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# Settlement of International Commercial Disputes

by Michael A. Almond\*

International traders as a rule do not want to argue with their contract partners; they simply want to "do" business with them. Given this rather straightforward objective, it often perplexes businessmen why the terms of that agreement hammered out in a Frankfurt hotel room or Tokyo steak house are so difficult to reduce to writing once the lawyers are brought in. In that magic moment when at last the deal is struck, the notion that one of the parties may later choose not to keep his promise is usually not given a second thought. Indeed, businessmen and their attorneys will often be able to anticipate most potential problems and to avoid many altogether. But inevitably, and for any number of reasons, some deals go sour. When this happens, the client is suddenly confronted with new and unfamiliar problems, and the decisions made by his attorney during this emergency situation will be of crucial importance.

This article is intended to cover that situation. Its scope is more limited than the title might suggest for its primary purpose is to acquaint the North Carolina practitioner with some of the unique and specialized problems which arise in representing clients who find themselves in serious disagreement with their contract partners in other countries. The discussion which follows will presume that the dispute arises in a commercial context involving an import or export transaction and a North Carolina buyer/seller. The buyer, for example, may fail to pay for goods delivered or may refuse to accept delivery at all. The seller, for his part, may ship inferior, defective, or otherwise nonconforming goods, or may divert his inventory to another customer willing to pay a higher price. Either or both may fail to perform in a timely manner.

If formal proceedings for relief are necessary, the basic issue will be simple: the client will want either to enforce his contract partner's obligations or avoid his own. The means to this end will usually be limited to litigation in state or federal court in the United States, litigation in a foreign country, or some form of arbitration.

The sections which follow will focus on four common problem areas:

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obtaining jurisdiction over a foreign defendant; choosing the law applicable to the controversy; choosing a particular forum for the resolution of the dispute (including the enforcement of arbitration agreements); and enforcing judgments or arbitral awards against the liable party.

## I. Jurisdiction

Some situations clearly call for the assistance of foreign counsel. If the foreign party institutes legal action in its own courts against the North Carolina party, it will be necessary in almost every case to entrust the defense of such action to an attorney abroad who is thoroughly familiar with the procedure and substantive law of the foreign jurisdiction. Or, if the North Carolinian elects to sue as plaintiff in the foreign court, foreign counsel will likewise be indispensable. In either case, while the North Carolina attorney will no doubt wish to monitor the proceedings carefully, the overall responsibility for the defense of the action must lay with foreign counsel.

If, on the other hand, the foreign party institutes an action against one's client in North Carolina, the controversy is no different from any other routine, local litigation matter except that, coincidentally, the case involves a foreign plaintiff.

Usually it will be preferable to institute an action in the local courts (either state or federal)<sup>1</sup> against the foreign defendant. At the outset, rather specialized rules will apply, for plaintiff's counsel must first establish proper jurisdiction over a defendant whose domicile may be thousands of miles away and who may never have set foot or done business in North Carolina.

### A. *Personal Jurisdiction: The "Long-Arm" and "Minimum Contacts"*

Subject matter jurisdiction should pose no problem since the controversy will normally involve allegations of breach of contract. Jurisdic-

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<sup>1</sup> Provided the requisite jurisdictional amount is in controversy, a North Carolina plaintiff could commence his action in the local federal district court due to the diversity of citizenship of the parties. Subsection (a)(2) of 28 U.S.C. § 1332 was amended in 1976 and now provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between— . . . (2) *citizens of a State and citizens or subjects of a foreign state . . .*" 28 U.S.C. § 1332(a)(2) (1972) (emphasis added).

Note, however, that an action commenced against a foreign-country defendant in *state* court might not remain there. Citizens of foreign countries are entitled to remove cases to federal court on the same basis as any other nonresident defendant. See 28 U.S.C. § 1441 (1972). Turnabout, in this circumstance at least, is not considered fair play. If, for example, a foreign plaintiff commences an action against a North Carolina defendant in *state* court, the North Carolina defendant has no right to remove the case to federal court. 28 U.S.C. § 1441(b) (1972). Where no federal question is involved, "such action[s] shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." *Id.*

In any event, the general rule is that, absent some federal statute, federal courts in diversity cases are to apply the appropriate state law. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Arrow-smith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963).

tion over the foreign defendant's *person*, however, poses a more difficult question. While the nonresident defendant's actual physical presence within North Carolina is not required, his absence will nevertheless require the plaintiff to demonstrate, first, that North Carolina law permits the exercise of in personam jurisdiction over him, and, second, that the exercise of such jurisdiction is not inconsistent with constitutional guarantees of due process of law.<sup>2</sup>

The statutory scope of in personam jurisdiction in North Carolina is controlled by N.C. Gen. Stat. § 1-75.4, and a plaintiff seeking to bind a foreign defendant to a judgment of a North Carolina court must be prepared to show that jurisdiction exists under one or more of the provisions of this "long-arm" statute.<sup>3</sup> Section 1-75.4 provides that "a court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances . . . ." A number of the statutory provisions which follow may be relied upon to establish jurisdiction over a nonresident defendant domiciled in a foreign country. Subsection (1), for example, provides that jurisdiction is proper "in any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party . . . (d) is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise."<sup>4</sup> Whether the foreign defendant's conduct amounts to "substantial activity within this State" is a question for the court to decide.

Subsection (4) is more directly applicable to international transactions. While primarily a products liability provision, subsection (4) authorizes jurisdiction:

in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either: a. Solicitation or service activities were carried on within this State by or on behalf of the defendants; or b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed within this State in the ordinary course of trade.<sup>5</sup>

The really "long-arm" provisions are contained in subsection (5). The reach of this subsection is literally worldwide, and in most cases involving international trade or commerce, this subsection will provide the

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<sup>2</sup> "The resolution of this question [of in personam jurisdiction over nonresident defendants] involves a two-fold determination. First, do the statutes of North Carolina permit the courts of this jurisdiction to entertain this action against defendants. If so, does the exercise of this power by the North Carolina courts violate due process of law." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 675, 231 S.E.2d 629, 630 (1977).

<sup>3</sup> *Id.* at 674, 231 S.E.2d at 629. Where a federal question exists, there are sometimes federal "long arm" statutes to aid the district courts in obtaining personal jurisdiction over non-resident defendants. *See, e.g.*, 15 U.S.C. § 77v(a) (1972).

<sup>4</sup> N.C. GEN. STAT. § 1-75.4(1) (1969).

<sup>5</sup> *Id.* § 1-75.4(4).

statutory basis for jurisdiction over a nonresident foreign defendant. Subsection (5) reads, in full, as follows:

- (5) Local Services, Goods or Contracts.—[A court of this State having jurisdiction of the subject matter has jurisdiction over a person] [i]n any action which:
- a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or
  - b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or
  - c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or
  - d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction; or
  - e. Relates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred.<sup>6</sup>

As is obvious from the excerpts quoted above, the provisions of N.C. Gen. Stat. § 1-75.4 are quite broad and, in many cases, may overlap. In addition, the North Carolina courts have long held that the "long-arm" statute is to be liberally construed in favor of in personam jurisdiction over nonresident defendants.<sup>7</sup> As a result, in the typical import/export transaction where an actual transfer of goods is made or contemplated, a North Carolina plaintiff should have little difficulty in establishing a statutory basis for jurisdiction over a foreign defendant.

The power of any State to subject nonresidents to the jurisdiction of its local courts is also limited by the Due Process Clause of the United States Constitution. The permissible reach of state long-arm statutes and the applicable constitutional standards have been articulated in a famous trilogy of United States Supreme Court cases, *International Shoe Co. v. Washington*,<sup>8</sup> *McGee v. International Life Ins. Co.*<sup>9</sup> and *Hanson v. Denckla*.<sup>10</sup> Briefly, these cases hold that in order to exercise in personam jurisdiction over a nonresident defendant, that defendant must have had sufficient

<sup>6</sup> *Id.* § 1-75.4(5).

<sup>7</sup> First Nat'l Bank of Shelby v. General Funding Corp., 30 N.C. App. 172, 226 S.E.2d 527 (1976); Dillon v. Numismatic Funding Corp., 29 N.C. App. 513, 225 S.E.2d 137 (1976), *rev'd other grounds* 291 N.C. 674, 231 S.E.2d 629 (1977); Munchak Corp. v. Riko Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

<sup>8</sup> 326 U.S. 310 (1945).

<sup>9</sup> 355 U.S. 220 (1957).

<sup>10</sup> 357 U.S. 235 (1958).

"minimum contacts" with the jurisdiction "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" <sup>11</sup>

Whether a foreign defendant has had sufficient "minimum contacts" with North Carolina is an issue which must be decided at the threshold of the litigation. Whenever there is a foreign defendant, plaintiff should expect at the pre-answer stage a motion to dismiss under N.C.R. Civ. P. 12(b)(2).<sup>12</sup> In a typical import/export transaction, however, such a defense is not likely to prevail. The North Carolina courts, for example, have been quite liberal in applying the "minimum contacts" standard,<sup>13</sup> and have held that a single contract may alone pro-

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<sup>11</sup> 326 U.S. at 316. Recently the Court has decided two cases which may suggest that the limits of "long-arm" jurisdiction have been reached and that state courts must apply the "minimum contacts" rule with greater regard for the rights of nonresident defendants. In *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Court held that the mere presence of defendant's property within a State was not sufficient to subject defendant to in rem or quasi in rem jurisdiction. For the first time the Court held that the traditional "minimum contacts" rationale applicable to in personam jurisdiction would likewise be applied to situations in which state courts are called upon to exercise jurisdiction over defendant's *property* only. "We therefore conclude that *all* assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." (emphasis added).

Schaffer v. Heitner has important implications for international litigation. Suppose, for example, that a foreign company is not otherwise subject to "long-arm" jurisdiction, but owns real or personal property in North Carolina. In the past the property itself provided the jurisdictional basis for a judgment. The property could then be attached and sold. Now, however, such in rem or quasi in rem jurisdiction is subject to the same "minimum contacts" standard as in personam jurisdiction. Thus foreign defendants can be expected to make a special appearance to contest the North Carolina court's jurisdiction over their property located here.

