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International Litigation

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I. Foreign Sovereign Immunities Act†

A. THE FSIA BEFORE THE SUPREME COURT

Under the Foreign Sovereign Immunities Act (FSIA), a foreign state is immune from suit, and its property from execution, unless an enumerated exception to immunity applies.¹ In 2009, the U.S. Supreme Court decided two cases involving the terrorism exceptions, applicable to designated state sponsors of terrorism.²

Republic of Iraq v. Beatty involved claims against Iraq (designated a state sponsor of terrorism in 1990) arising from hostage taking and torture during the first Gulf War.³ In April 2003 shortly after the removal of the former Iraqi regime, Congress passed the Emergency Wartime Supplemental Appropriations Act (EWSAA), authorizing the President to “suspend the application of any provision of the Iraq Sanctions Act of 1990” and further to “make inapplicable with respect to Iraq Section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terror-

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The views expressed are those of the authors and not necessarily those of the Department of State or the United States Government. Individual contributors will be referred to at the discussion of each relevant section.

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1. See 28 U.S.C. §§ 1604, 1609 (2009); see also *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

2. See § 1605A; 28 U.S.C. § 1605(a)(7) (1996) (repealed 2008) (both Supreme Court cases discussed here were brought under the former FSIA § 1605(a)(7)).

3. *Republic of Iraq v. Beatty*, 129 S. Ct. 2183 (2009).

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ism.”⁴ The issue in *Beatty* was whether this statutory language supports Presidential power to remove Iraq from the FSIA terrorism exception to suit, reinstating its sovereign immunity. The D.C. Circuit previously held that it does not, finding the italicized proviso to be strictly confined to the principal clause relating to legislative sanctions previously imposed on Iraq.⁵

The Supreme Court unanimously reversed, interpreting the EWSAA proviso as granting the President further power in addition to the principal power to suspend sanctions, and finding that such further power included rescinding the terrorism exception to immunity with respect to Iraq.⁶ In the alternative, even assuming that the EWSAA proviso encompassed only statutes that impose sanctions, the Court found that the FSIA terrorism exception would be one such law: as Justice Scalia put it, “[s]tripping the immunity that foreign sovereigns ordinarily enjoy is as much a sanction as eliminating bilateral assistance or prohibiting export of munitions.”⁷ Finally, the Court rejected the argument that the terrorism exception should apply because it arose from Iraq’s conduct prior to the President’s waiver; the general presumption against statutory retroactivity was overcome by principles of sovereign immunity.⁸

In *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, the plaintiff tried to execute his default judgment against Iran by attaching a U.S. judgment in Iran’s favor confirming an arbitration award against a third party defense contractor.⁹ The Ninth Circuit previously held that the property was immune under Section 1610(a) of the FSIA, which limits execution to a foreign state’s property that is both in the United States and used for a commercial activity in the United States, but found it amenable to attachment under a separate exception to sovereign immunity contained in the Terrorism Risk Insurance Act (TRIA), which allows execution of a terrorism-related judgment against statutorily defined “blocked assets” of a terrorist state.¹⁰ The Supreme Court left undisturbed the Ninth Circuit’s application of Section 1610(a), but reversed with regard to the TRIA, finding that the plaintiff waived his right to attach the property under the latter statute when he accepted compensation from the U.S. government as a holder of a terrorism-related judgment against Iran.¹¹

B. AGENCIES AND INSTRUMENTALITIES OF A FOREIGN STATE

1. *Individuals Acting in Official Government Capacities*

The circuit split continued in 2009 on whether an individual official of a foreign state may qualify as an “agency or instrumentality thereof” under Section 1603(b) of the FSIA

4. Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (2003) (emphasis added).

5. *Beatty*, 129 S. Ct. at 2187-90 (citing *Acree v. Republic of Iraq*, 370 F.3d 41, 48 (D.C. Cir. 2004)).

6. *Id.* at 2190-91.

7. *Id.* at 2191.

8. *Id.* at 2193-94.

9. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 129 S. Ct. 1732 (2009).

10. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 495 F.3d 1024, 1027 (9th Cir. 2007) (citing Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (codified as note to 28 U.S.C. § 1610)).

11. *Elahi*, 129 S. Ct. at 1741, 1744.

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and accordingly be protected by sovereign immunity. In *Yousuf v. Samantar*, the Fourth Circuit held that an individual does not so qualify, reasoning that “the FSIA’s use of the phrase ‘separate legal person’ [in Section 1603(b)] suggests that corporations or other business entities, but not natural persons, may qualify as agencies or instrumentalities,” and found such interpretation to be “also consistent with the overall statutory scheme of the FSIA.”¹² This decision followed the Seventh Circuit’s holding in *Enahoro v. Abubakar*, but is in sharp contrast to the majority position of the Second, Fifth, Sixth, Ninth and D.C. Circuits.¹³

Two circuit courts also touched upon the issue of immunity for former government officials. In *Yousuf*, the Fourth Circuit mentioned in dictum that, even if individual foreign officials were covered by the FSIA as agencies or instrumentalities, such officials would be entitled to immunity only if they were still holding their office at the time of suit.¹⁴ In *Matar v. Dichter*, the Second Circuit recognized the split between the Fourth Circuit’s dictum in *Yousuf* and the D.C. Circuit’s contrary dictum in *Belhas v. Ya’alon*, but declined to decide the issue.¹⁵ Instead, the Second Circuit found that, whether or not the FSIA applies to former officials, they were entitled to immunity under the discretionary common law principles that govern where the FSIA is silent, particularly where the position of the Executive Branch is that the court should decline to exercise jurisdiction.¹⁶

2. *Separateness Between Different Sovereign Entities*

Agencies and instrumentalities of a foreign state are entitled to a presumption of separateness from the foreign state itself, which can be overcome only when an “entity is so extensively controlled by its owner that a relationship of principal and agent is created” or when recognizing the separate status of the entity “would work fraud or injustice.”¹⁷ In *Doe v. Holy See*, the Ninth Circuit held that the “presumption of separate juridical status”

12. *Yousuf v. Samantar*, 552 F.3d 371, 380 (4th Cir. 2009).

13. Compare *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005) with *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 83 (2d Cir. 2008); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815-16 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388-89 (5th Cir. 1999); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1101-03 (9th Cir. 1990). The Fourth Circuit also distinguished its earlier decision in *Velasco v. Gov’t of Indonesia*, 370 F.3d 392, 399-400 (4th Cir. 2004), as ultimately deciding the “wholly separate question of whether, and under what circumstances, the acts of an individual operate to bind a foreign sovereign claiming immunity under the FSIA.” *Yousuf*, 552 F.3d at 379 (emphasis in original).

14. *Yousuf*, 552 F.3d at 381-83 (citing *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003)) (the use of the present tense in Section 1603(b)(2) indicates that the agency or instrumentality status of a corporate entity must “be determined at the time suit is filed”).

15. *Matar v. Dichter*, F.3d 9, 13 n.5 (2d Cir. 2009); *Belhas v. Ya’alon*, 515 F.3d 1279, 1286 (D.C. Cir. 2008) (distinguishing *Dole* on the ground that “the relationship between the state and its officials” is governed by different rules).

16. *Matar*, 563 F.3d at 13-14. Several district courts also examined the question of whether individuals’ actions were taken outside the scope of their official capacities. See, e.g., *Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 483 (D. Md. 2009) (former officer of Peruvian army not entitled to immunity because he was not acting in official capacity during alleged participation in a massacre); *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509, 522 (S.D.N.Y. 2009) (former Kuwaiti diplomat not entitled to immunity as he was not acting in official capacity in allegedly subjecting domestic servant to slavery); cf. *RSM Prod. Corp. v. Fridman*, 643 F.Supp.2d 382, 396 (S.D.N.Y. 2009) (allegation of bribe-taking was insufficient to strip former Deputy Prime Minister of Grenada of sovereign immunity where the alleged acts were undertaken in official capacity).

17. *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983) (*Bancec*).

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of Roman Catholic dioceses and religious orders in the United States from the Holy See, a foreign state, was not overcome by allegations that the Holy See created the dioceses and orders and continued to promulgate laws and regulations for them.¹⁸ Thus, the district court lacked jurisdiction over the Holy See for the tortuous acts allegedly committed by a U.S. archdiocese, bishop, and religious order.¹⁹

In *Butler v. Sukhoi Co.*, the Eleventh Circuit dismissed an action brought against third party agencies or instrumentalities of Russia to enforce a default judgment against another Russian entity where the only “conduct” alleged as a basis for subject matter jurisdiction was that the third parties were alter egos of the debtor.²⁰ The Court of Appeals also held that the district court abused its discretion in ordering jurisdictional discovery because the plaintiffs’ alter ego allegations, even if true, failed as a matter of law to establish an exception to sovereign immunity.²¹

In *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, the Second Circuit held that “foreign states are not ‘persons’ entitled to rights under the Due Process Clause.”²² *Frontera* thus overruled *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, which required courts to “engage in a due process scrutiny of the court’s power to exercise its authority over the state” in addition to assuring compliance with the FSIA’s jurisdictional requirements.²³ The Court did not decide whether an agency or instrumentality of a foreign state is similarly not entitled to due process protections, but instead remanded with an instruction to examine whether the relationship between Azerbaijan and the corporate defendant justified treating them as the same entity for purposes of the action.²⁴

C. EXCEPTIONS TO JURISDICTIONAL IMMUNITY

1. *The Waiver Exception*

The waiver exception to jurisdictional immunity under the FSIA, Section 1605(a)(1), provides that a foreign state is not immune from suit where it has “waived its immunity either explicitly or by implication.”²⁵ In *Capital Ventures International v. Republic of Argentina*, the Second Circuit found that an explicit waiver of immunity from suit in the United States could be found on the basis of a general contractual waiver of sovereign immunity,

18. *Doe v. Holy See*, 557 F.3d 1066, 1079-80 (9th Cir. 2009); see also *EM Ltd. v. Republic of Argentina*, No. 03 Civ. 2507 (TPG), 2009 WL 3149601, at *3, 6 (S.D.N.Y. Sept. 30, 2009) (coordination by large state-owned bank of its activities with state economic and financial policies and ability for government to borrow from state-owned bank were insufficient to show an alter ego relationship). The authors’ firm represented the Republic of Argentina in this action.

19. *Doe*, 557 F.3d at 1080.

20. *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1311-13 (11th Cir. 2009).

21. *Id.* at 1313-14; see also *Compania del Bajo Caroni (Caromin), C.A. v. Bolivarian Republic of Venezuela*, No. 08-2706-cv, 2009 WL 2476688, at *1 (2d Cir. Aug. 14, 2009) (district court did not abuse its discretion in denying jurisdictional discovery).

22. *Frontera Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 400 (2d Cir. 2009). This case is discussed at length below in Section VII on the Enforcement of Foreign Arbitral Awards and Judgments.

23. *Id.* at 398-400 (citing *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981)) (internal citations omitted).

24. *Id.* at 401.

25. 28 U.S.C. § 1605(a)(1) (2009).

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even if the relevant contract makes no reference to the United States, a U.S. forum, or U.S. law.²⁶

2. *The Commercial Activity Exception*

In *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia*, the Fifth Circuit determined that a contract for the provision of employees integrated into the air force, “vital to the operation of a national air defense system,” and treated as military personnel, was sovereign in nature, so that its subject matter did not fall within Section 1605(a)(2) of the FSIA.²⁷ The Court contrasted this with another contract for repair services for aircraft parts and components, which it found to be clearly commercial in nature.²⁸ Given that the second contract was also primarily performed and had a place of payment in the United States, and a U.S. company suffered financial losses from its breach, the Court of Appeals held that there was a “sufficient direct effect in the United States” to trigger the commercial activity exception.²⁹

In *Allfreight Worldwide Cargo, Inc. v. Ethiopian Airlines Enterprise*, the Fourth Circuit held that apparent authority of a foreign state official was insufficient to invoke the commercial activity exception in the absence of actual authority to bind the sovereign, notwithstanding the reasonableness of the contracting parties’ mistake.³⁰ Although the purported agent’s lack of actual authority arose from a violation of an internal operating policy that was not publicly available, it could not be deemed to “abrogate the sovereign’s immunity by creating actual authority where none exists.”³¹

In *Northrop Grumman Ship Systems, Inc. v. Ministry of Defense of the Republic of Venezuela*, involving an agent’s authority to settle an action brought under 1605(a)(2), the Fifth Circuit similarly emphasized that “a government entity has the power to define how and when it enters a contract, and, by extension, how and when its agents have authority to create contracts on its behalf.”³² The Court thus held that the law of the foreign sovereign should be applied in determining whether the sovereign had conveyed actual authority to its agent.³³

3. *The Expropriation Exception*

In *Cassirer v. Kingdom of Spain*, the Ninth Circuit held that the expropriation exception may apply even where the property was “taken” by an entity other than the foreign state.³⁴ The Court found that FSIA Section 1605(a)(3) did “not expressly require that the foreign

26. *Capital Ventures Int’l v. Republic of Argentina*, 552 F.3d 289, 294-95 (2d Cir. 2009). The authors’ firm represented the Republic of Argentina in this action. *Cf.* *A.R. Int’l Anti-Fraud Sys., Inc. v. Pretoria Nat’l Cent. Bureau of Interpol*, 634 F. Supp. 2d 1108, 1116 (E.D. Cal. 2009) (agreement to submit to a voluntary, non-binding dispute resolution program was not an implicit waiver of immunity).

27. *UNC Lear Serv., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 216 (5th Cir. 2009).

28. *Id.* at 217-18.

29. *Id.* at 218-19.

30. *Allfreight Worldwide Cargo, Inc. v. Ethiopian Airlines Enter.*, 307 F. App’x 721, 724 (4th Cir. 2009).

31. *Id.* at 725.

32. *Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of the Republic of Venezuela*, 575 F.3d 491, 500 (5th Cir. 2009).

33. *Id.* at 501.

34. *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1052 (9th Cir. 2009); § 1605(a)(3).

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state (against whom the claim is made) be the entity that took the property in violation of international law.”³⁵ The Court further determined that a state art foundation’s “advertising and promotional activity, purchase and sale of goods and services, and the exchange of artwork” with U.S. entities satisfied the requirement for “commercial activity in the United States” under the expropriation exception.³⁶

The district court in *Freund v. Republic of France* found that the “engaged in commercial activity” requirement of Section 1605(a)(3) “necessitates, at least, an affirmative decision by an ‘agency or instrumentality’ to perform a commercial transaction or act,” and the commercial actions of remote subsidiaries in the United States could not satisfy this requirement in the absence of any evidence of abuse of the corporate form.³⁷ The court also required plaintiffs to “specifically allege” (rather than rely on mere inferences) that expropriated property is either currently owned or operated by the foreign state, or that subject property is derived from expropriated property.³⁸

4. *The Tortious Act Exception*

In *O’Bryan v. Holy See*, the Sixth Circuit joined the Second and D.C. Circuits in finding that the “entire tort must occur in the United States” for the tortious act exception to apply.³⁹ The plaintiffs’ claims against the Holy See employees, premised upon their negligent supervision in the United States of the clergy allegedly committing acts of abuse, met this standard, and also were not barred by Subsection 1605(a)(5)(A) of the FSIA. This subsection precludes claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function.”⁴⁰ In its review of the individual negligence claims, the Court found that those based on failure to warn and failure to report survived, but the one based on failure to provide safe care amounted to a claim of negligent hiring, placing it within the discretionary function exclusion.⁴¹

By contrast, in *Doe v. Holy See*, the Ninth Circuit found that the negligent retention, supervision, and failure to warn claims were all barred by the discretionary function exclusion of 1605(a)(5)(A), because plaintiff failed to demonstrate the existence of any specific Holy See policy limiting discretion, and also because the hiring, supervision, training, and decision to warn of employees were discretionary acts protected by the statutory exclusion.⁴²

35. *Cassirer*, 580 F.3d at 1056.

36. *Id.* at 1052. Another notable aspect of the *Cassirer* decision is the Ninth Circuit’s finding that, although there is no absolute requirement for exhaustion of foreign remedies before invoking a U.S. court’s jurisdiction under the FSIA, where “principles of international comity and rules of customary international law require exhaustion,” the district court must conduct a “prudential exhaustion analysis.” *Id.* at 1062 (citing framework established in *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 832-33 (9th Cir. 2008)).

37. *Freund v. Republic of France*, 592 F. Supp. 2d 540, 556-57 (S.D.N.Y. 2008).

38. *Id.* at 560.

39. *O’Bryan v. Holy See*, 556 F.3d 361, 382 (6th Cir. 2009).

40. *Id.* at 385-87.

41. *Id.* at 387.

42. *Doe v. Holy See*, 557 F.3d 1066, 1083-84 (9th Cir. 2009).

