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International Legal Developments in Review: 2001, Service of Process Abroad

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International Litigation

EDITED BY KATHERINE BIRMINGHAM WILMORE*

I. Parallel Proceedings – Sisyphian Progress

LOUISE ELLEN TEITZ**

The primary reason for giving effect to the rulings of foreign tribunals is that such recognition factors [sic] international cooperation and encourages reciprocity. Thus, comity promotes predictability and stability in legal expectations, two critical components of successful international commercial enterprises. It also encourages the rule of law, which is especially important because as trade expands across international borders, the necessity for cooperation among nations increases as well.¹

Like Sisyphus' never-ending labors of rolling the stone up the mountain only to have it roll back again, many of the parallel proceedings this year were reversals, continuations, or transmogrifications of last year's cases. For example, the Seventh Circuit reversed the abstention of a lower court in favor of Greek proceedings,² exalting the sacred virtues of forum selection clauses. Meanwhile the House of Lords ultimately refused to enforce exclusive jurisdiction clauses in the final level of the *Donohue v. Armco*³ litigation, yielding to the need for unitary order amidst multiple forums. Then, the *Yahoo!* litigation crossed the Atlantic,⁴ intensifying the underlying controversy about prescriptive jurisdiction in cyberspace and serving as a reminder of the lack of shared values about free speech and expression. The cases come in pairs—up the mountain of comity in *Armco*, down in *AAR*; deference in *Deutz*,⁵ injunction in *Younis*.⁶ The underlying causes of parallel proceedings remain much

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1. Gen. Elec. Co. v. Deutz AG, 270 F.3d 144, 160 (3d Cir. 2001).

2. See *infra* at text accompanying notes 33–41. For a discussion of the lower court opinion last year, see Louise Ellen Teitz, *Parallel Proceedings: Moving Into Cyberspace*, 35 INT'L LAW. 491, 494–95 (2001).

3. See *infra* at text accompanying notes 23–32. For a fuller discussion of the opinion of the lower courts on both sides of the Atlantic, see Teitz, *supra* note 2, at 497–500.

4. See *infra* at text accompanying notes 7–21. For a fuller discussion of the earlier proceedings, see Teitz, *supra* note 2, at 492–93.

5. Gen. Elec. Co., 270 F.3d at 160.

6. *Younis Bros. & Co. v. CIGNA Worldwide Ins. Co.*, 167 F. Supp. 2d 743 (E.D. Pa. 2001).

the same—concurrent jurisdiction, forum shopping, inability to enforce foreign judgments—and unfortunately, too many courts continue to labor in the international field using only the tools of domestic doctrine.

A. PARALLEL LITIGATION AND CONCURRENT PRESCRIPTIVE JURISDICTION

The *Yahoo!* case illustrates of the new wave of parallel litigation,⁷ which reflects the uncertain reach of prescriptive jurisdiction in cyberspace, and therefore has implications for the limits of adjudicative jurisdiction. The reverse declaratory judgment suit in a California federal court starkly pits French anti-Nazi speech regulation against U.S. First Amendment protections. Although the underlying substantive issue has been addressed within the context of enforcing foreign defamation judgments,⁸ the addition of criminal sanctions⁹ and the use of cyberspace raise new issues, including the ability to block access within the limits of new technology. Indeed, the case has drawn increased attention in light of September 11 and the rush of countries cracking down on speech that is seen as hateful or terrorist.¹⁰

The first suit was filed in Paris¹¹ by the Union of Jewish Students, and the International League against Racism and Anti-Semitism (LICRA), seeking to enforce French laws¹² that forbid the sale of Nazi-related goods, in this case through Yahoo!'s U.S.-based portal. In November 2000, the Paris court upheld its initial interim order that Yahoo! must comply within three months or face fines of 100,000 French francs per day.¹³

In response to the Paris suit, Yahoo! filed the second suit, in federal court in San Jose, California, seeking a declaratory judgment that the French judgment is not enforceable in the United States and that the French court lacked jurisdiction to control Yahoo!'s U.S.-based Web site.¹⁴ The district court determined that it had personal jurisdiction over the defendants, that the controversy was not mooted by Yahoo!'s voluntary removal of Nazi-related items from its site, and that the possibility of enforcement was real.¹⁵ The district

7. See *Gutnick v. Dow Jones & Co.*, (2001) V.S. Ct. 305, available at www.austlii.edu.au/au/cases/vic/VSC/2001/305.htm (last visited July 3, 2002).