In *Kulko v. Super. Ct.*, 98 S. Ct. 1690 (1978), the Court reaffirmed the "minimum contacts" rule, but held that a New York defendant had had insufficient contact with California to sustain in personam jurisdiction. In *Kulko* the Court reversed the decision of the Supreme Court of California, holding that:

*While the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice are of course to be considered, . . . an essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State. . . . [W]e believe that the California Supreme Court's application of the minimum contacts test in this case represents an unwarranted extension of *International Shoe* and would, if sustained, sanction a result that is neither fair, just nor reasonable. Id. at 1697 (emphasis added).*

It cannot be disputed that California has substantial interests in protecting resident children and in facilitating child support actions on behalf of those children. But these interests simply do not make California a 'fair forum' . . . . We therefore believe that the state courts in the instant case failed to heed our admonition that 'the flexible standard of *International Shoe* does not herald the eventual demise of all restrictions on the personal jurisdiction of the state courts.' *Id.* at 1701.

These latest cases indicate a determination by the Court to enforce limits on the reach of "long-arm" statutes. Significantly in *Kulko*, *Shaffer*, and *Hanson v. Denckla*, the Court concluded that jurisdiction over the nonresident defendants did not exist under the standard applied by the trial court.

<sup>12</sup> N.C.R. Civ. P. 12(b)(2) provides for an affirmative defense or a motion to dismiss based upon "lack of jurisdiction over the person."

<sup>13</sup> "State legislatures have responded to these expanding notions of due process with 'long-arm' legislation designed to keep abreast of this jurisdictional trend and to make available to the courts of their states the full jurisdictional powers

vide a sufficient basis for jurisdiction over a nonresident defendant.<sup>14</sup>

Again, in a typical international transaction and under applicable legal precedents, a North Carolina plaintiff should be able to withstand both statutory and constitutional challenges to the court's in personam jurisdiction. This may, however, turn out to be a rather hollow victory. Defendant's purpose in raising the jurisdictional issue may not be so much to escape the lawsuit as merely to delay it. An order denying defendant's motion to dismiss for lack of personal jurisdiction, though clearly interlocutory, is nevertheless immediately appealable.<sup>15</sup> Moreover, since the issue of in personam jurisdiction over nonresident defendants involves "a substantial constitutional issue," an unsuccessful effort in the North Carolina Court of Appeals would entitle defendant to appeal *as of right* to the North Carolina Supreme Court.<sup>16</sup> A tremendous backlog of undecided cases in the overworked and overburdened Court of Appeals has meant that a foreign defendant determined to resist the jurisdiction of the North Carolina courts can tie the case in a procedural knot which literally may take years to untangle.<sup>17</sup> In many instances, the delay inherent in the appellate process becomes an end in itself for defendants, because it can easily require a year or more for a determination by the North Carolina Supreme Court on the jurisdictional question

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permissible under due process. Chapter I, Article 6A of the North Carolina General Statutes reflects this national approach to personal jurisdiction."

Chadbourn, Inc. v. Katz, 285 N.C. 700, 705, 208 S.E.2d 676, 679 (1974).

In addition to the Supreme Court cases, *supra* notes 8-10, the following cases should be useful to a practitioner confronted with a jurisdictional problem involving "minimum contacts": N.C. Supreme Court Cases: Byham v. House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965); Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974); Dillon v. Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1974); Farmer v. Ferris, 260 N.C. 619, 133 S.E.2d 492 (1965); Goldman v. Parkland, 277 N.C. 233, 176 S.E.2d 784 (1970); Putnam v. Publications, 245 N.C. 432, 96 S.E.2d 445 (1957). N.C. Court of Appeals Cases: Andrews Associates v. Sodibar Systems, 25 N.C. App. 372, 213 S.E.2d 369 (1975); Andrews Associates v. Sodibar Systems, 28 N.C. App. 663, 222 S.E.2d 922 (1976); Bank v. Funding Corp., 30 N.C. App. 172, 226 S.E.2d 527 (1976); Byrum v. Truck & Equipment Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977); Dillon v. Funding Corp., 29 N.C. App. 513, 225 S.E.2d 137 (1976); Duke University v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895 (1976); Equity Assoc. v. Society for Savings, 31 N.C. App. 182, 228 S.E.2d 761 (1976); Goldman v. Parkland, 7 N.C. App. 400, 173 S.E.2d 15 (1970); Trust Co. v. McDaniel, 18 N.C. App. 644, 197 S.E.2d 556 (1973); Buying Group, Inc. v. Coleman, 37 N.C. App. 26 (1978). Federal Cases: Bowman v. Curt T. Joa, Inc., 361 F.2d 706 (4th Cir. 1966); Golden Belt Mfg. Co. v. Janler Plastic Mold Corp., 281 F. Supp. 368 (M.D.N.C. 1967); Munchak Corp. v. Riko Enterprises, Inc., 368 F. Supp. 1366 (M.D.N.C. 1973); Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974); Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974); Stephenson v. Jordan Volkswagen, Inc. 428 F. Supp. 195 (W.D.N.C. 1977); United Advertising Agency, Inc. v. Robb, 391 F. Supp. 626, 630-31 (M.D.N.C. 1975).

<sup>14</sup> See, e.g., First-Citizens Bank & Trust Co. v. McDaniel, 18 N.C. App. 644, 197 S.E.2d 556 (1973).

<sup>15</sup> N.C. GEN. STAT. § 1-277(b) (1969).

<sup>16</sup> N.C. GEN. STAT. § 7A-31 (1969); N.C.R. APP. P. 14 (1978).

<sup>17</sup> The Clerk of the North Carolina Court of Appeals, Frank E. Dail, estimates that the interval between docketing an appeal and oral argument is approximately eleven months in a civil case and four months in a criminal case. Thereafter several weeks or months may be required for the court to hand down its decision in a particular case.

alone. Only after this issue is finally resolved will defendant be required to address the merits of plaintiff's complaint.

*B. Service of Process*<sup>18</sup>

Once a potential plaintiff is satisfied that the jurisdictional facts of his case can withstand statutory and constitutional scrutiny, plaintiff must see to it that the foreign defendant is properly served with the summons and complaint before that jurisdiction may be exercised.<sup>19</sup> While the General Assembly and courts have liberalized their views toward "long-arm" jurisdiction, this expansion in judicial power has been accompanied by increased concern that the legal formalities for service of process be strictly complied with, particularly where nonresident defendants are involved.<sup>20</sup> N.C.R. Civ. P. 4(j)<sup>21</sup> sets forth several alternatives for putting a foreign defendant on notice of the pending action against him. Counsel should carefully select the particular subsection most appropriate to the case and see to it that its requirements are scrupulously and literally complied with. Rule 4(j)(9), by its terms, establishes an "alternative method of service" for defendants who cannot be served within the state and who are not inhabitants of or cannot be found within North Carolina, and is the most useful section in serving nonresident defendants.

Rule 4(j)(9) contemplates service of process in one of three ways. First, personal service is authorized,<sup>22</sup> but such service is often impractical due to the difficulty and expense of locating someone in a foreign country to serve process on the defendant, even though the summons and complaint may be served by "anyone who is not a party and is not less than twenty-one years of age or anyone duly authorized to serve summons by the law of the place where service is to be made."<sup>23</sup>

Second, Rule 4(j)(9)(c) provides for service of process by publication, otherwise known as constructive notice to defendant of the action against him. If possible, service by publication should be avoided since it is the method most vulnerable to constitutional attack on due process

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<sup>18</sup> See generally, Louis, *Modern Statutory Approaches to Service of Process Outside the State—Comparing the North Carolina Rules of Civil Procedure with the Uniform Interstate and International Practice Act*, 49 N.C.L. REV. 235 (1971); Note, *Civil Procedure—Constitutionality of Constructive Service of Process on Missing Defendants*, 48 N.C.L. REV. 616 (1970).

<sup>19</sup> N.C. GEN. STAT. §§ 1-75.4, -75.6 (1969).

<sup>20</sup> *Edwards v. Edwards*, 13 N.C. App. 166, 185 S.E.2d 20 (1971).

<sup>21</sup> The federal counterpart is FED. R. CIV. P. 4. While elaborate federal procedures are established in this Rule, subsections (d)(7), (e) and (f) authorize service of process "in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

Note also that there is a federal statute designed to assist *foreign* plaintiffs in their efforts to obtain service of process over United States defendants. 28 U.S.C. § 1696 (1972).

<sup>22</sup> N.C.R. Civ. P. 4(j)(9)a.

<sup>23</sup> *Id.* 4(a).



grounds, particularly where foreign defendants are involved.<sup>24</sup> In addition, if the only basis for the exercise of the domestic court's jurisdiction is service by publication, courts in the defendant's country of domicile may refuse to enforce any default judgment obtained against defendant.<sup>25</sup>

By far the easiest, least expensive, and quickest way to notify a foreign defendant of a pending lawsuit is by mail. Service by certified or registered mail, return receipt requested, is expressly authorized by Rule 4(j)(9)(b)<sup>26</sup> and (d),<sup>27</sup> and is the most common manner in which foreign defendants are served. The U.S. Postal Service offers international registered mail service at reasonable rates, and a signed return receipt can be obtained. If a foreign defendant is properly served by mail according to the Rule, plaintiff's counsel should be able to present the court with proper proof of service, including defendant's signed return receipt, thus facilitating both the availability and enforceability of a default judgment if the defendant fails to appear.<sup>28</sup>

An important word of caution must be inserted here: while service of process by international registered mail may prove the quickest, easiest, and least expensive way to bring in a foreign defendant, one should be aware that the method used to effect service of process may later affect plaintiff's ability to enforce its judgment against the defendant in his home country, particularly if the judgment is obtained by default. As is discussed *infra*,<sup>29</sup> some countries refuse to enforce a default judgment rendered by a U.S. court against a local resident unless process is served in a manner satisfactory to the foreign court and consistent with foreign law and procedure. Thus, while service by registered or certified mail may be sufficient to bind the foreign defendant so far as the local state or federal court is concerned, such service may be disregarded by foreign courts when the plaintiff attempts to enforce his judgment abroad. It is of paramount importance, then, that prior to commencing a lawsuit

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<sup>24</sup> See, e.g., *Sink v. Easter*, 284 N.C. 555, 202 S.E.2d 138 (1974). See also Note, *supra* note 18.

<sup>25</sup> See text accompanying notes 121-23, *infra*.

<sup>26</sup> Note that Rule 4(j)(9)(b) does *not* require personal delivery to the addressee, but "contemplates merely that the registered or certified mail be delivered to the address of the party to be served and that a person of reasonable age and discretion receive the mail and sign the return receipt on behalf of the addressee." *Lewis Clarke Associates v. Tobler*, 32 N.C. App. 435, 438, 232 S.E.2d 458, 459 (1977).

