedure Civile will apply. It follows that these actions must be entered before the court of either the domicile or place of residence of the defendant.

Box 7: The Mauritian courts will not be able to exercise jurisdiction over an action in tort solely on the basis that the plaintiff is a Mauritian national or a company registered or incorporated in Mauritius.

Articles 19 and 20 of the Civil Code that provide for the jurisdiction of Mauritian Courts on the basis of the nationality of the plaintiff only apply to actions in contracts. It is useful to note that articles 19 and 20 are, in fact, exactly the same as articles 14 and 15 of the French Civil Code, which are now interpreted by French
French origin, the Supreme Court in the case of jurisdiction in civil matters in Mauritius are almost entirely of the tendency in Mauritius has been to follow and apply ratification of the French courts. This was because there have not been the same legislative developments in Mauritius as in France to justify adopting the interpretation of the French courts.

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Karuna Davay is a barrister at 5 St James Court. She was called to the Bar of England & Wales in July 2011 and to the Bar of Mauritius in September 2012. Davay has a mixed practice, undertaking both contentious and non-contentious civil work as well as criminal work. She appears regularly before the District and Intermediate Court and the Family Division of the Supreme Court in divorce and custody matters. She has also appeared as junior counsel before the Supreme Court of Mauritius as well as in local and international arbitration proceedings.

SECTION 3: INSOLVENCY – INDIVIDUALS OR CORPORATES

- This table disregards consumer transactions.
- It also does not include EU or EEA and common jurisdictional rules, eg the EC Insolvency Regulation of 2002.

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Expand on your jurisdiction’s treatment of insolvent companies and individuals. This can include, where applicable, explanation of courts’ discretion, or other relevant factors.

Boxes 1, 3 and 4

The general principle under the Insolvency Act is that a bankruptcy order may only be made against a debtor who is domiciled in Mauritius. In addition, the debtor must be present on the day on which the petition for bankruptcy order is presented; or, the debtor at any time during the three years preceding the date of the petition for the bankruptcy order, must have been ordinarily resident, or had a place of residence in Mauritius, or have carried on business in Mauritius. Section 5 of the Insolvency Act further states that a debtor will be deemed to have carried on a business where this was done through a partnership or through an agent or manager of such partnership or where the debtor did so through an agent or manager.

The courts in Mauritius will also have jurisdiction to wind up a company where the company is either incorporated or registered under the laws of Mauritius. It follows that the Mauritian courts will have jurisdiction in insolvency matters over a company that is incorporated outside Mauritius, but which is registered in Mauritius.

It is useful to note that the jurisdiction of Mauritian courts is generally grounded on the French law notion of ‘domicile’. Similar to French law and in accordance with the provisions of article 3 of the Civil Code, the question of domicile before a Mauritian court will necessarily have to be determined in accordance with the lex fori, that is, the laws of Mauritius. In this exercise, Mauritian courts will be guided by article 102 of the Civil Code to determine the place of the debtor’s main establishment.

As regards the notion of residence, guidance can also usefully be sought from other statutes. The Non-Citizens (Property Restrictions) Act provides, in relation to an individual, that a resident in Mauritius is a person who has his domicile in Mauritius; and in relation to a corporate body, a resident is a body incorporated or registered under the laws of Mauritius. Guidance may also be sought from the definition of residence under section 73 of the Income Tax Act. Of note under section 73, are the definitions of a resident company, société, trust, foundation and association of persons.

courts to extend jurisdiction to actions both in contracts and torts. While the tendency in Mauritius has been to follow and apply French rules of private international law, given that the internal laws on jurisdiction in civil matters in Mauritius are almost entirely of French origin, the Supreme Court in the case of Immobilien Development v Karla & Ors [2011] expressly declined to do so. This was because there have not been the same legislative developments in Mauritius as in France to justify adopting the interpretation of the French courts.
CO-PUBLISHED EXTRATERRITORIAL SURVEY  MOROCCO

Morocco
Dr Kamal Habachi and Salima Bakouchi, HB Law Firm

SECTION 1: CONTRACTS

- The contracts concerned are mainly loan contracts, guarantees, derivatives and other financial contracts.

All commercial and financial contracts would apply with no exceptions.

The Moroccan courts may hear proceedings brought in respect of a contract against a defendant domiciled out of the jurisdiction in the situations described above.

Moroccan courts might take jurisdiction over defendants domiciled out of the jurisdiction, depending on the type of contracts and international rules involved. Cases are analysed individually to determine whether to exercise jurisdiction.

It should be noted that there are other situations in which the Moroccan courts might take jurisdiction over defendants domiciled out of the jurisdiction: (i) contracts containing a jurisdiction clause conferring jurisdiction on Moroccan courts, and, (ii) certain claims for provisional measures.