8. See, e.g., *Matusевич v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995) (applying Maryland Uniform Foreign-Money Judgments Recognition Act); *Abdullah v. Sheridan Square Press, Inc.*, No. 93 Civ. 2515, 1994 WL 419847 (S.D.N.Y. May 4, 1994); *Bachchan v. India Abroad Publ'ns Inc.*, 585 N.Y.S.2d 661 (Sup. Ct. 1992). See generally Louise Ellen Teitz, *TRANSNATIONAL LITIGATION* 271–73 (1996 & 1999 Supp.).

9. A French court has indicated that it will bring criminal actions against Yahoo! and its former president, with an initial trial date set for May 7, 2002. The former president could be sentenced to up to five years in prison and fined if found guilty.

10. See Carl S. Kaplan, *New Economy: Bracing For A Flood Of Efforts To Control Speech Seen As Hateful Or Terrorist*, N.Y. TIMES, Feb. 11, 2002.

11. *League Against Racism and Antisemitism- LICRA and Yahoo! Inc.*, Interim Court Order, Tribunal de Grande Instance de Paris (County Court of Paris), Nov. 20, 2000, No. RG: 00/05308 (2000), available at www.cdt.org/jurisdiction (last visited July 3, 2002). The initial injunction was issued on May 22, 2000.

12. French Penal Code, art. R.645–2.

13. See *League Against Racism*, *supra* note 11.

14. Since Yahoo! has no significant assets in France, any attempt to enforce the French fines would probably require an action in the United States where Yahoo! has assets. The suit also sought an injunction to prevent the French anti-semitism advocacy groups from trying to enforce the French judgment in the United States. The complaint is available at www.cdt.org/jurisdiction (last visited July 3, 2002). The case is also discussed in Mylene Mangalindan & Kevin Delaney, *Yahoo! Ordered to Bar the French From Nazi Items*, WALL ST. J., Nov. 21, 2000, at B1.

15. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

court stressed that the purpose of the U.S. action was "to determine whether a United States court may enforce the French order without running afoul of the First Amendment. . . . [and a] United States court is best situated to determine the application of the United States Constitution."¹⁶ Rejecting the defendants' request for abstention, the district court granted summary judgment for Yahoo! and found that enforcing the judgment would be inconsistent with the First Amendment. In so doing, it relied heavily on earlier cases refusing to enforce British libel judgments.¹⁷ The district court indicated that its holding applied even if Yahoo! had the technological ability to block access as required by the French court, and in passing, suggested that the First Amendment might trump any treaty or convention in connection with speech that originated in the United States.¹⁸

While this round of the Yahoo! litigation may have run its course, the issues of who regulates conduct in cyberspace and what happens in the realm of concurrent jurisdiction are far from settled. For Yahoo!, the possibility remains of criminal action in France against a former executive.¹⁹ For multinational corporations, while there may be no international judgments convention in place as yet,²⁰ the Yahoo! litigation is a harbinger of what is to come, when the local laws conflict with U.S. values and policies. We are likely to see an increasing number of lawsuits filed in foreign countries, charging violation of criminal laws as well as civil ones and reactive reverse declaratory judgment actions in the home forum.²¹ A significant part of the litigation will turn on who controls the cyberspace in which the conduct is occurring. Jurisdiction—adjudicative and prescriptive—is but a straw man for the fundamental differences in underlying substantive law and policies.

B. PARALLEL LITIGATION AND FORUM SELECTION CLAUSES

Recently, an increasing number of cases of multiple proceedings have involved parties seeking to enforce or avoid forum selection clauses.²² Many of the cases raise questions of interpretation and scope of the clauses, especially in connection with multiple parties who may not be part of the underlying contractual transaction. Chosen courts may be asked to restrain parties from continuing other proceedings; non-designated courts may be asked to stay actions in deference to the designated forum. The trouble arises when the two courts involved disagree over the interpretation or scope of the forum selection clause, as seen in the litigation on both sides of the Atlantic in the *Armco* cases²³ discussed in last year's Year-

16. *Id.* at 1191-92.

17. *Id.*

18. "Absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment." *Id.* at 1193 (footnote omitted).

19. See *supra* note 9.

20. See generally Teitz, *supra* note 2, at 502, and *infra* at text accompanying notes 70-71.

21. For a discussion of some of these recent trends, see Eugene Gulland, *All The World's A Forum*, NAT'L L.J., Feb. 11, 2002, at B13. One recent case involved a RICO action brought by Canada against several cigarette manufacturers in the United States to recover costs incurred as a result of an alleged conspiracy to smuggle cigarettes into Canada. See *Att'y Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001) (dismissed because revenue rule that courts of one sovereign will not enforce tax judgments or claims of another sovereign).

