Chasing Debtors
Service and Cross-Border Issues

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September 2019
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Introduction
In an increasingly global world, cross-border issues now commonly arise in the enforcement of debts. One of the parties might be overseas permanently or temporarily, or the debtor's assets might be located offshore. Rights arising under legislation in two different countries might differ. To navigate those issues properly, it is important to understand some basic principles of private international law (or “conflict of laws”), and the problems that are likely to arise in a debt collection and insolvency context.

Private international law forms part of our domestic law. In cross-border disputes, it is the way a court determines:
- where the dispute can be heard
- where the dispute should be heard
- what system of law applies.

The concept of “jurisdiction” is central to these questions. However, the word has many different meanings. In this context, two are important:
- **Long-arm jurisdiction:** whether a New Zealand court can hear a dispute under our long-arm provisions, on the basis that there is a qualifying connecting factor allowing a New Zealand court to hear the claim against an overseas defendant.
- **Narrow jurisdiction for recognition purposes:** whether the resulting decision will be recognised and enforced overseas. For these purposes, most of the “long-arm” grounds will not so qualify.

This paper includes a suggested framework for understanding the key concepts and making the right strategic decisions for enforcement when cross-border and insolvency issues are involved. That framework is depicted in two diagrams shown on the following page, the elements of which are discussed in the subsequent sections of the paper.
Prior considerations
Before taking any enforcement steps in a cross-border context, the first priorities should be the following:

• Review whether the securities comply with the relevant formalities (this could include requirements overseas if, for example, assets have been taken offshore).\(^1\)

• Consider whether interim freezing orders are required, if there is a risk of dissipation.\(^2\) In appropriate circumstances, such orders can be obtained in advance of the overseas judgment being granted.\(^3\)

• Assess whether any evidential problems may arise with identifying the items that are subject to registered securities.\(^4\) There may still be time to address problems if you spot them early, particularly while the debtor is still co-operating.

1 For example, under the Personal Property Securities Act 1999, conflict of laws issues are dealt with in ss 26 to 33.
2 HCR 32.2. While this might protect against dissipation, it does not operate as a security over the assets: see Rt Sir M Casey Laws of New Zealand Injunctions at [18].
3 HCR 32.5. For interim orders in New Zealand in support of prospective foreign judgments, there must be a sufficient prospect that the other court will give judgment in favour of the applicant, and that the judgment will be registered in or enforced in New Zealand: see Rt Sir M Casey Laws of New Zealand Injunctions at [18].
4 See Gibson and Stiassny v Stockco Ltd [2011] NZCCLR 29 at [208] to [264].
Domestic jurisdiction

It is possible to commence an action wherever a court has jurisdiction as a matter of its domestic law. Jurisdiction is based on service.5

Most countries have “long-arm” provisions permitting service overseas in a wide range of circumstances (without leave),6 or where there is a real and substantial connection with the deciding forum (with leave).7 If those requirements are satisfied, but personal service cannot be achieved despite reasonable efforts,8 then courts may make an order for substituted service,9 which is treated as taking place where the document is likely to have come to the attention of the person, or where that person was likely to have been located on the expiry of the stipulated substituted service steps.10 This broad approach to jurisdiction for domestic purposes means that two or more jurisdictions might be available, providing a choice (forum shopping).

However, picking the forum most convenient to the lender might be of little or no use if it is not the most “appropriate” forum, or if the judgment will need to be enforced overseas (ie where the defendants or their assets are located). Contractual “choice of jurisdiction” clauses are relevant.11 Such clauses can restrict (but not entirely prevent)12 forum shopping, and they can also confer jurisdiction (submission being one of the grounds for serving outside without leave and for overseas recognition purposes).

6 HCR 6.27(2). Relevant for enforcement of a loan, this includes: (b) when the contract sought to be enforced was entered into in New Zealand, or was made by or through an agent trading or residing in New Zealand, or was to be wholly or partly performed in New Zealand, or was governed by its terms or by implication by New Zealand law; (c) when there has been a breach in New Zealand of a contract, wherever made; (d) when the claim is for a permanent injunction to compel or restrain the performance of any act in New Zealand or for interim relief in support of judicial or arbitral proceedings commenced or to be commenced in New Zealand; and (k) when the person to be served has submitted to the jurisdiction of the court.
7 HCR 6.28.
8 HCR 6.8(1).
10 HCR 6.08(2).
12 HCR 6.29 and 6.28(5)(c). Such a restriction prima facie applies if the parties agree to an “exclusive” (cf “non-exclusive”) jurisdiction, but the Court retains a discretion to stay proceedings in New Zealand if some other forum is clearly more appropriate: Heli Holdings Ltd v Chopper Worx Pty Ltd [2018] NZHC 3276 at [30], and D J Goddard QC Laws of New Zealand Conflict of Laws: Jurisdiction and Foreign Judgments (online ed) at [31] and [32], citing Bramwell v Pacific Lumber Co Ltd (1986) 1 PRNZ 307 at 310.
Applicable law

Determining the applicable substantive law starts with characterising the nature of the dispute, then applying the relevant choice of law rule, typically identified by “connecting factors”. Surprisingly, this process can be complex for the enforcement of a debt. This is mainly because of confusion in the case law, often involving a failure to distinguish contractual questions from proprietary ones.