<sup>27</sup> N.C.R. Civ. P. 4(j)(9)(d). As the North Carolina Comment to Rule 4(j)(9)d notes,

Subsection (9)(d).—This paragraph establishes alternative procedures when service is to be made in a foreign country. It is based upon rule 4(i) of the Federal Rules of Civil Procedure, which is itself drawn from Section 2.01 of the Uniform Interstate and International Procedure Act. Under this paragraph one may enlist the assistance of a foreign government and its laws in making service on a defendant found within its territory, in order to insure the validity of the service and to avoid any objection by the foreign government that efforts to make service there constitute an encroachment on its sovereignty.

<sup>28</sup> But see text accompanying notes 121-23, *infra*.

<sup>29</sup> See text accompanying notes 121-23, *infra*.

against a foreign defendant, North Carolina counsel satisfy himself of the enforceability of a judgment, including a default judgment, if service of process is to be achieved solely by registered or certified mail. If counsel determines that the enforceability of plaintiff's judgment may be compromised by the method of service of process employed, it may be advisable to associate a foreign attorney to insure that defendant is served "in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction."<sup>30</sup> Service in this manner will certainly satisfy the requirements of N.C.R. Civ. P. 4 and should, in turn, be conclusive upon the foreign court in a later action to enforce the judgment.<sup>31</sup>

Finally, it should be noted that there are two procedures for effective service of process by mail in Rule 4(j)(9).<sup>32</sup> Whereas Rule 4(j)(9)(b) authorizes *plaintiff's attorney* to mail the summons and complaint, (9)(d)(iv) requires the *clerk* to do so.<sup>33</sup> In most cases it will be less complicated for the attorney to mail the summons and complaint, and service effected in this manner is in compliance with the requirements of N.C.R. Civ. P. 4. Subsection (9)(d) is expressly stated to contain "*alternative provisions for service in a foreign country.*"<sup>34</sup> Thus, plaintiff's attorney should feel free to mail the summons and complaint himself or have the clerk of court do so, at his discretion.

### C. Drafting Hint: Consent to Jurisdiction

It is elementary hornbook law that the parties to a lawsuit cannot confer jurisdiction on a court by consent where such jurisdiction would not otherwise exist. This maxim, however, applies only to *subject matter* jurisdiction, and not to questions of *in personam* jurisdiction. Indeed, North Carolina courts regard an alleged lack of *in personam* jurisdiction as a purely personal defense which can be waived.<sup>35</sup>

The question then arises whether a defendant can, by contract, waive the defense *in advance*.<sup>36</sup> Put another way, can a foreign party consent as a matter of contract to the exercise of personal jurisdiction over him by North Carolina courts?<sup>37</sup> In *Jones v. Brinson*,<sup>38</sup> the Court held

<sup>30</sup> N.C.R. Civ. P. 4(j)(9)(d)(i).

<sup>31</sup> At least so far as service of process is concerned. See Part IV A, *infra*.

<sup>32</sup> See notes 26 and 27, *supra*.

<sup>33</sup> *Id.*

<sup>34</sup> N.C.R. Civ. P. 4(j)(9)(d).

<sup>35</sup> See discussion of *Jones v. Brinson*, *infra*. While a court's subject matter jurisdiction is subject to challenge at any time, even after appeal, it is clear that unless defendant pleads and proves lack of personal jurisdiction the defense will be deemed waived.

<sup>36</sup> "The principal common law bases for adjudicatory jurisdiction over individuals were *consent* (voluntary submission to the court's jurisdiction) and presence of the defendant . . . . *Consent seems obvious enough, although it may raise some doubts when extracted by the overwhelming bargaining power of one party or when the consenting party is ignorant of the meaning of a standard consent clause buried in masses of verbiage.*" H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 643 (1968) (emphasis added).

<sup>37</sup> "[I]n federal courts a party may validly consent to be sued in a jurisdiction where he

that:

*Jurisdiction over the subject matter of an action cannot be conferred by consent of the parties where it is not otherwise possessed by the court. Nor can jurisdiction in this sense be conferred by waiver or estoppel. In short, it may not be rested on agreements between the parties.*

While it is true that no consent can give a court jurisdiction of the subject matter of an action which the court does not possess without such consent, *it is equally true that a court may obtain jurisdiction over the person of a party litigant by his consent.* This for the reason that it is a mere personal privilege of a defendant to require that he be served with process in a legal manner, and since it is a personal privilege—even though of a constitutional nature—he may consent to the jurisdiction of the court without exacting performance of the usual legal formalities as to service of process.<sup>39</sup>

It is true that no contractual consent to jurisdiction was present in the *Brinson* case; there the conduct of one of the parties was construed by the court as tantamount to consent.<sup>40</sup> *Pulley v. Pulley*,<sup>41</sup> however, involved a confession of judgment executed by defendant. The court reaffirmed the *Brinson* rule and held that a party who has consented to personal jurisdiction is later estopped to deny that such jurisdiction exists. The court rejected defendant's attack on the confession of judgment, holding that "[w]e place our decision squarely upon the ground that defendant, under all the facts here, is estopped to question the validity of his own confessed judgment . . . and of the entry of judgment therefore by the Superior Court of Onslow County . . ."<sup>42</sup>

It would thus appear that many of the problems involving personal jurisdiction over a foreign defendant can be avoided in advance by a properly drafted contract provision, whereby the foreign party consents to the exercise of in personam jurisdiction by North Carolina courts in any action relating to or arising out of the contractual agreement.

One potential advantage of such a provision is that it could be pleaded in bar of a motion to dismiss for want of personal jurisdiction under N.C.R. Civ. P. 12(b)(2) or in support of a motion to strike such a defense. Citing *Pulley*, plaintiff should contend that the foreign defendant is estopped to assert that 12(b)(2) defense.

If the motion to dismiss is denied, the unsuccessful defendant may

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cannot be found for service of process through contractual designation of an 'agent' for receipt of process in that jurisdiction. In [*National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1974)] the Court stated:

'[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court to permit notice to be served by the opposing party, or even to waive notice altogether.'

*The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10-11 (1972) (emphasis added).

<sup>38</sup> 238 N.C. 506, 78 S.E.2d 334 (1953).

<sup>39</sup> *Id.* at 509, 78 S.E.2d at 337 (emphasis added).

<sup>40</sup> *Id.* Note that in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lescopulos*, 553 F.2d 842 (2d Cir. 1977), the court held that the mere inclusion of an arbitration clause in the contract designating a United States arbitrator provided a sufficient basis for *in personam* jurisdiction. See Note, *Arbitration Agreements*, 3 N.C.J. INT'L L. & COM. REG. 274 (1978).

<sup>41</sup> 255 N.C. 423, 121 S.E.2d 876 (1961).

<sup>42</sup> *Id.* at 432, 121 S.E.2d at 882.

still attempt to appeal the judge's order. In this event, plaintiff should move in the Court of Appeals to dismiss the appeal as interlocutory and premature.<sup>43</sup> While the refusal to dismiss amounts to an affirmation of the court's jurisdiction over defendant, plaintiff should contend that the consent provision, agreed to in advance by defendant, operates as a waiver of defendant's right under N.C. Gen. Stat. § 1-277(b)<sup>44</sup> to an interlocutory appeal of the jurisdictional issue. Simultaneously plaintiff should attempt to have the trial court disregard the purported appeal and proceed to the merits of the case. While the filing of a notice of appeal normally divests the trial court of jurisdiction,<sup>45</sup> "a litigant cannot deprive the Superior Court of jurisdiction to try and determine a case on its merits by taking an appeal . . . from a non-appealable, interlocutory order of the Superior Court."<sup>46</sup> As the North Carolina Supreme Court has noted, "where an interlocutory order is not subject to appeal, the Superior Court need not stay proceedings pending dismissal of the appeal in the Supreme Court."<sup>47</sup>

Where possible, then, a consent to jurisdiction clause should be included in the contract upon which the international transaction is based.

## II. Choice of Law<sup>48</sup>

A fundamental question for any court or arbitral panel is the proper law to be applied in adjudicating or resolving an international commercial dispute. The court or tribunal may have several choices available to it. If the buyer and seller are domiciled in different countries, for example, either the buyer's domestic law or the seller's may be held applicable. If the same buyer and seller negotiated and executed their contract in a third jurisdiction, that country's law could conceivably control the outcome. Then again, the parties may arrange for the contract to be performed in yet a fourth country, and under certain circumstances the law of the place of performance may determine the result.

Conflicts of law problems are not unfamiliar in American jurisprudence. The federal nature<sup>49</sup> of our system of government has inevitably

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<sup>43</sup> N.C.R. APP. P. 37. North Carolina does not allow an interlocutory appeal unless dismissal affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment. See *Jenkins v. Trantham*, 244 N.C. 422, 94 S.E.2d 311 (1956); *Veazey v. City of Durham*, 231 N.C. 354, 57 S.E.2d 375 (1949).

<sup>44</sup> N.C. GEN. STAT. § 1-277(b) (1969).

<sup>45</sup> *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E.2d 870 (1971); *American Floor Machine Co. v. Dixon*, 260 N.C. 732, 133 S.E.2d 659 (1963).

<sup>46</sup> *Veazey v. City of Durham*, 231 N.C. at 364, 57 S.E.2d at 382.

<sup>47</sup> *Harrell v. Harrell*, 253 N.C. 758, 761, 117 S.E.2d 728, 730 (1961).

<sup>48</sup> See generally Wurfel, *Choice of Law Rules in North Carolina*, 48 N.C.L. REV. 243 (1970).

<sup>49</sup> "In the exercise of diversity of citizenship jurisdiction the federal district courts must apply the substantive law of the state in which they sit, including its conflicts law. If the conflicts rule has not been decided by the state court, the federal court must decide as it believes the supreme court of the state would rather than as it deems best. If the state law changes while a diversity case is on appeal, a federal appellate court must apply the new state rule. Since, by definition diversity cases involve parties from different states, they frequently present conflicts

given rise to such conflicts problems since the earliest days of the Republic, and courts have often been required to determine which state's law applies to interstate disputes.<sup>50</sup>

The expertise developed in handling such interstate conflicts problems has enabled most state courts to handle similar issues that have arisen in the course of international business and commerce. The recent trend toward uniformity in state commercial law, manifested by the nationwide acceptance of the Uniform Commercial Code,<sup>51</sup> has also resulted in greater uniformity in the conflicts of law area, at least in the commercial context.