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5. *The Terrorism Exception*

The most significant decision in 2009 under the new Section 1605A is *In re Islamic Republic of Iran Terrorism Litigation*.⁴³ As a matter of first impression, the District Court for the District of Columbia examined the constitutionality of Section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), which authorizes individuals who had obtained final judgments under Section 1605(a)(7) of the FSIA to file new actions under Section 1605A if they are related to currently pending actions, and found that it does not call for the reopening of final judgments in contravention of Article III of the Constitution, because the newly created federal cause of action “allow[s] for new actions that simply were not available” before the enactment.⁴⁴ The court further held that the legislative abrogation of the defenses of *res judicata* and collateral estoppel in Section 1083(c)(3)(B) of the NDAA likewise did not contravene Article III of the Constitution.⁴⁵

The Court then addressed several other issues regarding the Section 1605A claims. With respect to the determination of substantive tort law governing such claims, the Court stated that it would “rely on well-established principles of law, such as those found in Restatement (Second) of Torts and other leading treatises, as well as those principles that have been adopted by the majority of state jurisdictions.”⁴⁶ With respect to service of process, the Court held that Section 1608 of the FSIA did not require service of new federal claims in actions already pending under the old Section 1605(a)(7) that had since been converted to actions under Section 1605A, because such converted actions need not be considered as new claims for purposes of the pleading requirements.⁴⁷

6. *Counterclaims Against a Foreign State*

In *Reino de España v. ABSG Consulting, Inc.*, the Second Circuit found that the defendant’s counterclaims for indemnity and contributory negligence bore a “logical relationship” to Spain’s claims against the defendant arising from an oil spill, and raised “similar, if not identical, issues of duty and causation,” so that it was “sensible, as a matter of fairness and judicial efficiency, to adjudicate them in tandem with Spain’s claims.”⁴⁸ The Court found this result to be in accord with the purpose of Section 1607(b) of the FSIA, which was “to prevent a foreign sovereign from obtaining the benefit of litigating its

43. See *In re Islamic Republic of Iran Terrorism Litig.*, 2009 WL 3112136, *1 (D.D.C. Sept. 30, 2009) (considering consolidated actions by over one thousand individual plaintiffs).

44. *Id.* at *36 (citing 28 U.S.C. § 1605A(c) and concluding that Section 1605A is “fundamentally different” from former Section 1605(a)(7)); National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-344 (2008).

45. *Id.* at *42-44 (*res judicata* was inapplicable to the consolidated cases because the claims under § 1605A could not have been raised under § 1605(a)(7); collateral estoppels was also precluded because the controlling legal principals had changed.).

46. *Id.* at *22 (for more guidance regarding these principles and their application in § 1605A actions, the court cited its separate opinion in *Estate of Heiser v. Islamic Republic of Iran*, 2009 WL 3112827, *1 (D.D.C. Sept. 30, 2009), issued the same day); see also *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835 (D.C. Cir. 2009) (analyzing the choice-of-law rules applicable in an action under the old §1605(a)(7)).

47. *In re Iran Terrorism Litig.*, 2009 WL 3112136, at *65-66 (despite this holding, the court noted that counsel in § 1605A cases would be well advised to take a conservative approach and serve Iran with the new claims).

48. *Reino de España v. ABSG Consulting, Inc.*, 334 F. App’x. 383, 2009 WL 1636122, at *2 (C.A.2 (N.Y.)).

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claims in a U.S. court while simultaneously avoiding liability for counterclaims logically related to them.”⁴⁹

D. EXCEPTIONS TO IMMUNITY FROM EXECUTION

In *Aurelius Capital Partners, LP v. Republic of Argentina*, the Second Circuit confirmed that the Section 1610(a) analysis of whether “property in the United States of a foreign state” is “used for a commercial activity in the United States” must be undertaken as of the time of the attempted attachment or execution.⁵⁰ The court found that the statute foreclosed consideration of the use of property before it became property of the foreign state, or of potential or future uses of the property.⁵¹ Thus, where the property had been attached immediately upon the adoption by the foreign state of a law transferring legal control of that property from private corporations to a state entity, neither the state entity nor the foreign state had any opportunity to use the property for a commercial activity in the United States; the mere transfer of legal control did not qualify property as being “used for a commercial activity.”⁵²

In *Bennett v. Islamic Republic of Iran*, the District Court for the District of Columbia stated in dicta that FSIA Section 1610(g), establishing special execution rules applicable to property of foreign state sponsors of terrorism, does not lift the immunity long accorded to diplomatic properties.⁵³

II. Service of Process Abroad†

International service of process was again a topic of significant discussion in 2009. Although service of process for a domestic corporation is generally straightforward, international service of process is not so clear cut.

International service of process is governed by Rule 4(f) of the Federal Rules of Civil Procedure, which allows service outside the United States “by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention.”⁵⁴ In *Volkswagenwerk Aktiengesellschaft v. Schlunk*, the Supreme Court held that when service of process is to be made in a foreign country that is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (Hague Convention), Rule 4(f) requires that the Hague Convention’s provisions are the exclusive means to effectuate process.⁵⁵

49. *Id.*

50. *Aurelius Capital Partners, LP v. Argentina*, 584 F.3d 120, 130 (2d Cir. 2009). The authors’ firm represented the Republic of Argentina in this action.

51. *Id.*

52. *Id.*; accord *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys.*, 495 F.3d 1024, 1037 (9th Cir. 2007), *rev’d on other ground*, *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 129 U.S. S. Ct. 1732, 1738-40 (2009).

53. *Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d 152, 170 (D.D.C. 2009).

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54. Fed. R. Civ. P. 4(f)(1).

55. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988).

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A. ALTERNATIVE SERVICE

One of the most litigated issues arising out of international service of process in 2009 is whether alternative methods of service under Rule 4(f)(3) would be allowed and the forms those methods may take. Federal Rule of Civil Procedure 4(f)(3) allows for service “by other means not prohibited by international agreement, as the court orders.”⁵⁶

Because Rule 4(f)(3) uses “as the court orders,” prior court approval is required. And *International Raelian Movement v. Hashem* highlights the need to seek court permission before attempting any alternative service of process under Rule 4(f)(3).⁵⁷ The plaintiff in that case had attempted to serve defendants in Egypt by conventional means. When those attempts proved unsuccessful, plaintiff sent electronic copies to various e-mail addresses associated with the defendants, as well as hard copies to the physical address associated with the defendants’ website.⁵⁸ Noting that the plaintiff was required to get prior approval, the Court rejected retroactive approval of the plaintiff’s methods. But the Court did recognize that service of process was likely unavailable through traditional means, and thus granted the plaintiffs approval to re-serve the defendants using those alternative methods of service.⁵⁹

Besides prior court approval, Rule 4(f)(3) is only applicable by means not prohibited by an international agreement, such as the Hague Convention. In *In re South African Apartheid Litigation*, the plaintiffs attempted to serve a German defendant using Germany’s Central Authority.⁶⁰ Germany objected to service by judicial agent, mail, or by diplomat, leaving Germany’s Central Authority as the only available means.⁶¹ For reasons that are unclear, the Central Authority in Germany failed to serve the defendants after six years.⁶² The plaintiff, thus, sought alternative service. But the Court was faced with a difficult fact: Germany had explicitly objected to service via mail, judicial agent, or diplomat.⁶³ To overcome this, the Court noted that while Germany objected to those methods, it did not expressly forbid numerous other potential avenues and that the Court need only select one reliable mechanism.⁶⁴ The court’s choice was simple: serve the defendant’s counsel.

Along with the two enumerated provisions—not prohibited by international agreement and prior court authorization—the courts have maintained that to comply with the Due Process Clause, any service under Rule 4(f)(3) must be reasonably calculated to notify the opposing party of the action.⁶⁵ But outside of that general Due Process consideration, the courts have wide latitude to permit any method of service, as the following cases illustrate.

In a similar fashion to the *South African Apartheid* court, the court in *In re: TFT-LCD (Flat Panel) Antitrust Litigation* approved service of process on Taiwanese defendants

56. Fed. R. Civ. P. 4(f)(3).

57. *Int’l Raelian Movement v. Hashem*, U.S. Dist. LEXIS 60542, at *9-12 (E.D. Cal. July 15, 2009).

58. *Id.* at *11.

59. *Id.* at *14-16.

60. *In re S. Afr. Apartheid Litig.*, 642 F. Supp. 2d 423, 426-27 (2009).

61. *Id.* at 432.

62. *Id.* at 437.

63. *Id.*

64. *Id.*

65. See *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2009 U.S. Dist. LEXIS 93448, *13 (N.D. Cal. Oct. 6, 2009).

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through their U.S. counsel.⁶⁶ “Taiwan is not a signatory to the Hague Convention,” so the plaintiff was forced to use other means, such as the letters rogatory process.⁶⁷ But that process is both time consuming and costly. Recognizing the cost and time factors, the Court granted the plaintiff’s motion to serve the Taiwanese defendants’ U.S. counsel, which had made filings and appearances on those defendants’ behalf. The court reasoned that under such circumstances, it was reasonable to infer that the Taiwanese defendants have sufficient notice of the case and service would comply with the Due Process clause.⁶⁸

But service through U.S. counsel is not the only other means available. In some cases, electronic service to the defendants e-mail address was allowed. For example, in *United States v. Machat*, the Court granted the plaintiffs’ motions for alternative service via e-mail.⁶⁹ The rationale here was that the plaintiff—in this case, the U.S. government—could not effect service through the Hague Convention because it was unable to find the defendant’s actual address, although it was believed the defendant was located somewhere in London, England. In *California Board Sports, Inc. v. G.H. Dijkmans Bebeer B.V.*, a California district court was similarly faced with a plaintiff seeking to serve a Dutch company’s counsel in Missouri by e-mail.⁷⁰ In this case, the plaintiff’s argument was that it would take several months to effect service in the Netherlands by using international registered mail, and that service may be too slow to defeat the defendant’s attempt to litigate the dispute in Missouri as opposed to California.⁷¹ But this argument was unavailing because it was the plaintiff’s own fault that it waited to start its service efforts.⁷² Thus, according to the Court, the circumstances did not necessitate the court’s intervention.

Not all courts, however, view service of process via e-mail to be legitimate. In *Mapping Your Future, Inc. v. Mapping Your Future Services, Ltd.*, a South Dakota district court was presented with a similar situation to that in *Machat*.⁷³ Here, the plaintiff moved for authorization for alternative service via e-mail under Rule 4(f)(3), but unfortunately for the plaintiff, they were in the Eighth Circuit, and under Eighth Circuit law, service of process by mail is not allowable under the Hague Convention.⁷⁴ Reasoning that because Rule 4(f)(3) only allows service not prohibited by international agreement, and that the Eighth Circuit has held that the Hague Convention does not permit service via mail, the Court concluded that sending a summons and complaint via e-mail was not allowed.⁷⁵

The *Mapping Your Future* case highlights two important aspects of service of process analysis. First, there is still not uniform agreement on the contours of the Hague Convention. The Eighth Circuit has taken the view that Article 10(a) of the Hague Convention does not allow service via registered mail.⁷⁶ But that line of reasoning is not in the major-

66. *Id.* at *11.

67. *Id.* at *9.

68. *Id.* at *15.

69. *United States v. Machat*, 2009 U.S. Dist. LEXIS 87000, *10-11 (S.D.N.Y. Sept. 21, 2009).

70. *Cal. Board Sports, Inc. v. G.H. Dijkmans Bebeer B.V.*, 2009 U.S. Dist. LEXIS 97641, *1 (S.D. Cal. Oct. 21, 2009).

71. *Id.* at *2-4.

72. *Id.*

73. *Mapping Your Future, Inc. v. Mapping Your Future Servs., Ltd.*, 2009 U.S. Dist. LEXIS 87571, (D. S.D. Sept. 23, 2009).

74. *Id.* at *5-7.

75. *Id.* at *9.

76. *Id.*

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ity. For example, in *Xyrous Communications, LLC v. Bulgarian Telecommunications Co.*, a district court in Virginia held that “service by mail on a party in a foreign country is appropriate only if the country of designation does not object to Article 10.”⁷⁷ Similarly, in *McKenzie v. Hero Industries*, a district court in Arizona found service of process by registered mail sufficient because “[a]lthough the Hague Convention does not expressly provide for service by mail, the Ninth Circuit has concluded that service by certified mail is not excluded by the Convention.”⁷⁸ And the court presented a similar analysis in the *South African Apartheid* case when the court noted that Germany had explicitly rejected service by mail as a viable option.

The second aspect highlighted in *Mapping Your Future* is that the divergent views on the Hague Convention affect more than just how to proceed via the Hague Convention. If a court takes a restrictive view of the provisions of the Hague Convention, it can affect possible alternative methods of service of process. By concluding that service of process through registered mail is not an option available under the Hague Convention, the Eighth Circuit has eliminated e-mail as a possible option under Rule 4(f)(3).

B. RUSSIA AND THE HAGUE CONVENTION

This past year has also seen courts disagree on how to deal with countries that suspend judicial cooperation. As described above, in the *South African Apartheid* case, the district court granted alternative service of process because the Central Authority in Germany responsible for serving the defendant inexplicably had not done so in over six years.

Germany was not the only uncooperative country. In *In re Potash Antitrust Litigation*, the plaintiff sought alternative means to serve defendants living in Russia.⁷⁹ The plaintiffs sought permission for alternative service because Russia had unilaterally suspended all judicial cooperation with the United States, even though it was a signatory to the Hague Convention. Reasoning that service in such a circumstance was unavailable, the Court granted permission to serve by several alternative methods: (1) e-mail to corporate headquarters; (2) fax to corporate headquarters; and (3) delivery to two purported agents.⁸⁰

But the district court in *Nuance Communications, Inc. v. Abby Software House* came to a different conclusion.⁸¹ In that case, the plaintiff admitted to not following the Hague Convention but instead asserted that the Hague Convention was inapplicable because the Russian Federation unilaterally suspended all judicial cooperation.⁸² The district court, however, rejected this argument because “[t]here is no authority for this proposition and nothing before the Court indicates that the Hague Convention is not the proper vehicle for service of the foreign defendants in this matter.”⁸³ This is a markedly different result from the *Potash Antitrust* case. Both involved Russian defendants and both plaintiffs asserted that the Hague Convention was rendered inoperable by Russia’s unilateral suspen-

77. *Xyrous Commc’n, LLC v. Bulgarian Telecomm. Co.*, 2009 U.S. Dist. LEXIS 80620, *30 (E.D. Va. Sept. 4, 2009).

78. *McKenzie v. Hero Indus.*, 2009 U.S. Dist. LEXIS 67932, *15 (D. Ariz. July 30, 2009).

79. *In re Potash Antitrust Litig.*, 2009 U.S. Lexis 102623, *50 (N.D. Ill. Nov. 3, 2009).

80. *Id.* at *49-50.

81. *Nuance Commc’n, Inc. v. Abby Software House*, 2009 U.S. Dist. LEXIS 75583 (N.D. Cal. Aug. 25, 2009).

82. *Id.* at *10-11.

83. *Id.* at *11.

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sion of judicial cooperation. So, why the different outcomes? In *Potash Antitrust*, the plaintiff offered evidence to support its contention, such as documentation of conversations with the U.S. Department of State's Legal Office.⁸⁴ The district court in *Nuance*, however, mentioned that there was no support for that proposition. It is possible the plaintiff in *Nuance* did not offer up enough credible evidence.

As demonstrated, courts have disagreed on whether service via e-mail is acceptable or whether circumventing the Hague Convention is acceptable when the defendants are Russian. But there are also other pitfalls besides those two that plaintiffs and defendants need to be aware of in this area.

In *Smallwood v. Allied Pickfords, LLC*, Allied Pickfords challenged service of process in the United Arab Emirates because the plaintiff did not use the proper diplomatic channels.⁸⁵ Interestingly, Allied Pickfords did not assert that it did not receive actual notice or was prejudiced, but instead claimed that the plaintiff failed to comply with UAE law, which the plaintiff did not dispute.⁸⁶ Relying on Rule 4(f)(2)(A)'s specific requirement that the foreign jurisdiction's local law be followed, the Court found service to be insufficient. But because the defendant did not claim any prejudice, the Court merely quashed service and ordered the plaintiff to effect service within sixty days.⁸⁷

So here there are two lessons—one for the plaintiff and one for the defendant. First, plaintiffs need to be aware of the law of the foreign jurisdiction in which they are serving process. Second, defendants challenging service of process need to show some prejudice or risk having the court quash the summons instead of dismissing the case.

III. Personal Jurisdiction†

With the exception of a few decisions in the Federal Circuit, federal personal jurisdiction jurisprudence was unremarkable this year.⁸⁸ In late 2008, the Federal Circuit declined to extend personal jurisdiction in a suit for declaratory judgment of non-infringement and invalidity of a foreign company's two American patents because the company had not purposefully directed its activities in the forum beyond sending letters

84. *In re Potash Antitrust Litig.*, 2009 U.S. Lexis 102623 at *54 n. 20.

85. *Smallwood v. Allied Pickfords, LLC*, 2009 U.S. Dist. LEXIS 91141, *37 (S.D. Cal. Sept. 29, 2009).

86. *Id.* at *38-39.

87. *Id.* at *39-42.

† Jarrett B. Perlow, Legal Adviser, United States District Court for the District of Maryland. The views expressed are those of the author and not necessarily those of the court or the United States Government.