22. See Teitz, *supra* note 2, at 497-500.

23. The U.S. proceeding is *Armco Inc. v. N. Atlantic Ins. Co.*, 68 F. Supp. 2d 330 (S.D.N.Y. 1999). The English proceedings are under the name *Donohue v. Armco Inc. and Others*. The lower court opinion is

in-Review. However, the last chapter of this litigation in 2001, a decision by the House of Lords,²⁴ illustrates the statesmanlike use of comity to defuse escalating proceedings, while providing some protection for the English defendant in the New York forum.

The *Armco* cases arise out of a management buy-out headed by Mr. Donohue and Mr. Atkins of a group of English insurance companies owned by Armco and some of its subsidiaries. The Armco negotiators were Mr. Rossi and Mr. Stinson. Armco brought suit against Donohue, Rossi, Stinson, and Atkins—a.k.a. “the group of four”—and additional corporate conspirators in the Southern District of New York alleging common law fraud, conversion, breach of fiduciary duty, and RICO violations. Some of the defendants filed motions to dismiss for lack of personal jurisdiction, improper venue, and *forum non conveniens*. The defendants specifically argued that filing suit in the United States breached the English exclusive jurisdiction clauses contained in the transfer and sale agreements.²⁵

In the subsequent English proceedings, Donohue sought to enjoin the U.S. litigation as vexatious and oppressive, evidenced by its being in breach of the exclusive jurisdiction clauses. The English trial court found that exclusive jurisdiction clauses, although valid, only bound some of the parties and that the claims in the New York lawsuit were based on a pre-existing conspiracy and therefore did not arise out of the contracts and were largely outside the exclusive jurisdiction clauses.²⁶ The English court also found that the proceedings against Donohue in New York were neither vexatious nor oppressive and England was not the “natural forum” for the litigation. The defendants appealed.

Subsequently, the New York district court denied the motions to dismiss, agreeing with plaintiffs that the forum selection clauses did not cover the pending litigation and were unenforceable because induced by fraud. In denying the *forum non conveniens* motion, the district court relied specifically on the intervening English trial court opinion to demonstrate that the United States had a greater interest in the action.²⁷

Next, however, the proceedings returned to England, before the Court of Appeal, which reversed the lower trial court and issued an antisuit injunction against the Armco entities from proceeding in New York.²⁸ In addition to Donohue, the court granted injunctions to two other individuals and four corporations, even though all but one were not parties to any exclusive jurisdiction clause. They were considered necessary and proper parties for the English proceedings.²⁹ Contrary to the lower court’s approach of looking at the most appropriate place for the litigation, the Court of Appeals considered that when there is an exclusive jurisdiction clause there has to be a strong reason for not granting an antisuit injunction to enforce the contractual agreement.

In the final act of this litigation, at least for this year, the House of Lords has reversed the Court of Appeal.³⁰ The Lords first reviewed the decision of the Court of Appeal to include in the antisuit injunction individuals and corporations that had not been party to

reported at: 2 Lloyd’s Rep. 649 (Q.B. 1999) (Aikens, J., dismissing application for antisuit). The Court of Appeal decision is reported at 1 Lloyd’s Rep. 579 (C.A. 2000) (granting antisuit injunctions).

24. *Donohue v. Armco Inc.*, U.K.H.L. 64 (H.L. 2001).

25. Not all of the Armco entities, nor all of the defendants, were parties to the agreements at issue. See *Donohue*, U.K.H.L. ¶ 7.

26. See *Donohue*, 2 Lloyd’s Rep. at 649.

27. *Armco Inc.*, 68 F. Supp. 2d at 341.

28. See *Donohue*, 1 Lloyd’s Rep. at 579.

29. See *Donohue*, U.K.H.L. 64, ¶ 15.

30. *Id.*

the exclusive jurisdiction clauses. The Lords clarified the principles controlling the grant of an injunction as established in other case law. First, an injunction is only available when justice requires and will only restrain vexatious or oppressive foreign litigation. Second, the foreign forum must not be the natural home for the litigation. Third, the court must also evaluate what injustices may result for both parties, including whether the defendant will be deprived of advantages in the foreign forum to which he is entitled. Applying these principles, the House of Lords found that England was not the natural forum for the proceedings, and as to these defendants, the New York litigation is neither vexatious nor oppressive.³¹