For the purposes of conflict of laws, property is classified as movable or immovable. Choses in action (including debts) are classified as interests in intangible movable property. For such property, the relevant connecting factor is often said to be the situs (the place where the property is situated). For a debt, the situs is ordinarily where the debtor is resident. If the debtor is resident in a number of countries, then the situs of a debt has been described as where it is required to be paid by an express or implied provision of the contract or (if there is none), where it would be paid in the ordinary course of business (eg in the case of a debt due from a bank to a customer, at the branch where the account is kept). The law of the situs will generally determine what enforcement remedies are available (eg attachment orders) and what constitutes a discharge of the debt obligation. The rationale is that if the law governing the debt determines that the debt is discharged by an enforcement remedy (eg payment under an attachment order), then that should be recognised in other countries under private international law rules. Otherwise granting an enforcement remedy elsewhere could be unfair because it might not operate to discharge the relevant debt.

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13 M Pawson Laws of New Zealand Conflict of Laws: Choice of Law (online ed) at [5].
14 M Pawson Laws of New Zealand Conflict of Laws: Choice of Law (online ed) at [6].
16 M Pawson Laws of New Zealand Conflict of Laws: Choice of Law (online ed) at [158].
17 In general, estates, interests, and charges in or over New Zealand land are classified as immovables: M Pawson Laws of New Zealand Conflict of Laws: Choice of Law (online ed) at [159]. However, the interest of a mortgagee is classified by New Zealand Courts as movable, whereas the English Courts classify a mortgage land as immovable property: M Pawson Laws of New Zealand Conflict of Laws: Choice of Law (online ed) at [159].
18 Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd [2010] NZSC 49, [2010] 3 NZLR 713 at [27]. See also M Pawson Laws of New Zealand Conflict of Laws: Choice of Law (online ed) at [164]. Note that the Supreme Court in England has held that the situs of letters of credit is the location of the paying bank: Taurus Petroleum Ltd v State Oil Marketing Company [2017] UKSC 64, [2018] AC 690; [2017] 3 WLR 1170; [2018] 2 All ER 675.
20 M Pawson Laws of New Zealand Conflict of Laws: Choice of Law (online ed) at [164].
21 Hardy Exploration & Trade (India) v Government of India [2019] QC 544 at [44].
22 Hardy Exploration & Trade (India) v Government of India [2019] QC 544 at [54].
However, the general rule may be displaced if, for example, proceedings must be brought against the debtor elsewhere under an “exclusive forum” clause.\(^{23}\) Also, the approach to determining the situs of the debt will differ if the relevant debt has not yet been established by a judgment or arbitral award.\(^{24}\) Before then, a different court might have competent jurisdiction to determine whether the relevant debt is properly recoverable (e.g., as a matter of contract).\(^{25}\)

Accordingly, the law governing a contract (also known as the “proper law” of the contract) may be determinative on matters such as the validity of the contract, rights arising from pre-contractual representations, mistake, illegality and issues of performance, breach and discharge of contractual obligations.\(^{26}\) The “proper law” of a contract is determined by an express choice of law clause (a “governing law” clause). Otherwise (if none exists) it is determined as a matter of implication from the contract and the surrounding circumstances.\(^{27}\)

Procedural rules are determined by the law of the forum,\(^{28}\) including the nature of the remedy available and proof of quantum issues.

Some matters might be characterised as having a relevant law different from the contract’s “proper law” (e.g., real property is subject to the law and jurisdiction of where the land is located), or “mandatory” laws may override.\(^{29}\) In some cases, legislation might be solely domestic in scope, so a foreign court would not have subject matter jurisdiction.\(^{30}\)

If a court has both personal and subject matter jurisdiction but a foreign law substantively applies (e.g., if the contract is governed by English law), that law must be proved as a matter of fact.\(^ {31}\) This can be costly, because it requires overseas experts to give evidence if the issues are disputed.