88. As an example, the Fourth Circuit's decision in *Consulting Engineers Corp. v. Geometric Ltd.* provides a concise overview of how to analyze a question of federal personal jurisdiction. *See Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 277-79 (4th Cir. 2009). Three other cases may also be of interest. *D'Jamoos v. Pilatus Aircraft Ltd.*, 566 F.3d 94 (3d Cir. 2009) (rejecting argument that Swiss aircraft manufacture has purposefully directed its activities in the forum by targeting itself to the United States market by complying with Federal Aviation Administration standards); *Oldfield v. Pueblo de Bahia Lora, S.A.*, 558 F.3d 1210 (11th Cir. 2009) (finding no specific personal jurisdiction under Rule 4(k)(2) analysis and setting aside a default judgment in a suit against a Costa Rica resort for injuries from a boating accident); *CFA Inst. v. Inst. of Chartered Fin. Analysts of India*, 551 F.3d 285 (4th Cir. 2009) (extending personal jurisdiction in trademark infringement and unfair competition suit against Indian licensing association under the Virginia long-arm statute and not, as the district court found, under Federal Rule of Civil Procedure 4(k)(2) because the association engaged in a "substantial business relationship" and "purposefully transacted business" with the plaintiff in Virginia).

suggesting patent infringement.⁸⁹ Five months later, the Federal Circuit clarified the extent of its decision. This new case, *Autogenomics, Inc. v. Oxford Gene Technology Ltd.*,⁹⁰ is discussed first, followed by a second patent infringement case. A final Alien Tort Claims Act case from the Ninth Circuit looks at jurisdiction and agency law following that court's 2001 *Unocal* decision.⁹¹

A. DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF PATENTS

Autogenomics, a Californian biotechnology company filed federal suit in the Central District of California against Oxford Gene Technology, a British biotechnology company, for declaratory judgment of non-infringement, invalidity, and unenforceability of a portion of Oxford's American patent related to analyzing DNA sequences.⁹² Having concluded Oxford was not subject to general personal jurisdiction in the forum, the Court turned to whether specific personal jurisdiction applied by evaluating whether Oxford "purposefully directed its activities" at the forum.⁹³ The court reiterated that in *Avocet* it limited these activities to "only enforcement or defense efforts related to the patent rather than the patentee's own commercialization efforts" in a declaratory judgment suit.⁹⁴ While the Court was "concerned that foreign patentees like Oxford may engage in significant commercialization and licensing efforts in a state while benefiting from the shelter of the *Avocet* rule,"⁹⁵ California lacked specific jurisdiction over Oxford because its' only alleged patent-related activities in the forum involved sending cease-and-desist letters to Autogenomics.⁹⁶ The court affirmed the lower court's dismissal for lack of general or specific jurisdiction.⁹⁷

89. *Avocet Huntsville Corp. v. Aten Int'l Co.*, 552 F.3d 1324, 1326 (Fed. Cir. 2008); *see id.* at 1336 ("In short, a defendant patentee's mere acts of making, using, offering to sell, selling, or importing products—whether covered by the relevant patent(s) or not—do not, in the jurisdictional sense, relate in any material way to the patent right that is at the center of any declaratory judgment claim for non-infringement, invalidity, and/or unenforceability. Thus, we hold that such sales do not constitute such 'other activities' as will support a claim of specific personal jurisdiction over a defendant patentee. While such activities may in the aggregate justify the exercise of general jurisdiction over the patentee, they do not establish a basis for specific jurisdiction in this context.") (emphasis and citations omitted).

90. *Autogenomics, Inc. v. Oxford Tech. Ltd.*, 566 F.3d 1012 (Fed. Cir. 2009).

91. *Bauman v. Daimlerchrysler Corp.*, 579 F.3d 1088, 1091 (9th Cir. 2009). *See Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001).

92. *Autogenomics*, 566 F.3d at 1014 ("oligonucleotide microarrays for analysis of polynucleotides"). For more information, *see* U.S. Patent No. 6,054,270 (issued Apr. 25, 2000).

93. *Id.* at 1018 (finding no evidence of continuous and systemic contacts in California from Oxford's attendance at several conferences in the state, Oxford's collaborative agreement with a separate company with California offices, and one percent of sales revenue from California in 2006—unrelated to the patent at issue in this case).

94. *Id.* at 1020 ("[T]he relevant activities are those that the defendant 'purposefully directs . . . at the forum which relate in some material way to the enforcement of the defense of the patent'") (quoting *Avocet*, 552 F.3d at 1336) (omission in original).

95. *Id.* at 1021 (rejecting the dissent's contention that foreign patents are "immunized from adjudication" because 35 U.S.C. § 293 places jurisdiction over foreign patents in the U.S. District Court for the District of Columbia).

96. *Id.* (concluding Autogenomics failed to "allege sufficient activities 'relat[ing] to the validity and enforceability of the patent'") (quoting *Avocet*, 552 F.3d at 1336) (edit in original).

97. *Id.* at 1024 (finding the court did not abuse its discretion in denying Autogenomic's request for jurisdictional discovery). *But see id.* at 1024-28 (Newman, J., dissenting) (disagreeing on the jurisdictional issue).

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Before *Autogenomics*, the Federal Circuit considered the extent to which Federal Rule of Civil Procedure 4(k)(2) applies in patent infringement cases.⁹⁸ Synthes, a medical-device company based in Pennsylvania, filed a patent infringement suit against GMReis, a Brazilian medical-device corporation.⁹⁹ Synthes alleged infringement based on GMReis's attendance and participation in a 2007 trade show.¹⁰⁰ In evaluating Rule 4(k)(2), the Court found that the case arose under federal law, that personal jurisdiction was appropriate because GMReis purposely promoted its products at a trade show in the United States, and that jurisdiction over GMReis would be "both reasonable and fair."¹⁰¹ Having concluded GMReis was subject to personal jurisdiction in the United States, the Court reversed and remanded the case to the district court.¹⁰²

The Federal Circuit reconciled its decision with *Synthes* in a brief footnote in *Autogenomics*: "*Synthes* was not a declaratory judgment action against the patent holder but rather an infringement suit brought by the patentee against an accused infringer, where commercialization-type contacts are highly relevant to personal jurisdiction."¹⁰³ For now, it appears *Avocent* is limited to declaratory judgment actions only.

B. ALIEN TORT CLAIMS ACT

Several Argentines brought suit under the Alien Tort Claims Act, alleging their former employer, Mercedes Benz Argentina, conspired and colluded with the former Argentine military government to root out subversive employees.¹⁰⁴ The plaintiffs named DaimlerChrysler AG, a German company, as the sole defendant and argued DaimlerChrysler was subject to personal jurisdiction through its relationship with its wholly-owned subsidiary, Mercedes Benz U.S.A., L.L.C., which was responsible for marketing and distributing DaimlerChrysler's vehicles in California.¹⁰⁵

Under its decision in *Unocal*, a subsidiary's contacts may be imputed to a parent organization if the subsidiary "perform[s] services 'sufficiently important to the [parent] corporation that if it did not have a representative to perform them, the [parent] . . . would undertake to perform substantively similar services.'"¹⁰⁶ But if the business relationship is simply a matter of investment, then the subsidiary is not an agent.¹⁰⁷ While not deviating

98. See *Synthes v. G.M. Dos Reis Jr. Ind. Com. De Equip. Medico*, 563 F.3d 1285 (Fed. Cir. 2009) ("[W]e have not yet had occasion to analyze the applicability of Rule 4(k)(2)"); *Id.* at 1293 ("[W]e have not yet had occasion to analyze the applicability of Rule 4(k)(2)").

99. *Id.* at 1287-88.

100. *Id.* at 1288.

101. *Id.* at 1299-30.

102. *Id.* at 1300.

103. *Autogenomics*, 566 F.3d at 1020 n.1 ("By contrast, in *Avocent* we held that '[w]hat the patentee makes, uses, offers to sell, sells, or imports is of no real relevance to the enforcement or defense of a patent.'") (edit in original, internal citation omitted). In his *Autogenomics* dissent, Judge Newman believed these cases were incompatible, and the distinction between a foreign party being an accused infringer (GMReis) and a patentee (Oxford) had been previously rejected by the court. See *id.* at 1026-27 (citing *Viam Corp. v. Iowa Export-Import Trading Co.*, 84 F.3d 424 (Fed. Cir. 1996)).

104. *Bauman*, 579 F.3d at 1091.

105. *Id.* at 1092, 1094.

106. *Id.* at 1094-95 (quoting subsequent cases applying *Unocal*).

107. *Id.* at 1095. The court reiterated that "[a]ppropriate parental involvement includes: monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures." *Id.* (quoting *Unocal*, 248 F.3d at 926).

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from its position in *Unocal*, the Court clarified that *Unocal* did not remove the requirement for the principal to exercise “pervasive and continual control” over the agent in the case of agency-based jurisdiction.¹⁰⁸

Applying *Unocal* to the facts of *Bauman v. DaimlerChrysler AG*, the Court found DaimlerChrysler did not exercise pervasive and continual control over Mercedes Benz USA because the agreement between the companies was terminable, Mercedes Benz’s sales goals were negotiated between the parties, and Mercedes Benz could decide not to buy and market DaimlerChrysler’s product in California.¹⁰⁹ Yet even if DaimlerChrysler exercised sufficient control, Mercedes Benz did not function as DaimlerChrysler’s representative: the plaintiffs failed to show that DaimlerChrysler “would undertake to perform substantially similar services in the absence” of Mercedes Benz.¹¹⁰ Because Mercedes Benz did not meet the standard for agency in *Unocal*, its contacts “could not be imputed” to DaimlerChrysler,¹¹¹ and absent this relationship with Mercedes Benz, DaimlerChrysler lacked “continuous and systemic contacts sufficient to confer general jurisdiction,”¹¹² and therefore the Ninth Circuit affirmed the district court’s dismissal.¹¹³

IV. The Act of State Doctrine†

A. INTRODUCTION

The act of state doctrine is a prudential limitation on the exercise of judicial review¹¹⁴ and reflects judicial reluctance to interfere in matters of foreign relations more appropriately left to other branches of government.¹¹⁵ Applying the doctrine, U.S. courts will avoid reviewing cases or controversies that require passing judgment on the validity of the official acts of a foreign State performed in its own territory.¹¹⁶

B. THE ACT OF STATE DOCTRINE DISTINGUISHED FROM FOREIGN SOVEREIGN COMPULSION AND INTERNATIONAL COMITY DOCTRINES

In *In re Vitamin C Antitrust Litigation*, in which plaintiffs allege price fixing and supply restrictions in violation of the Clayton and Sherman Acts, defendant companies moved to dismiss on the basis that the act of state, international comity, and foreign sovereign compulsion doctrines barred the suit because the Chinese government compelled defendants’ actions.¹¹⁷ Developing evidence not in the complaint, defendants argued that the Chinese Ministry of Commerce mandated their membership in a government-sponsored commit-

108. *Id.* at 1095.

109. *Id.* at 1096.

110. *Id.*

111. *Id.* at 1097.

112. *Id.*; *but see id.* at 1098-1106 (Reinhardt, J., dissenting).

113. *Id.* at 1098 (majority opinion).

† Submitted by Matthew D. Slater, Partner at Cleary Gottlieb Steen & Hamilton LLP in Washington, D.C., with assistance from Lee F. Berger and Kish Vinayagamoorthy, both associates at the same firm.

114. *See, e.g.,* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964); *Credit Suisse v. United States Dist. Court for the Cent. Dist. of Cal.*, 130 F.3d 1342, 1346 (9th Cir. 1997).

115. *See Siderman de Blake v. Argentina*, 965 F.2d 699, 707 (9th Cir. 1992).

116. *See Sabbatino*, 376 U.S. at 399; *Credit Suisse*, 130 F.3d at 1346.

117. *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 550 (E.D.N.Y. 2008).

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tee, which strictly controlled vitamin C production and set and enforced export prices.¹¹⁸ Plaintiffs responded that the defendants' actions were purely voluntary, pointing out that the defendants had failed to identify any particular laws or regulations requiring the conduct and noting that price and volume restrictions only arose after defendants achieved market power.¹¹⁹

In its analysis, the district court distinguished the three doctrines, clarifying that "the act of state doctrine is aimed at reserving for the executive branch decisions that may significantly affect international relations"¹²⁰ and ensuring that "any censure of another country's acts within its own territory is reserved to diplomatic channels and does not come within the purview of the courts."¹²¹ By contrast, the foreign sovereign compulsion doctrine:

focuses on the plight of a defendant who is subject to conflicting legal obligations under two sovereign states. Rather than being concerned with the diplomatic implications of condemning another country's official acts, the foreign sovereign compulsion doctrine recognizes that a defendant trying to do business under conflicting legal regimes may be caught between the proverbial rock and a hard place where compliance with one country's laws results in violation of another's.¹²²

Last, international comity applies only when there is a "true conflict between domestic and foreign law."¹²³ Because the parties disputed the issue of government compulsion and the factual record was insufficient on this point, the Court rejected defendants' motion to dismiss, waiting for further factual development regarding the extent to which the alleged price-fixing occurred as a matter of Chinese law or at the Chinese government's instruction.¹²⁴

C. CRIMES AGAINST HUMANITY DO NOT IMPLICATE THE ACT OF STATE DOCTRINE

In *Lizarbe v. Rondon*,¹²⁵ the District Court for Maryland denied act-of-state dismissal of a suit under the Torture Victim Protection Act and Alien Tort Claims Act alleging that the defendant engaged in crimes against humanity, war crimes, torture, and extra-judicial killings while he was a member of the Peruvian Army.¹²⁶ The court relied on three grounds. First, because the acts were "committed in violation of the norms of customary international law, [they] are not deemed official acts for the purposes of the acts [sic] of state

118. *Id.* at 553-54. Although the opinion discusses numerous state and quasi-state entities, the Ministry allegedly controls them all. *Id.*

119. *Id.* at 554.

120. *Id.* at 550.

121. *Id.*

122. *Id.* at 551.

123. *Id.* at 552 (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993)).

124. *Id.* at 559. The Chinese Ministry of Commerce submitted an amicus brief explaining that defendants were required to agree on a price for exports of vitamin C and every defendant had to abide by the agreed upon price. *Id.* at 554. Although the court accorded the brief "substantial deference," it did not take it as "conclusive evidence of compulsion." *Id.* at 557. The Court noted what it perceived to be a lack of transparency in Chinese law, and confusion as to when the defendants and the government acted. *Id.* at 559.

125. *Lizarbe v. Rondon*, 642 F. Supp. 2d 473 (D. Md. 2009).

126. *Id.* at 477-78.

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doctrine,”¹²⁷ a conclusion the Court considered confirmed by language in a U.S. Senate report concerning the Torture Victim Protection Act.¹²⁸ Second, there was little risk that adjudication would cause international friction because both the U.S. and current Peruvian governments expressly condemned the acts alleged, and the current Peruvian government denied that they were acts of state.¹²⁹ Third, the Court found that a change of regime in Peru since the alleged acts occurred makes them “less likely to implicate the act of state doctrine.”¹³⁰

D. NATURE OF A SOVEREIGN ACT QUALIFYING FOR APPLICATION OF ACT OF STATE DOCTRINE

In *In re Refined Petroleum Products Antitrust Litigation*, plaintiffs sought relief under federal antitrust laws, alleging that defendant companies assisted an antitrust conspiracy among sovereign nations, including those within OPEC, to limit the production (and raise the price) of crude oil.¹³¹ Defendants moved to dismiss on act of state grounds, among others.

In response, the Southern District of Texas followed a familiar analysis, placing the burden of proving the applicability of the act of state doctrine on the party wishing to invoke it.¹³² To apply, a party’s claim must concern the validity¹³³ of a governmental act that a recognized sovereign performs within its own borders.¹³⁴ If so, the doctrine’s predicate is satisfied, even if the defendants are private parties and not governmental actors.¹³⁵ Nevertheless, the court must evaluate whether the doctrine’s application would further its purpose and whether any exceptions exist.¹³⁶

The court held that the act of state doctrine applied to bar the action because, at their core, the plaintiffs’ antitrust claims concerned sovereign decisions about exploitation of the States’ natural resources, and these decisions are “sovereign acts regardless of whether the decisions are products of unilateral deliberations or consultations with others.”¹³⁷ Although the plaintiffs focused attention on the defendant companies’ actions alleged to further the States’ conspiracy, the Court concluded that defendants’ actions alone could not have violated the law absent an illegal conspiracy among the States.¹³⁸ The court thus

127. *Id.* at 488. The court also explained that “actions of military officers are not *ipso facto* acts of state.” *Id.* Moreover, the doctrine “does not call for abstention merely because a case may require the acts of a former foreign government official to be judged.” *Id.*

128. *Id.* at 488-89.

129. *Id.* at 489.

130. *Id.* The court reaffirmed each of these grounds in denying defendant’s motion for certification for interlocutory review under 28 U.S.C. § 1292(b). See *Lizarbe v. Rondon*, No. PJM 07-1809, 2009 U.S. Dist. LEXIS 70647 (D. Md. Aug. 12, 2009).

131. *In re Refined Petroleum Prod, Antitrust Litig.*, 649 F. Supp. 2d 572, 575-76 (S.D. Tex. 2009). This decision is currently on appeal to the U.S. Court of Appeals for the Fifth Circuit. The author submitted a brief for the United Mexican States as *amicus curiae* in both the trial and appellate courts.

132. *Id.* at 583-85.

133. *Id.* at 588.

134. *Id.* at 582.

135. *Id.* at 589.

136. *Id.* at 584.

137. *Id.* at 588.

138. *Id.* at 589.

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stressed the importance of examining the full context to assess whether the lawsuit presents a risk of declaring invalid a sovereign nation's actions.