The House of Lords then addressed the grant of the antisuit injunction as to Donohue alone, considering that "where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it."³² The House of Lords found that Donohue had the right, as to the Armco entities with whom he had exclusive jurisdiction clauses, to expect not to be sued in New York and even more critically, not to be subject to RICO claims that would be impossible in England. However, the Lords noted that those Armco entities not bound by the exclusive jurisdiction clauses may pursue Donohue where he can be found, and the Armco entities bound by the clauses may pursue him on claims outside the exclusive jurisdiction clauses—all of which appear to have found jurisdiction in New York and will proceed even if an antisuit injunction were issued. This prospect of litigation proceeding both in England and New York led the House of Lords to deny the injunction, concluding that,

the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice.³³

However, the House of Lords added a condition that Mr. Donohue may not be sued for RICO claims or multiple or punitive damages, and that Mr. Donohue may claim that the sale and purchase agreement is governed by English law. Thus the House of Lords allowed the goal of "submission of the whole dispute to a single tribunal" for a comprehensive judgment in the interests of justice to override enforcement of an exclusive jurisdiction clause. The result encourages courts to avoid granting antisuit injunctions, which will simply result in encouraging conflicting judgments, but which also counsels courts to attempt to shape some compromise where possible to protect the contractual expectations of parties.

In contrast to the ultimately measured approach of the House of Lords in the *Armco* litigation, the Seventh Circuit again has demonstrated its resistance to comity,³⁴ by reversing the lower court's abstention order in *AAR International, Inc. v. Vacances Heliades S.A.*—this time in the name of enforcing a "permissive forum selection clause."³⁵ The lower court had

31. In addition, the House of Lords considered a jurisdictional objection, deciding that "[i]t would be wrong in principle to allow [the non-parties to the clauses] to use Mr. Donohue's action as a Trojan horse in which to enter the proceedings when they could have shown no possible ground for doing so in their own right." *Id.* ¶ 21.

32. *Id.* ¶ 24.

33. *Id.* ¶¶ 33–34.

34. See, e.g., *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425 (7th Cir. 1993); see generally Teitz, *supra* note 8, at 245–47.

granted a motion to abstain in favor of proceedings in Greece concerning the lease of an airplane.³⁶ Following the *Colorado River*³⁷ and *Moses Cone*³⁸ domestic precedents of abstention "for wise judicial administration," the lower court considered a number of factors but relied heavily on the repetitive nature of the actions and the satisfactory alternative forum in Greece.³⁹

Unfortunately, the Seventh Circuit, like the lower court, turned first to domestic precedent. The court first disagreed with the lower court determinations that the U.S. and Greek actions were parallel and that the Greek actions would likely dispose of the claims in the U.S. action. The Circuit found that the Greek actions focused on the alleged engine failure, rather than on the independent duties of the defendants to make payments under the lease, which were the subject of the U.S. action. Reading the requirement of *Moses Cone* to mean it would be a "serious abuse of discretion" to abstain if there is *any doubt* as to the actions being parallel, the Seventh Circuit found a basis to reverse. The court rejected an argument equating "parallel" for purposes of *Moses Cone* with pleadable as a compulsory counterclaim, focusing on whether Greece has a compulsory counterclaim rule.

All of this posturing was irrelevant in the end since the appellate court decided that the lower court had improperly balanced the abstention factors. The Seventh Circuit found that the district court had placed "undue weight on the inconvenience of the federal forum for the [Greek] appellees, and did not adequately consider the inconvenience of the Greek forum for AAR."⁴⁰ The district court did not consider the non-exclusive Illinois jurisdiction clause and the irrevocable waiver of objection to Illinois as an inconvenient forum contained in the lease, and thus there was a basis for reversal under the abuse of discretion standard. This jurisdiction and waiver clause also weighed in the Seventh Circuit's decision to refuse to abstain in the face of parallel litigation, such that AAR ultimately appears to have received from this non-exclusive clause the benefits that would otherwise be accorded only to an exclusive jurisdiction clause.

In the second portion of the opinion, the Seventh Circuit considered whether the consent to non-exclusive jurisdiction and waiver of objection was also dispositive of the foreign defendant's *forum non conveniens* motion. The court again equated the permissive jurisdiction clause and waiver of venue with a mandatory forum selection clause and applied the *Bremen*⁴¹ standards of presumptive validity in the absence of a showing that (1) the clause was the result of fraud, (2) its enforcement would be unreasonable or unjust, or (3) it would be so inconvenient as to deprive one of his day in court.⁴² In the end, the court denied the motion for *forum non conveniens* with an analysis that again gave determinative weight to the non-exclusive choice of forum clause and short shrift to the fact of earlier-filed foreign litigation and existing rulings by the Greek court.