\(^{23}\) Hardy Exploration & Trade (India) v Government of India [2019] QC 544 at [82(6)].
\(^{24}\) Hardy Exploration & Trade (India) v Government of India [2019] QC 544 at [82(7)].
\(^{25}\) Hardy Exploration & Trade (India) v Government of India [2019] QC 544 at [82(7)(a)].
\(^{26}\) In other words, the types of provisions in the Contract and Commercial Law Act 2017. See M Pawson Laws of New Zealand Conflict of Laws: Choice of Law (online ed) at [126]-[139]. However, note an exception for the date of payment of a bill of exchange at [140].
\(^{27}\) M Pawson Laws of New Zealand Conflict of Laws: Choice of Law (online ed) at [115] and [118], involving an assessment of factors such as where the contract was made, where it is to be performed, the nature and location of the subject-matter, the place of the parties’ residence or business, the currency for payment, the terminology of the contract, and consistency of the terms with the potentially relevant systems of law.
\(^{28}\) M Pawson Laws of New Zealand Conflict of Laws: Choice of Law (online ed) at [254].
\(^{29}\) M Pawson Laws of New Zealand Conflict of Laws: Choice of Law (online ed) at [8] and [123].
\(^{30}\) The concept of subject matter jurisdiction is discussed in Brown v New Zealand Basing Ltd [2017] NZSC 139, [2018] 1 NZLR 245 at [39].
\(^{31}\) M Pawson Laws of New Zealand Conflict of Laws: Choice of Law (online ed) at [271]-[274].
Appropriate forum

Even if a New Zealand Court has domestic jurisdiction, on an application by a party the Court may decide to stay a proceeding in favour of another more “appropriate” forum. Relevant considerations include the ability of the respective courts to provide the most effective relief, and the cost and efficiency of proceedings in the respective jurisdictions (involving matters such as availability of documents and witnesses, the places where the parties respectively reside or carry on business and the law governing the relevant transaction). In assessing these issues, the Court has the discretion to override an exclusive jurisdiction clause but will need strong reasons to do so.

Key factors

- Jurisdiction
  - Service and submission
- Location of assets
  - Ability to enforce payment
- Applicable law
  - Substance and procedure
- Relief required
  - Monetary, non-monetary, penalties and taxes
- Cost and convenience
  - Parties, witnesses, documents
- Other
  - Contract terms, multi-party issues

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32 The “forum conveniens” is the forum in which the proceeding could be more suitably tried in the interests of the parties and for the ends of justice, with any other alternative described as a “forum non conveniens”.

33 See Heli Holdings Ltd v Chopper Worx Pty Ltd [2018] NZHC 3276 at [29] and D J Goddard QC Laws of New Zealand Conflict of Laws: Jurisdiction and Foreign Judgments (online ed) at [30] for the full list of factors, which includes the existence of litigation in another jurisdiction, and the state of those proceedings, whether all relevant parties are subject to New Zealand jurisdiction so that all issues can be resolved in one hearing, any jurisdiction clauses in the disputed contract and where enforcement will take place.

34 Heli Holdings Ltd v Chopper Worx Pty Ltd [2018] NZHC 3276 at [30]. See footnote 12 above.
Defendant’s strategy
Generally, defendants served with overseas proceedings have three options:
(i) submit to jurisdiction and defend on the merits;
(ii) protest jurisdiction (as a matter of domestic law), or assert that there is a more appropriate forum; or
(iii) ignore the proceeding, intending to resist recognition overseas (in which case it is critical not to take any steps that would submit to jurisdiction).

A New Zealand judgment will result if the defendant takes the third “ignore” option. That judgment will be enforceable against local assets, but it might not be enforceable overseas. Therefore the costs of obtaining a local judgment may be wasted under the “ignore” scenario. From the defendant’s perspective, reputational issues may influence whether this is a feasible strategy.

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35 Usually judgment would be obtained by default with leave of the court, upon establishing the matters required by HGR 15.11: see D J Goddard QC Laws of New Zealand Conflict of Laws: Jurisdiction and Foreign Judgments (online ed) at [22].
Recognition and enforcement
Key to cross-border enforcement is understanding that the long-arm domestic test for jurisdiction is different from whether that court will be regarded as having sufficient jurisdiction for the purposes of recognition and enforcement overseas of any resulting judgment.

Trans-Tasman regime
Cross-border enforcement between New Zealand and Australia is relatively easy because there is a special regime in place under legislation enacted in each country, the Trans-Tasman Proceedings Act 2010 (NZ) and (Cth). Under that regime, a qualifying “registrable judgment” from one country is recognised and enforced in the other, subject only to a defence that enforcement would be contrary to public policy (in a narrow sense).