Without deciding the existence of a commercial activity exception to the act of state doctrine, the Court declined to apply it in this case because the central alleged acts concerned sovereign decisions regarding natural resource production levels, not commercial activity.¹³⁹ The court also declined to apply a strict territorial limitation to the doctrine based on allegations that the sovereign nations may have agreed on production levels in meetings outside their own territorial boundaries because their decisions concerned sovereign matters applicable within their borders.¹⁴⁰ The court also found that the doctrine's application would further its purpose because of (1) the low degree of consensus concerning antitrust matters in international law, (2) significant implications of this issue for United States foreign relations, and (3) the continued existence of governmental regimes whose acts were challenged.¹⁴¹

In *In re Petition to Vacate an Adoption Decree, in the adoption of John Doe, Adoptee*, the New York Appellate Division's First Department declined to apply the act of state doctrine to Cambodian government statements purporting to resolve an adoption dispute between U.S. citizens domiciled in New York regarding a Cambodian child domiciled in New York.¹⁴² The Court questioned whether the doctrine applies other than to public acts of general applicability, whereas "an adoption can be characterized as an administrative act which essentially involves a matter of *private* interests."¹⁴³ The Court did not rest on this ground, but rather concluded that the government statements were not acts of state because they merely characterized prior government acts and applied them to the disputed matters in New York.¹⁴⁴ Moreover, the territorial limitation precluded the doctrine's applicability because:

The doctrine's territorial limitation requires that the doctrine apply to acts done by a foreign state within its own territory and applicable there. . . . A foreign government's act is not 'done' or 'committed' or 'taken' within its own territory simply because the government officials responsible for the act were physically located within that nation's boundaries at the time when they acted. Rather, the doctrine applies only when the subject matter of the act is located within the geographical boundaries of the foreign state.¹⁴⁵

Because the child and the parties were all located in New York, the Court found that the matter fell more appropriately within New York's, rather than Cambodia's jurisdiction.

139. *Id.* at 595-96.

140. *Id.* at 594.

141. *Id.* at 592.

142. *In re Petition to Vacate an Adoption Decree, in the adoption of John Doe, Adoptee*, 868 N.Y.S.2d 40 (1st Dept. 2008).

143. *Id.* at 46.

144. *Id.* at 47.

145. *Id.* at 48 (citations omitted). The court found potential exceptions inapplicable because the acts in question would have effect, if at all, only outside Cambodia. *See id.*

E. DETERMINING WHETHER SOVEREIGN ACTS ARE IMPLICATED

In *Interspan Distribution Corporation v. Liberty Ins. Underwriters Inc.*, the Southern District of Texas denied an act of state doctrine motion because, although the complaint involved putative government conduct, the court could adjudicate the complaint without addressing the validity of any government act.¹⁴⁶ Interspan claimed that Uzbekistan's arrest of its employee and a principal's family member conveyed a threat that their safety would be in danger unless Interspan relinquished its business and assets in Uzbekistan.¹⁴⁷ Interspan then sought to recover its losses under a previously issued Liberty insurance policy that provided coverage for extortion.¹⁴⁸ Liberty sought to invoke the act of state doctrine by arguing that the court could not decide the coverage issue without calling into question the validity of Uzbekistan's arrest of persons connected to Interspan.¹⁴⁹ The court agreed with Interspan that the act of state doctrine was not implicated because "[t]he sole focus of the inquiry is whether Interspan had an objectively reasonable belief that it was faced with a covered threat when it decided to give up its business interests and assets in Uzbekistan."¹⁵⁰

In *United States v. Portrait of Wally*, the Southern District of New York declined to apply the state action doctrine to a dispute regarding ownership of a painting.¹⁵¹ Egon Schiele's "Portrait of Wally" (Wally) was owned by a Jewish art collector, but she was forced to relinquish it to flee Nazi persecution.¹⁵² The artwork went through a number of hands and a series of approvals by various Austrian ministries before it finally became the property of the Leopold Museum.¹⁵³ When the Leopold Museum shipped the painting to the United States for display, the estate of Wally's original owner and the U.S. government moved to have it seized as stolen property under the National Stolen Property Act.¹⁵⁴ The Leopold Museum argued that the act of state doctrine applied because the court would have to consider the validity of various Austrian government approvals of the transfers of Wally's possession.¹⁵⁵ In rejecting the Museum's argument, the Court concluded that its adjudication did not risk declaring invalid any actions taken by the Austrian government, but rather would only determine the effect, if any, of such actions on the ownership of the painting.¹⁵⁶ Moreover, the court found little risk of interference with the conduct of foreign relations, noting that the U.S. Executive Branch itself sought the adjudication, and "Austrian law favors restoration of ownership."¹⁵⁷

146. *Interspan Distrib. Corp. v. Liberty Ins. Underwriters, Inc.*, No. H-07-1078, 2009 U.S. Dist. LEXIS 74236, at *114 (S.D. Tex. Aug. 21, 2009).

147. *Id.* at *75.

148. *Id.* at *76-77.

149. *Id.* at *103.

150. *Id.* at *111-12.

151. *United States v. Portrait of Wally*, No. 99 Civ. 9940 (LAP), 2009 U.S. Dist. LEXIS 91464, at *34, *39 (S.D.N.Y. Sept. 30, 2009).

152. *Id.* at *9-10.

153. *Id.* at *7-31.

154. *Id.* at *3.

155. *Id.* at *34-37.

156. *Id.*

157. *Id.* at *38.

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F. ACT OF STATE DOCTRINE AND FEDERAL SUBJECT MATTER JURISDICTION

Provincial Gov't of Marinduque v. Placer Dome Inc. was removed from state court to federal court and sought damages arising from a mining company's alleged pollution in the Philippines.¹⁵⁸ The basis for removal, sustained by the District Court of Nevada, was that the act of state doctrine applied and created federal jurisdiction.¹⁵⁹ The Ninth Circuit reversed, holding that although plaintiff's complaint "is sprinkled with references to the Philippine government, Philippine law, and the government's complicity,"¹⁶⁰ the act of state doctrine was not implicated because "none of the supposed acts of state . . . is essential to the [plaintiff's] claims"¹⁶¹ and the "complaint does not require us to pass on the validity of the Philippines' governmental actions"¹⁶² the validity of many or perhaps all of which was not disputed.¹⁶³ The Court found further support because the alleged sovereign acts were taken by a previous regime and were therefore unlikely to affect foreign relations.¹⁶⁴ Because the complaint did not present a federal question giving rise to federal jurisdiction, removal was improper, and remand to the state court was required.¹⁶⁵

V. International Discovery†

A. OBTAINING U.S. DISCOVERY FOR USE IN FOREIGN PROCEEDINGS

In 2009, U.S. federal courts elaborated on earlier jurisprudence concerning the requirements for obtaining discovery in the United States for use in foreign proceedings pursuant to 28 U.S.C. Section 1782(a).¹⁶⁶ Several court decisions analyzed the factors set out by Section 1782(a) and the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*¹⁶⁷ to determine whether to allow discovery.¹⁶⁸ The Eleventh Circuit held in *Weber v. Finker* that the scope of discovery under Section 1782(a) is not limited to documents that are

158. *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083 (9th Cir. 2009).

159. *Id.* at 1091. *See id.* at 1085 (Act of State doctrine can qualify as a basis for federal question jurisdiction "when the plaintiff's complaint challenges the validity of a foreign state's conduct.").

160. *Id.* at 1091.

161. *Id.*

162. *Id.* at 1092.

163. *Id.*

164. *Id.*

165. *Id.*

† Contributed by Howard S. Zelbo, Partner at Cleary Gottlieb Steen & Hamilton LLP in New York, New York, with assistance from Ram Murali, Ann Nee, and Catherine Barnard, associates at the same firm.

166. *See* 28 U.S.C. § 1782(a) (2009) ("The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal."). *Id.*

167. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

168. In *Intel* the Supreme Court noted three requirements for invoking section 1782(a): (1) the discovery must be sought from a person residing in the district of the court to which the application is made; (2) the discovery must be for use in a proceeding before a foreign tribunal; and (3) the applicant must be a foreign or international tribunal or an interested person. The Court also listed several discretionary factors for a court to consider, including: (1) whether the person for whom discovery is sought is a participant in the foreign proceeding; (2) the nature of the proceedings and the "receptivity" of the foreign court to U.S. federal court assistance; (3) whether the application attempts to circumvent foreign proof gathering restrictions or other policies of a foreign country; and (4) whether the request is unduly burdensome or intrusive. *Id.* at 264-65.

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actually to be used in a foreign proceeding.¹⁶⁹ The Court noted that “Section 1782 expressly provides that the district court should grant discovery under the Federal Rules of Civil Procedure,” and thus, granting discovery “for context” is permissible when such discovery is allowed under Rule 26(b)(1) of the Federal Rules of Civil Procedure.¹⁷⁰ The Northern District of California adopted a similar interpretation in *Cryolife, Inc. v. Tenaxis Med., Inc.*¹⁷¹ The Court emphasized that Section 1782(a) does not require that the party seeking discovery establish that the requested information would be discoverable in the foreign jurisdiction or that U.S. law would permit discovery in an analogous domestic proceeding.¹⁷²

Other cases focused on the underlying purposes of Section 1782(a) and expressed concern about potential forum shopping by foreign parties. The Southern District of New York in *In re OOO Promnefstroy* denied an application for discovery pursuant to Section 1782(a), finding that granting the application would give parties “an incentive, after losing in their original requests for information in the foreign tribunal, to rush to the United States in hopes of obtaining a second bite at the apple.”¹⁷³ Similarly, the Northern District of Indiana in *In re Kulzer* rejected an application for discovery, stating that Section 1782(a) “is not intended to allow unfettered access to the United States’ courts or to encourage foreign parties to ‘forum shop,’ whenever the procedures of their home tribunal are less favorable to their case.”¹⁷⁴

The controversy continued over the types of tribunals that should be included under Section 1782(a). In the past, some U.S. courts have held that private commercial arbitral bodies do not fall within the scope of tribunals to which Section 1782(a) applies.¹⁷⁵ In the years following the Supreme Court’s decision in *Intel*, a number of district courts came to the opposite conclusion.¹⁷⁶ In 2009, however, several U.S. courts once again held that private arbitration does not fall within the scope of Section 1782(a). In *El Paso Corp. v. La Comisión Ejecutiva*, the Fifth Circuit held that Section 1782(a) does not apply to discovery for use in a private international arbitration.¹⁷⁷ The Court noted that the application of

169. *Weber v. Finker*, 554 F.3d 1379 (11th Cir. 2009).

170. *Id.* at 1385.

171. *Cryolife, Inc. v. Tenaxis Med.*, No. C08-05124 HRL, 2009 WL 88348, at *4 (N.D. Cal. Jan 13, 2009) (not designated for citation).

172. *Id.* at *2; *See also In re Fischer Advanced Composite Components AG*, No. C08-1512 RSM, 2008 WL 5210839, at *2 (W.D. Wash. Dec. 11, 2008) (nothing in statute or its legislative history includes a “foreign-discoverability” rule).

173. *In re OOO Promnefstroy*, No. M 19-99 (RJS), slip op., 2009 WL 3335608, at *10 (S.D.N.Y. Oct. 15, 2009).

174. *In re Kulzer*, No. 3:09-MC-08 CAN, 2009 WL 961229, at *4 (N.D. Ind. Apr. 8, 2009), *aff’d*, 2009 WL 2058718 (N.D. Ind. July 9, 2009).

175. *See, e.g., National Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999) (holding that “tribunals” under §1782(a) are limited to government bodies); *see also Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 883 (5th Cir. 1999).

176. *See, e.g., In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 240 (D. Mass. 2008) (stating private commercial arbitral bodies are included in scope of 1782(a)); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 957 (D. Minn. 2007) (stating a private arbitral tribunal was a “tribunal” under 1782(a)); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1225-26 (N.D. Ga. 2006) (“Although Intel did not expressly hold arbitral bodies to be ‘tribunals,’ it quoted approvingly language that included ‘arbitral tribunals’ within the term’s meaning in § 1782(a).”).

177. *El Paso Corp. v. La Comisión Ejecutiva, Hidroeléctrica Del Río Lempa*, No. 08-20771, 2009 WL 2407189, at *1 (5th Cir. Aug. 6, 2009).

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Section 1782(a) to private arbitration was not at issue in *Intel*.¹⁷⁸ The Northern District of Illinois came to the same conclusion, holding that Section 1782 does not apply to discovery for use in a private arbitration conducted pursuant to arbitration provisions in a reinsurance policy.¹⁷⁹ The court interpreted the *Intel* court's reference to "arbitral tribunals" as "including state-sponsored arbitral bodies but excluding purely private arbitrations."¹⁸⁰ Similarly, the Middle District of Florida held that Section 1782(a) "does not authorize discovery relief in a proceeding such as [private arbitration], which functions as a contractual alternative to state-sponsored [tribunals]."¹⁸¹ The District Court for the District of Connecticut also addressed the types of tribunals that should be included under Section 1782(a) in *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*¹⁸² The court held that the arbitration panel in that case was a "foreign tribunal" within the meaning of Section 1782(a) for two reasons: first, the Court accepted the argument that it was not a purely private tribunal because the arbitration was governed by the UNCITRAL rules of arbitration and, second, according to the court, the arbitration award could be reviewed on the merits by a Swedish court on appeal.¹⁸³

Finally in 2009, courts applied Section 1782(a) in the context of family law. In *Kwong Mei Lan Mirana v. Battery Tai-Shing Corp.*, the Northern District of California granted a motion to compel production of documents, concluding that information related to a spouse's share of ownership of companies was relevant to a Hong Kong divorce proceeding.¹⁸⁴ Conversely, in *In re Marano*, the Court denied a discovery application for use in a British divorce proceeding, where the document requests were "overly broad and unduly burdensome."¹⁸⁵ In another case, *In re Letter of Request From Dist. Court Stara Lubovna*, the U.S. government filed an application, pursuant to Section 1782(a), for an order compelling a party to provide a blood or DNA sample to determine the paternity of a minor child.¹⁸⁶ The court granted the application, finding that it satisfied the requirements of Section 1782(a).¹⁸⁷

B. OBTAINING DISCOVERY FROM ABROAD FOR USE IN U.S. PROCEEDINGS

In 2009, several U.S. courts applied the discretionary factors in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa* in evaluating requests for discovery of information located abroad for use in U.S. proceedings.¹⁸⁸ One

178. *Id.* at *3.

179. *In re Arbitration in London*, 626 F. Supp. 2d 882, 882 (N.D. Ill. 2009).

180. *Id.* at 885.

181. *In re Operadora DB Mex.*, No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *12 (M.D. Fla. Aug. 4, 2009).

182. *See generally* *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, No. 3:09 MC 265(JBA), 2009 WL 2877156 (D. Conn. Aug. 27, 2009).

183. *Id.* at *4.

184. *See* *Kwong Mei Lan Mirana v. Battery Tai-Shing Corp.*, No. C 08-80142 MISC. JF (RS), 2009 WL 290459, at *4 (N.D. Cal. Feb. 5, 2009).

185. *In re Marano*, No. CV-09-80020-MISC-DLJ, 2009 WL 482649, at *3 (N.D. Cal. Feb. 25, 2009).

186. *See In re Letter of Request From Dist. Court Stara Lubovna*, No. 3:09-MC-20-34 MCR, 2009 WL 3711924, at *1 (M.D. Fla. Nov. 5, 2009).

187. *Id.* at *3.

188. *See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 539 (1987) (stating the Hague Convention is not the exclusive means for obtaining evidence located

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bankruptcy case, *In re Global Power Equip. Group Inc.*, allowed discovery under the Federal Rules rather than via the Hague Convention.¹⁸⁹ The debtor in that case sought discovery from a Dutch company claimant of information held by the claimant's affiliate in France.¹⁹⁰ The Dutch company argued it could not produce the information under French law except in accordance with the Hague Convention.¹⁹¹ The Court allowed discovery under the Federal Rules, however, holding that the French interest was "particularly attenuated" where the producing party was not a French national, the discovery was regarding a project taking place outside France, and the information was mostly developed outside France.¹⁹²

In another case, the Southern District of New York conducted a comity analysis using the factors in *Aérospatiale* in a situation involving discovery of information not located abroad.¹⁹³ The Court granted plaintiffs' motion to compel discovery from a U.S. auditing firm of documents in the United States generated in an investigation where the U.S. firm was hired as an expert by French statutory auditors.¹⁹⁴ The Court held that, even though two French courts had determined that French law barred production of the requested documents, France's interest in enforcing its laws was weaker as to non-nationals in the United States.¹⁹⁵ Further, the Court observed that the French statutory auditors' expectation of maintaining the files' secrecy may not have been reasonable in light of their "purposeful availment" of a U.S. auditing firm.¹⁹⁶

In a case concerning discovery requests under the Hague Convention, the Eastern District of Texas declined to issue a Letter of Request where defendants sought to compel "broad discovery from an agent or agency of a sovereign nation," which was "not something [the] court would lightly undertake."¹⁹⁷ Similarly, the Southern District of Florida held that courts should give "serious consideration to the availability of alternate sources"

abroad); Restatement (Third) of Foreign Relations Law § 442(1)(c) (1987) (setting out five factors courts should take into account when deciding whether to issue an order of production of information located abroad: "[1] the importance to the . . . litigation of the documents or other information requested; [2] the degree of specificity of the request; [3] whether the information originated in the United States; [4] the availability of alternative means of securing the information; and [5] the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine the important interests of the state where the information is located"). Courts in the Second Circuit also consider "the hardship of compliance on the party or witness from whom discovery is sought [and] the good faith of the party resisting discovery." See *Minpeco S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 523 (S.D.N.Y. 1987).

189. *In re Global Power Equip. Group Inc.*, 418 B.R. 833, 836 (Bankr. D. Del. 2009).

190. *Id.*

191. *Id.* at 839.

