NATIONAL TREATMENT UNDER THE BERNE CONVENTION AND THE DOCTRINE OF FORUM NON CONVENIENS

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I. Introduction

The United States judicial system provides an attractive forum for foreign parties who desire to litigate disputed intellectual property rights. The attraction of the United States as a forum is in part a result of our comprehensive pre-trial discovery process, our array of intellectual property protection available to litigants, and our comprehensive body of intellectual property law. The attraction will likely continue in the future and foreign parties may increasingly seek to litigate intellectual property rights in the United States rather than other countries. One procedural mechanism that may be asserted by a defendant in resisting jurisdiction in a particular forum is the doctrine of forum non conveniens. This doctrine allows a court, in its sound discretion, to resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. [n.1] As more foreign parties file claims in the United States, the forum non conveniens doctrine will likely see increasing application.

This article addresses the recent conflict over the role of the doctrine as applied to copyright cases involving foreign parties availing themselves under the United States copyright laws. It will begin with a brief overview of the doctrine of forum non conveniens and the principle of national treatment under the Berne Convention. [n.2] After examining the *328 Ninth Circuit's opinion affirming the forum non conveniens dismissal of a United States copyright infringement claim involving two foreign parties. Additionally, this article will explore the underlying reasons supporting the use of the forum non conveniens doctrine in appropriate cases and focus on the significance of the principle of national treatment under the forum non conveniens analysis.

II. Forum Non Conveniens

Under the common law doctrine of forum non conveniens, a court may "decline to exercise its jurisdiction, even though the court has venue, where it appears that the convenience of the parties and the court, and the interests of justice indicate that the action should be tried in another forum." [n.3] Generally, a plaintiff's choice of forum is entitled to great deference when the forum chosen is the home of the plaintiff. Less

deference will be conferred to the plaintiff's choice of forum when the plaintiff is a foreign party. [n.4] To overcome the deference accorded to the plaintiff's choice of forum, a party moving to dismiss on grounds of forum non conveniens must demonstrate: (1) the existence of an adequate alternative forum; and (2) that the balance of relevant private and public interest factors favor dismissal. [n.5]

A. Adequate Alternative Forum

At the outset of any forum non conveniens analysis, a court must determine whether an adequate alternative forum exists. The defendant bears the burden of showing the existence of such a forum. The requirement will ordinarily be satisfied if the defendant is "amenable to process" in the other alternative forum. [n.6] A second determination must be made as to whether "the remedy provided by the alternative forum is *329 so clearly inadequate or unsatisfactory that it is no remedy at all." [n.7] In rare circumstances where the remedy is clearly unsatisfactory, dismissal will not be proper even if the defendant is amenable to process in the alternative forum. The Supreme Court has provided some guidance and described such an inadequate forum as one which "does not permit litigation on the subject matter of the dispute." [n.8]

B. The Balance of Private and Public Interest Factors

Once a court is satisfied that an adequate alternative forum exists, the court must then balance private and public interest factors to determine whether to dismiss under forum non conveniens. Under the balancing process, controlling weight is not given to any single factor and the moving party bears "the burden of showing that, notwithstanding the presumption accorded plaintiff's choice of forum, the balance of private and public interests requires dismissal." [n.9]

1. Private Interest Factors

The private interest factors enumerated by the Supreme Court in Gulf Oil Corp. v. Gilbert include:

(1) the relative ease of access to sources of proof;

(2) availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses;

(3) possibility of viewing premises, if view[ing is] appropriate to the action;

(4) the enforceability of a judgment if one is obtained; and

(5) all other practical problems that make trial of a case easy, expeditious and inexpensive. [n.10]

*330 2. Public Interest Factors

The public interest factors include:

(1) administrative difficulties flowing from court congestion;

(2) imposition of jury duty on the people of a community that has no relation to the litigation;

(3) local interest in having localized controversies decided at home;

(4) the interest in having a diversity case tried in a forum familiar with the law that governs the action; and

(5) the avoidance of unnecessary problems in conflicts of law. [n.11]