Any issues that the debtor might wish to raise in relation to jurisdiction, fraud or natural justice should be raised in the original court rather than in the enforcement proceedings. The regime permits the cross-border enforcement of non-money judgments, taxes, penalties and criminal fines, but the definition excludes certain family law and other matters, and some other categories of judgment (eg competition law) are governed by different regimes in other subparts. An order in council has been made declaring “specified Australian insolvency judgments” to be excluded from recognition or enforcement under this regime.

Under the Trans-Tasman regime, proceedings can be served in the other country as of right. Special provisions address how to determine which of the two countries is the most appropriate forum. The general discretionary factors reflect the “appropriate forum” principles at common law, but exclusive “choice of court” clauses are binding subject to only limited exceptions (such as illegality, lack of capacity and manifest injustice).

36 Trans-Tasman Proceedings Act 2010, s 54 and the definition of “excluded matter” in s 4.
37 Under the Trans-Tasman Proceedings Act 2010, ss 4(2)(b) and 54(2)(a) and (b) and (3).
38 Trans-Tasman Proceedings (Specified Australian Insolvency Judgments Excluded From Recognition or Enforcement in New Zealand and Excluded Matter) Order 2013 (2013/345).
40 Trans-Tasman Proceedings Act 2010, Part 2, subpart 2 (ss 21 to 29).
41 Trans-Tasman Proceedings Act 2010, s 24(2).
42 Trans-Tasman Proceedings Act 2010, s 25.
Other countries
For enforcement of a New Zealand judgment in non-Australian overseas courts, it is more difficult. This is a matter of the law in the relevant overseas jurisdiction, so overseas legal advice will be required to make an informed assessment in any given case. The general approach overseas tends to be consistent with New Zealand’s approach when considering the recognition and enforcement of foreign judgments. A foreign judgment does not have the force of law in New Zealand unless transformed by the judicial or statutory machinery into a debt recoverable in New Zealand.43

In order for a foreign judgment to be recognised in this way,44 one of the key requirements is jurisdiction as a matter of private international law. This requires that the defendant was present in the foreign country at the time proceedings were commenced (under the REJA “resident” or with a “principal place of business”), or was a plaintiff or counterclaimed in the foreign court, or submitted to the jurisdiction of the court by voluntarily appearing, or by agreeing before commencement to submit to the jurisdiction of that Court in respect of the subject matter of the proceeding (ie a “choice of court”, “choice of forum” or

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44 For the United Kingdom and a number of other specified countries, the Reciprocal Enforcement of Judgments Act 1934 (“REJA”) applies, but the substantive requirements are very similar to the requirements at common law. If the judgment is not enforceable under the Reciprocal Enforcement of Judgments Act 1934, but the judgment is nevertheless from a Commonwealth country, then section 172 of the Senior Courts Act 2016 provides an optional procedure (rarely used) in which common law principles remain relevant.
“jurisdiction” clause in a contract).\footnote{45} In addition, at common law there are three exceptions preventing enforcement: breach of natural justice (including concepts of notice and a fair opportunity to be heard), fraud and public policy.\footnote{46} Given these private international law tests, using other service overseas entitlements (HCR 6.27 and 6.28) or substituted service methods (HCR 6.8) are of little or no value if the objective is enforcement overseas.

Also, only monetary judgments can be recognised and enforced overseas. Orders requiring personal conduct (eg injunctions to hand back information or assets) must be sought where the defendants can be served domestically, and courts are reluctant to make orders requiring conduct offshore (for comity reasons and because such orders cannot be enforced overseas).

**New International Convention**

On 2 July 2019, the delegates of the 22nd Diplomatic Session of the HCCH\footnote{47} adopted the **2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters**.\footnote{48} This new Convention provides a single global framework for the cross-border recognition and enforcement of civil and commercial judgments.

Under this Convention, the core jurisdictional basis for recognition is that the person was habitually resident in the State of origin,\footnote{49} or had his or her principal place of business there and the claim arose out of those activities,\footnote{50} or the defendant maintained a branch, agency or other establishment without a separate legal personality in the State of origin at the time it became a party to the proceedings and the claim is based on those activities.\footnote{51}

In relation to submission to jurisdiction, proper grounds for recognition exist if consent to jurisdiction was given “in the course of the proceedings in which the judgment was given”.\footnote{52} Another ground is where express consent has been agreed in advance (ie in a “choice of court” clause).\footnote{53} However, this new 2019 convention seeks to avoid overlap with the Hague Convention of 30 June 2005 on Choice of Court Agreements.\footnote{54} To that end, the 2019 Convention only deals with non-exclusive choice of court agreements designating the State of origin as an available forum. For exclusive choice of court agreements, the 2005 Choice of Court Convention is intended to apply (under which the chosen court must in principle hear the case).