192. *Id.* at 849-50; see also *Schindler Elevator Corp. v. Otis Elevator Co.*, No. 09-cv-560 (DMC), 2009 WL 3069651, at *4, *7 (D.N.J. Sept. 24, 2009) (authorizing the U.S.-sited deposition of a foreign party under the Federal Rules where the deposition was focused on the "crucial threshold issue of jurisdiction" to be decided "as soon as possible," and the foreign party deponent had waived any objection to such a deposition by submitting a declaration in support of a motion to dismiss under the Federal Rules).

193. *In re Vivendi Universal, S.A. Sec. Litig.*, 618 F. Supp. 2d 335, 341 (S.D.N.Y. 2009).

194. *Id.* at 338, 343.

195. *Id.* at 341-42.

196. *Id.*

197. *Seoul Semiconductor Co. Ltd. v. Nichia Corp.*, 590 F. Supp. 2d 832, 836-37 (E.D. Tex. 2008).

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of evidence and declined to issue Letters of Request where the evidence sought was likely to yield mostly, if not entirely, duplicative information.¹⁹⁸

In the criminal context under Rule 15 of the Federal Rules of Criminal Procedure, the Eastern District of Virginia analyzed the requirements for ordering a foreign deposition and found that the defendant had not “adequately established that exceptional circumstances exist to warrant [the depositions], and so letters rogatory should not issue requesting Nigerian judicial officials’ assistance in obtaining their depositions.”¹⁹⁹ The Court, however, construed defendant’s motion for authorization of depositions as containing a “lesser included motion” for judicial assistance in obtaining further information relating to the Rule 15 requirements and issued a Letter Rogatory to request such information.²⁰⁰

Finally, in a case involving the Walsh Act,²⁰¹ the Northern District of California granted the Securities and Exchange Commission’s request for a subpoena compelling a U.S. citizen abroad to attend a deposition in the United States.²⁰² The Court held that the intended deponent was a critical witness with otherwise unavailable information and that his physical presence in the United States was necessary to protect the discovery rights of the Securities and Exchange Commission, which had already in other instances been “inappropriately thwarted.”²⁰³

VI. Extraterritorial Application of United States Law†

In determining the appropriateness of applying U.S. law extraterritorially, courts look to the *Restatement (Third) of the Foreign Relations Law of the United States*. The Restatement allows a state to exercise prescriptive jurisdiction where the conduct in question “has or is intended to have substantial effect within its territory.”²⁰⁴ Courts should consider the following factors in determining whether extraterritorial jurisdiction is reasonable: (1) the extent of the domestic effect of the conduct; (2) the connections between the United States and the persons engaging in the conduct in question; (3) the character of the conduct and the extent to which it is regulated elsewhere; (4) whether justified expectations exist and are protected; (5) the importance of the regulation internationally; (6) consistency with international custom; (7) the interests of other States in regulating the conduct;

198. *Calixto v. Watson Bowman Acme Corp.*, No. 07-60077-CIV, 2009 WL 3823390, at *21 (S.D. Fla. Nov. 16, 2009).

199. *United States v. Jefferson*, 594 F. Supp. 2d 655, 675 (E.D. Va. 2009).

200. *Id.*; see also *Brake Parts, Inc. v. Lewis*, No. 09-132-KSF, 2009 WL 1939039, at *3-4, *6 (E.D. Ky. July 6, 2009) (granting plaintiff’s request for a Letter Rogatory against a non-party because the non-party failed to demonstrate that plaintiff’s request exceeded the low threshold under the Federal Rules of being likely to lead to discovery of admissible evidence, and there was no requirement for plaintiff first to seek the requested discovery from defendant).

201. 28 U.S.C.A. § 1783(a) (2009) (permitting court to order issuance of a subpoena to American citizen located outside of the United States where testimony sought “is necessary in the interest of justice” and, in a non-criminal proceeding, “it is not possible to obtain his testimony in admissible form without his personal appearance”).

202. *SEC v. Sabhlok*, No. C 08-4238 CRB (JL), 2009 WL 3561523, at *1, *8 (N.D. Cal. Oct. 30, 2009).

203. *Id.* at *4.

† Contributed by Karen Woody, attorney at Bracewell & Giuliani LLP.

204. *Restatement (Third) of Foreign Relations* § 402(1)(c) (1987).

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and (8) whether the regulation would create a conflict with the laws of a foreign jurisdiction.²⁰⁵

In the past year, U.S. courts have applied these principles to a wide variety of areas, and in particular, have considered extraterritoriality in disputes involving criminal statutes and the Alien Tort Claims Act.

A. CRIMINAL STATUTES

In *United States v. Lloyds TSB Bank PLC*, the Southern District of New York held that the Court lacked extraterritorial jurisdiction over the Swiss branch of a British bank in an action brought for alleged violations of the Money Laundering Control Act (MLCA).²⁰⁶ Lloyds TSB Bank (the Bank) is organized under the laws of the United Kingdom and maintained a branch in Geneva, Switzerland. Two individual citizens of Cyprus, both officers in AremisSoft Corporation, a Delaware corporation, executed a widespread fraud scheme, resulting in a loss of \$500 million to AremisSoft shareholders, using accounts at the Bank's Geneva branch.²⁰⁷ The U.S. Attorney brought an action for a civil monetary remedy against the Bank, asserting that the Bank violated the MLCA.²⁰⁸ The complaint alleged that the Bank and one of the AremisSoft officers engaged in transactions to promote fraud and should be held liable for conspiracy. The Bank argued that the U.S. Government lacked subject matter jurisdiction to bring an action against it. The Court, in analyzing whether the Bank was a proper party, noted that Congress expressed its intent for the MLCA to apply extraterritorially in limited circumstances if the conduct at issue is by a U.S. citizen or occurs in part in the United States.²⁰⁹ The Court concluded that the MLCA did not create extraterritorial jurisdiction, and any exercise of that jurisdiction would be unreasonable.²¹⁰

In *United States v. Martinez*, defendant Martinez kidnapped a fifteen-year-old minor in Texas and took her to Mexico where he engaged in sexual activity with her.²¹¹ Martinez argued that the Western District of Texas lacked jurisdiction because the underlying alleged sex acts occurred in Mexico. Martinez challenged the court's jurisdiction over the charge of "engaging in illicit sexual activity in foreign places," in violation of 18 U.S.C. Section 2423(c).²¹² The Court disagreed, stating that the legislative authority extends to conduct by Americans abroad, that both defendant and the victim are American citizens, and that Congress intended the statute to apply extraterritorially.²¹³ Martinez argued that extraterritorial application of the U.S. law was unreasonable because the age of consent in Mexico is twelve, rather than eighteen. The Court rejected Martinez's argument and held that Section 2423 withstood scrutiny under the principles of international law and the reasonableness standard applied to extraterritorial jurisdiction.²¹⁴ Specifically, the Court

205. *Id.* § 403(2).

206. *United States v. Lloyds TSB Bank PLC*, 639 F. Supp. 2d 314, 314 (S.D.N.Y. 2009).

207. *Id.* at 315.

208. *Id.* at 316.

209. *Id.* at 316-17.

210. *Id.* at 324.

211. *United States v. Martinez*, 599 F. Supp. 2d 784, 790-91 (W.D. Tex. 2009).

212. *Id.* at 792, 796.

213. *Id.* at 797, 800.

214. *Id.*

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stated that the law of Mexico was not relevant given the nationalities of the parties and that the act in question was not consensual sex, but forced sex, which is also illegal in Mexico.²¹⁵ For these reasons, the Court determined that the extraterritorial application of the statute was appropriate.

B. ALIEN TORT CLAIMS ACT

The following case involved an analysis of extraterritorial application of the Alien Tort Claims Act. In *Sarei v. Rio Tinto P.L.C.* (Rio Tinto V),²¹⁶ a case that had been discussed in the 2007 Year in Review,²¹⁷ the Central District of California considered whether aliens who had virtually no connection with the United States could sue a foreign international mining group for violations of international law in connection with the operation of a copper mine. The Court held that because the plaintiffs established only a weak nexus between their claims and the United States, the Court should consider prudential exhaustion before applying jurisdiction.²¹⁸ After considerable review, the Court determined that the plaintiffs adequately stated claims that the mining group had violated international laws, the Geneva Convention, and crimes against humanity.²¹⁹ The Court concluded that the prudential exhaustion requirement of the Alien Tort Claims Act was not appropriate and that plaintiffs could bring their case for crimes against humanity, war crimes, and racial discrimination claims, despite their weak nexus with the United States.²²⁰

In the case of *In re South African Apartheid Lit.*, in which individuals who suffered damages as a result of crimes of apartheid in South Africa brought claims against multinational corporations who did business in apartheid South Africa, the Southern District of New York rejected the defendants' claim that the court lacked jurisdiction.²²¹ The defendants claimed that the court could not address torts stemming from extraterritorial events. The court disagreed, noting that the Alien Tort Claims Act is a jurisdictional provision that applies "universal norms that forbid conduct regardless of territorial demarcations or sovereign prerogatives."²²² The court also noted that the Alien Tort Claims Act is not limited by the locus of the injury, and therefore the court had the authority to hear claims for torts committed abroad.²²³

215. *Id.* at 801-802.

216. *Sarei v. Rio Tinto, PLC*, 650 F. Supp. 2d 1004, 1004 (C.D. Cal. 2009).

217. Jennifer Toole et al., *International Litigation*, 41 INT'L LAW. 329, 350 (2007).

218. *Rio Tinto*, 650 F. Supp. 2d at 1020.

219. *Id.* at 1023.

220. *Id.* at 1030-31.

221. *South African Apartheid Litig. v. Daimler*, 617 F. Supp. 2d 228, 247 (S.D.N.Y. 2009).

222. *Id.* at 246.

223. *Id.* at 247.

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VII. Enforcement of Foreign Arbitral Awards and Judgments†

A. INTRODUCTION

In U.S. courts, recognition and enforcement of foreign arbitral awards and foreign court judgments are governed by two distinct regimes. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)²²⁴ governs the recognition and enforcement of foreign arbitral awards and is implemented in U.S. law through Chapter Two of the Federal Arbitration Act (FAA).²²⁵ The New York Convention applies to awards “made in the territory” of a State other than the enforcing State and to awards “not considered as domestic awards” in the enforcing State.²²⁶ State law, however, governs the recognition and enforcement of foreign court judgments. Many states have adopted the Uniform Foreign Money-Judgments Recognition Act, which is based upon the comity principles expressed in *Hilton v. Guyot*.²²⁷ In states that have not enacted such a statute, courts generally apply the *Hilton* principles as a matter of common law.

On January 19, 2009, the United States signed the Convention on Choice of Court Agreements, which was concluded by the Hague Conference on Private International Law on June 30, 2005. The Convention seeks to “provide certainty and ensure the effectiveness of exclusive choice of court agreements between parties to commercial transactions”²²⁸ Under this Convention, exclusive choice of court agreements require the chosen court or courts of a contracting state to exercise jurisdiction and hear the parties’ dispute “unless the agreement is null and void under the law of that State.”²²⁹ Additionally, a non-chosen court in a contracting state must both decline jurisdiction to hear the parties’ dispute, subject to certain exceptions,²³⁰ and recognize and enforce judgments issued by the chosen court, also subject to certain exceptions.²³¹ The United States has not yet ratified this Convention.

† Contributed by Neale H. Bergman, Attorney-Adviser, Office of the Legal Adviser, United States Department of State, with special thanks to Alicia Cate, Attorney-Adviser, Office of the Legal Adviser, United States Department of State. The views expressed are those of the author and not necessarily those of the Department of State or the U.S. Government.

224. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

225. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208 (2009).

226. New York Convention, *supra* note 224, art. I(1); *see also* Inter-American Convention on International Commercial Arbitration, June 16, 1976, 1438 U.N.T.S. 245 [hereinafter Panama Convention], governing the recognition and enforcement of foreign arbitral awards among member-States of the Organization of American States who are party and implemented in U.S. law through Chapter 3 of the FAA. 9 U.S.C. §§ 301-307. For disputes involving parties to arbitration from States party to the Panama Convention, that Convention applies to the exclusion of the New York Convention. *Id.* § 305.

227. *Hilton v. Guyot*, 159 U.S. 113 (1885).

228. Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

229. *Id.* art. 5.

230. *Id.* art. 6.

231. *Id.* arts. 8-9.

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B. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

1. *Non-Statutory Grounds for Vacatur and Modification of Arbitral Awards*

Since the U.S. Supreme Court's holding last year in *Hall St. Assoc, L.L.C. v. Mattel Inc.*²³² that "§§ 10 and 11 provide exclusive regimes for the review provided by the [FAA],"²³³ a number of U.S. Courts of Appeal have considered whether manifest disregard of the law remains a viable ground for vacatur under the FAA.

In *Ramos-Santiago v. United Parcel Serv.*,²³⁴ the First Circuit held that an arbitral award finding that an employee had been properly terminated was not issued in manifest disregard of the law. Because the parties had not invoked the FAA's expedited review provisions and the original action was brought "in Puerto Rico state court under a mechanism provided by state law," the court did not address whether *Hall St.* precluded consideration of manifest disregard of the law.²³⁵ But the court did acknowledge in dicta that, because of *Hall St.*, manifest disregard "is not a valid ground for vacating or modifying an arbitral award in cases brought under the [FAA]."²³⁶

In *Comedy Club, Inc. v. Improv West Assoc.*,²³⁷ the Ninth Circuit reconsidered its application of manifest disregard, on remand from the Supreme Court, to vacate an arbitral award arising from a trademark dispute. The Court determined that *Hall St.* did not undermine its prior precedent in *Kyocera Corp. v. Prudential-Bach Trade Serv.*²³⁸ Similar to the Second Circuit in *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*,²³⁹ the Court concluded that manifest disregard was actually shorthand for Section 10(a)(4) of the FAA.²⁴⁰

In *Citigroup Global Mkt, Inc. v. Bacon*,²⁴¹ the Fifth Circuit, in vacating and remanding the district court's vacatur of an arbitral award concerning a dispute over unauthorized bank account withdrawals, held that manifest disregard of the law was no longer a valid independent ground for vacatur. In reaching this conclusion, the Court criticized the Sixth Circuit's decision in *Coffee Beanery, Ltd. v. WW, L.L.C.*²⁴² for failing to address *Hall St.*'s holding that Section 10 of the FAA provides the exclusive grounds for vacatur by narrowly

232. *Hall St. Assoc. L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

233. *Id.* at 588-91. In so holding, the Court, considering whether parties could supplement the grounds for judicial review by contract, rejected Hall Street's argument that the grounds for vacatur set out in § 10 of the FAA were not exclusive because manifest disregard of the law had also been recognized as one. *Id.* at 583-87. However, the Court did not specifically address the significance of its holding for vacatur and modification of non-domestic arbitral awards governed by the New York Convention or the Panama Convention in U.S. courts. For further discussion of last year's *Hall Street* decision, see Cameron Holland, *International Litigation*, 43 INT'L LAW. 505, 531 (2009).

234. *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 126 (1st Cir. 2009).

235. *Id.* at 125 n.3.

236. *Id.*

237. *Comedy Club, Inc. v. Improv West Assoc.*, 553 F.3d 1277 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 145 (2009).

238. *Id.* at 1290 (quoting *Kyocera Corp. v. Prudential-Bache T Servs.*, 341 F.3d 987, 997 (9th Cir. 2003) (stating that *Kyocera* held that "arbitrators 'exceed their powers' when the award is 'completely irrational' or exhibits a 'manifest disregard of the law.'")).

239. *Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 553 F.3d 1277 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 145 (2009).

240. *Comedy Club*, 553 F.3d at 1290 ("manifest disregard of the law . . . is part of § 10(a)(4).").

241. *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009).

242. *Coffee Beanery, Ltd. v. Williams*, 300 F. App'x. 415 (2008), *cert. denied*, 130 S.Ct. 81 (2009).

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construing it to apply “only to contractual expansions of the grounds for vacatur.”²⁴³ The Court did not criticize the holdings in *Stolt-Nielsen* or *Comedy Club* that manifest disregard fell under Section 10(a)(4) of the FAA, but stated that *Stolt-Nielsen*’s “description of manifest disregard is very narrow.”²⁴⁴ Ultimately, the Court declared that, “from this point forward, arbitration awards under the FAA may be vacated only for reasons provided in § 10.”²⁴⁵

2. *Foreign States Are Not Entitled to Rights under the Due Process Clause*

In *Frontera Res. Azerbaijan Corp. v. State Oil Co. Azerbaijan*,²⁴⁶ an important decision for foreign governments and instrumentalities involved in recognition and enforcement actions, the Second Circuit held that foreign states are not entitled to the rights of “persons” under the Due Process Clause.²⁴⁷ In 2006, a Swedish arbitral tribunal awarded Frontera, a Caymanian corporation, roughly US\$1.24 million plus interest, arising from its oil payment dispute with the State Oil Company of the Azerbaijan Republic (SOCAR).²⁴⁸ Soon after, the Southern District of New York dismissed Frontera’s enforcement action for lack of personal jurisdiction, holding that SOCAR had insufficient contacts with the United States by reluctantly applying the due process analysis in *Texas Trading & Milling Corp. v. Nigeria*²⁴⁹ and declining to find quasi in rem jurisdiction over SOCAR because Frontera had failed to identify specific SOCAR assets within the court’s jurisdiction.²⁵⁰

Reviewing the dismissal *de novo*, the Second Circuit first rejected Frontera’s personal jurisdiction argument²⁵¹ and then turned to Frontera’s contention that foreign states and their instrumentalities should not be entitled to Due Process Clause protections. Acknowledging that case law had evolved since *Texas Trading*,²⁵² the Court read the U.S. Supreme Court’s decision in *Argentina v. Weltover, Inc.*²⁵³ to imply that foreign states should not enjoy due process protections because “States of the Union” do not.²⁵⁴ The Court was also persuaded by the D.C. Circuit’s reasoning in *Price v. Libya*,²⁵⁵ which declared that foreign sovereigns should not receive more favorable treatment than “States of

243. *Citigroup Global Mkts.*, 562 F.3d at 356.