Expand on your jurisdiction’s treatment of contract breaches. This includes, where applicable, explanation of courts’ discretion and the types of contract that would apply.

Box 2: The temporary presence of a director of a non-Moroccan domiciled corporate defendant is not sufficient to decide whether to exercise jurisdiction.

Box 9: The presence of assets alone is not sufficient, however if the whole subject matter of a claim relates to assets located within the jurisdiction, the Moroccan courts may exercise their discretion to take jurisdiction, especially in real estate matters.

SECTION 2: TORTS/DELICTS

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- The table disregards EU or EEA and common jurisdictional rules.

In principle, in the case of both torts and delicts, the jurisdiction is based on the territoriality principle.

The Moroccan courts might take jurisdiction in all situations in which torts/delicts are committed locally.

However, there are circumstances in which Moroccan courts might take jurisdiction in relation to a tort claim over a defendant domiciled out of the jurisdiction: (i) if the contract provides a clause that confers jurisdiction on the Moroccan courts, and, (ii) in the case of certain claims for injunctive relief or for interim remedies.

Expand on your jurisdiction’s treatment of torts or delicts. This includes, where applicable, explanation of courts’ discretion, further explanation of the applicable torts, or other relevant factors.

Box 2: The temporary presence of a director of a non-Moroccan domiciled corporate defendant is not sufficient to decide whether to exercise jurisdiction.

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Expand on your jurisdiction’s treatment of insolvent companies and individuals. This can include, where applicable, explanation of courts’ discretion, or other relevant factors.

Box 2: If the director is considered liable for the liabilities of the undertaking in an action en comblement de passif, as provided for by Moroccan insolvency procedures, the Moroccan courts may take jurisdiction.

The Moroccan courts may exercise their jurisdiction in insolvency matters where the principal establishment of the individual or the head office of the company is located in Morocco.

Box 9: If the whole subject matter of a claim relates to assets located within the jurisdiction, the Moroccan courts may exercise their discretion to take jurisdiction, if the local assets were construed as a permanent establishment (PE).

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Bakouchi has handled a wide range of transactions in various sectors and conducted many seminars in copyright, consumer law and competition law both in Morocco and abroad.

She is specialised in intellectual property law, finance & banking law, corporate law, administrative law, labour law, commercial law, competition law and ADR. Bakouchi speaks three languages: Arabic, French and English.
Nigeria
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Expand on your jurisdiction’s treatment of contract breaches. This includes, where applicable, explanation of courts’ discretion and the types of contract that would apply.

All commercial and financial contracts would apply with no exceptions.

Box 1: In the western and northern states, the local presence of a defendant within the jurisdiction, if a writ has been properly served on him, activates the extraterritorial jurisdiction of the Nigerian courts. However, this is arguable if this common law transient rule has been statutorily repudiated in the eastern states of Nigeria (Abia, Anambra, Ebonyi, Imo and Enugu).

Nigeria operates a federal system of government. Jurisdiction of courts in Nigeria is statutorily conferred. The law/rule prescribing extraterritorial jurisdiction of Nigerian courts is contained in the High Court laws of the constituent states and the Civil Procedure Rules of the courts. The constituent states could legislate to confer on their courts extraterritorial jurisdiction. Nigerian courts have resolved international jurisdictional problems with the aid of the domestic rules of venue. The rules are based substantially on the English law in the western and northern states of Nigeria, but this is not the case in the eastern states of Nigeria.

Section 10 of the High Court of Lagos State law, for example provides that:

‘The High Court shall, in addition to any other jurisdiction conferred by the constitution of the Federation or by this or any other enactment, possess and exercise, within the limits mentioned in, and subject to the provisions of, the Constitution of the Federation and this enactment, all the jurisdiction, powers and authorities which are vested in or capable of being exercised by the High Court of Justice in England.’

Under this provision, courts in the western and northern states of Nigeria, just as in England, can exercise jurisdiction over a defendant who is casually present within their jurisdiction or can serve him with a writ.

In Anambra state, for instance, the High Court law gives the court jurisdiction to hear and determine any suit founded upon breach of contract if:

- the contract was drawn up within the jurisdiction of the court, though the breach occurred elsewhere;
- the breach occurred within the jurisdiction, though the contract was drawn up elsewhere;
- the contract ought to have been performed within jurisdiction; and,
- the defendant or one of the defendants resides within the jurisdiction.

Similar provisions are contained in the High Court laws of the eastern states.