35. AAR Int'l, Inc. v. Vacances Heliades S.A., 100 F. Supp. 2d 875 (N.D. Ill. 2000), *rev'd*, AAR Int'l, Inc. v. Nimelias Enters S.A., 250 F.3d 510 (7th Cir. 2001).

36. For a fuller discussion of the lower court decision, see *Teitz*, *supra* note 2, at 494-95.

37. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). See generally Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L. REV. 99 (1986). See also *Teitz*, *supra* note 8, at 238-40.

38. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

39. *AAR Int'l, Inc.*, 100 F. Supp. 2d at 878.

40. *AAR Int'l, Inc.*, 250 F.3d at 522.

41. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

42. *AAR Int'l, Inc.*, 250 F.3d at 525. Here the Seventh Circuit relied on its earlier precedent concerning the validity of a forum selection clause in *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156 (7th Cir. 1993).

Cases like *Armco* and *AAR* that result from differences in the interpretation and enforcement of forum selection clauses serve to highlight the need for a multilateral convention that will enforce forum selection clauses much the way the New York Convention assures that agreements to arbitrate are enforceable. Even when parties attempt to pre-ordain the location of later disputes in transnational transactions, the inability to enforce that agreement without litigation nullifies the value of a choice of forum clause and removes the predictability and allocation of costs for which the parties bargained. A scaled-back Hague Judgments Convention⁴³ that gave credibility and certainty to choice of court clauses, by means of subsequent enforcement of judgments, would go a long way in resolving a significant number of parallel proceedings, and ones that have engendered increasingly vocal reactions even among similar legal systems.

C. ANTISUIT INJUNCTIONS IN 2001

Antisuit injunctions, the reverse image of staying or dismissing, accord no deference to foreign sovereigns. The Circuits have generally split into two camps,⁴⁴ those that embrace the liberal approach to granting an antisuit injunction, followed primarily by the Fifth, Seventh, and Ninth Circuits, and those circuits that have adopted the stricter "*Laker*"⁴⁵ standard, followed primarily by the D.C., Second, and Sixth Circuits. In 2001, the *Laker* approach gained a majority when the Third Circuit officially aligned itself with the "more restrictive standard," after hinting at the importance of comity within the transnational litigation context in several earlier cases.⁴⁶ In *General Electric Co. v. Deutz AG*,⁴⁷ the Third Circuit reversed the district court's order enjoining the defendant's efforts in English courts to enforce the right to arbitration on the basis of comity, and in the process rejected the argument that an important public policy—"the sanctity of the jury verdict"—would be threatened without the injunction.

In *Deutz*, GE entered into a joint venture contract with Moteren-Werke Mannheim AG, a German corporation, to design and manufacture diesel engines for locomotives. Under the contract, Moteren-Werke's parent, Deutz AG, guaranteed the design obligations of the subsidiary. When the joint venture fell apart and Deutz refused to provide additional funding, GE brought suit in federal court in Pennsylvania for breach of contract. Deutz, besides challenging personal jurisdiction, also asserted that the contract required arbitration. In July 1999, while the suit was pending in the district court, Deutz sought to arbitrate before the International Arbitration Association in London. The district court, meanwhile, ruled that there was personal jurisdiction and submitted to a jury the issue of whether the contract language provided for arbitration. The jury found that Deutz was not entitled to arbitration. In April 2000, before the arbitration panel issued a decision, Deutz petitioned the High

43. See *infra* at text accompanying notes 70–71.

44. For an interesting analysis of parallel proceedings, circuit by circuit, see Margarita Trevino de Coale, *Stay, Dismiss, Enjoin, or Abstain?: A Survey of Foreign Parallel Litigation in the Federal Courts of the United States*, 17 B.U. INT'L L.J. 79 (1999). See generally Teitz, *supra* note 8, at 233–50.

45. See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

46. See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) (applying comity in connection with prescriptive jurisdiction in antitrust case); *Compagnie Des Bauxites de Guinée v. Ins. Co.*, 651 F.2d 877 (3d Cir. 1981); *Armstrong World Indus., Inc. v. Sommer Allibert, S.A.*, No. Civ. 97-3914, 1998 WL 195938 (E.D. Pa. Apr. 13, 1998).

47. *General Electric Co. v. Deutz AG*, 270 F.3d at 159.

Court in London to enjoin GE from continuing to litigate in federal court in Pennsylvania, which the English court declined to do. At the end of July 2000, after the London court had refused to enjoin GE and before the arbitral panel's decision, GE convinced the U.S. district court to do what the London court had refused to do — issue an antisuit injunction, and enjoin Deutz from resorting to the High Court in the future. Deutz appealed. In November 2000, the arbitration panel held that GE and Deutz had not agreed to arbitrate this dispute, closing the circle.