Prior to the adoption of the UCC, North Carolina conflicts law looked to the "lex loci celebrationis,"<sup>52</sup> and our courts held that "in interpreting a contract made outside of this State our courts long ago established the principle that the law of the country where the contract is made is the rule by which the validity of it, its exposition, and consequences are to be determined."<sup>53</sup> "Moreover, it is a generally accepted principle that 'the test of the place of a contract is as to the place at which the last act was done by either of the parties essential to a meeting of the minds. Until this act was done there was no contract, and upon its being done at a given place, the contract became existent at the place where the act was done.'"<sup>54</sup>

In those cases where the place of performance of the contract differs from the place where the contract was made, North Carolina cases have not developed a firm conflicts rule.<sup>55</sup> Even less clear is the effect to be given by the North Carolina courts to a choice of law clause. For obvious reasons, the parties to an interstate or international contract might wish to agree in advance that, should a dispute arise, the law of a designated jurisdiction would determine the controversy.

Prior to July 1, 1967, the enforceability in North Carolina of such choice of law clauses was not clear.<sup>56</sup> On that date, however, the Uniform Commercial Code became effective and, at least in commercial matters, new conflicts and choice of law rules were adopted. The Code's

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problems the resolution of which composes a substantial part of the lore of conflict of laws. However, if another federal ground of jurisdiction is present, the federal courts must apply federal conflict of laws rules." *Id.* at 245.

<sup>50</sup> "In this country, the principles of conflict of laws developed primarily in interstate matters. . . . When international cases came up, the principles developed in the *intrastate* cases were transferred almost unquestioningly to the *international* matters." Cheatham, *Some Developments in Conflict of Laws*, 17 VAND. L. REV. 193, 200 (1963).

<sup>51</sup> In North Carolina, see N.C. GEN. STAT. §§ 25-1-101 to 10-107 (1965).

<sup>52</sup> Wurfel, *supra* note 48, at 275.

<sup>53</sup> *Fast v. Gulley*, 271 N.C. 208, 211, 155 S.E.2d 507, 509 (1967).

<sup>54</sup> *Bundy v. Commercial Credit Co.*, 200 N.C. 511, 515, 157 S.E. 860, 862 (1931).

<sup>55</sup> As Professor Wurfel has pointed out, "[t]he issue of whether questions of performance are governed by the law of the place of contracting or of the place of performance has not been conclusively decided in North Carolina." Wurfel, *supra* note 48, at 275.

<sup>56</sup> But the North Carolina Supreme Court has hinted that such clauses might very well be enforceable. See, e.g., *Cocke v. Duke Univ.*, 260 N.C. 1, 131 S.E.2d 909 (1963).

conflicts provisions are set forth in N.C. Gen. Stat. § 25-1-105,<sup>57</sup> which provides that the parties to a commercial transaction may indeed choose the law to be applied to their contract.<sup>58</sup> Absent such a choice of law clause, moreover, the Code provides that the UCC should govern "transactions bearing an appropriate relation to this State."<sup>59</sup> While the Code places certain limitations on the parties' ability to choose applicable law,<sup>60</sup> these restrictions primarily involve situations where failure to apply Code provisions strictly would upset the entire statutory scheme, undermine the goal of national uniformity, or prejudice the rights of third parties and strangers to the contract.<sup>61</sup>

When the parties include a choice of law clause in their contract, section 1-105(1) should insure that their choice is enforced and given effect by North Carolina courts,<sup>62</sup> assuming the limitations contained in subsection (2) do not apply. Such a clause should be effective even though the presiding judge may be required to enforce a foreign and unfamiliar rule of law which is inconsistent with the articulated public policy of the forum state.<sup>63</sup>

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<sup>57</sup> N.C. GEN. STAT. § 25-1-105 (1965) reads as follows:

Territorial application of the act; parties' power to choose applicable law.—(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this State and also to another state or nation the parties may agree that the law either of this State or of such other state or nation shall govern their rights and duties. Failing such agreement this chapter applies to transactions bearing an appropriate relation to this State.

(2) Where one of the following provisions of this Chapter specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. (G.S. 25-2-402).

Applicability of the article on bank deposits and collections. (G.S. 25-4-102).

Bulk transfers subject to the article on bulk transfers. (G.S. 25-6-102).

Applicability of the article on investment securities. (G.S. 25-8-106).

Perfection provisions of the article on secured transactions. (G.S. 25-9-1030).

<sup>58</sup> See generally Nordstrom & Ramerman, *The Uniform Commercial Code and the Choice of Law*, 1969 DUKE L.J. 623 (1969); Wurfel, *supra* note 48, at 279-91.

<sup>59</sup> N.C. GEN. STAT. § 25-1-105(1), *supra* note 57. As the North Carolina Comment notes, "[t]his may be a modification of prior law."

<sup>60</sup> *Id.* § 25-1-105(2).

<sup>61</sup> The Official Comment states that:

Subsection (2) spells out essential limitations on the parties' right to choose the applicable law. Especially in Article 9 parties taking a security interest must have sure ways to find out whether and where to file and where to look for possible existing filings.

The North Carolina Comment to the UCC notes, in addition, that:

This subsection states a second limitation upon the general right to select the law governing a transaction. The rationale of all five of the exceptions set forth is two-fold: (1) the necessity of certainty as to the applicable law exists in the five instances and (2) the inalienability by the contracting parties of rights of third parties, generally creditors, under local law.

<sup>62</sup> "The Code permits parties to select the law which will govern their rights and duties provided that their transaction bears a reasonable relation to the state or nation whose law is selected. The inference is that if the parties choose the law of some state which has no reasonable relation to the transaction, that choice will not be recognized." Nordstrom & Ramerman, *supra* note 58, at 626.

<sup>63</sup> "One limitation courts should not place on choice of law clauses in commercial

The more complicated issue involves the second sentence of section 1-105(1) which attempts to provide a conflicts rule in those situations where the parties do not agree upon applicable law in advance. "If choice of law problems arise in a transaction not covered by subsection (2) of 1-105 and if the parties have not designated the governing law, the forum's version of the Code 'applies to transactions bearing an appropriate relation to the state.'" <sup>64</sup> The term "appropriate relation" is deliberately left undefined, and the Official Comment is of little help in ascertaining its intended meaning:

Where there is no agreement as to the governing law, the Act is applicable to any transaction having an 'appropriate' relation to any state which enacts it. . . .

Where a transaction has significant contacts with a state which has enacted the Act and also with other jurisdictions, the question what relation is 'appropriate' is left to judicial decision. <sup>65</sup>

The North Carolina Comment merely states that "the second sentence provides that where there is no agreement as to the law that will govern, and where there is sufficient relation to North Carolina, North Carolina law will be used. This may be a modification of prior law." <sup>66</sup> The only North Carolina case in which Section 1-105 has been cited did not address the point. <sup>67</sup>

The significance of the "appropriate relation" test has diminished insofar as interstate transactions are involved, since the UCC has been adopted nationwide and the applicable law will, in any event, be the same or nearly so. In an international context, however, the "appropriate relation" test may yet prove of crucial importance when a decision must be made whether to apply Code provisions to an international dispute, or whether the commercial law of some foreign jurisdiction should apply. <sup>68</sup>

#### A. *Drafting Hint: Choice of Law Clause*

Where international sales contracts are concerned, the best advice a

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transactions is the long-recognized principle that the public policies of the forum are not to be overridden by the application of foreign law. . . .

The Code contains no public policy exception to party autonomy in choosing applicable law, and none should be read in by the courts. It may well be that for the general area of conflict of laws some restrictions are needed on allowing parties to contract out from under local policies, but no such exception is required in commercial law where states have almost unanimously agreed on the basic Code policies. . . . There is no longer room in commercial law for a notion that because the rules applied to a particular problem vary in their detail, those details express some principle of strong local policy negating the parties' own choice of law." *Id.* at 634.

<sup>64</sup> *Id.* at 634-35.

<sup>65</sup> Official Comment, UCC § 1-105.

<sup>66</sup> Official Comment, N.C. Gen. Stat. § 25-1-105 (1965).

<sup>67</sup> *Tennessee Carolina Transportation, Inc. v. Strick Corp.*, 283 N.C. 423, 431, 196 S.E.2d 711, 716 (1973).

<sup>68</sup> See generally Nordstrom & Ramerman, *supra* note 58, at 634-45; Wurfel, *supra* note 48, at 285-87.

North Carolina attorney can give his client is to insist that the contract include a choice of law clause and that the law chosen be both familiar and accessible. Normally this would mean that the contract should, if possible, be governed by North Carolina law.

Nothing is more frustrating than attempting to litigate issues of foreign law in a North Carolina court. Locating reliable sources of such law is almost impossible. The expense of this effort alone may be enough to cool a client's passion for litigation, and, after several days spent trying to track down the commercial laws of Norway, even the attorney's enthusiasm may begin to wane. The libraries of the State's law schools do not purport to be repositories of the laws of the world's many nations, and what little information is available is apt to be incomplete or hopelessly out of date. To the extent that sources of foreign law can be found, they are usually written in the foreign country's native tongue, and whatever English translations are available usually fail to reflect the latest developments and amendments. Unless very large sums of money are involved, justifying the association of foreign counsel and the employment of qualified translators, the selection of foreign law may, as a practical matter, leave one's client stranded in his own domestic courts without remedy or hope for relief.

The UCC now provides the legal basis for choosing North Carolina law and enforcing that choice. Thus, to the extent that the North Carolina party has superior bargaining power or sufficient leverage to do so, he should insist that North Carolina law govern the contract. If the other side balks, the next best solution is to include no choice of law clause at all, relying instead upon the last sentence of section 1-105 to the effect that "failing such agreement this chapter applies to transactions bearing an appropriate relation to this State."<sup>69</sup> An argument can then be made that the contract need not have been *made* in North Carolina in order to have "an appropriate relation to this State." If the contract calls for goods to be shipped from or to North Carolina, or if payment is to be made by or to the North Carolina party, then a strong argument can be made that the contract is so "appropriately related" to the forum as to justify the application of North Carolina law.

### III. Choice of Forum

#### A. *Choice of Judicial Forum*<sup>70</sup>

Parties to international contracts have long sought and attempted to eliminate uncertainty in their agreements by providing that a particular court or forum designated by the parties should have exclusive jurisdiction of any disputes which might arise. Such choice of forum clauses

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<sup>69</sup> UCC § 1-105; N.C. GEN. STAT. § 25-1-105 (1965).

<sup>70</sup> See generally Wilner, *Choice of Forum and Public Policy: Some Indications of the Development in United States Law of a Distinct "International" Public Policy*, 2 N.C.J. INT'L L. & COM. REG. 29 (1977).



have been disfavored, however, and until recently most American courts uniformly held them unenforceable.