III. The Principle of National Treatment Under the Berne Convention

A. The Berne Convention

The Berne Convention represents the highest internationally recognized standard for the protection of works of authorship of all kinds. As a member, the United States secures the highest available level of multilateral copyright protection for United States artists, authors, and other creators. The central thrust of this multilateral treaty is the general principle of national treatment, "which requires each member State to accord to nationals of other member States the same level of copyright protection provided to its own citizens." [n.12] Under this principle, a work of a United States national that is first generated in United States will receive the same protections in other Berne Union countries as those countries accord their own citizens (nationals). [n.13] The *331 Berne Convention requires that well- specified minimum rights be guaranteed under the laws of member states. These minimum rights include: "duration of copyright for life of the author plus 50 years, and rights of translation, reproduction, public performance, broadcasting, adaptation and arrangement." [n.14] Additionally, the Berne Convention has also long protected moral rights.

B. Rule of Territoriality Implicated by National Treatment

While the Berne Convention specifies that domestic law governs a work's protection in its country of origin, the treaty is less clear as to choice of law for acts of infringement that occur in other nations. For such acts of infringement abroad, the treaty uses the ambiguous concept of the "law of the country where protection is claimed." [n.15] It is commonly acknowledged that although the treaty does not expressly discuss choice of law rules, " t he applicable law is the copyright law of the state in which the infringement occurred, not that of the state of which the author is a national or in which the work was first published." [n.16] Thus, one court has indicated that, "the national treatment principle implicates a rule of territoriality." [n.17]

IV. Creative Technology Ltd. V. Aztech Systems pte Ltd. [n.18] Background

The plaintiff, Creative Technology Ltd. (Creative) and defendant, Aztech Systems PTE Ltd. (Aztech), are competing Singapore companies in the business of designing, developing, and manufacturing computer sound cards. After designing and developing the software in Singapore, both companies distributed the computer sound cards in the *332 United States through wholly owned United States-based subsidiaries. Creative filed suit in the United States District Court for the Northern District of California, claiming that Aztech's reproduction, adaptation, and United States distribution of software infringed the plaintiff's twelve United States copyrights under the United States Copyright Act.

Aztech filed a motion to dismiss the United States action under the doctrine of forum non conveniens. The district court granted the motion after concluding that Singapore offered an adequate alternative forum and that the balance of private and public interest factors favored dismissing the United States action in favor of adjudication in Singapore. Creative then appealed this ruling to the Ninth Circuit.

V. The Ninth Circuit's Opinion and Rationale

A. Majority Opinion

The Ninth Circuit concluded under the first prong of inquiry that Singapore was an adequate alternative forum due in large part because the defendants are "amenable to process" in Singapore. Despite Creative's argument that the Singapore forum was inadequate due to the reach of the Singapore Copyright Act, [n.19] which is limited to infringing acts occurring within Singapore, the majority concluded that the High Court of Singapore is capable of granting the type of relief that Creative is seeking notwithstanding the territorial limitations of the Singapore Copyright Act. The court explained that the "lack of extraterritorial reach should not prevent the High Court of Singapore from subsuming the amount of damages incurred by Aztech Labs' alleged illegal distribution of pirated cards within the United States in the amount of the damages awarded under the Singapore Copyright Act for Aztech's alleged infringing acts occurring in Singapore." [n.20]

The court further stated that it was aware of nothing that prevented the High Court of Singapore from applying United States copyright law to Creative's claims. The lack of extraterritorial reach of the Singapore Copyright Act should not impede the High Court from *333 applying United States copyright law to the claims relating to the infringing acts abroad. The court asserted that it has recognized the potential of United States courts to entertain claims under the copyright laws of foreign nations; and therefore, if United States courts can do this, then the High Court of Singapore can do likewise. [n.21]

Under the second prong of inquiry, the court agreed that the balancing of relevant factors favored dismissal of the action. In view that all of the records and most witnesses were located in Singapore and that the parallel action in the High Court of Singapore was

further advanced, the court concluded that there had not been a clear abuse of discretion by the district court in its consideration of the private factors. The court also agreed that the public interest factors favored dismissal. According to the court, this was essentially a dispute between two Singapore companies as to who originally developed the technology embodied in the sound cards. The case neither involved piracy of United States made goods nor substantially involved United States companies. As a result, the court concluded that the United States' interest in resolving this controversy was extremely attenuated and dismissal was favored.