244. *Id.* at 356-58. The Fifth Circuit also noted the First Circuit’s rejection of manifest disregard in dicta in *Ramos-Santiago*. *Id.* at 355.

245. *Id.* at 358.

246. *Frontera Resources Azerbaijan Corp.*, 582 F.3d at 395.

247. *Id.* at 399.

248. *Id.* at 395.

249. *Tex. Trading and Milling Corp. v. Nigeria*, 647 F.2d 300 (2d Cir. 2009).

250. *Fontera*, 582 F.3d at 395.

251. In rejecting Frontera’s argument that the district court’s dismissal unnecessarily relied upon personal jurisdiction, the Second Circuit pointed out that the district court had also analyzed whether it had quasi in rem jurisdiction over any SOCAR property. *Id.* at 396-98. Then, the Court declared that the New York Convention limits the types of challenges to confirmation, but “does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought.” *Id.* at 397.

252. According to the Court, *Texas Trading* held that a foreign state qualified as a “person” under the Due Process Clause and that to assert jurisdiction a court must both comply with the Foreign Sovereign Immunity Act, 28 U.S.C. § 1608(a), and conduct a minimum contacts due process analysis. *Fontera*, 582 F.3d at 398.

253. *Argentina v. Weltover*, 504 U.S. 607, 619 (1992).

254. *Fontera*, 582 F.3d at 398.

255. *Price v. Libya*, 294 F.3d 82, 96 (D.C. Cir. 2002).

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the Union” under the Due Process Clause absent compelling circumstances.²⁵⁶ In holding that foreign states do not qualify as “persons” under the Due Process Clause and thus overruling that aspect of *Texas Trading*,²⁵⁷ the Court still considered whether SOCAR should have due process rights as an instrumentality even though Azerbaijan was not entitled to them. To make this determination, the Court called for application of the U.S. Supreme Court’s framework in *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, which presumed that government instrumentalities established as distinct entities are entitled to be treated as such unless the state exercises such extensive control that either an agency relationship is formed or adherence to the corporate form would result in injustice.²⁵⁸ On remand, the Court directed the district court to consider whether SOCAR was an agent of Azerbaijan under the *Bancec* framework, and if not, whether SOCAR qualified for due process protections.²⁵⁹

C. RECOGNITION AND ENFORCEMENT OF FOREIGN COURT JUDGMENTS

1. *Non-Enforcement of a Petition under the Hague Convention on International Child Abduction for Clear Misinterpretation of the Convention, Departure from Its Fundamental Premises, or Failure to Meet a Minimum Standard of Reasonableness*

In *Asvesta v. Petroutsas*,²⁶⁰ the Ninth Circuit refused to enforce a Greek court’s order under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention),²⁶¹ a decision with potentially significant ramifications due to the Hague Convention’s reliance on comity. As noted by the Court, the Hague Convention seeks to promptly return any child “wrongfully removed to or retained in any Contracting State” and “to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”²⁶² To do so, the Convention is implicitly based upon the principle that consideration of custody rights “should take place before the competent authorities in the State where the child had its habitual residence prior to its removal.”²⁶³ Under the Convention, courts shall promptly order the return of a wrongfully removed or retained child if, upon the commencement of proceedings, less than one year has passed since the removal or retention, subject to certain exceptions.²⁶⁴

256. *Fontera*, 582 F.3d at 399 (quoting *Price*, 294 F.3d at 96).

257. *Id.*

258. *Id.* at 400.

259. *Id.* at 401.

260. *Asvesta v. Petroutsas*, 580 F.3d 1000 (9th Cir. 2009).

261. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 49. It was implemented in U.S. law through the International Child Abduction Remedies Act, 42 U.S.C. § 11601 (2009) [hereinafter ICARA]. Both the United States and Greece are signatories to the Convention. Acceptances of Accessions, Nov. 11, 2009, http://www.hcch.net/upload/abductoverview_e.pdf.

262. *Asvesta*, 580 F.3d at 1003 (quoting Hague Convention, art. 1).

263. *Id.* at 1003-04 (quoting Elisa Pérez-Vera, Hague Conference on Private International Law 428-29, ¶ 13 (1982)) [hereinafter Pérez-Vera Report].

264. *Id.* at 1004 (quoting Hague Convention, art. 12). Under Article 3, a wrongful removal or retention occurs when there is a breach of custody rights under the law of the child’s habitual residence and those rights were exercised and would continue to be exercised but for the removal or retention. *Id.* (quoting Hague

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As George Petroutsas and Despina Asvesta's marriage unraveled, he sent her an email stating, "[g]o to Greece with the child and we will see how I will come to Greece to visit him," and he subsequently consented in writing to Asvesta's taking the child to Greece for a month.²⁶⁵ Not long after Asvesta left with the child, Petroutsas filed for divorce and sought custody in California. When the California court granted custody to Petroutsas, Petroutsas filed a Hague Convention petition, which was submitted to the Piraeus One-Member Court of First Instance (Greece's Hague Court). Greece's Hague Court concluded that the child's removal from the United States had not been "illegal" and rejected the petition on grounds that: (1) Petroutsas had consented, (2) he had not been exercising custody due to his indifference to his familial obligations, and (3) that the child's return to the United States would expose him to "a severe danger" of "mental tribulation."²⁶⁶ Nevertheless, Petroutsas took the child and fled from Greece to California. Based on the Greek custody order, Asvesta filed a Hague Convention petition in the Northern District of California. Although the district court was troubled by the improper considerations of Greece's Hague Court, "[t]he district court granted Asvesta's Hague petition and ordered the child returned" with a stay pending appeal.²⁶⁷ Petroutsas appealed, arguing that Greece's Hague Court improperly evaluated the merits of the California court's custody order and made unsupported findings.²⁶⁸

On appeal, the Ninth Circuit acknowledged that, because the ICARA expressed "the need for uniform international interpretation of the Convention,"²⁶⁹ it would consider decisions from other federal and state courts, as well as courts of other contracting states.²⁷⁰ The Court began its Hague Convention analysis, pursuant to *Hilton v. Guyot*,²⁷¹ "with an inclination to accord deference to' a foreign court's"²⁷² Hague petition, yet pointed out that the Second Circuit in *Diorinou v. Mezitis*,²⁷³ the Third Circuit in *Carrascosa v. McGuire*,²⁷⁴ and the Ontario Court of Appeal in *Pitts v. De Silva*²⁷⁵ all considered

Convention, art. 3). Article 13 provides certain exceptions to prompt return where (1) the petitioner had not been exercising custody rights, consented, or subsequently acquiesced to the removal or retention, or (2) if there is a "grave risk" of "expos[ing] the child to physical or psychological harm" or of putting the child in an "intolerable situation." *Id.* (quoting Hague Convention, arts. 13(a)-(b)). With respect to these exceptions, the U.S. Department of State has advised that those negotiating the Convention "were aware that any exceptions had to be drawn very narrowly lest their application undermine the express purposes of the Convention . . ." *Id.* (quoting Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. at 10509). *See also id.* (quoting Pérez-Vera Report at 435 ("[A] systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.")).

265. *Id.* at 1005.

266. *Id.* at 1007.

267. *Id.* at 1010.

268. *Id.*

269. *Id.* at 1009 (quoting 42 U.S.C. § 11601 (2009)).

270. *Id.* (citations omitted).

271. *Hilton v. Guyot*, 159 U.S. 113 (1895).

272. *Asvesta*, 580 F.3d at 1011.

273. *Diorinou v. Mezitis*, 237 F.3d 133 (2d Cir. 2001). According to the Court, the Second Circuit in *Diorinou* ultimately extended comity to Greece's Hague petition there because, despite "dubious determinations regarding Article 13 exceptions," "the Greek court's finding that the mother['s]" retention of the child in Greece was not wrongful was "entirely supportable." *Asvesta*, 580 F.3d at 1012.

274. *Carrascosa v. McGuire*, 520 F.3d 249 (3d Cir. 2008).

275. *Pitts v. De Silva*, C46740, O.J. 36 (O.N.C.A. Jan. 10, 2008).

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the merits of the foreign court's Hague Convention determinations. Despite recognizing that examination of the merits of another State's Hague Convention findings could undermine the Convention because "its success relies upon the faithful application of its provisions," the Court concluded that it could properly refuse to extend comity if Greece's Hague Court "clearly misinterprets the Hague Convention, contravenes the Convention's fundamental premises or objectives, or fails to meet a minimum standard of reasonableness."²⁷⁶

The Court then criticized Greece's Hague Court for focusing on irrelevant issues²⁷⁷ and failing to conduct the structured and objective analysis required by Convention.²⁷⁸ Assuming that the Greek court denied Petroutsas' petition because he failed to show wrongful retention, the Court found that the Greek court erred not only for failing to determine the child's habitual residence, but also for finding that Petroutsas was not exercising custody rights.²⁷⁹ It concluded that Petroutsas' failure to show wrongful retention "resulted from a clear misapplication" of the Hague Convention.²⁸⁰ Concerning the consent exception, the Court examined Petroutsas' email and subsequent written consent for temporary travel²⁸¹ and determined that the finding of "indefinite" consent was "unreasonable."²⁸² Concerning the grave risk of harm exception, the Court criticized the Greek court for "stepp[ing] out of its role as a Hague Convention tribunal by inquiring into the best interests of the child" and held that its broad determination of grave risk "contravened the intent of the Convention's drafters."²⁸³ Because the Greek court's decision was "so egregious," the Court reversed the district court's extension of comity and remanded for reconsideration of Asvesta's Hague Convention petition and determination of the child's habitual residence.²⁸⁴

2. *Violation of International Concept of Due Process Mandates Non-Enforcement of Judgment*

In *Osorio v. Dole Food Co.*,²⁸⁵ the Southern District of Florida refused to enforce a ninety-seven million dollar Nicaraguan judgment under the Florida Uniform Out-of-Country Foreign Money-Judgments Recognition Act (FRA)²⁸⁶ because, among other reasons and of significance for future enforcement actions, the judgment was held to violate the "international concept of due process." The Nicaraguan judgment concerned 150 Nicaraguan plaintiffs who were alleged "to have worked on banana plantations in Nicaragua between 1970 and 1982" where they were exposed to dibromochloropropane (DBCP), a pesticide banned for links to sterility in the United States in 1977 and in Nica-

276. *Asvesta*, 580 F.3d at 1013-14.

277. *Id.* at 1016 (highlighting focus of Greece's Hague court on Petroutsas' "alleged infidelity, failure to be the sole bread-winner . . . and refusal to speak to Asvesta in the last months of their marriage"). *Id.*

278. *Id.*

279. *Id.* at 1017. The Ninth Circuit noted the importance of a habitual residence finding, because it is the law of the State of habitual residence that governs custody rights determinations, violations of those rights, and whether those rights were exercised. *Id.*

280. *Id.* at 1019.

281. *O'Bryan*, 556 F.3d at 387-88.

282. *Asvesta*, 580 F.3d at 1019-20.

283. *Id.* at 1020-21.

284. *Id.* at 1021.

285. *Osorio v. Dole Food Co.*, No. 07-22693-CIV, 2009 WL 3398931, at *1 (S.D. Fla. 2009).

286. *Id.* (citing Fla. Stat. §§ 55.601-55.607 (2009)).

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ragua in 1993.²⁸⁷ Plaintiffs were awarded about \$647,000 each from Dole and Dow Chemical for exposure to DBCP, for DBCP-induced sterility, and for related psychological effects under Nicaragua's Special Law 364.²⁸⁸

While an appeal was still ongoing in Nicaragua, the plaintiffs sought to enforce their judgment in a Florida state court, but the defendants removed it to federal court.²⁸⁹ The defendants argued four grounds for non-recognition under the FRA: (1) the Nicaraguan court lacked either personal or subject matter jurisdiction or both under Special Law 364, (2) Nicaragua did not follow procedures that comported with due process of law, (3) enforcement would violate public policy, and (4) Nicaragua's judicial system lacked impartial tribunals.²⁹⁰ Ultimately, the Court found that the defendants "established multiple, independent grounds under the [FRA] that compel non-recognition" of the judgment.²⁹¹

In reaching this decision, the Court first provided an overview of DBCP cases. The first cases were consolidated and dismissed on forum non conveniens grounds in *Delgado v. Shell Oil Co.*,²⁹² which prompted the passage of Special Law 364 in Nicaragua.²⁹³ In 2003 and 2005, two other related enforcement actions failed in California.²⁹⁴ In 2005, a group of DBCP defendants, including Dow, failed to obtain an injunction on due process grounds against enforcement of Nicaraguan judgments because of a lack of personal jurisdiction over the plaintiffs.²⁹⁵ The court also described three recent cases brought directly by Nicaraguan plaintiffs in California court, two of which were dismissed with prejudice for fraud,²⁹⁶ and the third, in which damages had already been awarded, was recently remanded for consideration of the fraud findings in the other two.²⁹⁷

After providing more factual background on Special Law 364 and the *Osorio v. Dole Food Co.* litigation in Nicaragua, the Court turned to the defendants' objections. First, the Court found that the Nicaraguan trial court did not have either subject matter or personal jurisdiction over the defendants, as required by the FRA,²⁹⁸ because they had opted out of

287. *Id.* at *11.

288. *Id.* at *1.

289. *Id.* at *1, *10.

290. *Id.* at *11.

291. *Id.* at *41.

292. *Id.* at *1 (citing *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1362 (S.D. Tex. 1995) (finding that Nicaragua was the appropriate forum for Nicaraguan plaintiffs)).

293. *Id.* Special Law 364 was designed to deal with DBCP claims and was passed in 2000. Although most cases are still pending, the Court noted that Nicaraguan courts have already awarded over \$2 billion and that in *Herrera Rios v. Standard Fruit Co.*, a sister case in Nicaragua to the one before the court, the same trial judge awarded 1248 plaintiffs roughly \$648,000 each, totaling about \$800 million. *Id.*

294. *Id.* at *2 (citing *Franco v. Dow Chemical Co.*, No. CV 03-5094 NM (PJWx), slip op. at 7-16 (C.D. Cal. Oct. 21, 2003) (failing on technical and jurisdictional grounds); *Shell Oil Co. v. Franco*, No. CV 03-8846 (PJWx) (C.D. Cal. Nov. 10, 2005) (failing because Nicaraguan court lacked personal jurisdiction).

295. *Shell Oil*, No. CV 03-8846 (PJWx) (C.D. Cal. Nov. 10, 2005) (citing *Dow Chemical Co. v. Calderon*, 422 F.3d 827 (9th Cir. 2005)).

296. *Id.* at *2-3 (citing *Mejia v. Dole Food Co. and Riveria v. Dole Food Co.*, Los Angeles Sup. Ct. Case Nos. BC340049, BC379820 (June 17, 2009) (order terminating both cases for fraud)).

297. *Id.* at *3 (citing *Dole Food Co. v. Tellez*, Los Angeles Sup. Ct. Case No. B216182, B216264 (July 4, 2009)). The defendants also raised fraud concerns in this case, but the Court set aside the issue "in the event that Defendants do not prevail on any other defenses to recognition." *Id.* at *10.

298. *Id.* at *13 (citing Fla. Stat. § 55.605(1)(b)-(c) (2009)).

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Nicaragua's jurisdiction under Special Law 364.²⁹⁹ Second, the Court considered whether the judgment comported with the FRA's due process requirements,³⁰⁰ particularly if it was compatible with an "international concept of due process."³⁰¹ Although acknowledging that international due process norms differed from those in the United States, the Court found that the irrebuttable presumption of causation under Article 9 of Special Law 364, which precluded defendants from "offering scientific evidence that conclusively rebuts this presumption," did not comport with international due process norms because it effectively awarded hefty damages absent proof of causation.³⁰² The court also found that the disparate and unfair treatment of a defined group of foreign companies did not comport with international norms, particularly because it "subject[ed] them to minimum damages so dramatically out of proportion with damage awards against resident defendants."³⁰³ Third, although acknowledging that the public policy basis for non-recognition under the FRA "sets a high bar," the Court found that Special Law 364's irrefutable presumption of causation was repugnant to Florida public policy because it "deprive[d] defendants of a fair process."³⁰⁴ Fourth, in concluding that Nicaragua lacked impartial tribunals as required by the FRA, the court not only considered Nicaragua's Country Report, which was prepared by the U.S. Department of State and highlighted political influence and corruption concerns, but also heard expert testimony about political interference, corruption, and "the difference between Nicaragua's judicial structure on paper and in practice."³⁰⁵

VIII. Forum Non Conveniens†

A. INTRODUCTION

"The doctrine of forum non conveniens permits a court with venue to decline to exercise its jurisdiction when the parties' and court's own convenience, as well as the relevant public and private interests, indicate that the action should be tried in a different forum."³⁰⁶ Under the federal law standard,

forum non conveniens dismissal is appropriate when: (1) the trial court finds that an adequate alternative forum exists which poses jurisdiction over the whole case, including all of the parties; (2) the trial court finds that all relevant factors of private interest favor the alternate forum, weighing in the balance a strong presumption against disturbing plaintiffs' initial forum choice; (3) if the balance of private interests is at or near equipoise, the court further finds that factors of public interest tip the balance in favor of trial in the alternate forum; and (4) the trial judge ensures that

299. *Id.* at *13-16 (explaining that Special Law 364 gives defendants the option to refuse to make required deposits under the law if they waive their *forum non conveniens* defenses).