From the above, it is clear that in Anambra and other eastern states, courts can exercise extraterritorial jurisdiction in any suit founded on a breach of contract with a foreign element in the above situations, but may not exercise jurisdiction based on the transient presence of the defendant within their jurisdiction.

About the author

Babatunde Ogungbamila
Olisa Agbakoba & Associates

He is a consummate professional with the uncommon talent of combining top level corporate commercial practice with litigation and other alternative dispute resolutions (ADRs). He has particular expertise in international commercial transactions and financing with a bias for petroleum and mineral taxation, project finance, negotiation and management of commercial contracts in the international oil and gas industry. He is also adept in international dispute settlement, power industry dynamics, international business law and transactions.

His attention to detail, calmness and ability to simplify and offer solutions for complex issues, coupled with his considerable experience in corporate transactions requiring mastery of Nigerian business, and the legal and commercial climate are of great value to his clients.

He has published many papers in international journals, including the Oil, Gas and Energy Law Journal (OGEL) that published his master thesis focusing on options in increasing the bankability of project financing transit pipelines in the face of the risk of obsolescing bargain.

He is registered with the Securities and Exchange Commission as a capital market consultant.

Ogungbamila is a litigation partner at Olisa Agbakoba & Associates.
SECTION 2: TORTS/DELICTS

- Torts or delicts include such wrongs as miselling financial products or misrepresentation in an offering circular.
- The table disregards EU or EEA and common jurisdictional rules.

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Expand on your jurisdiction’s treatment of torts or delicts. This includes, where applicable, explanation of courts’ discretion, further explanation of the applicable torts, or other relevant factors.

Box 1: In the case of torts, in the western and northern states, the local presence of a defendant within a jurisdiction, if a writ has been properly served on him, activates the extraterritorial jurisdiction of the Nigerian courts. However, it is also arguable in relation to torts that this common law transient rule has been statutorily repudiated in the eastern states of Nigeria (Abia, Anambra, Ebonyi, Imo and Enugu).

Section 10 of the High Court of Lagos State law, for example provides that:

‘The High Court shall, in addition to any other jurisdiction conferred by the constitution of the Federation or by this or any other enactment, possess and exercise, within the limits mentioned in, and subject to the provisions of, the Constitution of the Federation and this enactment, all the jurisdiction, powers and authorities which are vested in or capable of being exercised by the High Court of Justice in England.’

By this provision, courts in the western and northern states of Nigeria, just as in England, can exercise jurisdiction over a defendant in torts who is casually present within the jurisdiction, or can serve him with a writ.

However, this is not the case in eastern Nigeria. The High Court law of Anambra state, for instance, requires the defendant to be resident or carry on business within the jurisdiction before the court can assume jurisdiction. The law also empowers the courts to exercise jurisdiction to hear and determine any civil cause or matter, other than one on breach of contracts, in which the cause of the action arose or occurred within jurisdiction of the court, whether or not the defendant or any of the defendants resided or carried on business within the jurisdiction of the court. Similar provisions are contained in the High Court laws of other eastern states.

Unlike in the western and northern states of Nigeria, the courts in the eastern states of Nigeria may not exercise extraterritorial jurisdiction on a defendant, in relation to torts, who is only casually present within the jurisdiction.

SECTION 3: INSOLVENCY – INDIVIDUALS OR CORPORATES

- This table disregards consumer transactions.
- It also does not include EU or EEA and common jurisdictional rules, eg the EC Insolvency Regulation of 2002.

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Expand on your jurisdiction’s treatment of insolvent companies and individuals. This includes, where applicable, explanation of courts’ discretion, or other relevant factors.

Box 1: For the time being, the extraterritorial jurisdiction of the Nigerian courts in relation to insolvency is predicated on the High Court laws and rules and practice of the courts for regulating the ordinary civil procedure of the court. The rules on the extraterritorial jurisdiction of the courts in relation to contracts also applies to insolvency, subject to the insolvency laws in Nigeria.

As discussed regarding contracts, the local presence of a defendant within a jurisdiction, if a writ has been properly served on him, also activates the extraterritorial jurisdiction of the Nigerian courts in the western and northern states. However, this common law transient rule has been statutorily repudiated in the eastern states of Nigeria (Abia, Anambra, Ebonyi, Imo and Enugu).

About the author

Ejeme Emerole Specialises in litigation, alternative dispute resolution, and corporate commercial law. She obtained a BL and an LLB from the Nigeria Law School and the University of Ibadan, respectively, and was called to the Nigerian Bar in 2009. In the area of litigation, Emerole has worked extensively over the years on labour law matters, matrimonial causes, garnishee proceedings, recovery, arbitration and fundamental rights cases, among other things. She also provides advisory services to clients on various issues relevant to their specific industry and needs. She is a graduate of the Institute of Chartered Secretaries and Administrators of Nigeria (ICSAN). She has a passion for corporate governance and the need to ensure that the core values of corporate governance are entrenched into the fabric of corporate organisations in Nigeria.