The Third Circuit upheld personal jurisdiction and the determination that Deutz was not entitled to compel arbitration under the contract, but reversed the antisuit injunction, thus clearly joining with those Circuits following the stricter *Laker* approach to granting antisuit injunctions. Although the district court arguably had applied the stricter standard, the Third Circuit did not agree that the court's jurisdiction was threatened by the possibility that the arbitral panel might find that the parties had agreed to arbitrate. The court found that "the circumstances here were not so aggravated as to justify interference with the jurisdiction of the courts of another sovereign state, and there is no indication that the English courts would have prevented General Electric from arguing the *res judicata* effect . . ." of the district court order.⁴⁸ In addition, the English High Court had already refused to issue an injunction against GE and given no indication that it was likely to issue one. Finally, the Third Circuit rejected the argument that the public policy of the forum, as represented by a jury verdict, was threatened by the parallel litigation.⁴⁹

Of particular significance in *Deutz* is the Third Circuit's repeated acknowledgement that parallel litigation involving international proceedings is different from purely domestic litigation, and thus the precedent should reflect different values, particularly comity. The court looked at its own international cases and took great pains to show deference to the English High Court's ruling.⁵⁰ Moreover, the Third Circuit's unwillingness to consider the effect of jury findings as an essential public policy of the forum is an acknowledgment that not all litigation will, or need, follow the American model.

It is interesting to compare the *Deutz* court's stand on the public policy of jury trials with *Younis Brothers & Co. v. CIGNA Worldwide Ins. Co.*,⁵¹ an opinion issued just six months earlier by a district court in the Third Circuit. In *Younis*, the district court granted an antisuit injunction in connection with parallel litigation in Liberia, basically because of the Liberian court's refusal to accord *res judicata* effect to an earlier U.S. federal court ruling. The insured plaintiffs had sued CIGNA in federal court to recover for property losses suffered in Liberia during the Liberian civil war in 1990. The jury verdict in favor of the plaintiffs was set aside by the court, primarily on the basis that, as a matter of law, recovery was precluded under the war risk exclusion in the policy. The plaintiffs subsequently filed suit again against

48. *Id.* at 159.

49. Although the jury unquestionably has a more important role in the American jurisprudential system than in that in any other nation, its verdict is neither infallible nor immune from judicial scrutiny.

We have been cited to no authority that endorses enjoining proceedings in a foreign court on the grounds that an American jury verdict might be called into question.

Id.

50. *Id.* at 161–62 ("Our jurisprudence thus reflects a serious concern for comity. . . . This is not an aggravated case that calls for extraordinary intervention, nor is it sufficient that the ruling of the arbitral panel might have jeopardized the district court's jurisdiction.").

51. *Younis Brothers & Co. v. CIGNA Worldwide Ins. Co.*, 167 F. Supp. 2d at 743.

CIGNA in Liberia. The Liberian court rejected CIGNA's defense of *res judicata* on the basis of the earlier U.S. federal court judgment, relying on Liberia's policy against judgment n.o.v., as evidenced by its express abolition of this practice. CIGNA filed suit in U.S. federal court to enjoin the plaintiffs from continuing to litigate in Liberia or seeking to enforce the Liberian judgment. In granting the antisuit injunction, the district court acknowledged that the Third Circuit had "implicitly" adopted the restrictive approach, but applied a "balancing test" and relied heavily on its finding that the Liberian litigation "is wholly duplicative" and vexatious, as well as the Liberian's court refusal to recognize the earlier U.S. judgment as a threat to the U.S. court's jurisdiction.⁵² The district court also relied on "our nation's strong public policy in favor of *res judicata* and the finality of judgments."⁵³ The court ultimately decided that the plaintiffs would suffer no legal harm "since it has already been determined that they are not entitled to recover against CIGNA, and because of the strong public policy in favor of *res judicata* . . ."⁵⁴ The *Younis* case is a graphic example of the result due to the lack of a multilateral treaty on recognition and enforcement of judgments.⁵⁵ Unfortunately, it is also another example of the transposing of domestically developed theories, such as preclusion, into an international context.