The issue of enforceability has usually arisen upon a motion to dismiss or to stay proceedings in a state or federal court pending the commencement or completion of proceedings in the designated forum. Traditionally, courts have rejected contractual efforts to "oust" them of jurisdiction in circumstances where, but for the choice of forum clause, such jurisdiction would clearly be appropriate. The common law rule in North Carolina was stated in *Skinner v. Gaither Corp.*:<sup>71</sup>

It is settled law in this jurisdiction, as in most others, that when a cause of action has arisen, the courts cannot be ousted of their jurisdiction by an agreement, previously entered into, to submit the rights and liabilities of the parties to arbitration or to some other tribunal named in the agreement.<sup>72</sup>

Until recently, both state and federal courts routinely applied the common law rule to international commercial contracts containing a choice of forum clause.

Before 1971, United States courts were likely to disregard such a clause whenever an American party to the agreement brought a suit in a United States forum. The public policy-based reasons given by the courts were three-fold: the superior convenience of the United States forum, possible prejudice abroad, and the likelihood of non-application of United States law by the foreign court.<sup>73</sup>

In 1971, however, the United States Supreme Court indicated that the time may have come at long last to give effect to forum selection clauses in international commercial contracts. The Court, in *The Bremen v. Zapata Off-Shore Co.*<sup>74</sup> acknowledged that the jurisdictional prerogatives guarded so jealously and for so long by domestic courts must, in some cases, give way to the demands and realities of modern international commerce. While the ultimate impact of *Zapata* is yet to be seen, this opinion, by the highest court of the world's most important marketplace, signals a remarkable shift in judicial attitude towards freedom of contract in international commerce.

*Zapata*, a United States corporation, entered into a towage contract with Unterweser, a German corporation, under which Unterweser agreed to transport *Zapata's* oil-drilling rig from Louisiana to a point off Ravenna, Italy. The contract provided that "[a]ny dispute arising must be treated before the London Court of Justice."<sup>75</sup> A storm damaged the rig in transit, and it was towed to Tampa, Florida where *Zapata* promptly filed suit in admiralty in the U.S. District Court seeking damages against Unterweser and its towing vessel for negligent towage and breach of contract. Unterweser invoked the forum selection clause, moved to

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<sup>71</sup> 234 N.C. 385, 67 S.E.2d 267 (1951).

<sup>72</sup> *Id.* at 386-87, 67 S.E.2d at 269. See also Wurfel, *supra* note 48, at 279; H. STEINER & D. VAGTS, *supra* note 36, at 727-35.

<sup>73</sup> Wilner, *supra* note 70, at 31.

<sup>74</sup> 407 U.S. 1 (1972).

<sup>75</sup> *Id.* at 2.

dismiss, and then filed its own breach of contract suit in the High Court of Justice in London, the contractually-designated forum.

Acknowledging that "England had no interest in or contact with the controversy other than the . . . forum-selection clause,"<sup>76</sup> the Court nevertheless held that "such [forum selection] clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."<sup>77</sup> The Court's analysis reflects a new awareness of the important differences between interstate and international commerce.

For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. . . . The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

[Enforcement of forum selection clauses] accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world. Not surprisingly, foreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter.

The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting.<sup>78</sup>

The Court noted that "[f]orum-selection clauses have historically not been favored by American courts,"<sup>79</sup> and conceded that "this view still has considerable acceptance."<sup>80</sup> Nevertheless the Court held that

[t]he argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and had little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals.<sup>81</sup>

The Court concluded that "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside."<sup>82</sup>

The Court did hold that under some circumstances a forum selec-

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<sup>76</sup> *Id.* at 7.

<sup>77</sup> *Id.* at 10.

<sup>78</sup> *Id.* at 8-9, 11-14.

<sup>79</sup> *Id.* at 9.

<sup>80</sup> *Id.* at 10.

<sup>81</sup> *Id.* at 12.

<sup>82</sup> *Id.* at 15.

tion clause might yet be unenforceable, but placed a heavy burden of proof on the party resisting enforcement:

The correct approach would have been to enforce the forum clause specifically *unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.* . . .

. . . [A] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.<sup>83</sup>

The Court was not impressed by the argument that the "inconvenience" of the designated forum could, in and of itself, render the selection clause "unreasonable" and thus unenforceable:

Courts have also suggested that a forum clause, even though it is freely bargained for and contravenes no important public policy of the forum, may nevertheless be 'unreasonable' and unenforceable if the chosen forum is *seriously* inconvenient for the trial of the action. . . .

. . . [W]hatever 'inconvenience' Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape this contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.<sup>84</sup>

Two years later, in *Scherk v. Alberto-Culver*,<sup>85</sup> the Court reaffirmed its holding in *Zapata* as to the enforceability of forum selection clauses, even when it seemed apparent that enforcement of the parties' agreement would achieve a result inconsistent with the strong public policies reflected in the federal securities laws.

Alberto-Culver had commenced a securities fraud action against Scherk in the federal district court in Illinois, ignoring a contractual clause providing for arbitration of "any controversy or claim [that] shall arise out of this agreement or the breach thereof"<sup>86</sup> before the International Chamber of Commerce in Paris. Scherk filed a motion to stay pending arbitration. Alberto-Culver, relying on *Wilco v. Swan*,<sup>87</sup> argued that an agreement to arbitrate could not deprive a defaulted investor of his right to judicial remedy under the Securities Act of 1933. The district court refused the stay, and the Seventh Circuit affirmed.<sup>88</sup> Citing the Federal Arbitration Act<sup>89</sup> and the "international" nature of the contract, the Supreme Court reversed:

[T]he respondent's reliance on *Wilco* in this case ignores the significant and, we find, crucial differences between the agreement involved in

<sup>83</sup> *Id.* at 15 (emphasis added).

<sup>84</sup> *Id.* at 16-18.

<sup>85</sup> 417 U.S. 506 (1974).

<sup>86</sup> *Id.* at 508.

<sup>87</sup> 346 U.S. 427 (1953).

<sup>88</sup> *Alberto-Culver Co. v. Scherk*, 484 F.2d 611 (7th Cir. 1973).

<sup>89</sup> 9 U.S.C. §§ 1-14 (1976).

*Wilco* and the one signed by the parties here. *Alberto-Culver's* contract to purchase the business entities belonging to *Scherk* was a truly international agreement. . . . Such a contract involves considerations and policies significantly different from those found controlling in *Wilco*. . . . A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.<sup>90</sup>

The Court again demonstrated its commitment to reshape American law to fit the demands and expectations of international businessmen, even at the expense of domestic public policy:

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if *Scherk* had anticipated that *Alberto-Culver* would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining *Alberto-Culver* from proceeding with the litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, *the dicey atmosphere of such a legal no-man's land would certainly damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.*

For all these reasons we hold that the agreement of the parties in this case to arbitrate any dispute arising out of their *international commercial transaction* is to be respected and enforced by the federal courts in accordance with the explicit provisions of the Arbitration Act.<sup>91</sup>

Professor Wilner has stated that:

The Court enforced a clause specifying a foreign arbitral forum, even though the Court knew that enforcement could result in the non-application of the 1934 Securities Exchange Act, a piece of legislation containing the highest internal public policy content. . . . Thus, in *Scherk v. Alberto-Culver Co.*, as in *The Bremen v. Zapata*, one finds a recognition that a distinction exists between domestic transactions and transnational transactions. The two cases embrace the view that transnational transactions must be encouraged and that such transactions should therefore be subject to less restrictive standards than purely domestic transactions. In essence, *Scherk* and *The Bremen* reflect a recognition by the Supreme Court of 'international public policy'.<sup>92</sup>

It is as yet unclear whether state courts will follow the Supreme Court's lead in *Zapata* and *Alberto-Culver*.<sup>93</sup> Those cases, it must be remembered, involved federal law; admiralty law in *Zapata*, the Federal Arbitration Act in *Alberto-Culver*. The Court's uncharacteristically sweeping language in these two cases, however, suggests that traditional antipathy toward forum selection clauses is a principle of American

<sup>90</sup> 417 U.S. at 515-16 (emphasis added).

<sup>91</sup> *Id.* at 516-17, 519-20 (emphasis added).

<sup>92</sup> Wilner, *supra* note 70, at 33-34.

<sup>93</sup> *Id.* at 32. For the attitude of foreign countries to forum selection clauses, see generally H. STEINER & D. VAGTS, *supra* note 36, at 738-40.

jurisprudence whose time has come and gone. It seems only a matter of time until the *Zapata/Alberto-Culver* analysis is applied to all choice of forum agreements contained in international commerce agreements.<sup>94</sup>

### B. Drafting Hint: Forum Selection Clauses

Professor Wilner has summarized it best:

What do the two Supreme Court cases and other recent judicial pronouncements tell the draftsmen for a United States national who is party to a transnational commercial agreement? It appears that if a choice of forum clause calling for the exclusive jurisdiction of one or more foreign judicial or arbitral fora is inserted and if the agreement is transnational in nature, the United States court would enforce the clause. . . . The conclusion to be drawn from the cases discussed is that the United States party is unlikely to be able to sue in the United States forum which, in order to take jurisdiction, would be compelled to disregard the choice of forum clause on grounds such as forum nonconveniens or public policy, based, among other things, on the fact that the foreign forum is unlikely to apply United States law or United States law concepts. Precisely this type of public policy argument was rejected in *The Bremen v. Zapata*. . . . Whether, in diversity cases, the state courts and the federal courts must follow the Supreme Court's pronouncements is an unanswerable question. Nevertheless, it appears that, in drafting a choice of forum clause which provides for foreign courts or foreign arbitral tribunals, close attention must be paid to the likelihood that the clause will be enforced by United States courts and that, as a result, a United States party will be unable to avoid becoming a party to litigation abroad.<sup>95</sup>

### C. Arbitration Clauses<sup>96</sup>

The common law in this country condemned arbitration agreements just as strongly as forum selection clauses. The last few decades, however, have witnessed a dramatic turnabout in American attitudes toward arbitration. As the Supreme Court pointed out in *Alberto-Culver*, "[a]n agreement to arbitrate before a specified tribunal is, in effect, a special-

<sup>94</sup> The Supreme Court decision in *Alberto-Culver* was 5-4, with Justices Douglas, Brennan, White and Marshall dissenting. The Seventh Circuit had reached precisely the opposite result with one dissenting vote, *Alberto-Culver v. Scherk*, 484 F.2d 611 (7th Cir. 1973). The one lone dissenter, however, was then Judge Stevens who has since replaced Justice Douglas on the Court, suggesting the majority in favor of the *Zapata/Alberto-Culver* approach is now at least 6-3.