300. *Id.* at *16 (quoting Fla. Stat. § 55.605(1)(b)-(c) (2009)).

301. *Id.* (quoting *Society of Lloyds v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000) (defining "international concept of due process" as "a concept of fair procedures simple and basic enough to describe the judicial processes of civilized nations, our peers")).

302. *Id.* at *22-25.

303. *Id.* at *34.

304. *Id.* at *35-37 (citations omitted).

305. *Id.* at *37-41.

† Contributed by Phillip B. Dye, Jr. and Justin R. Marles of Vinson & Elkins LLP in Houston, Texas. 306. *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052, 1056 (11th Cir. 2009).

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plaintiffs can reinstate their suit in the alternate forum without undue inconvenience or prejudice.³⁰⁷

Only when a district court has taken into account and weighed all of the relevant factors may it grant a forum non conveniens dismissal.³⁰⁸ A district court need not conclusively establish its own jurisdiction before dismissing a suit for forum non conveniens.³⁰⁹

B. FORUM NON CONVENIENS AND U.S. TREATY OBLIGATIONS

On several occasions in 2009, U.S. federal circuit courts dealt with the question of whether district courts may dismiss cases brought by foreign plaintiffs from countries to which the United States owes an international legal obligation to accord their citizens no less favorable access to U.S. courts than an American national suing in the United States. These bilateral treaties, often referred to as Friendship, Commerce, and Navigation (FCN) treaties, were invoked by plaintiffs in cases before both the Eleventh Circuit and Seventh Circuit in an attempt to avoid forum non conveniens dismissal.

In a noteworthy case in the Eleventh Circuit, a plane crash in Milan, Italy of a Cessna aircraft operated by a German charter led both European and American plaintiffs to file suit against Cessna in the Southern District of Florida in *King v. Cessna Aircraft Co.*³¹⁰ Cessna moved for a forum non conveniens dismissal of the case. The district court granted the dismissal with respect to the European plaintiffs and denied with respect to the American plaintiffs.³¹¹ On appeal, the Eleventh Circuit considered whether the district court's decision to dismiss the European plaintiffs was proper.³¹² One of the primary arguments raised by the European plaintiffs was that a majority of defendants were "from countries having bilateral treaties with the United States that accord them 'no less favorable' access to U.S. courts to redress injuries caused by American actors."³¹³ Al-

307. *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1289-90 (11th Cir. 2009). The Supreme Court, in the seminal case of *Gulf Oil Corp. v. Gilbert*, held that the private interest factors include:

the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining the attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

A recent restatement of the public interest factors has noted that they involve the consideration of:

(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; (5) the avoidance of unnecessary problems in conflicts of law. *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 664 (9th Cir. 2009).

308. *See, e.g., Windt v. Qwest Commc'ns Int'l, Inc.*, 529 F.3d 183, 189-190 (3d Cir. 2008).

309. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007).

310. *King*, 562 F.3d at 1377-78.

311. *Id.* at 1378. This was in fact the second time that the district court had partially granted Cessna's motion to dismiss for forum non conveniens, the district court's first decision having been vacated by the Eleventh Circuit in *King ex rel. Estate of King v. Cessna Aircraft Co.*, 505 F.3d 1160, 1173 (11th Cir. 2007).

312. *Id.*

313. *Id.* at 1382-83 (citing Treaty of Friendship, Commerce and Navigation, U.S.-Italy, art. V.4, July 26, 1949, 63 Stat. 255, 1949 WL 37628; Treaty of Friendship, Commerce and Navigation, U.S.-Denmark, arts.

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though these plaintiffs recognized that the general forum non conveniens rule is that a foreign plaintiff's choice of forum is only entitled to weak deference, they argued that the bilateral treaties between their respective countries and the United States guaranteeing them access to American courts operated to bar the application of forum non conveniens to their claims. Looking to the Second Circuit's earlier decision in *Farmanfarmaian v. Gulf Oil Corp.*,³¹⁴ the Eleventh Circuit rejected plaintiffs' argument, and held that "the lesser deference given by the district court to the European Plaintiffs' choice of forum was consistent with the treaty obligations of the United States."³¹⁵ The Eleventh Circuit reasoned that the focus of the forum non conveniens analysis is on convenience rather than citizenship, and wrote that "[j]ust as it would be less reasonable to presume an American citizen living abroad would choose an American forum for convenience, so too can we presume a foreign plaintiff does not choose to litigate in the United States for convenience."³¹⁶

The Seventh Circuit confronted similar objections by plaintiffs arguing against a forum non conveniens dismissal based on a FCN treaty between the United States and Argentina.³¹⁷ In *Abad v. Bayer Corp.*, the Seventh Circuit decided a consolidated appeal from two different groups of Argentine citizens who filed products-liability suits in U.S. federal district courts against American manufactures for injuries sustained in Argentina.³¹⁸ One group sued for injuries from blood products allegedly tainted with HIV; the other group sued for allegedly faulty tires that resulted in an automobile accident. In both instances, the district court judge dismissed the plaintiffs' complaints in favor of litigation in Argentina.³¹⁹ Plaintiffs asserted in their appeal that they were "entitled to *all* the litigation rights of an American citizens" because of certain treaty obligations between the United States and the Republic of Argentina.³²⁰ The Seventh Circuit agreed, stating that plaintiffs were "entitled to sue these American corporations in American courts" and that "[i]t should make no difference that the plaintiffs are Argentines rather than Alaskans."³²¹ The Court, however, did not accept the argument that application of the forum non conveniens doctrine to the Argentine plaintiffs' cases would necessarily result in a treaty violation.³²² Instead, the Seventh Circuit upheld the dismissals, writing that "[w]hen the plaintiff wants to sue on the defendant's home turf, and the defendant wants to be sued on the plaintiff's home turf, all really that the court is left to weigh is the relative advantages and disadvantages of the alternative forums" and that "there is no reason to place a thumb on the scale" in favor of the foreign plaintiff or domestic defendant.³²³

V.1 & XXII.1, July 30, 1961, 12 U.S.T. 908, 1961 WL 62672). Plaintiffs from other countries with similar bilateral treaties with United States were entitled to "freedom of access" or "access" to courts in the United States. See *id.* at 1383 n.2 (citing, e.g., Treaty of Friendship, Commerce and Consular Rights, U.S.-Fin., art. I, Aug. 10, 1934, 49 Stat. 2659, 1934 WL 29046).

314. *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880 (2d Cir. 1978).

315. *King*, 562 F.3d at 1383.

316. *Id.* (citing *Sinochem Int'l Co.*, 549 U.S. at 430).

317. *Abad v. Bayer Corp.*, 563 F.3d 663, 666 (7th Cir. 2009).

318. *Id.* at 665.

319. *Id.* at 665, 668-69, 671.

320. *Id.* at 666 (citing Treaty of Friendship, Commerce, and Navigation Between Argentina and the United States, July 27, 1853, art. VIII, 10 Stat. 1005) (emphasis original).

321. *Id.*

322. *Id.* at 667.

323. *Id.*

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Similarly in *Pierre-Louis v. Newvac Corp.*,³²⁴ the Eleventh Circuit returned to the intersection of forum non conveniens and U.S. treaty obligations by examining *forum non conveniens* dismissal in the context of the Convention for the Unification of Certain Rules for International Carriage by Air (the so-called Montréal Convention).³²⁵ This consolidated appeal resulted from the forum non conveniens dismissal of wrongful death actions brought by the survivors of passengers killed in the crash of a McDonnell Douglas aircraft in the mountains of Venezuela.³²⁶ “Plaintiffs argue[d] that the district court was precluded from applying this doctrine by the Montreal Convention, which is the exclusive means by which international air travel passengers can seek damages for death or personal injury in cases by it.”³²⁷ The Montreal Convention contains several jurisdiction provisions, one of which provides that “any action for damages . . . must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier . . . or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business.”³²⁸ Because the United States was the territory of the contracting carriers, the plaintiffs asserted that forum non conveniens could not apply, as “the Convention does not specifically affirm the availability of forum non conveniens. . . .”³²⁹ The district court disagreed, and relied on Article 33(4) of the Montréal Convention which states that “questions of procedure shall be governed by the law of the court seised [sic] of the case.”³³⁰ In granting forum non conveniens dismissal, “[t]he district court reasoned that because the doctrine of forum non conveniens is part of United States civil procedure, the Convention unambiguously permits its application in accordance with the law of the forum.”³³¹

The Eleventh Circuit upheld the district court’s dismissal, explaining “that a district court may, where appropriate, exercise its discretion to apply forum non conveniens, without interfering with the implementation of the Convention, so long as another Convention jurisdiction is available and can more conveniently adjudicate the claim.”³³² Interestingly, even in upholding dismissal, the Eleventh Circuit appeared to recognize a new degree of deference somewhere between the strong deference given to the choice of an American resident suing in U.S. courts, and the somewhat weaker deference of a foreign resident suit in U.S. courts. When plaintiffs come from country-parties to “international treat[ies] with a specific venue provision,” like the Montreal Convention, a certain intermediate deference should be applied.³³³ According to the court, “[t]he logic of this conclusion stems from the fact that the Convention has already done part of the work in selecting a convenient forum—all potential jurisdictions under the Convention bear some connection, broadly speaking, to the air crash” and the plaintiffs’ “choice of forum is enti-

324. *Pierre Louis v. Newvac Corp.*, 584 F.3d 1052, 1055-56 (11th Cir. 2009).

325. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. 106-45, 2242 U.N.T.S. 309 (2000) [hereinafter Montréal Convention].

326. *Pierre-Louis*, 584 F.3d at 1055.

327. *Id.* at 1056.

328. *Id.* at 1057 (quoting Montréal Convention, art. 46, 2242 U.N.T.S. 309).

329. *Id.* at 1057-58.

330. *Id.* at 1057 (quoting Montréal Convention, art. 33(4), 2242 U.N.T.S. 309).

331. *Id.*

332. *Id.* at 1058.

333. *Id.* at 1059.

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ted to greater deference than non-U.S.-resident plaintiffs *not* acting pursuant to a treaty.”³³⁴

C. FORUM NON CONVENIENS AND ADMIRALTY LAW

“The doctrine of forum non conveniens is well accepted in admiralty law.”³³⁵ This is hardly surprising given the inherent transnational nature of maritime commerce. Nonetheless, in 2009 two different U.S. district courts dealt with admiralty appeals regarding the question of whether federal statutes preempted a district court’s ability to issue a forum non conveniens dismissal.

In *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, the Ninth Circuit considered “whether a claim implicating the Death on the High Seas Act (DOHSA), 46 U.S.C. § 30301 *et seq.*, is subject to dismissal on the basis of *forum non conveniens*.”³³⁶ In *Loya*, the widow of the decedent brought claims under DOHSA and Washington state law arising out of the death of her husband who expired during a scuba-diving trip off the coast of Mexico.³³⁷ The plaintiff argued that “DOHSA effectively precludes dismissal on the grounds of *forum non conveniens*” on the basis that “Congress did not intend for the *forum non conveniens* doctrine to eliminate access by an American beneficiary to a remedy under DOHSA for the wrongful death of an American on the high seas.”³³⁸ In deciding *Loya*, the district court relied on *Pain v. United Technologies Corp.*,³³⁹ holding that “DOHSA actions are within the admiralty jurisdiction of the federal courts and, whether or not DOHSA applies to this action, the Act does not preclude *forum non conveniens* dismissal.”³⁴⁰

The Ninth Circuit Court of Appeals compared the provisions of DOHSA to the Jones Act.³⁴¹ Unlike DOHSA, the Ninth Circuit explained, the Jones Act “has a specific venue provision.”³⁴² This provision states that “[a]n action under this section shall be brought in the judicial district in which the employer resides or the employer’s principal office is located.”³⁴³ In affirming the district court’s decision, the Ninth Circuit stated “DOHSA neither explicitly, nor implicitly, rejects application of the doctrine of *forum non conveniens*.”³⁴⁴

Another recent admiralty case in which the application of a forum non conveniens dismissal was upheld by a circuit court is *Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV*.³⁴⁵ In this factually complex but intriguing case, the Fourth Circuit faced

334. *Id.* at 1061 (emphasis original).

335. *Loya*, 583 F.3d at 661.

336. *Id.* at 659. As explained by the Ninth Circuit, “DOHSA was enacted in 1920 to overrule the Supreme Court’s decision in *The Harrisburg*, 119 U.S. 199 (1886), stating that admiralty afforded no remedy for wrongful death in the absence of an applicable state or federal statute.” *Loya*, 583 F.3d at 660-61.

337. *Id.* at 660.

338. *Id.* at 660.

339. *Pain v. United Tech. Corp.*, 637 F.2d 775, 780-81 (D.C. Cir. 1980).

340. *Loya*, 583 at F.3d at 660.

341. *Id.* at 661-62. The Jones Act is set out at 46 U.S.C. § 30104 (2009), and allows injured American seaman to bring actions against their employers in the United States.

342. *Loya*, 583 F.3d at 662.

343. 46 U.S.C. § 30104(b) (2009).

344. *Loya*, 583 F.3d at 663.

345. *In Re Compania Naviera Joanna SA*, 569 F.3d 189 (4th Cir. 2009).

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an unusual situation in which the plaintiff, MSC Shipping, requested a forum non conveniens dismissal of its own case³⁴⁶ brought under the Limitation of Liability Act.³⁴⁷ MSC Shipping's case originated from a collision in Chinese waters between a Panamanian-owned and Swiss-chartered freighter, the *MSC Joanna*, and a dredging vessel, the *W.D. Fairway*, owned and chartered by Netherlands corporations and sub-chartered to a Chinese dredging firm.³⁴⁸

The facts as reported by the Fourth Circuit are complex. The district court below found that:

In an effort to force [MSC Joanna's owners and charterers MSC Shipping] to take advantage of the U.S. Limitation of Liability Act, which in the circumstances of this case would probably result in a more favorable outcome to [W.D. Fairway's Dutch owners and charterers] Boskalis³⁴⁹, Boskalis began filing damage claims in the United States against MSC Shipping, demanding in each \$326 million in damages.³⁵⁰

Further, "[b]ecause MSC Shipping could not be found in the United States, Boskalis employed Admiralty Rule B and attached other, unrelated ships chartered by MSC Shipping that were calling on U.S. ports."³⁵¹ In order to prevent further attachments of its ship, MSC Shipping commenced its own action in U.S. courts so as to "enjoin all of Boskalis' actions in favor of one action and then to have it dismissed under the doctrine of *forum non conveniens*."³⁵² Boskalis challenged MSC Shipping's request for forum non conveniens dismissal of MSC Shipping's own case, arguing that "the doctrine does not apply to limitation-of-liability actions" and asserting that MSC Shipping's case, which it filed with the explicit intention of seeking forum non conveniens dismissal, constituted improper use of the Limitation of Liability Act.³⁵³

The Fourth Circuit, however, rejected both of Boskalis's arguments. According to the court, prevailing case law allowed for the application of forum non conveniens in admiralty cases generally, with no exception for limitation-of-liability cases.³⁵⁴ The Fourth Circuit's decision to apply forum non conveniens dismissal in this matter is of particular interest, given that Admiralty Rule B and the Limitation of Liability Act both involve a form of quasi in rem jurisdiction. In instances in which "there is no other forum" besides the United States where a defendant has property located to satisfy a judgment in favor of the plaintiff and jurisdiction is quasi in rem in nature, there is a contrary argument that a

346. *Id.* at 195.

347. 46 U.S.C. § 30501 (2009). The Fourth Circuit explains "upon receipt of a claim arising from damage at sea or a shipwreck," the U.S. Limitation of Liability Act allows "the owner or charterer of the vessel [to] commence an action . . . by depositing a fund with the court for the benefit of all claimants equal to the value of the owner's interest in the vessel and pending freight at the end of the voyage or following any wreck." *Compania Naviera Joanna SA*, 569 F.3d at 198.

348. *Compania Naviera Joanna SA*, 569 F.3d at 193-95.

349. Boskalis was concerned that a parallel action pending in Chinese admiralty court would not allow it to collect the increased amount of damages available to it in the United States under the United States Limitation of Liability Act. *Id.* at 196.

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.* at 198-99.

354. *Id.* at 199.