In yet another of the cases discussed last year,⁵⁶ the Second Circuit has reversed and remanded the granting of an antisuit injunction in an admiralty case involving about 1000 claimants in a limitation proceeding. The district court had enjoined a third party defendant's parallel suit in Korea for a declaratory judgment of nonliability, which named only three of the cargo claimants as parties. In reversing the district court, primarily due to uncertainty about aspects of personal jurisdiction over the third party defendant, the Second Circuit, without reaching the merits of the injunction, stressed again its strict approach to antisuit injunctions and its emphasis on two factors: "whether the foreign action threatens the jurisdiction of the enjoining forum, and whether strong public policies of the enjoining forum are threatened by the foreign action. . . ."⁵⁷ The Second Circuit, in dicta, intimated that the district court should have given greater weight to these two factors than to whether "proceedings in the other forum prejudice other equitable considerations" or whether "adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment."⁵⁸ Thus, the Second Circuit stands firm in its commitment to restraint in the face of parallel proceedings.

52. *Id.* at 746.

53. *Id.* at 747. The district court quoted extensively from the Supreme Court's opinion in *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981), for finding that *res judicata* "is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts." *Moitie* concerned litigation in state and federal courts only and had no international component.

54. *Younis Bros.*, 167 F. Supp. 2d at 747.

55. It is not clear whether a treaty with a public policy exception to recognition might still provide a court a basis to refuse to recognize a judgment under these facts.

56. *In re Rationis Enters.*, No. 97 CV 9052 (RO), 2000 U.S. Dist. LEXIS 10226 (S.D.N.Y. July 24, 2000), *rev'd*, 261 F.3d 264 (2d Cir. 2001). See Teitz, *supra* note 2, at 500.

57. *In re Rationis Enters.*, 261 F.3d at 270, citing *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987)).

58. *Id.* at 270. In granting the antisuit injunction, the district court had stressed the "unusual size and complexity" of the limitation proceeding and the concern with potential collateral estoppel effects from any Korean judgment.

D. MIXED RESULTS

A recent case from the District of Massachusetts, *Linkco, Inc. v. Nichimen Corp.*,⁵⁹ nicely illustrates deference to a foreign forum, in this case viewed within the context of a motion to dismiss the U.S. litigation for *forum non conveniens* where reverse litigation had already resulted in a foreign judgment.⁶⁰ Nichimen, a Japanese-based corporation, filed the first suit—a declaratory judgment action in Japan—which was contested on the merits by Linkco, the defendant Delaware company. The Japanese court issued a twenty-one-page opinion, finding for Nichimen on all counts, including those based on U.S. federal economic espionage laws and Massachusetts unfair business practices law. Linkco subsequently filed suit in federal court in Illinois. When Nichimen moved to dismiss for *forum non conveniens*,⁶¹ Linkco dismissed the Illinois action and simultaneously filed a nearly identical complaint in Massachusetts federal court—which, not surprisingly, was met by the same motions to dismiss as had been filed in Illinois. As part of its analysis of the *forum non conveniens* motion, the court considered the impact of the earlier Japanese judgment and the potential enforceability of any subsequent U.S. judgment abroad. The court suggested that it might be barred from hearing Linkco's case by the res judicata effect of the earlier Japanese judgment, and that Linkco would be unable to enforce any judgment the U.S. federal court might render. Finally, the district court emphasized the importance of comity where a foreign judgment has already been rendered, quoting *Hilton v. Guyot* and the classic parallel litigation case, *Laker*.⁶²

Finally, the Northern District of California recently proved that there is more than one way both to "abstain" in favor of parallel litigation and to transpose wholly domestic doctrine to the international context.⁶³ In *Supermicro Computer Inc. v. Digitechnic, S.A.*,⁶⁴ the first suit was filed in France in December 1998 by a French buyer of computer parts, which allegedly were defective and caught fire, seeking replacement costs and consequential damages. The California seller claimed in that action that the sales invoices and user's manual limited recovery, such that the sole remedy was repair and replacement of malfunctioning parts. More than one year later, while the French suit was proceeding before the French Commercial Court, the California seller filed a reverse declaratory action in U.S. federal

59. *Linkco, Inc. v. Nichimen Corp.*, 164 F. Supp. 2d 203 (D. Mass. 2001).

60. It appears that the Japanese judgment was subject to appeal since the U.S. defendant in that litigation, Linkco., had indicated it planned to appeal. The district court, however, also suggested that the judgment in the Japanese case rendered moot the motion for a stay pending the Japanese litigation by Nichimen, the defendant in the U.S. case and plaintiff in the reverse litigation in Japan, is moot.

61. The motion to dismiss for *forum non conveniens* was joined with an alternative motion to stay the litigation in light of pending parallel litigation, a common practice.