<sup>95</sup> Wilner, *supra* note 68 at 34-37. See also *Tai Kien Indus. Co. Ltd. v. M/V Hamburg*, 528 F.2d 835 (9th Cir. 1976); *Gaskin v. Stumm Handel*, 390 F. Supp. 361 (S.D.N.Y. 1975); Note, *Tai Kien Industry Co. Ltd. v. M/V Hamburg: Contractual Forum Selection Clears Another Hurdle*, 2 N.C.J. INT'L L. & COM. REG. 173 (1977). In *Tai Kien*, the Ninth Circuit "outlined three instances where forum selection clauses might be declared unreasonable: (1) where the law which will be applied in the contract forum is contrary to a strong public policy of the forum where the suit has been brought; (2) where the agreement is part of an adhesion contract; and (3) where there would be such serious inconvenience to the party objecting to the contractual forum as to result in denial of his day in court." *Id.* at 175-76.

<sup>96</sup> See generally, McClelland, *International Arbitration: A Practical Guide for the Effective Use of the System for Litigation of Transnational Commercial Disputes*, 12 INT'L LAW. 83 (1978); Comment, *International Commercial Disputes: The Alternative of Arbitration*, 2 N.C.J. INT'L L. & COM. REG. 142 (1977).

ized kind of forum-selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute."<sup>97</sup> The principles enunciated in *Zapata* and *Alberto-Culver*, therefore, would apply with equal force to arbitration agreements. Indeed, *Alberto-Culver* was itself an effort by defendant to enforce such an agreement pursuant to the Federal Arbitration Act.

Apart from federal case law, however, state and federal statutes, treaties, and international conventions have, in their cumulative effect, successfully obliterated common law attitudes toward enforcement of arbitration agreements.

On August 1, 1973, the Uniform Arbitration Act<sup>98</sup> became effective in North Carolina. The Act provides that arbitration agreements "shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy."<sup>99</sup> If one of the parties to the agreement refuses to arbitrate, the Act contemplates proceedings to compel arbitration. Upon motion, the court is directed to order the parties to proceed with arbitration unless the opposing party "denies the existence of the agreement to arbitrate. . . ."<sup>100</sup> If the opposing party contends that there is no agreement to arbitrate, the Act provides that "such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration."<sup>101</sup> The Act also states that the arbitration procedures contained in the contract are to be enforced and, if the agreement is silent on the specific procedure to be followed, the Act provides a statutory procedure to govern the arbitration proceedings.<sup>102</sup>

The Federal Arbitration Act<sup>103</sup> provides that:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.<sup>104</sup>

The federal Act specifically provides that " 'commerce', as herein defined, means commerce among the several States *or with foreign*

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<sup>97</sup> 417 U.S. at 519. "In a sense, [an arbitration agreement] is more drastic than a choice-of-forum clause since it removes the controversy from any court and places it in the hands of private arbitrators." H. STEINER & D. VAGTS, *supra* note 36, at 735.

<sup>98</sup> N.C. GEN. STAT. § 1-567.1-.20 (Supp. 1977).

<sup>99</sup> *Id.* § 1-567.2(a).

<sup>100</sup> *Id.* § 1-567.3(a).

<sup>101</sup> *Id.* § 1-567.3(b).

<sup>102</sup> *Id.* § 1-567.4-.9.

<sup>103</sup> 9 U.S.C. §§ 1-14 (1976).

<sup>104</sup> *Id.* § 2.

nations. . . ."<sup>105</sup> If any party to an arbitration agreement institutes legal action against his contract partner on an issue properly referable to arbitration, the federal Act requires the court to "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."<sup>106</sup>

Clauses dealing with the enforceability of arbitration agreements have also been included in a number of United States Treaties of Friendship, Commerce and Navigation. Our treaty with Belgium, for example, provides that "[c]ontracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party."<sup>107</sup> This treaty provision, of course, makes international arbitration agreements enforceable only if and to the extent that purely domestic agreements are enforceable. Other treaty provisions, such as Article V(2), of the Treaty of Friendship, Commerce and Navigation with the Netherlands signed March 27, 1956, provides that arbitral awards "which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either party."<sup>108</sup> This provision gives a foreign arbitral award the same status as a domestic award and precludes review by the enforcing party of the proceedings before the arbitration tribunal.<sup>109</sup>

In 1970, the United States adopted the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>110</sup> Article II(1) provides that "[e]ach Contracting State shall

<sup>105</sup> *Id.* § 1 (emphasis added).

<sup>106</sup> *Id.* § 3. Note, however, that "[a] proceeding to remedy a failure to arbitrate must be brought in a court 'which, save for such agreements, would have jurisdiction,' i.e., there must be an independent basis for [federal] jurisdiction such as the existence of diversity of citizenship or a federal question . . . or the presence of admiralty jurisdiction." H. STEINER & D. VAGTS, *supra* note 36, at 736-37.

<sup>107</sup> Treaty of Friendship, Commerce and Navigation, Feb. 21, 1961, U.S.-Belgium, Art. III (6), 14 U.S.T. 1284, 1292-95, T.I.A.S. No. 5432.

<sup>108</sup> Treaty of Friendship, Commerce and Navigation, March 27, 1956, U.S.-Netherlands, 8 U.S.T. 2043, 2049, T.I.A.S. No. 3942.

<sup>109</sup> *See, e.g.*, W. SURREY & C. SHAW, A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 987-89 (1963). This somewhat dated work is being revised and reissued as a multi-volume second edition by Surrey and Wallace. Part I is now available as 1 W. SURREY & D. WALLACE, A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS (2d ed. 1977).

<sup>110</sup> 9 U.S.C. § 201 (1970); U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3. *See* Quigley, *Convention on Foreign Arbitral Awards*, 58 A.B.A.J. 821 (1972); McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MARITIME L. 735 (1971); Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW. U.L. REV. 1 (1971); Note, *United Nations Foreign Arbitral Awards Convention: United States Accession*, 2

recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."<sup>111</sup> Article II(3) provides that "the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."<sup>112</sup> United States acceptance of the Convention is subject to two important reservations. First, "the United States of America will apply the Convention on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of *another contracting state*."<sup>113</sup> Second, the United States limits application of the Convention to legal disputes "whether contractual or not, which are considered as *commercial under the national law of the United States*."<sup>114</sup>

Congress has enacted implementing legislation<sup>115</sup> to incorporate the Convention into federal law. Section 205<sup>116</sup> is somewhat unusual in that it provides that whenever state court proceedings involve an arbitration agreement or an award which is covered by the Convention, the defendant in such proceeding may remove the action to federal district court "at any time before the trial . . . ." This is significantly different from practice under the Federal Arbitration Act, under which a defendant may not remove a case to federal court unless there exists some other appropriate basis for federal jurisdiction other than the Act itself.<sup>117</sup>

#### IV. Enforcement of Judgments and Arbitral Awards

##### A. *Enforcement of Domestic Judgments in Foreign Countries*

The obvious goal of an action filed in a United States state or federal court against a foreign defendant is a final judgment awarding the relief sought. Such a judgment has value, however, only if and to the extent that courts in jurisdictions where the defendant has property or other assets will enforce the American judgment against such assets.

The enforceability of foreign judgments, absent a treaty on the subject, is universally regarded as a question of domestic law to be governed

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CAL. W. INT'L L.J. 67 (1971). See also *Parsons & Whittlemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974).

<sup>111</sup> U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 110, at 2519, T.I.A.S. No. 6997, 3 U.N.T.S. at 40.

<sup>112</sup> *Id.*

<sup>113</sup> 9 U.S.C. § 201 (1970) (emphasis added).

<sup>114</sup> *Id.* (emphasis added).

<sup>115</sup> *Id.* at §§ 201-208.

<sup>116</sup> *Id.* at § 205.

<sup>117</sup> See note 104 *supra*.



by the jurisdiction in which enforcement is sought, and is not considered an issue involving principles of international law.<sup>118</sup> Thus, a North Carolina judgment creditor seeking to enforce or execute upon a local judgment abroad will usually require the assistance of foreign counsel. The rules governing enforcement of foreign judgments vary from country to country, and "no useful generalization can be made beyond the statement that most countries either will not recognize foreign judgments at all or will do so only upon the basis of reciprocity."<sup>119</sup> Foreign judgments, in the United States and other countries, are not typically given conclusive effect, and it is usually necessary to obtain a local judgment based upon the foreign decree which can then be enforced under local law and procedure. French courts, for example, take a dim view of foreign judgments against French nationals on the presumption that the quality of justice available in other countries is inferior to that available in France.<sup>120</sup> Enforcement is generally less complicated in the United Kingdom and other countries.<sup>121</sup>

Potential problems relating to enforceability should be anticipated and explored *prior to* commencement of the action. How the case is handled at the pleading stage may have a significant impact upon the later enforceability of any judgment obtained.

In the Federal Republic of Germany, for example, the recognition and enforcement of foreign judgments is governed by section 328 of the Code of Civil Procedure (*Zivilprozessordnung*).<sup>122</sup> While the Code presumes that foreign judgments generally will be enforceable, subsection 2 provides that a decree will *not* be enforced "[i]f the unsuccessful defendant is a German and he did not appear in the proceeding, insofar as the summons or order initiating the proceedings was not served upon him personally in the state of the trial court or through German judicial assistance . . . ."<sup>123</sup> The enforceability of a default judgment, while valid under state or federal law, will thus depend upon the manner in which service of process was effected. As a result, service upon a German defendant solely by international registered mail or by publication, while clearly adequate to invoke the court's jurisdiction under domestic law, will be inadequate to render the judgment enforceable against a German defendant. A German who is not served personally "in the state of the

<sup>118</sup> H. STEINER & D. VAGTS, *supra* note 36, at 686.

<sup>119</sup> W. SURREY & C. SHAW, *supra* note 109, at 986.

<sup>120</sup> See, e.g., Nadlemann, *French Courts Recognize Foreign Money Judgments: One Down and More To Go*, 13 AM. J. COMP. L. 72 (1964); Nadlemann, *Recognition of Foreign Money Judgments in France*, 5 AM. J. COMP. L. 248 (1956).

<sup>121</sup> See, e.g., Graupner, *Some Recent Aspects of the Recognition and Enforcement of Foreign Judgments in Western Europe*, 12 INT'L & COMP. L.Q. 367 (1963); Golomb, *Recognition of Foreign Money Judgments: A Goal Oriented Approach*, 43 ST. JOHN'S L. REV. 604, 610 (1969); Lorenzen, *The Enforcement of American Judgments Abroad*, 29 YALE L.J. 188 (1919); Nadlemann, *Reprisals Against American Judgments?*, 65 HARV. L. REV. 1184 (1952).