E: eemerole@agbakoba-associates.com
Norway
Gaute Gjelsten and Leif Petter Madsen, Wikborg Rein

SECTION 1: CONTRACTS

The contracts concerned are mainly loan contracts, guarantees, derivatives and other financial contracts.

Expand on your jurisdiction’s treatment of contract breaches. This includes, where applicable, explanation of courts’ discretion and the types of contract that would apply.

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For purely domestic matters, a person has a general venue at his domicile, and companies at their registered head office. Foreign companies operating through a branch in Norway have a general venue at the location of the branch for matters relating to the branch. Additionally, there are a number of specific venues, the most relevant in this context being that a contract can be sued upon in the place it is to be performed.

In matters with an international aspect, there is an additional test to be met: the matter must have sufficient connection (tilstrekkelig tilknytning) with Norway. This quite generally phrased condition can give rise to a broad assessment of many factors. In many cases, the test will be met if the defendant has a venue in Norway for the matter, as described above, but this will not always be enough.

Conversely, the courts will take jurisdiction if the general test is met, even if there is no directly applicable local venue. In that case, the venue will either be the City Court of Oslo, or any other place of the plaintiff’s choice in Norway where the defendant has assets.

SECTION 2: TORTS/DELICTS

Torts or delicts include such wrongs as misselling financial products or misrepresentation in an offering circular.

The table disregards EU or EEA and common jurisdictional rules.

Expand on your jurisdiction’s treatment of torts or delicts. This includes, where applicable, explanation of courts’ discretion, further explanation of the applicable torts, or other relevant factors.

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For purely domestic matters, a person has a general venue at his domicile, and companies at their registered head office. Foreign companies operating through a branch in Norway have a general venue at the location of the branch for matters relating to the branch. Additionally, there are a number of specific venues, the most relevant in this context being that the party suffering a tort can sue at the place the damage, or effects of the damage, occurred.

In matters with an international aspect, there is an additional test to be met: The matter must have sufficient connection (tilstrekkelig tilknytning) with Norway. This quite generally phrased condition can give rise to a broad assessment of many factors. In many cases, the test will be met if the defendant has a venue in Norway for the matter, as described above, but this will not always be enough. To give an example: in a claim for compensation after the crash of a Russian aeroplane in Norway, where the passengers and crew were Russians, the Norwegian courts refused jurisdiction.

Conversely, the courts will take jurisdiction if the general test is met, even if there is no directly applicable local venue. In that case, the venue will either be the City Court of Oslo, or any other place of the plaintiff’s choice in Norway where the defendant has assets.
Bankruptcy proceedings in Norway can be opened in companies registered with the Norwegian Register of Business (NRB), which has its principal place of business in Norway. Under case law, the principal place of business is understood to be the actual place of business. If the debtor is not registered with the NRB but with another company register abroad, bankruptcy proceedings may only be initiated in Norway if the company conducts business in Norway. That, in the view of a judge, makes Norway the company’s actual place of business. In particular, this applies if the company operates in Norway through a branch and has no activities elsewhere. The same principle also applies for Norwegian companies. If a Norwegian company has its actual place of business in another country, bankruptcy proceedings cannot be opened in Norway, but must be opened by a court in the country in question.

To decide where a company has its actual place of business, the nature and scope of the business conducted must be assessed. Placement of the company’s administration and the nationality of the board members or other key figures may be indicators. The company’s registered address and place of production is also important. It is not enough that the foreign company merely has a Norwegian branch.

If bankruptcy proceedings are opened in Norway, all of the debtors’ assets, regardless of their location, will be included in the seizure of the estate. However this only applies if the assets can be sold, leased or otherwise converted into money.

Whether Norwegian bankruptcy proceedings are effective for assets located outside of Norway, will depend on whether the Norwegian bankruptcy proceedings are recognised by the courts in the country where the assets have been located. Such recognition will depend on bilateral agreements between Norway and the country in question. This also applies the other way around. A foreign bankruptcy, in principle, will not be recognised in Norway, given that such bilateral agreements do not exist. The consequence of this is that bankruptcy proceedings may be opened in Norway, even if such proceedings have been initiated in a foreign country.