B. Dissenting Opinion

The dissent concluded that "the district court erred by ignoring the unique nature and complexity of United States copyright law in its analysis of both parts of the forum non conveniens test." [n.22]

According to the dissent, the principle of national treatment requires that United States copyright law be applied in order to remedy infringing conduct that occurred in the United States, and Creative's works must receive the benefit and protections of the United States Copyright Act. National treatment precludes Singapore from being an adequate alternative forum, and the United States remains as the only appropriate forum to hear this dispute. The dissent pointed out that the majority failed to cite any authority or precedent in Singapore that would support their assertions that the High Court of Singapore can provide appropriate remedies to afford relief for the violations under the United States Copyright Act. [n.23] Also of concern was the fact that Singapore is not a signatory of the Berne Convention and thus is not bound by its protections and provisions.

*334 The dissent claimed that the district court abused its discretion when it failed to consider the public interest in having the federal courts of this country apply United States copyright law to resolve this controversy. [n.24] The dissent reasoned that since the infringement occurred in the United States and the applicable law is the United States Copyright Act, it should be clear that there is a strong public interest in having United States courts resolve this localized controversy. [n.25] The dissent further explained that this case involved a very important area of copyright law, namely computer software. The full extent of legal protection for computer software is not fully resolved or settled. Public interest factors should take into account that the dispute involves an unsettled area of law, and as such, the appropriate forum for the resolution is the United States, not foreign courts which clearly have a lesser interest in resolving complex, unsettled bodies of foreign law. [n.26] For the foregoing reasons, the dissent claimed that the district court erred in dismissing this action on grounds of forum non conveniens.

VI. Analysis and Recommendations

The critical point of disagreement between the majority and dissent centers on what role the principle of national treatment should play in a forum non conveniens analysis. Moreover, this case illustrates the conflicting opinions over the significance of the rule of territoriality in copyright infringement actions. The author argues that the dissent's expansive view of the interplay between the principle of national treatment and the forum non conveniens doctrine is misplaced.

While the majority acknowledges that the Berne Convention mandates a national treatment policy and that this implicates a rule of territoriality, it strongly disagrees with the dissent's sweeping conclusion that "[t]he national treatment principle requires that, where a copyright has been infringed in a particular country, the author has a right to pursue a remedy in that country." [n.27] Such a bold, sweeping conclusion clearly limits the application of the doctrine of forum non conveniens and is *335 difficult to accept when one considers the underlying purposes and policies of the doctrine.

The extraterritorial aspect of United States copyright law and its relation to the doctrine's application was also similarly disputed in the Creative case. It is important to realize that the Creative case originated in the United States District Court for the Northern District of California. This district has historically taken a restrictive view on the extraterritorial effect of United States copyright law in holding that jurisdiction could not be exercised over an infringer where the alleged infringing acts occurred outside the United States. [n.28] If one accepts this proposition, does the inverse apply equally, namely that the territoriality rule requires that jurisdiction should be exercised if the alleged infringing acts occur in the United States? If one accepts this, then a conundrum arises as to whether the forum non conveniens doctrine is then rendered utterly meaningless and obsolete under similar factual circumstances. Such an approach appears to be too restrictive and unduly limiting in scope.

The principle of national treatment requires "each member state to accord to nationals of other member states the same level of copyright protection provided to its own citizens." [n.29] Therefore, a United States court must grant foreign nationals the same copyright protections that a United States citizen enjoys. This principle does not dictate that foreign nationals enjoy an absolute right to bring an action in a United States court or be immune from the application of the doctrine of forum non conveniens. To the contrary, while a United States plaintiff's choice of forum is entitled deference, "a United States citizen has no absolute right to sue in a United States court." [n.30] As a foreign plaintiff, Creative's choice of forum is entitled to some deference, though less than if it were a United States plaintiff. However, it still does not have an absolute claim to bring suit in this country. Under the national treatment principle, Creative is entitled to the protections of the United States Copyright Act, but it is also subject to the same court standards that face United States parties. Therefore, national treatment and territoriality do not absolve foreign parties from the application of the forum non conveniens doctrine, but rather require foreign parties to be subjected to the doctrine in a manner consistent with its application to United States parties.