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\footnote{45} Xu v Liu [2017] NZHC 1689, [2017] NZAR 1334 at [10]. See also the test as outlined in D J Goddard QC *Laws of New Zealand* Conflict of Laws: Jurisdiction and Foreign Judgments (online ed) at [67] (common law), [51] (Reciprocal Enforcement of Judgments Act 1934); and [79] (registering a memorial of the judgment under s 172(1) of the Senior Courts Act 2016).

\footnote{46} Yoonwoo C & C Development Corp v Huh [2019] NZAR 45 at [19].

\footnote{47} Hague Conference on Private International Law Conférence de la Haye de droit international privé.

\footnote{48} Available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>.

\footnote{49} Article 5(1)(a). This includes where a company has its statutory seat, was incorporated or formed, has its central administration or principal place of business: Article 3(2).

\footnote{50} Article 5(1)(b).

\footnote{51} Article 5(1)(d).

\footnote{52} Article 5(1)(e).

\footnote{53} Article 5(1)(m).

\footnote{54} This is explained in the Revised Draft Explanatory Report, available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=6642&dtd=61> at [220].
Beyond those categories, the 2019 Convention goes on to expand significantly the circumstances in which commercial judgments will be recognised, including where the judgment rules on a contractual obligation given in the State in which performance of that obligation took place, or should have taken place (unless the defendant’s activities clearly did not constitute a purposeful and substantial connection to the state).55

Under Article 5(1)(i) jurisdiction also arises when the judgment rules on a contractual obligation secured by a right in rem in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right in rem.56

Under Article 7, recognition and enforcement may be refused on the grounds of breach of notice/natural justice requirements, fraud, manifest incompatibility with public policy, inconsistency with the “choice of court” agreement, and res judicata issues.

It remains to be seen if and when New Zealand will decide to adopt the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, and the earlier 2005 Choice of Court Convention.

### Hague Conventions (not enacted in New Zealand)

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55 Article 5(1)(g).
56 Article 5(1)(i).
Cross-border insolvency

If the debtor is (or might become) insolvent, it is necessary to assess how this might impact on enforcement.

Dash for cash

Insolvency orders generally stop unsecured creditor enforcement as soon as insolvency orders are made, with such claims then dealt with under the relevant insolvency process (ie bankruptcy, administration or liquidation). At that point a judgment creditor is in no better position than other unsecured creditors, unless the judgment debt has already been paid (and even then payment is subject to clawback). This includes cases where charging orders have been granted (ie a charging order is only a stop order preventing disposal; it does not confer any priority in an insolvency). If the debtor is clearly insolvent, or is absconding, it may not be necessary to obtain a judgment or serve a bankruptcy notice before seeking adjudication.

Seeking insolvency orders and special service obligations

For the party seeking bankruptcy orders, special service obligations apply.

- Under the Insolvency Act 2006 and HCR 6.30, the court must give permission for service of a bankruptcy notice overseas (including in Australia, despite the TPPA), and service must occur in the prescribed manner. For a bankruptcy application, leave to serve overseas is generally required under HCR 6.28, because it does not come within any of the gateways under HCR 6.27(2). However, unlike the bankruptcy notice, the creditor’s application is a “civil proceeding” for the purposes of the TTPA, so leave is not required for service in Australia, but service must comply with the

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57 Insolvency Act 2006, ss 31 and 32 (once an application for adjudication is made, that creditor cannot continue execution to recover a debt on which the application is based, and application may be made to halt execution by other creditors) and s 77 (creditor may not begin or continue execution after the Assignee has advertised the adjudication or given notice of it to the debtor); Companies Act 1993 s 239ABG (enforcement process halted in an administration) and s 248(1)(c) (in a liquidation a person may not continue to exercise or enforce a right or remedy over or against property of the company) and s 251 (a creditor is not entitled to retain the benefit of any execution process unless it was completed before the liquidation order).

58 In a liquidation, payment is subject to clawback under the voidable transaction provisions of ss 292 and 294 of the Companies Act 1993 during a “specified period” of 2 years with a presumptive “restricted period” of 6 months: see Robert Jones Holdings Ltd v McCullagh [2019] NZSC 86; McIntosh v Fisk [2017] NZSC 79, [2017] 1 NZLR 863. In a bankruptcy, payment is subject to clawback as an “insolvent transaction” under s 194 during an equivalent 2 year period with a presumptive period of 6 months.