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**Expand on your jurisdiction’s treatment of insolvent companies and individuals. This can include, where applicable, explanation of courts’ discretion, or other relevant factors.**

The wording of the statements in the boxes is not best suited to describe Norwegian courts’ jurisdiction in cases where the debtor is a foreign company. This is especially the case for boxes 3 and 4. Therefore, we are providing below a brief account of when bankruptcy proceedings can be initiated in Norway against a foreign company.

### About the author

**Gaute Gjelsten**

Gaute Gjelsten has extensive litigation experience before Norwegian courts and in arbitration proceedings, particularly in the areas of international shipping and offshore law, including maritime, energy and insurance. He also has a substantial practice relating to conflict of laws, and recognition and enforcement of decisions by foreign courts and international arbitration awards. He managed the firm’s office in Kobe, Japan for three years, while also acting as Norwegian Consul General for Kobe/Osaka. Gjelsten is recommended by Chambers and Partners as a ‘leader in his field’ in the shipping and litigation categories.

Gjelsten also serves as the global head of the firm’s shipping offshore practice, which includes the offices in London, Singapore, Shanghai and Kobe. Gjelsten is a partner at Wikborg Rein’s Oslo office.

**Leif Petter Madsen**

Leif Petter Madsen’s main areas of practice are insolvency law and restructuring, as well as related litigation matters. He has been appointed trustee in several major bankruptcies in Norway over the last 20 years, including those of the department store Steen & Strøm, NOKA Securities (the first major stock broker to go bankrupt in recent times), the Finance Credit system (one of the largest finance scandals in Norway), Faktor Eiendom with 50 subsidiaries, and Aksjespareklubben TA-Invest, an informal investment collective.

Besides his appointments as trustee, Madsen concentrates his insolvency practice in the field of debt reorganisation and out-of-court composition proceedings. Madsen was consultant to the board in connection with the restructuring of Hansa Property Group in 2009.

Madsen is a partner at Wikborg Rein’s Oslo office; he is admitted to the Supreme Court of Norway.
United Kingdom
Nicholas Herrod, Dylan Matthews and Karen Birch, Allen & Overy

SECTION 1: CONTRACTS

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9. Local assets, however small | ✓

General: Where the EU jurisdictional regime does not apply, the English courts may hear proceedings brought in respect of a contract against a defendant domiciled out of the jurisdiction in the situations identified above. However, it is up to the English court’s discretion whether to refuse to permit a party to serve the defendant in question out of the jurisdiction (where relevant) or subsequently to decline jurisdiction on the basis that the English court is not the relevant forum.

**Box 2:** Temporary presence of a director of a non-English domiciled corporate defendant is not on its own sufficient.

There are also other circumstances in which the English courts might, in their discretion, take jurisdiction over defendants domiciled out of the jurisdiction, including in relation to: (a) a breach of contract committed within the jurisdiction; (b) contracts containing a jurisdiction clause conferring jurisdiction on the English courts; (c) certain claims for injunctive relief or for interim remedies; (d) claims where the defendant is a necessary or proper additional party to the proceedings; and, (e) certain claims in relation to trusts.

**Box 9:** If the whole subject matter of a claim relates to property located within the jurisdiction, the English courts may exercise their discretion to take jurisdiction, but the presence of assets is not otherwise sufficient.

SECTION 2: TORTS/DELICTS

- Torts or delicts include such wrongs as misselling financial products or misrepresentation in an offering circular.
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5. Tort committed locally | ✓
6. Tort governed by local law | ✓
7. Local nationality or domicile of plaintiff | ✓
8. Local assets, however small | ✓
9. Other | ✓

General: Where the EU jurisdictional regime does not apply, the English courts may hear tort proceedings against a defendant domiciled out of the jurisdiction in the situations identified above. However, it is up to the English court’s discretion whether to refuse to permit a party to serve the defendant in question out of the jurisdiction (where relevant) or subsequently to decline jurisdiction on the basis that the English court is not the relevant forum.

**Box 2:** Temporary presence of a director of a non-English domiciled corporate defendant is not on its own sufficient.

There are also other circumstances in which the English courts might take jurisdiction in relation to a tort claim over defendants domiciled out of the jurisdiction, including in relation to: (a) torts falling within the scope of a jurisdiction clause conferring jurisdiction on the English courts; (b) certain claims for injunctive relief or for interim remedies; (c) claims where the defendant is a necessary or proper additional party to the proceedings; and, (d) certain claims in relation to trusts.

**Box 4:** If tort harm is suffered locally.

**Box 8:** If the whole subject matter of a claim relates to property located within the jurisdiction, the English courts may exercise their discretion to take jurisdiction, but presence of assets is not otherwise sufficient.
**SECTION 3: INSOLVENCY – INDIVIDUALS OR CORPORATES**

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Expand on your jurisdiction’s treatment of insolvent companies and individuals. This can include, where applicable, explanation of courts’ discretion, or other relevant factors.