*336 The author recommends that United States courts should consider the following factors when applying the doctrine: (1) the complexity of the issues presented and the degree to which the relevant area of copyright law is unsettled or marked by conflicting opinions; (2) the ability of a foreign court to apply and interpret the relevant United States copyright law; and (3) the enforceability of a foreign judgment in a United States court. The preceding factors should especially be taken into account when a court is ruling on a forum non conveniens motion in an action by a foreign party under the United States Copyright Act alleging infringement in the United States by a second foreign party.

If the applicable area of copyright law is especially complex or unsettled, this consideration should be evaluated under the public interest factors of the forum non conveniens analysis. One United States district court hinted that "though we are fully capable of applying foreign law should the need arise ... the prospect is not a pleasant one. Indeed, experts on the subject were engaged even for the purposes of this motion, and they have already disagreed about the state of law in England." [n.31] The district court considered this factor under the public interest prong of the forum non conveniens analysis. The Ninth Circuit in Gates Learjet v. Jensen also considered such interests when it stated that " a proper understanding of the applicable law and the relative interests, in fact, suggests that Arizona has the more substantial interest in this litigation." [n.32] This statement should apply likewise to an inquiry whether a foreign forum is adequate. In complex copyright cases involving unsettled areas of copyright law, such as computer protection, a court when entertaining a motion to dismiss should examine any difficulties facing the foreign court in interpreting and applying the applicable law.

In Creative, the majority saw nothing preventing the High Court of Singapore from applying United States copyright law to the claims alleging infringement in the United States. [n.33] While this may be true, the majority's statements concerning this issue were lacking supporting authority and were somewhat cursory. As the dissent pointed out, there is no indication that the High Court of Singapore has applied United States copyright law before or has any desire to do so due to the fact that it is not a signatory of the Berne Convention. Before a court finds the presence of an adequate alternative forum, it should evaluate whether that forum has experience in applying the applicable law that surrounds the *337 dispute before it. Of course, the nature of the issues will factor into this analysis; for the more complex the law is, the greater the likelihood that the foreign court may encounter difficulties in applying such law.

A court should also consider if the enforcement of a foreign judgment in the United States raises any difficulties or questions. While the United States Constitution provides that full faith and credit shall be given in each state to the judicial proceedings of every other state, it is silent as to the treatment of foreign judgments. [n.34] Guidance on this issue of enforceability of foreign judgments has been left to the common law. The historical case of Hilton v. Guyot [n.35] provides some guidance. This case enunciated that the elements of comity and reciprocity are the starting point of discussion for analyzing the recognition and enforcement of foreign judgments. Before granting recognition and enforcement of a foreign judgment under the principle of comity, several

requirements should be satisfied. [n.36] In addition, the enforcement of a foreign judgment in the United States may only be possible if the foreign court rendering the judgment would enforce a similar decision of the United States enforcing court. [n.37]

This issue of enforcement of foreign judgments should not significantly alter the forum non conveniens doctrine. The doctrine presupposes the existence of two adequate forums. Therefore, the United States court that is entertaining the motion to dismiss under the doctrine is an appropriate forum having personal and subject-matter jurisdiction over the parties. [n.38] As a result, if a party later returns to a United States *338 court seeking to enforce a foreign judgment decided under the United States copyright laws, personal and subject-matter jurisdiction should exist for such enforcement. Public policy should favor the enforcement of such a foreign judgment, for there is a national interest in enforcing judgments obtained under the application of our country's laws. The enforcement of foreign judgments obtained after applying the United States copyright laws will also preserve the integrity of our laws and our judicial process. Moreover, United States courts have generally been liberal in recognizing and enforcing judgments obtained abroad. [n.39] Therefore, it is likely that the issue of enforceability of foreign judgments should not significantly impact or alter the traditional forum non conveniens analysis.