<sup>122</sup> See generally Brenscheidt, *The Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany*, 11 INT'L LAW. 261 (1977).

<sup>123</sup> *Id.* at 264.

trial court" or in Germany "through German judicial assistance" may with some confidence ignore state or federal proceedings against him in the United States, secure in the knowledge that section 328 will protect him against attempts to enforce the forthcoming default judgment. The unfortunate American plaintiff, having obtained a valid domestic judgment, will not likely be permitted to commence a new proceeding on the same cause of action merely to correct his oversight in effecting service. Plaintiff's only alternative at this point, and not a very palatable one, will be to sue the defendant *in Germany*. As far as enforceability is concerned, plaintiff's case was, for all practical purposes, over before it ever really began, for even if the German defendant were inclined to appear and defend himself in the American action, he would be foolish to do so unless properly served as provided in section 328.

### *B. Enforcement of Foreign Judgments in U.S. Courts*<sup>124</sup>

What happens when a foreign plaintiff seeks to enforce a judgment obtained in a foreign court against a North Carolina defendant? A local attorney may be called upon for advice on this issue either by the foreign judgment creditor, who wants to know how he can enforce his judgment, or by the North Carolina defendant, who wants to avoid judgment if possible.

Surprisingly, there are no North Carolina cases or statutes which specifically address the issue of recognition and enforcement of judgments obtained in the courts of foreign countries.<sup>125</sup> Case law in North Carolina is limited to the effect to be given in North Carolina to a judgment rendered by a *sister state*. The focal point of these cases is the "Full Faith and Credit Clause," contained in Article IV of the Constitution, which is not applicable to judgments of courts in foreign countries.

As Professor Wurfel reported:

Since the full faith and credit mandate of the Federal Constitution does not apply to foreign-country judgments, the issue of their recognition rests entirely in comity. Three views on this subject are possible: (1) no recognition will be given to the judgment of a foreign country unless a treaty between the two nations concerned expressly provides for such recognition; (2) recognition will be extended on a basis of reciprocity; and (3) recognition will be accorded in all cases without regard to reciprocal treatment being extended by the law of the judgment nation. The first view is the rule in France and a few other civil law countries. The second is the federal rule as enunciated by the Supreme Court in *Hilton v. Guyot* and the third is the New York conflict of laws rule on the point.<sup>126</sup>

*Hilton v. Guyot*,<sup>127</sup> although decided in 1895, remains the most complete treatment by the United States Supreme Court of the issue of recognition and enforcement of foreign-country judgments. Plaintiffs had

<sup>124</sup> See generally Wurfel, *Recognition of Foreign Judgments*, 50 N.C.L. REV. 21 (1971).

<sup>125</sup> *Id.* at 69.

<sup>126</sup> *Id.* at 69-70.

<sup>127</sup> 159 U.S. 113 (1895).

obtained a judgment in France of which almost \$200,000 remained unpaid. Plaintiffs sought to enforce their judgment in the Circuit Court for the Southern District of New York, but defendants argued not only that they were not indebted to the plaintiffs, but that the judgment was procured in France by fraud. The Court, in refusing to hold the French judgment conclusive upon American courts, established a rule of comity for the enforcement of foreign-country judgments.<sup>128</sup> Although *Hilton v. Guyot* has never been overruled, many legal scholars contend that the "comity" or "reciprocity" rule established in that case no longer reflects modern attitudes toward recognition and enforcement of foreign judgments.<sup>129</sup>

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<sup>128</sup> "The most certain guide, no doubt, for the decision of such questions is a treaty or statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. . . . *Id.* at 163.

"'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws. . . . *Id.* at 164.

"[I]t clearly appears that, at the time of the separation of this country from England, the general rule was fully established that foreign judgments *in personam* were *prima facie* evidence only, and not conclusive of the merits of the controversy between the parties. . . . *Id.* at 187. Indeed, the rule that the judgment is to be *prima facie* evidence for the plaintiff would be a mere delusion if the defendant might still question it by opening all or any of the original merits on his side; for under such circumstances it would be equivalent to granting a new trial. . . . *Id.* at 190.

"[W]e are satisfied that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendants, therefore, cannot be permitted, upon that general ground, to contest the validity or the effect of the judgment sued on. *Id.* at 203.

"It appears, therefore, that there is hardly a civilized nation on either continent which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money. . . . The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiff's claim. . . . In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive." *Id.* at 227-228.

<sup>129</sup> "While the Supreme Court [in *Hilton v. Guyot*] enunciated a reciprocity rule, its rule was subjected to criticism and does not appear to be in accordance with the majority of American decisions today. For example, New York rejected the doctrine of reciprocity. Commentators have noted that the trend in American jurisdictions is to afford conclusive effect to foreign judgments." W. SURREY & C. SHAW, *supra* note 109, at 986.

The lingering confusion as to the proper "federal" rule is probably of little importance today, given that foreign judgment creditors will usually attempt to enforce their judgments in the state court where the American defendant resides or in the federal courts for that district upon grounds of diversity of citizenship. The Supreme Court in *Hilton v. Guyot* could not have anticipated the impact of the Court's later decision in *Erie R.R. v. Tompkins*<sup>130</sup> to the effect that "there is no federal general common law."<sup>131</sup> *Erie*, together with *Klaxon Co. v. Stentor Electric Mfg. Co.*,<sup>132</sup> established the rule that federal courts in diversity cases are to apply the conflict of law rules of the state in which they are sitting.<sup>133</sup> Thus, in most cases, the "federal" rule established in *Hilton v. Guyot* will be inapplicable in an action in state or federal court to enforce a foreign-country judgment. Lower court decisions since *Erie* and *Klaxon* clearly reflect an understanding on the part of federal courts that they are to apply the state rule in enforcing foreign-country judgments.<sup>134</sup>

Bilateral or multilateral treaties with other nations on the subject of judgment recognition and enforcement would, of course, preempt state law and would establish a uniform federal rule for the United States.<sup>135</sup> As in 1895, however, the United States is not presently a party to any treaty providing for the mutual recognition and enforcement of judgments.

If an action is brought in North Carolina to enforce a judgment obtained abroad, North Carolina law would govern the effect to be given that judgment. The more difficult problem, however, is to determine what the North Carolina law is on the point. As mentioned above, there are no cases directly on point, and the General Assembly has not enacted statutory guidelines in this area. As a result, the issue remains open to the effective advocacy and imagination of counsel. As Professor Wurfel concludes:

Any of the three rules regarding recognition could conceivably be adopted by North Carolina in the absence of a treaty between the United States and the country concerned which expressly required recognition. Adoption of the severe French view seems unlikely. The requirement of reciprocity in the limited factual circumstances found in *Hilton* is a possibility and would be consistent with the language of the two North Carolina dicta. This view has not been favored by most legal writers, but in the international community there is merit to the reciprocity concept that the golden rule should cut both ways. Finally, North Carolina could follow the New York conflicts rule that if the juris-

<sup>130</sup> 304 U.S. 64 (1938).

<sup>131</sup> *Id.* at 78.

<sup>132</sup> 313 U.S. 487 (1941).

<sup>133</sup> Wurfel, *supra* note 124, at 72.

<sup>134</sup> *See, e.g.,* Somportex Ltd. v. Philadelphia Chewing Gum Corp., 318 F. Supp. 161 (E.D. Pa. 1970), *aff'd* 453 F.2d 435, *cert. denied*, 405 U.S. 1017 (1972); Svenska Handelsbanken v. Carlsson, 258 F. Supp. 448 (D. Mass. 1966); Note, *Conflicts of Laws—Enforcement of Foreign Judgments in Federal Courts*, 49 N.C.L. REV. 747 (1971).

<sup>135</sup> Wurfel, *supra* note 124, at 73; Note, *supra* note 134, at 750 n.20.

dictional foundation upon which the foreign-country judgment is based is not successfully attacked, it will be given full credit in the forum without review of the merits.<sup>136</sup>

One thing would seem to be certain. North Carolina courts are not likely to give greater recognition to foreign-country judgments than they do to the decrees of sister states under the Full Faith and Credit Clause. As a result, the defenses which are available to a sister state judgment should be available to a party resisting enforcement of a foreign-country judgment. If this analysis is correct, a foreign-country judgment should be subject to attack on grounds of lack of jurisdiction, fraud in the procurement, or as being against public policy.<sup>137</sup> "Defects in foreign judgments such as extrinsic fraud or lack of jurisdiction over the person will preclude enforcement in American courts, as will lack of due notice and failure to provide an opportunity to be heard. Judgments which are not final will also be denied enforcement. In addition, those judgments which do not accord with the public policy of the enforcing state or which are deemed contrary to 'natural justice' will be denied enforcement."<sup>138</sup>

### *C. Enforcement of Foreign Arbitral Awards*

The strong recent trend favorable to awards by foreign arbitral tribunals is in striking contrast to U.S. attitudes toward the recognition and enforcement of foreign-country judgments. Action at both the state and federal levels in recent years has gone far toward according foreign arbitral awards conclusive and binding effect on the United States. Indeed, the growing sense of confidence on the part of parties to international contracts that their arbitration agreements will be honored and awards enforced has led to a dramatic increase in the use of arbitration as a means of international conflict settlement.<sup>139</sup>

North Carolina courts will not review an arbitral award on the merits, and the award will be vacated only if it was procured by "corruption, fraud or other undue means," or there was evident partiality or misconduct on the part of the arbitrators, or for other reasons related to the conduct of the arbitration proceedings.<sup>140</sup>

The North Carolina Arbitration Act requires the successful party to have his award confirmed here,<sup>141</sup> and upon confirmation of the award as provided in the Act, a "judgment or decree shall be entered in con-

<sup>136</sup> Wurfel, *supra* note 124, at 73-74.

<sup>137</sup> Thrasher v. Thrasher, 4 N.C. App. 534, 167 S.E.2d 549 (1969); *In re Blalock*, 233 N.C. 493, 64 S.E.2d 848 (1951); Howland v. Stitzer, 231 N.C. 528, 58 S.E.2d 104 (1950).

<sup>138</sup> W. SURREY & C. SHAW, *supra* note 109, at 985-86.