In this summary we have ignored the impact of the EC Insolvency Regulation of 2002 and therefore the information below will not apply where the debtor’s centre of main interests is in the EU.

As a general point, even if the relevant jurisdictional thresholds are satisfied, the English court always has discretion as to whether or not to open the relevant proceedings.

There are four primary English insolvency procedures: personal bankruptcy, administration, company voluntary arrangements, and liquidation.

**Personal bankruptcy**

Bankruptcy proceedings may only be brought in England and Wales (including against a foreign debtor) if the debtor:

(a) is domiciled in England and Wales;

(b) is personally present in England and Wales on the day on which the bankruptcy petition is presented; or,

(c) at any time in the period of the preceding three years ending on that day, has been ordinarily resident, or has had a place of residence, in England and Wales; or,

(d) has carried on a business in England and Wales.

**Administration/Company voluntary arrangements**

A foreign company may only enter administration, or be the subject of a company voluntary arrangement, if the company:

(a) is incorporated in an EEA state other than the UK; or,

(b) is not incorporated in an EEA state but has its centre of main interests in a member state other than Denmark.

**Liquidation**

An English court may exercise its discretion to allow a foreign company to enter liquidation if the company has a sufficient connection with England and Wales (for example the company has a place of business in England and Wales).

In addition:

(a) there must be a reasonable possibility, if a winding-up order is made, of benefit to those applying for the winding-up order; and,

(b) one or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise a jurisdiction.

The English courts may also be able to open insolvency proceedings in connection with providing assistance to specific former Commonwealth jurisdictions.

We have not considered English schemes of arrangement, as they are not insolvency proceedings.

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**About the authors**

**Nicholas Herrod**  
Senior PSL – London, Allen & Overy  
E: nick.herrod@allovery.com

Nick Herrod is a professional support lawyer for the firm’s global restructuring group. He provides a wide range of advice on restructuring and insolvency matters, in particular, specialising on cross-border insolvency.

Recent experience includes advice to many financial institutions in relation to all aspects of the Lehman Brothers insolvency and advice in relation to schemes of arrangement of foreign companies.

Herrod is the co-author of a number of chapters for (and co-editor of) the Sweet & Maxwell European Cross-Border Insolvency publication and a member of the Insolvency Lawyers’ Association’s technical committee.

**Dylan Matthews**  
Senior associate – Allen & Overy  
E: dylan.matthews@allovery.com

Dylan Matthews specialises in restructuring leveraged acquisition finance transactions, and distressed financings and refinancings. Much of his work has focussed on eastern Europe, the Middle East and other emerging markets.

His recent experience includes acting for the senior lenders in relation to the restructuring of a Greek chemicals company, acting for the borrower in relation to the restructuring of a UK retail business, acting for the lenders in relation to the restructuring of a Middle Eastern sovereign wealth fund, acting for the secured lenders in relation to the restructuring of a Middle Eastern financial investment firm, and acting for the sponsors in relation to the distressed refinancing of a real estate investment fund in the Republic of Georgia.

**Karen Birch**  
Professional support lawyer – Allen & Overy  
E: karen.birch@allovery.com

Karen Birch is PSL counsel in Allen & Overy’s London litigation practice. She has particular expertise in advising on cross-border governing law and jurisdiction issues and dispute resolution clauses in the context of complex international transactions.

She is a go-to person for Allen & Overy lawyers globally in this area and advises clients across a wide range of sectors on the legal issues that arise and on their practical implications for clients doing business internationally.

Birch also advises widely on other litigation and arbitration related issues, in particular on English litigation procedure and legal privilege and on how clients can best manage their litigation risk.
The contracts concerned are mainly loan contracts, guarantees, derivatives and other financial contracts. A state has *in rem* jurisdiction over any real property or personal property located within the state’s boundaries. The jurisdiction is over the property itself, and not the owner of the property. Therefore, having property in a state does not create personal jurisdiction over the owner, but the state has *in rem* jurisdiction over the property itself and has the power to determine legal ownership of that property.

Entering into a contract in the forum state will typically be sufficient to establish extraterritorial jurisdiction. New York’s long-arm statute, NY CV. LAW section 302, specifically states that New York will exercise jurisdiction over non-domiciliaries, including their agents, who ‘transact any business within the state or contract anywhere to supply goods or services in the state.’ This provision is broad and would apply to any contract entered into in the forum state, or relating to the forum state.

While each state has a different long-arm statute, the effect of the statutes is often similar.

# Expand on your jurisdiction’s treatment of contract breaches.

This can include, where applicable, explanation of courts’ discretion and the types of contract that would apply.