It may also be prudent for a court to examine if the alleged alternative adequate foreign forum is located in a country that is a signatory to the Berne Convention. By being a signatory, a country has expressed an interest in the international protection of copyrights and the preservation of certain rights and principles, such as national treatment. This may provide some certainty that a Berne member will apply foreign law for foreign infringement in an effort to preserve international copyright protection and comply with the goals of the convention. A dispute similar to Creative may be easier to resolve and reconcile if the alleged adequate alternative forum is located in a Berne member state. If the forum is in a Berne state, then that state is obligated to adhere to the minimum rights, including the principle of national treatment, that are protected under the treaty. This may lend some assurance that actions arising under the United States Copyright Act will be adjudicated abroad in a manner consistent with adjudication in our country.

VII. Conclusion

The application of the doctrine of forum non conveniens is not significantly altered by the principle of national treatment and the rule of territoriality under the Berne Convention. The impact of the principle of national treatment should be a consideration under the public interest factors of the forum non conveniens analysis. However, national treatment should neither be a controlling factor nor should it provide immunity from the application of the doctrine. The doctrine of forum *339 non conveniens and the principle of national treatment can coincide together with neither dictating a particular result.

Also, the decision to dismiss under the doctrine rests in the sound discretion of the trial judge and the standard of appellate review is very narrow in scope. [n.40] The presence

of these deferential standards increases the likelihood that the surrounding case law will be marked by differing conclusions and will vary according to jurisdictional boundaries.

This doctrine should continue to see application in future actions involving foreign parties desiring to litigate intellectual property rights in United States courts. Therefore, its understanding and appreciation are valuable to an intellectual property practitioner.

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[n.1]. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

[n.2]. Berne Convention for the Protection of Literary and Artistic Works (hereinafter Berne Convention), signed in Berne, Switzerland, on Sept. 9, 1886. The Berne Additional Protocol of Berlin, signed March 20, 1914; (4) the Rome Revision of June 2, 1928; (5) the Brussels Revision of June 26, 1948; (6) the Stockholm Revision of July 14, 1967; and (7) the Paris Revision of July 24, 1971.

[n.3]. Sibaja v. Dow Chemical Co., 757 F.2d 1215, 1218 (11th Cir. 1985), reh'g denied, 765 F.2d 154 (11th Cir. 1985), cert. denied, 474 U.S. 948 (1985).

[n.4]. See In re Union Carbide Corp. Gas Plant Disaster, 634 F.Supp 842, 845 (S.D.N.Y. 1986), aff'd, 809 F.2d 195 (2nd Cir. 1987), cert. denied, 484 U.S. 871 (1987).

[n.5]. Contact Lumber Co. v. P.T. Moges Shipping Co. Ltd., 918 F.2d 1446, 1449 (9th Cir. 1990) (citing Gulf Oil Corp., 330 U.S. at 508-09).

[n.6]. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981).

[n.7]. Id.

[n.8]. Id.

[n.9]. La Seguridad v. Transytur Line, 707 F.2d 1304, 1307 (11th Cir. 1983) (no one factor controlling); Firma Melodiya v. ZYX Music GmbH, 882 F.Supp 1306, 1317, 35

U.S.P.Q.2d (BNA) 1599, 1608 (S.D.N.Y. 1995) (burden on moving party) (citing Manu Int'l. S.A. v. Avon Prods., 641 F.2d 62, 65 (2nd Cir. 1981)).

[n.10]. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

[n.11]. Creative Technology Ltd. v. Aztech Systems PTE Ltd., 61 F.3d 696, 703-04, 35 U.S.P.Q.2d (BNA) 1590, 1595 (9th Cir. 1995) (citing Zipfel v. Halliburton Co., 832 F.2d 1477, 1485 (9th Cir. 1987) (citing Gulf Oil Corp. v. Gilbert 330 U.S. 501, 508-09 (1947)).

[n.12]. S. Rep. 352, 100th Cong., 2d Sess. 2 (1988), reprinted in 1988 U.S.C.C.A.N. 3706, 3707 (hereinafter S. Rep. 352).

[n.13]. See Berne Convention Art. V. ("Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.").

[n.14]. S. Rep. 352, supra note 12, at 3.

[n.15]. Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1097 n.15, 30 U.S.P.Q.2d (BNA) 1746, 1753 n.15 (9th Cir. 1994), cert. denied, 115 U.S. 512 (1994) (citing Berne Conv. Art. V(2)).