<sup>139</sup> "One of the most important reasons why a diversity between the enforcement of judgments and arbitral awards exists is that the United States has entered into a series of bilateral treaties with regard to enforcement of arbitration awards while there are presently no treaties governing the enforcement of foreign judicial decrees." *Id.* at 985.

<sup>140</sup> N.C. GEN. STAT. § 1-567.13 (Cum. Supp. 1973).

<sup>141</sup> *Id.* § 1-567.12.

formity therewith and be docketed and enforced as any other judgment or decree."<sup>142</sup> The provision authorizing appeals does not provide for appellate review of alleged legal or factual error on the part of the arbitrators. The Federal Arbitration Act sets forth grounds for vacating an arbitral award similar to those contained in the North Carolina statute.<sup>143</sup> In addition to the state and federal statutes, Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>144</sup> provides that:

#### Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Section 207<sup>145</sup> of the implementing legislation for the Convention specifies that

within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as

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<sup>142</sup> *Id.* § 1-567.15.

<sup>143</sup> 9 U.S.C. § 10 (1925).

<sup>144</sup> *See id.* § 201.

<sup>145</sup> *Id.* § 207.

against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.<sup>146</sup>

The grounds for vacating arbitral awards contained in the various statutes and treaties governing arbitration agreements may prove useful in another context. Since the United States has no treaties with other countries relating to the recognition and enforcement of foreign-country judgments, and since the law in North Carolina is not at all clear on the subject, North Carolina courts might look to the law governing arbitration agreements for guidance in deciding which foreign judgments should be enforced and which should be disregarded.<sup>147</sup> If a foreign-country judgment would not be enforceable as an award under the applicable arbitration statutes or treaties, then a strong argument can be made that such judgment should not be given conclusive effect in North Carolina.

### Question and Answer

*Mr. Farnsworth:* As you (Michael Almond) were talking about choice of forum, two questions occurred to me. First, if I recall correctly, *Bremen v. Zapata Offshore Oil Co.* was a towage contract case and I was curious as to whether you thought that fact, in light of the fact that choice of forum clauses are rather traditional in maritime contracts—more traditional than in sales contracts—made that a slightly uneasy authority to rely on in a straight sale of goods contract?

The second question is this: My recollection is that *Zapata* deals with ousting of jurisdiction, that is, whether a choice of forum clause will be honored in the United States by a refusal of jurisdiction on the assumption that jurisdiction would be taken by London. I am not sure that is a good thing and it might push me away from choice of forum to arbitration.

For instance, assume you are dealing with someone in Timbuktu and he does not know anything about *Zapata*. If you choose the North Carolina forum, he may say that he has never heard of such a clause. If you are subject to the jurisdiction of Timbuktu absent the clause, the clause does not make any difference. Therefore, if you choose North Car-

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<sup>146</sup> *Id.*

<sup>147</sup> The impact of local "public policy" upon the enforcement of arbitral awards is no doubt much diminished. If an arbitration *agreement* will be enforced notwithstanding its inconsistency with the public policies of the forum, then it would seem to follow that any arbitral *award* forthcoming from such proceedings must survive the public policy defense and would be held enforceable. See text accompanying notes 70-117 *supra*. If local policy must give way to enforcement of the agreement to arbitrate, then the *Zapata/Alberto-Culver* rationale would require that the award likewise be held enforceable. See text accompanying notes 70-95 *supra*. Courts, in dealing with international contracts at least, will thus be required to enforce non-judicial awards against local citizens, even though such awards may be totally irreconcilable with the fundamental public policies of the forum.

olina as the forum in that instance, the forum clause is not usually going to help you. If you choose Timbuktu as the forum, the clause will help, but it is going to help the party who wants to ensure that you get sued in Timbuktu. The courts in North Carolina have nothing to do with it. Hence, in so far as *Zapata* is an ousting of jurisdiction case, it seems that to raise the question of whether one should insert a choice of forum clause is a little hazardous and works against the American party.

*Mr. Almond:* There is one circuit court case which says essentially that if you refuse to follow the line, it refuses to enforce the choice of forum clause. The rationale was that the Supreme Court told us in admiralty towage cases to enforce choice of forum clauses. However, that may not have any application to any other case. I had my answer prepared, and I was going to say that the authorities do not agree with that, until I realized that one of the authorities is here and he does not know whether he agrees with it or not.

However, there is authority for the proposition that the *Bremen v. Zapata Offshore Oil Co.* case is certainly not limited to admiralty cases, particularly when you combine it with the *Alberto-Culver Co. v. Scherk* case, which involved an arbitration clause. The *Alberto-Culver* clause was more clearly a forum selection clause than this new case, *Tai Kien Industry Co., Ltd. v. M/V Hamburg*, which I think is cited in the outline.

In *Tai Kien*, which is a circuit court opinion, the two contract parties had specified a particular forum and one of the contract parties was sued in the United States by a third party. The second contract partner, who had not been sued, then attempted to sue the first contract party in the U.S. court. The U.S. court did not allow that, saying it made no difference that it would be judicially economical to have all the parties and all the claims in one lawsuit. Although judicial proceedings had been instigated by an outside third party and the second contract party had some claims against the first party, the court would not allow the intervention. In other words, the court told the second contract party that it must present its claims in the jurisdiction specified in the forum clause.

*Zapata* involved a contract between a German company and an American company to tow an oil crane across the ocean and put it in the Mediterranean. The parties specified, however, that all disputes would be tried before the London High Court of Justice. The U.S. Supreme Court acknowledged that this contract had nothing to do with England or the High Court of London, but they enforced the clause, ousting the Federal District Court of Miami of jurisdiction.

The importance of *Zapata* is the following: assume the United States is the selected jurisdiction and that another party obtained a judgment in a jurisdiction which is not the selected jurisdiction. Upon attempting to enforce the judgment in the United States, is there not an argument that the court over there lacked the jurisdiction? This is one of the tradi-



tional bases for resisting the enforcement of an award or judgment. At least it would be a basis for an estoppel against bringing an action on that foreign judgment. They would have to bring the action in the U.S. courts.

*Question:* What are the North Carolina rules about place of contract?

*Mr. Almond:* Prior to the adoption of the UCC, North Carolina conflicts law looked at *lex loci celebrationis*. North Carolina courts held that in interpreting a contract made outside this state, the established principle is that the law of the state or country where the contract was made is the rule by which its validity, exposition and consequences are to be determined. Moreover, it is a generally accepted principle that the test for the place of contract is the place at which the last act essential to the meeting of the minds was done by either of the parties. That quotes Professor Seymour Wurfel's excellent article in the North Carolina Law Review, Wurfel, *Choice of Law Rules in North Carolina*, 48 N.C.L. REV. 243, 275 (1970).

*Question:* Are you aware of the North Carolina Uniform Foreign Money Judgments Act?

*Mr. Almond:* I think that I have looked at that and concluded at one time that the Act was only for sister state judgments. I believe that the Uniform Foreign Money Judgments Act is a uniform act which is designed to help the states implement their obligations under the full faith and credit clause, and that it does not apply to foreign countries.

*Question:* Section 3(d) of your presentation outline says always use local law. Mr. Farnsworth says pick and choose. Do you stand by your "always"?

*Mr. Almond:* Yes, unless you know that you are going to do something to zap your partner and you know that you cannot be held responsible for it under the laws of other jurisdictions, but that you can be held responsible under this jurisdiction. That would be a good time to specify that the other jurisdiction's law is to apply. Without a really good reason like that or without some remedy available in another jurisdiction, that you know of in advance, I would pick North Carolina law. If you are writing on a clean slate and you have not thought about the above consequences, I certainly would recommend applying North Carolina law.

We found ourselves in a terrible situation once where we wanted to get out of our contract with a Belgian steel making company. We did not take the steel that they had and we were going to claim that the sharp decline in steel prices had so altered the conditions of the contract that we ought to be able to get out of it. However, there was an arbitration clause which specified that Belgian law would apply and we had a difficult time trying to determine the applicable Belgian commercial law. We discovered that it was the Uniform Law on the International Sale of Goods, with certain conditions and reservations imposed by Belgium. So, the situation consisted of a Belgian plaintiff, a North Carolina de-

fendant arbitrating in English in Montreal, and the application of Belgian law—it was impossible.

If you have a small import-export transaction that is less than \$100,000 and you get into a situation where foreign law is applied, you may be without a remedy in the long run because of the overall cost.

*Mr. Farnsworth:* I would say that the above mentioned Belgian case is one in which our advice does not conflict in the least. It seems to me that it would be foolish to apply Belgian law if the arbitration is to take place in Montreal, unless you have already agreed to invite three Belgians over as arbiters. If you decide to choose the High Court of London, for example, would you really think that it would be a good thing to choose North Carolina law and have to transport your experts there? That is the kind of thing that I am suggesting. If you can predict where a dispute will be litigated, as by a choice of forum clause or by an arbitration clause (which depends not only on where the arbiters sit but also on which legal system will be used), it is not a bad idea to consider that third legal system, especially one in which Americans feel less uneasy than Belgians do.

*Mr. Almond:* Generally, in our export contracts we have an order form on the front and voluminous terms and conditions of sale on the back. Within the terms and conditions of sale, we include (1) a clause stating that there be no contract until the order form is accepted by the U.S. party, by his signature at the bottom; and (2) a consent to jurisdiction clause which is clearly in North Carolina, I believe. You can waive a personal defense in advance, which amounts to lack of personal jurisdiction.

In addition, we put in a choice of forum clause and a choice of law clause whereby the parties consent to the jurisdiction of the North Carolina courts. This stipulates that any actions arising out of this agreement shall be brought exclusively in the North Carolina courts and that the applicable law is the law of the state of North Carolina. We secure a signature on that and it comes back for our signature. We do not sell people things if they will not agree to that. There is the risk that that is an uneven contract, but it is a risk that I think we will take.

*Mr. Farnsworth:* If you are lucky enough to have everything your way, then there is no problem. However, if for example you are buying and you have to furnish a letter of credit, I think that you are going to have to sue on the contract. If you do not have some kind of jurisdiction over the foreign seller in your own place, then it is hard to imagine how you are not going to be suing in the courts of the other country. I think it is quite true that the Swiss case involved questions of to what extent did defects give rise to the rights to reject the goods when they were tendered and ultimately call off the whole deal. The question of "to what extent" is often raised where you want to get out of a contract, and the defects may involve both technical defects, as in a complicated television system,

and delays and failures to give assurances. In any case, a practical matter is involved. Whereas our feeling is that we can tell them a lot of American law, I think three reasonably well-informed Swiss commercial judges will reach as sensible a decision on that question under Swiss law as under American law which they were reading in Swiss-French translation.