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forum non conveniens dismissal is not proper on the grounds that there is no alternative forum besides the United States, as one jurisdiction cannot exercise quasi in rem jurisdiction over property in another forum.³⁵⁵ Nevertheless, the Fourth Circuit opined that MSC Shipping's use of the Limitation of Liability Act was proper and fulfilled at least one of the Act's purposes, as "MSC Shipping was simply seeking to collect all of the cases in the United States relating to the Chinese collision and have them subjected to the test for determining whether they should be dismissed under the *forum non conveniens* doctrine."³⁵⁶

D. FORUM NON CONVENIENS AND PRIOR DETERMINATIONS OF ADEQUATE AND AVAILABLE ALTERNATIVE FORUMS

Courts in forums that frequently attract foreign plaintiffs are often called to rule upon the availability and adequacy of the same proposed alternative forum time and again.³⁵⁷ Mexican plaintiffs in the case of *In re Ford Motor Co.* brought suit in Texas for injuries suffered in automobile accidents in Mexico allegedly caused by defective car tires.³⁵⁸ Their cases were subsequently transferred to a multi-district litigation (MDL) proceeding in the Seventh Circuit.³⁵⁹ Defendant automobile manufacturer Ford and tire manufacturer Bridgestone/Firestone moved the MDL court for a forum non conveniens dismissal of the plaintiffs' cases for litigation in Mexico,³⁶⁰ but the plaintiffs argued that dismissal would not be proper, and submitted to the district court *ex parte* decisions from Mexican trial courts stating that these courts would not hear cases like those of the plaintiffs if filed in Mexico.³⁶¹ Relying solely on these decisions, which stated that the Mexican courts did not have competence to hear cases similar to those of the *In re Ford* plaintiffs, the MDL court rejected the defendants' motion and "agreed with plaintiffs that Mexico [was] not an available forum,"³⁶² eventually referring the case back to the Western District of Texas for trial.³⁶³ The defendants filed a motion for reconsideration with the Texas trial court, again requesting a forum non conveniens dismissal.³⁶⁴ The Texas trial court, however, declined to reconsider the decision of the MDL court that determined that Mexico was not an adequate alternative forum.³⁶⁵

Ford and Bridgestone/Firestone then sought a writ of mandamus from the Fifth Circuit, which granted the writ and reversed the decision of the MDL court and Texas federal district court.³⁶⁶

355. See, e.g., *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 304 (D.C. Cir. 2005).

356. *Compania Naviera Joanna SA*, 569 F.3d at 199.

357. As previously explained, in order for a court to grant forum non conveniens dismissal, the defendant must identify an adequate alternative forum that is available for plaintiff's case. See *Aldana*, 578 F.3d at 1289-90.

358. *In re Ford Motor Co.*, 580 F.3d 308, 310 (5th Cir. 2009) (pet. for *en banc* rehearing pending).

359. *Id.* at 310.

360. *Id.* at 309-310.

361. *Id.* at 311. It is important to note that these *ex parte* decisions were not obtained by the *In re Ford* plaintiffs in this particular appeal, but by other plaintiffs who were not before the court.

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.* at 317.

The Fifth Circuit explained that it had found Mexico to be an available adequate alternative forum on numerous prior occasions,³⁶⁷ writing that “[t]hese many decisions create a nearly airtight presumption that Mexico is an available forum.”³⁶⁸ The Fifth Circuit stated “[d]istrict courts do not have to start from scratch each time they consider a forum’s availability; if we have found a forum to be available in earlier cases, district courts can rely on our precedent in similar cases to hold that it is still available.”³⁶⁹ In addition, the Fifth Circuit explained that the MDL court and Texas district court had erred in relying solely on the Mexican court’s *ex parte* jurisdictional decisions determining that Mexico was not an available forum, opining that the American courts should look beyond the orders to expert testimony, relevant Mexican statutes, or case law, and that the plaintiffs “have not submitted any evidence to show that these orders *must* be issued without the opposing counsel’s being present” as occurred in the Mexican proceeding.³⁷⁰

IX. Parallel Proceedings†

Parallel proceedings exist where “substantially the same parties are litigating substantially the same issues simultaneously in two fora.”³⁷¹ With the continued expansion of international commerce, in 2009 U.S. courts were again confronted with disputes involving parallel proceedings in foreign jurisdictions. Noteworthy this year was that U.S. plaintiffs seeking to prevent defendants from pursuing foreign suits often sought anti-suit injunctions. Five recent decisions involving such injunctions are discussed below.

Although there is no debate that a court may issue an anti-suit injunction enjoining foreign proceedings,³⁷² debate persists as to what test courts should apply to determine whether to issue such an injunction. Courts agree on the threshold inquiry, which consists of determining first whether the parties are the same in both suits and second, whether resolution of the case before the enjoining court is dispositive of the other suit.³⁷³ Courts disagree, however, regarding the weight to be attributed to international comity considerations.³⁷⁴ Under the conservative standard, the court must determine first, whether an action in a foreign jurisdiction would prevent U.S. jurisdiction or threaten a

367. *Id.* at 313-14 (citing *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 804 (5th Cir. 2007); *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 671 (5th Cir. 2003); *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 380 n.3 (5th Cir. 2002)).

368. *In re Ford Motor Co.*, 580 F.3d at 314.

369. *Id.*

370. *Id.* at 315 (emphasis in original).

† Contribution by Lorraine de Germiny, Associate, King & Spalding LLP, Paris, France. Special thanks to Catalina Constantina for her research assistance.

371. *Chalmers v. Gray*, No. 3:09-CV-232, 2009 WL 1748009, at *1 (N.D. Ind. June 18, 2009) (citing *Schneider Nat’l Carriers, Inc. v. Carr*, 903 F.2d 1154, 1156 (7th Cir. 1990)); *Royal and Sun Alliance Ins. Co. of Can. v. Century Int’l Arms, Inc.*, 466 F.3d 88, 94 (2d Cir. 2006).

372. *Applied Med. Distrib. Corp. v. Surgical Co. BV*, No. 09-55155, 2009 U.S. App. LEXIS 24117, at *28 (9th Cir. Nov. 3, 2009); *see also* *Answers in Genesis of Ky., Inc. v. Creation Ministries Int’l, Ltd.*, 556 F.3d 459, 471 (6th Cir. 2009); *SEC v. Pension Fund of Am.*, 613 F. Supp. 2d 1341, 1344 (S.D. Fla. 2009).

373. *See, e.g.*, *Software AG, Inc. v. Consist Software Solutions, Inc.*, 323 F. App’x. 11, 12 (2d Cir. 2009), *Pension Fund of Am.*, 613 F. Supp. 2d at 1344.

374. *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 995 (9th Cir. 2006); *Goss Int’l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 360 (8th Cir. 2007); *see also* *Zimmnick v. Neo-Neon Int’l, Ltd.*, No. 06-C-4879, 2009 WL 2392065, *2 (N.D. Ill. July 30, 2009); *Albemarle Corp. v. As-trazeneca UK Ltd*, No. 5:08-1085, 2009 WL 902348, at *6 (D.S.C. Mar. 31, 2009).

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vital U.S. policy and second, whether domestic interests outweigh the concerns of international comity.³⁷⁵ Under the liberal standard, the court will order an anti-suit injunction where necessary to prevent duplicate and vexatious foreign litigation and to avoid inconsistent judgments.³⁷⁶

A. ZIMNICKI AND THE “LAXER” STANDARD OF THE SEVENTH CIRCUIT

As noted by the Northern District of Illinois in *Zimmicki v. Neo-Neon International Ltd.*, the Seventh Circuit has yet to adopt an approach.³⁷⁷ In *Zimmicki*, the plaintiffs sued in the United States for copyright infringement and the defendant brought suit in China seeking primarily declaratory relief. Faced with a motion for an anti-suit injunction, the district court did not specifically adopt either the “conservative” or the “liberal” approach, noting nevertheless that the Seventh Circuit was “incline[d] toward the laxer standard.”³⁷⁸ Under either approach, the plaintiff’s request had to be denied because it failed to demonstrate that the U.S. litigation would be dispositive of the defendant’s Chinese lawsuit. Although the parties were the same, the plaintiff had not shown that the Chinese intellectual property laws applicable to the declaratory judgment action were “the same or similar to the provisions of the Copyright Act and the Lanham Act.”³⁷⁹

B. PARALLEL PROCEEDINGS AND FORUM-SELECTION CLAUSES

When a dispute arises out of an international contract, forum-selection clauses often factor into a court’s decision to stay or dismiss proceedings or to issue an anti-suit injunction. In *Applied Medical Distribution Corp. v. Surgical Co.*,³⁸⁰ the Ninth Circuit was called upon to determine whether the district court had abused its discretion in declining to enjoin the defendant from pursuing relief in Belgium. Indeed, shortly after the plaintiff’s filing of the action before the district court, the defendant had filed suit in Belgium. The claims arose out of a distribution agreement which provided that it “shall be governed by and construed under the laws of the State of California” and that “federal and state courts within the State of California shall have exclusive jurisdiction to adjudicate any dispute arising out of this Agreement.”³⁸¹ The district court had denied the anti-suit injunction on grounds that the Belgian claims were “potentially broader.”³⁸²

The Ninth Circuit found that the district court had abused its discretion in denying the injunction. The district court had erred in part in requiring that the claims in the foreign and domestic actions be “identical” instead of making the more functional inquiry applied by the Ninth Circuit in *E. & J. Gallo Winery v. Andina Licores S.A.*³⁸³ Under this standard,

375. *Zimmicki*, 2009 WL 2392065, at *2; *Goss*, 491 F.3d at 363; see also *Answers in Genesis of Ky.*, 556 F.3d at 363; *Albemarle*, 2009 WL 902348, at *7.

376. *Zimmicki*, 2009 WL 2392065, at *2; *Goss*, 491 F.3d at 360; *Albemarle*, 2009 WL 902348, at *6.

377. *Zimmicki*, 2009 WL 2392065.

378. *Id.* at *2.

379. *Id.* at *3.

380. *Applied Med. Distrib. Corp. v. Surgical Co. BV*, No. 09-55155, 2009 U.S. App. LEXIS 24117 (9th Cir. Nov. 3, 2009).

381. *Id.* at *3.

382. *Id.* at *6-7.

383. *E. & J. Gallo Winery*, 446 F. 3d at 984.

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claims are functionally the same if the domestic suit can dispose of the issues in the foreign suit and these issues fall under the forum-selection clause.³⁸⁴ Requiring issues to be “identical” would be “counterproductive.”³⁸⁵ The Court stated that:

[F]orum selection clauses would lose their reliability and robustness if a party could avoid them simply by waiting until a local suit is filed, and then file a foreign action that, despite being easily disposed of by resolution of the local action, is in some way not identical in form, a likely possibility because the verbal form of laws in different countries will inevitably differ.³⁸⁶

Furthermore, “differences between foreign and domestic law do not necessarily make the ‘issues’ different.”³⁸⁷ The court must determine, in addition to the threshold inquiry, whether the foreign litigation would “frustrate a policy of the forum issuing the injunction” and “whether the impact on comity would be tolerable.”³⁸⁸ The Ninth Circuit held first that the initial (California) action was dispositive of the later (Belgian) action because all of the Belgian claims could be litigated and resolved in the California action.³⁸⁹ Second, denying the anti-suit injunction would frustrate California’s strong policy favoring enforcement of forum-selection clauses.³⁹⁰ Third, enjoining a later-filed foreign suit which contravenes the forum-selection clause was not contrary to comity.³⁹¹

C. WHEN THE COLORADO RIVER DOCTRINE MEETS ARBITRATION

A notable decision involving arbitration and parallel foreign court proceedings came from the Sixth Circuit with *Answers in Genesis of Kentucky, Inc. v. Creation Ministries Int’l, Ltd.*³⁹²

The dispute arose out of an agreement that contained both a non-exclusive forum-selection clause³⁹³ and an arbitration clause. After the Australian defendant had brought suit before Australian courts, the claimant moved to compel arbitration and sought an anti-suit injunction from the Eastern District of Kentucky. The Sixth Circuit affirmed the decision of the district court to compel arbitration but to deny an anti-suit injunction.

Several aspects of the decision are of interest. First, the Court rejected the defendant’s argument that the lower court should have abstained on the basis of international comity. It noted “whether to abstain in regard to a motion to compel arbitration because of international comity concerns is an issue of first impression in this circuit.”³⁹⁴ The Court applied the well-known factors enunciated by the Supreme Court in *Colorado River Water*

384. *Applied Med. Distrib. Corp.*, 2009 U.S. App. LEXIS 24117, at *14, *16.

385. *Id.* at *15.

386. *Id.*

387. *Id.* at *24.

388. *Id.* at *8.

389. *Id.* at *12.

390. *Id.* at *27.

391. *Id.* at *29.

392. *Answers in Genesis of Ky., Inc. v. Creation Ministries Int’l, Ltd.*, 556 F.3d 459 (6th Cir. 2009).

393. The agreement provided that “the law applicable to the State of Victoria, Australia” applied and that “[t]he parties submit to the non-exclusive jurisdiction of its courts and courts of appeal.” *Id.* at 464.

394. *Id.* at 467.

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Conservation Dist. v. United States,³⁹⁵ to determine whether to abstain in favor of the foreign proceedings. Abstention, “an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it,”³⁹⁶ may be based on such factors as inconvenience of the federal forum, desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained.³⁹⁷ The Sixth Circuit transposed the *Colorado River* factors to the case before it stating that they were “the most applicable . . . because those factors and their relative weight match most closely the public-policy concerns the Supreme Court has identified as vital in the area of arbitration.”³⁹⁸ After analyzing the *Colorado River* factors, the Court looked to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, noting that it must compel arbitration unless the arbitration agreement is “null and void, inoperative, or incapable of being performed.”³⁹⁹

Next, the Court considered the defendant’s cross-appeal of the district court’s order declining to issue a foreign anti-suit injunction. It stated that it needed “to look at whether an injunction is necessary to protect the jurisdiction of a federal court or if allowing the foreign litigation to continue would allow a party ‘to evade the forum’s important policies’.”⁴⁰⁰ It found that because Australia is also a signatory of the New York Convention, “it would be difficult” to find that the defendant was trying to evade an important public policy of this forum.⁴⁰¹ Furthermore, because the parties had agreed to suspend the Australian proceedings pending the outcome of the U.S. court action, the district court did not abuse its discretion in denying the anti-suit injunction.⁴⁰²

D. DISTRICT OF SOUTH CAROLINA’S APPROACH TO FOREIGN FORUM-SELECTION
CLAUSE

The District of South Carolina granted an anti-suit injunction in *Albemarle Corp. v. Astrazeneca UK Ltd.*⁴⁰³ The dispute arose out of an agreement between a U.S. corporation and a U.K. corporation with the following forum-selection clause: “this contract shall be subject to English law and the jurisdiction of the English High Court.”⁴⁰⁴ The Claimant filed suit in South Carolina and moved for an order enjoining the defendant from filing a similar suit in English court.

The district court stated that, before examining the reasonableness of the forum-selection clause, it had to determine whether the clause was mandatory or non-mandatory.⁴⁰⁵ The court observed that “the word ‘shall’ alone is not enough to create a mandatory forum-selection clause[.]”⁴⁰⁶ In *IntraComm, Inc. v. Bajaj*, on which the court relied, the

395. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

396. *Id.* at 813.

397. *Id.* at 818.

398. *Answers in Genesis of Ky.*, 556 F.3d at 467.

399. *Id.* at 469 (citing to New York Convention art. II(3)).

400. *Id.* at 471.

401. *Id.*

402. *Id.* at 472.

403. *Albemarle Corp. v. Astrazeneca UK Ltd.*, No. 5:08-1085, 2009 WL 902348 (D.S.C. Mar. 31, 2009).

404. *Id.* at *2.

405. *Id.* at *3.

406. *Id.*

court held that a forum-selection clause stating “either party *shall be free* to pursue its rights . . . in a court of competent jurisdiction in Fairfax County, Virginia” was non-mandatory.⁴⁰⁷ Nevertheless, the court concluded that in *Albermarle*, despite the “shall be subject to” language that “absent further language making England the mandatory venue,” the forum-selection clause was not mandatory and therefore the question of its reasonableness was moot.⁴⁰⁸ It went on to deny the defendant’s motion to dismiss on forum non conveniens grounds.⁴⁰⁹

The district court also granted the plaintiff’s anti-suit injunction. After noting the circuit split on foreign anti-suit injunctions and the lack of controlling Fourth Circuit precedent, the court concluded that the plaintiffs were entitled to an injunction under either standard.⁴¹⁰ A suit in England would be duplicative because it would threaten the jurisdiction of the district court.⁴¹¹

E. INTERNATIONAL COMITY CONSIDERATIONS

Finally, the findings and observations of the Southern District of Florida in *SEC v. Pension Fund of America*⁴¹² regarding international comity and anti-suit injunctions merit attention. The case involved a receivership action initiated by the SEC and a Costa Rican citizen seeking the return of several million dollars allegedly invested in the Pension Fund of America. The individual later filed both criminal and civil actions in Costa Rica. The receiver accordingly sought to enjoin the Costa Rican civil litigation.

The court held that “[i]n light of the totality of the circumstances, and taking into account important considerations of international comity, the equities here weigh strongly in favor of an injunction.”⁴¹³ The court found that the Costa Rican litigation was “interdictory,” that it was, “designed to interfere with the proceedings in this Court and to evade this Court’s judgments.”⁴¹⁴ According to the court, comity considerations were nonetheless respected because the receiver was not seeking to enjoin the Costa Rican criminal proceedings and because the case “presented no conflicting national priorities or regulatory schemes.”⁴¹⁵ Additionally, the Costa Rican courts had rendered no judgments that the U.S. court’s anti-suit injunction could disrupt.⁴¹⁶ The district court thus granted the anti-suit injunction.⁴¹⁷

407. *IntraComm, Inc. v. Bajaj*, 492 F.3d 285, 290 (4th Cir. 2007) (emphasis added).

408. *Albermarle*, 2009 WL 902348, at *3.

409. *Id.* at *6.

410. *Id.* at *6-8.

411. *Id.* at *7-8.

412. *SEC v. Pension Fund of Am.*, 613 F. Supp. 2d 1341 (S.D. Fla. 2009).

413. *Id.* at 1346.

414. *Id.*

415. *Id.* at 1347.

416. *Id.*

417. *Id.*

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