59 A charging order creates a “charge” within the meaning of s 3 of the Insolvency Act 2006 so that the charge holder is a secured creditor for the purposes of s 3 of the Insolvency Act 2006: Lynch v Main HC Palmerston North CIV-2008-454-285, 8 May 2009. However, this does not give the charge holder any priority if the enforcement process is incomplete before adjudication (Coulson’s Ltd v Dyer [1960] NZLR 281; Property Restoration Ltd v Farquhar [1991] 3 NZLR 498) or liquidation (Companies Act 1993, ss 251 and 252).

60 Westpac New Zealand Ltd v Boulton [2014] NZHC 693 at [16]. Other “acts of bankruptcy” in ss 18 to 28 of the Insolvency Act 2006 include departure from New Zealand with intent to defeat or delay creditors, suspending the payment of debts, and removal or concealment of property with intent to prejudice creditors.

61 Insolvency Act 2006 ss 17(3) and (4)(b) and s 29(1)(d), and HCR 6.30 (because a bankruptcy notice is not an “originating document”): Westpac New Zealand Ltd v Boulton [2014] NZHC 693 at [9] and [10].
requirements of ss 13 and 15 of the TPPA and Form 1 of the Schedule of the Trans-Tasman Regulations and Rules 2013.63

If a document served by email is likely to be received overseas, then this will constitute service outside of New Zealand.64 One possible solution, with the debtor’s agreement, would be to serve within New Zealand on an agent or in an agreed manner,65 so long as it does not involve an email to a recipient located overseas.

**Insolvency (Cross-border) Act 2006**

Cross-border insolvency issues arise when insolvency orders are made in respect of a person (eg bankruptcy) or company (eg liquidation or administration) that may have assets or operations in one or more other countries. To facilitate a common framework for managing these issues, many countries have enacted legislation to give effect to the core principles in the UNCITRAL66 Model Law on Cross-Border Insolvency (the “MLCBI”).

In New Zealand, the Insolvency (Cross-border) Act 2006 applies a modified version of the MLCBI. The equivalent legislation in Australia is the Cross-Border Insolvency Act 2008. Both took effect in July 2008. The Insolvency (Cross-Border) Act 2006 provides a statutory framework for recognising and granting assistance to representatives in foreign insolvency proceedings.67

63 Westpac New Zealand Ltd v Boulton [2014] NZHC 693 at [38] and [42].
64 Westpac New Zealand Ltd v Boulton [2014] NZHC 693 at [13]; Bank of New Zealand v Letele HC Auckland CIV-2012-404-2367, 20 August 2012 at [6] because “service takes place where the documents come to the personal knowledge of the defendant, not where the plaintiff takes steps to bring the documents to her personal knowledge.” Under 6.8(2), it should be possible to argue that if the email were unexpectedly opened overseas (eg while the recipient was on a short-term holiday overseas), then it will nevertheless be treated as served at that person’s usual residential location.
65 D J Goddard QC Laws of New Zealand Conflict of Laws: Jurisdiction and Foreign Judgments (online ed) at [11] and [12].
67 A “foreign proceeding” is defined in article 2 of Schedule 1 as a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign
The court procedure is contained in the High Court Rules 2016 in subpart 15 of Part 24. The substantive rules are contained in Schedule 1 of the Insolvency (Cross-border) Act. A foreign proceeding is recognised as either “main” or “non-main”, depending on where the debtor has the centre of its main interests (“COMI”).

Art 19: Is urgent relief required?

Art 17(2)(a)
COMI?

Main

Art 20
Automatic stay

Non-main

Art 21
Discretionary relief

Art 17(2)(b)
Establishment?

Art 17(2)(b)
Order requesting aid?

S 8
Discretionary assistance

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The application is made by originating application: HCR 24.56(1). Under HCR 24.56(2)(b) service is required unless dispensed with (eg where the application is made by consent or has gone to ground: Official Trustee in Bankruptcy v Smith [2014] NZHC 1305 at [12]; Official Trustee in Bankruptcy v Henare at [2019] NZHC 248 at [11]).

69 Article 17(2). “COMI” is not defined, so case law is important. See Heath and Whale on Insolvency (online looseleaf ed, LexisNexis) at [53.15] for a discussion of the approach of the European Court of Justice (which emphasises that the evidence must be objective and ascertainable by third parties) and preferred in Australia, compared with the multi-factorial approach taken by the courts in the United States.
A presumption applies that a company’s COMI is in the place of its registered office. However, that presumption can be displaced.\textsuperscript{70} If a foreign main proceeding is recognised, then a stay of proceedings and execution in New Zealand is automatic (but a creditor may still apply for discretionary exceptions, or for leave to commence a New Zealand insolvency proceeding).\textsuperscript{71}