[n.16]. See 3 David Nimmer & Melville B. Nimmer, Nimmer on Copyright § 17.05, at 17-39 (1994); London Film Productions Ltd. v. Intercontinental Communications, Inc., 580 F.Supp 47, 50 n.6, 223 U.S.P.Q. (BNA) 381, 383 n.6 (S.D.N.Y. 1984).

[n.17]. 24 F.3d at 1097, 30 U.S.P.Q.2d (BNA) at 1753.

[n.18]. 61 F.3d 696, 35 U.S.P.Q.2d (BNA) 1590 (9th Cir. 1995).

[n.19]. Id. at 701, 35 U.S.P.Q.2d (BNA) at 1593 (quoting Section 31(1) of the Singapore Copyright Act which provides:

Subject to this Act, the copyright in literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without license of

the owner of the copyright, does in Singapore, or authorizes the doing in Singapore of, any act comprised in copyright).

[n.20]. Id. at 702, 35 U.S.P.Q.2d (BNA) at 1593.

[n.21]. Id. at 702-03, 35 U.S.P.Q.2d (BNA) at 1594.

[n.22]. Id. at 704-05, 35 U.S.P.Q.2d (BNA) at 1596.

[n.23]. Creative asserted that Aztech's U.S. distribution of software violated Creative's exclusive rights under 17 U.S.C. § § 106, 501 (1988).

[n.24]. Creative Technology Ltd. v. Aztech Systems PTE Ltd., 61 F.3d 696, 707, 35 U.S.P.Q.2d (BNA) 1590, 1598 (9th Cir. 1995) (citing Contact Lumber Co. v. P.T. Moges Shipping Co. Ltd., 918 F.2d 1446, 1452 (9th Cir. 1990)); See also Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1334 (9th Cir. 1984) (discussing standard of review and that district court abuses its discretion when its fails to balance relevant factors).

[n.25]. 61 F.3d at 707, 35 U.S.P.Q.2d (BNA) at 1598.

[n.26]. Id. at 708, 35 U.S.P.Q.2d (BNA) at 1598-99.

[n.27]. Id. at 705-06, 35 U.S.P.Q.2d (BNA) at 1597 (emphasis added).

[n.28]. See Robert A. Cinque, Making Cyberspace Safe for Copyright: The Protection of Electronic Works in a Protocol to the Berne Convention, 18 Fordham Int'l L.J., 1258, 1279 (1995).

[n.29]. S. Rep. 352, supra note 12, at 2.

[n.30]. Mizokami Brothers of Arizona, Inc. v. Baychem Corp., 556 F.2d 975, 977 (9th Cir. 1977) (per curiam), cert. denied, 434 U.S. 1035 (1978).

[n.31]. Maljack Productions, Inc. v. British-Pathe News Ltd., No. 93-C- 7767, 1994 WL 270268, at *5 (N.D.Ill. June 15, 1994).

[n.32]. Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1337 (9th Cir. 1984).

[n.33]. Creative Technology Ltd. v. Aztech Systems PTE Ltd., 61 F.3d 696, 702-03, 35 U.S.P.Q.2d (BNA) 1590, 1594 (9th Cir. 1995).

[n.34]. U.S. Const. art. IV, § 1.

[n.35]. 159 U.S. 113 (1895).

[n.36]. Id. at 202-03 (Justice Gray listed the following requirements: "[T]here has been an 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 ....").

[n.37]. See generally Ronald A. Brand, Enforcement of Foreign Money- Judgments in the United States: In Search of Uniformity and International Acceptance, 67 Notre Dame L. Rev., 253, 255 (1991).

[n.38]. Before a court will entertain a motion to dismiss under the doctrine, the court will look to see if personal and subject-matter jurisdiction is present. If one of these elements is lacking, the court will dismiss because of lack of jurisdiction. In addition, a party may file a special appearance to challenge the court's jurisdiction over this party, but once again, the motion to dismiss under the doctrine will not be addressed until the jurisdictional issues are resolved and the court finds proper jurisdiction over the party.

[n.39]. Brand, supra note 37, at 255.

[n.40]. Creative Technology Ltd. v. Aztech Systems PTE Ltd., 61 F.3d 696, 699, 35 U.S.P.Q.2d (BNA) 1590, 1591 (9th Cir. 1995).