Extraterritorial jurisdiction in the US is generally governed by state law, with overarching constitutional principles dictated by the Supreme Court. Each state has a long-arm statute that will determine the extent to which it will exercise personal jurisdiction over foreign defendants (including defendants of another US state or a foreign country). Some long-arm statutes, such as that in New York, specifically enumerate the types of behaviour that will create personal jurisdiction, while other statutes, like that in California, are broad and indicate that the state will exercise personal jurisdiction ‘on any basis not inconsistent with the constitution of the US or the constitution of California.’

States may only exercise personal jurisdiction over foreign defendants if there are sufficient contacts such that a party ‘could reasonably expect to be haled into court’ in that state. The Supreme Court has found sufficient contacts with the forum state where a defendant is physically located in the state (even for a very short time), a defendant enters into a contract with a resident of the state, has placed its product into the stream of commerce such that it foreseeably reaches the forum state, seeks to serve residents of the forum state or avail itself of the forum state, or the defendant’s conduct has sufficient effects on the forum state.

An additional consideration is whether the plaintiff is seeking general or specific jurisdiction. General jurisdiction applies to provide extraterritorial jurisdiction over any claim arising against a defendant whether or not the claims arise from the defendant’s contacts with the state. An individual typically is subject to personal jurisdiction in his or her domicile. A corporation is subject to general jurisdiction in its state of incorporation and in the state where it has its principal place of business. Specific jurisdiction, on the other hand, arises where the claims are based on the defendant’s contacts with the forum state, but those contacts are insufficient to give rise to general jurisdiction.

*In rem* jurisdiction is not part of extraterritorial jurisdiction, but is related. A state has *in rem* jurisdiction over any real property or personal property located within the state’s boundaries. The jurisdiction is over the property itself, and not the owner of the property. Therefore, having property in a state does not create personal jurisdiction over the owner, but the state has *in rem* jurisdiction over the property itself and has the power to determine legal ownership of that property.

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Andrew Rhys Davies is a partner in Allen & Overy’s litigation practice, based in New York. His experience includes representing financial institutions and individual clients in securities and other complex litigations at the trial and appellate levels, and representing corporations and individuals in regulatory investigations and litigations. He graduated from Cambridge University, and has practiced as a solicitor in London.
UNITED STATES

SECTION 2: TORTS/DELICTS

- Torts or delicts include such wrongs as misselling financial products or misrepresentation in an offering circular.
- The table disregards EU or EEA and common jurisdictional rules.

<table>
<thead>
<tr>
<th>JURISDICTION</th>
<th>TORTS/CIVIL WRONGS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Local presence of defendant</td>
<td>✓</td>
</tr>
<tr>
<td>2. Local presence of director of corporate defendant</td>
<td>✓</td>
</tr>
<tr>
<td>3. Local branch, even if claim unconnected to branch</td>
<td>✓</td>
</tr>
<tr>
<td>4. Defendant does business locally, eg enters into contracts or has meetings</td>
<td>✓</td>
</tr>
<tr>
<td>5. Tort committed locally</td>
<td>✓</td>
</tr>
<tr>
<td>6. Tort governed by local law</td>
<td>✓</td>
</tr>
<tr>
<td>7. Local nationality or domicile of plaintiff</td>
<td>✓</td>
</tr>
<tr>
<td>8. Local assets, however small</td>
<td>✓</td>
</tr>
<tr>
<td>9. Other</td>
<td>✓</td>
</tr>
</tbody>
</table>

Expand on your jurisdiction’s treatment of torts or delicts. This includes, where applicable, explanation of courts’ discretion, further explanation of the applicable torts, or other relevant factors.

Extraterritorial jurisdiction over tort claims is based on the same general principles as claims arising under contracts. As with a contract claim, extraterritorial jurisdiction over tort claims will be determined on a state-by-state basis in accordance with that state’s relevant long-arm statute. The state may only exercise extraterritorial jurisdiction over the defendant if the defendant has sufficient contacts with the forum state. Those contacts may be sufficient for general jurisdiction or specific jurisdiction over the tort claim.

New York’s long-arm statute is very broad and specifically enumerates the circumstances in which it will exercise jurisdiction over a defendant in a tort action. NY CPLR, section 302 states that it will find jurisdiction over a non-domiciliary where that party ‘(2) commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or (3) commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or (4) owns, uses or possesses any real property situated within the state.’

New York’s long-arm statute also provides that ‘where jurisdiction is based solely upon [section 302], an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.’ As such, if a non-domiciliary has no basis for general personal jurisdiction, but was a defendant to a tort claim or party to a contract, absent other grounds for jurisdiction, that party would be subject to specific personal jurisdiction only for the purposes of the tort claim.