Otherwise a foreign proceeding will be “non-main” if the debtor has an “establishment” in the foreign state. The relevant definition in Article 2(e) requires “any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services”. For “non-main” foreign proceedings, the relief of a stay is discretionary.\textsuperscript{72}

If the foreign proceeding is neither “main”, nor “non-main”, it is still possible to seek discretionary relief under s 8 of the Insolvency (Cross-Border) Act 2006. Under that section, the High Court has the discretion to act in aid of and be auxiliary to a foreign court in relation to a foreign insolvency proceeding, so long there has been a qualifying request for aid.\textsuperscript{73}

For assistance overseas, Article 25 of Schedule 1 of the Insolvency (Cross-border) Act 2006 authorises the High Court in New Zealand to seek the assistance of courts in other jurisdictions for the implementation and enforcement of insolvency proceedings in relation to property held in other jurisdictions.\textsuperscript{74}

The main objectives of the MLCBI are ensure that the interests of creditors and other interested persons are adequately protected (Art 22), and that the courts and insolvency representatives in the relevant jurisdictions communicate and co-operate effectively (Arts 25 to 27) to facilitate the realisation of local assets for administration and distribution consistent with both local law and the overall pari passu distributions determined to be appropriate in the main proceeding (Arts 28 to 30). To that end, article 32 codifies the common law hotchpot rule.\textsuperscript{75}

\textsuperscript{70} Whittman (As Foreign Representative of UCI Holdings Ltd) v UCI Holdings Ltd [2016] NZHC 1754 at [17]. In this case, the Court recognised a Chapter 11 proceeding brought in the United States Bankruptcy Court for the District of Delaware as a “foreign main proceeding”, despite the fact that the company was registered in New Zealand, four of its directors were resident here, and the company had entered into a general security deed and a specific security deed that had non-exclusive jurisdiction clauses in favour of New Zealand. Overwhelming evidence of a USA COMI included the location of management, the location of its primary assets, where the group companies “predominantly” operated, the location of employees, sales and creditors, and compliance with USA reporting requirements and securities regulation.

\textsuperscript{71} Article 20(1). See Kim v STX Pan Ocean Co Ltd [2014] NZHC 845 (HC) for an example of discretionary leave being granted under art 20(2) for the enforcement of in rem rights in admiralty proceedings.

\textsuperscript{72} Article 21 confers jurisdiction to grant a wide range of discretionary relief, upon recognition of foreign main or non-main proceedings. For a foreign non-main proceeding, the Court must be satisfied that the relief relates to assets that, under the law of New Zealand, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

\textsuperscript{73} See Leeds v Richards [2016] NZAR 1405 (HC) at [31] to [35]; Williams v Simpson [2011] 2 NZLR 380 (HC) at [67]–[87].

\textsuperscript{74} See Official Assignee v Ma [2018] NZHC 1304.

\textsuperscript{75} If part payment has been received by an unsecured creditor in an overseas insolvency proceeding, that creditor cannot receive a payment for the same claim regarding the same debtor in a New Zealand insolvency proceeding until it is in the same proportionate position as other creditors of the same class.
The foreign representative is recognised as having standing to take action in respect of voidable transactions. However, the regime creates procedural, rather than substantive, rights. Standing to commence recovery proceedings locally on behalf of the insolvent company does not equate to being entitled to “claw back” assets (e.g., under voidable transaction provisions). A local, auxiliary liquidation of the foreign entity might be needed for those purposes. Similarly, English courts have also been reluctant to recognise foreign restructuring proceedings that discharge debts unless those debts are discharged pursuant to the law of the contract or the creditor has submitted to the jurisdiction of the foreign insolvency proceeding. To bind non-participating creditors that have debts governed by a different law, the court of each relevant foreign jurisdiction would need to approve a reorganisation under

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76 Article 23. In addition, the foreign administrator can be entrusted to act locally, or an agent can be appointed to administer or realise the respondent’s assets located in New Zealand: Article 21(1)(e) and (2). The Hamilton office of the Insolvency and Trustee Service is the liaison office with the Australian Financial Security Authority (AFSA) in respect of requests for assistance with Australian bankruptcies: Official Trustee in Bankruptcy v Henare [2019] NZHC 1024 at [27].

77 Leeds v Richards [2016] NZAR 1405 (HC) at [27]; Kim v STX Pan Ocean Co Ltd [2014] NZHC 845 (HC) at [30].


79 For these article 23 issues in Australia, see King (Trustee), re Zetta Jet Pte Ltd v Linkage Access Ltd [2018] FCA 1979 at [18] to [40]. For a discussion about the New Zealand position, see Heath and Whale on Insolvency (online looseleaf ed, LexisNexis) at [53.38].

80 Re OJSC International Bank of Azerbaijan [2018] EWHC 59 (Ch), [2018] 4 All ER 964, applying the “rule” in Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) 25 QBD 399, [1886–90] All ER Rep 804 that a debt governed by English law cannot be discharged by a foreign insolvency proceeding. The court was not prepared to grant a procedural stay permanently (beyond the term of the restructuring process), as an indirect means of undermining the rule.
its local law, causing the risk of inconsistent decisions, higher costs and time delays.

Adopted in 2018, UNCITRAL’s Model Law on Recognition and Enforcement of Insolvency-Related Judgments (“MLIJ”)81 is designed to address these issues. It provides a framework for the domestic recognition and enforcement of “insolvency-related judgments”.82 This regime excludes a judgment commencing or opening an insolvency proceeding, the effect of which remains governed by the MLCBI. Various other exceptions include lack of jurisdiction, breach of natural justice, fraud and public policy, inconsistency with local insolvency proceedings or judgments, and the failure to protect adequately the interests of creditors.

More recently, on 15 July 2019, UNCITRAL formally approved the Enterprise Group Insolvency: Draft Model Law (“MLEGI”).83 This is designed to complement the MLCBI. Adopting similar principles, it addresses multiple insolvency proceedings involving multiple debtors that are members of the same enterprise group, rather than cross-border proceedings involving a single debtor. It provides for a “group insolvency solution” to be developed in a “planning proceeding”, with a “group representative” appointed to seek relief and assistance in the relevant jurisdictions.

These new instruments, to the extent they may be enacted locally by member states, have the potential to greatly streamline cross-border insolvencies.

**Conclusion**

Easiest in the short term does not necessarily mean best in the long run. For most lenders, selecting the best strategy for enforcement in a cross-border context requires an overall analysis of the net expected outcome (taking into account both costs and benefits) from commencing proceedings through until the ultimate conclusion of realising against assets. This might involve legal costs in two or more jurisdictions. If proportionality is marginal, the best strategy might require focusing on where the most valuable assets are located. It is important to adopt the most robust process for achieving an enforceable judgment in that jurisdiction.

Given the complexity of the issues that can arise, wasted legal costs can often be avoided by investing early in factual investigations (ie location of assets and the defendant’s residence) and undertaking a thorough analysis of the conflict of laws issues that arise (including obtaining overseas legal advice where appropriate).

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82 The Guide to Enactment at [9] indicates that this category would include avoidance actions; insolvency law-related lawsuits on the personal liability of directors and officers; lawsuits concerning the priority of a claim; disputes between an insolvency representative and debtor on inclusion of an asset in the insolvency estate; approval of a reorganization plan; discharge of residual debt; and actions against an insolvency representative, if exclusively based on the carrying out of the insolvency proceedings.


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Appendix: Case Studies

Mudajaya Corp Berhad v Keng
[2019] NZHC 1436

Facts

1. Alleged fraud as employee
2. Cooperation and PTAs with submission
3. Moved to NZ
4. Substituted service, default judgment

Notice
- May be informal
- No tenable evidence, mere speculation
- Favours "truly evasive"
- Nevertheless quid pro quo

Outcome
- Freezing orders rescinded
- Foreign judgment would not be recognised and enforced
Xu v Liu
[2017] NZAR 1334

Facts

1. Loans with submission to jurisdiction
2. Fled to NZ
3. Substituted service, default judgment on "daytime" loans
4. NZ proceedings for "daytime loans" with ordinary claim in alternative and for other loans

Fraud

- Allegation submission was tainted
- Could not determine in summary process

Notice

- Can be informal, eg via family
- Could not determine in summary process

Appropriate forum

- Not persuaded Hangzhou was available
- People, discovery, enforcement
- Possible that raised for tactical reasons

Outcome

Defendants’ application for summary judgment, strike out and stay dismissed
Re Videology [2018] EWHC 2186 (Ch)

Facts

1. V Ltd (UK) subsidiary of V Inc (USA)
2. V Inc owed IP, V Ltd has substantial debtors
3. Chap 11 in USA, with intention to restructure
4. Sought immediate stay and recognition in UK

COMI
- Presumption for place of registration
- Administration of interests
- Ascertainable by third parties
- COMI provision in loan agreement and floating charges

Art 21 relief
- Assumption that insolvency proceedings in COMI
- Rebuttable by strong reasons and obvious benefit

Local process
- Local administrator could be appointed and co-operate in Ch 11 process
- Additional cost and delay not justified

Outcome
- V Inc recognised as "main" and V Ltd as "non-main"
- Art 21 relief granted to protect from claims in UK and permit sale and distribution in Ch 11 process
- Leave reserved