The New York long-arm statute is consistent with the general principle that the state will exercise extraterritorial jurisdiction over a party that has a reasonable expectation that it might be subject to jurisdiction, or has availed itself of the forum state. As noted above, each state has a different long-arm statute, and some states will explicitly exercise extraterritorial jurisdiction over a defendant to a tort claim to the full extent permitted under the US constitution and relevant state constitution.

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UNITED STATES

SECTION 3: INSOLVENCY – INDIVIDUALS OR CORPORATES

- This table disregards consumer transactions.
- It also does not include EU or EEA and common jurisdictional rules, eg the EC Insolvency Regulation of 2002.

**JURISDICTION** | **INSOLVENCY OF INDIVIDUALS OR CORPORATES**
--- | ---
1. Local presence of the debtor (who is an individual/natural person) | ✓
2. Local presence of director of the debtor (who is not an individual/person) | ✓
3. Debtor has a local branch, even if creditor’s claim is unconnected to branch | ✓
4. Debtor does business locally, eg contracts or meetings locally | ✓
5. Contract on which claim is based is made locally | ✓
6. Contract on which claim is based is governed by local law | ✓
7. Contract on which claim is based is performable locally | ✓
8. Local nationality or domicile of creditor | ✓
9. Debtor has local assets, however small | ✓
10. Other | ✓

Expand on your jurisdiction’s treatment of insolvent companies and individuals. This can include, where applicable, explanation of courts’ discretion, or other relevant factors.

Congress has the power to enforce its laws outside the territorial limits of the US. Equal Employment Opportunity Comm’n v. Arabian Oil Co. and Aramco Servs. Co. (1991). However, there is a presumption against extraterritorial application of a US statute, and a clear expression from congress is required for a statute to reach non-domestic conduct. In re Maxwell Communication Corp. (1996).

Numerous judicial opinions have held that the plain language of the US Bankruptcy Code (the Code) reflects congress’s intent that bankruptcy courts have worldwide jurisdiction over a bankruptcy estate’s property in plenary proceedings. Specifically, these courts cite to section 541 which creates a global estate comprising all of the legal or equitable interests of the debtor ‘wherever located and by whomever held.’

The automatic stay provided in section 362, in turn, applies to all entities and protects the debtor’s property and the bankruptcy court’s jurisdiction by barring ‘any act to obtain possession of property of the estate….or to exercise control over property of the estate.’ Accordingly, courts have generally held that congress intended the automatic stay to have extraterritorial reach. See, eg, In re Simon (1998).

Less clear is whether congress intended extraterritorial application of the power to avoid prepetition transfers of foreign property. The majority rule is that disputed transfers do not become property of the estate until they are avoided, and therefore extraterritorial avoidance is prohibited. See, eg, In re Maxwell Commun. Corp. (1994). However, one court has held that because the Code allows for the avoidance of ‘interests of the debtor in property,’ which tracks the language defining the estate, congress demonstrated an affirmative intention to allow avoidance of transfers of foreign property that, but for the transfer, would have been property of the estate. In re French (2006).

Although many court rulings affirm the global reach of the Code, the extent is tempered by principles of international comity which may require the application of foreign law. Further, in an ancillary proceeding under chapter 15 of the Code, a bankruptcy court’s jurisdiction is generally limited to property located within the US and thus similar justifications for enforcing relief extraterritorially may not apply. See In re JSC BTA Bank (2010). Lasty, despite a bankruptcy court’s exclusive in rem jurisdiction over a debtor’s worldwide assets, it can only enforce relief extraterritorially against entities over which it has personal jurisdiction. Personal jurisdiction can be established by an entity filing a proof of claim, otherwise accessing the court for relief (and in some cases simply appearing at the proceedings) or having sufficient contacts with the US (note that bankruptcy courts have nationwide jurisdiction so contact with any judicial district within the US counts). Indeed one judge explained ‘to the extent anyone, even abroad, takes steps abroad, to cause injury here to the reorganisation before me, it is analytically no different than shooting a bullet across a state line.’ In re Lyondell Chem. Co. (2009).

Box 9: The eligibility requirements for filing a bankruptcy in the US set forth in section 109 are relatively lenient, and foreign companies often file in the US. With a few exceptions, a person is eligible to be a debtor if that person has a residence, domicile, a place of business or property located in the US. The threshold for eligibility to file is very low and would be satisfied if the company had either a place of business or assets in the US, and with respect to the latter, even an insignificant asset in the US would make the company eligible to file.

### About the author

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