62. The central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations. The interests of both forums are advanced—the foreign court because its laws and policies have been vindicated; the domestic country because international cooperation and ties have been strengthened. The rule of law is also encouraged, which benefits all nations. *Linkco, Inc.*, 164 F. Supp. 2d at 29–30 (quoting *Laker*, 731 F.2d at 937).

63. For a discussion of the incorrect reliance on domestic precedent in an international context, see Posner v. Essex Ins. Co., 178 F.3d 1209, 1222–24 (11th Cir. 1999), discussed in Louise Ellen Teitz, *Parallel Proceedings and the Guiding Hand of Comity*, 34 INT'L LAW. 545, 546–47 (2000).

64. *Supermicro Computer Inc. v. Digitechnic, S.A.*, 145 F. Supp. 2d 1147 (N.D. Cal. 2001).

court, seeking a determination that the parts were not defective, or in the alternative that, the sole remedy is repair or replacement. The California plaintiff (seller) sought summary judgment while the French defendant (buyer) moved to stay or dismiss the U.S. litigation in favor of the earlier-filed French suit. The district court first looked at international abstention, and while admitting that "this case appear[s] to fit neatly with the doctrine,"⁶⁵ decided that the Ninth Circuit has not specifically adopted "international abstention." Instead, the court utilized another discretionary doctrine, allowing courts to decline jurisdiction of declaratory actions and permitting greater discretion than the *Colorado River* abstention.⁶⁶ Under the test for declining jurisdiction in actions seeking only declaratory relief with no independent claims, the "touchstone factors" look to whether the court can avoid duplicative litigation while considering the "convenience of the parties, and the availability and relative convenience of other remedies."⁶⁷ While the district court ultimately decided that it should dismiss⁶⁸ the later-filed action in deference to the ongoing French proceeding, its analysis tries to shoehorn international facts into the domestic doctrine with *forum non conveniens* factors added in. Comity won in the end, but in the process the court further fragmented the doctrinal treatment of multiple proceedings when non-domestic litigation is involved.

E. PREDICTING THE PATH OF FUTURE PARALLEL PROCEEDINGS

The amount of parallel litigation generated by issues of concurrent prescriptive jurisdiction is likely to increase exponentially, especially in cyberspace and areas lacking consensus on underlying substantive law and values. Areas such as defamation, intellectual property, and securities law are ripe for friction among courts.⁶⁹ The conflict is also likely to expand in the future to parallel proceedings where one of the actions involves a criminal or penal action.

Major news events in 2001 also suggest the potential for increased parallel proceedings. Litigation stemming from September 11 is likely to generate actions in multiple forums, both civil and criminal, and many of a class nature, especially where defendants seek to gain universal preclusive results. Complicating such litigation may be specific tribunals or administrative bodies established to handle portions of claims and federal statutes providing relief. Another major event in the news, the Enron scandal, will likely end in parallel proceedings, some of which may involve bankruptcy actions of one or more entities and produce actions in the United States and elsewhere where Enron has assets or business partners.⁷⁰

65. *Id.* at 1149.

66. *Id.* at 1150 (citing *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995)).

67. *Id.* (quoting *Gov't Employees Ins. Co. v. Dizon*, 133 F.3d 1220, 1225 (9th Cir. 1998)).

68. One aspect of trying to treat this as a discretionary dismissal under the declaratory judgment doctrine is the decision to dismiss the action, here without prejudice, rather than staying the action, which is often the course utilized in abstention cases.

69. For a recent typical example of the potential for parallel proceedings erupting, see Gutnick, *supra* note 7, an Australian litigation brought against Dow Jones & Co. for alleged defamation based on an internet publication. Dow Jones has appealed the decision and there has not been any enforcement action and as yet no attempts to block enforcement through parallel litigation.

70. The question of deferring to parallel proceedings has arisen previously in connection with large multinational bankruptcies that involve assets and creditors in different nations. The Second Circuit, relying on

The increasingly likely stalemate, for some of the reasons discussed last year at the Hague Conference on Private International Law in producing a comprehensive jurisdiction and judgments convention to which the United States would be a party suggests that parallel litigation due to concurrent jurisdiction and the unenforceability of foreign judgments will continue.⁷¹ Some country members of the Hague Conference have called for a scaled-back convention that might provide limited relief while not addressing some of the controversial areas involving consumers, electronic commerce, and intellectual property. The carefully crafted compromise between the civil law tradition of *lis pendens* and the common law doctrine of *forum non conveniens* may unfortunately fall by the wayside. One distinct possibility gaining attention focuses on a choice of court/forum convention⁷² that would enforce forum selection clauses and resulting judgments, much as the New York Convention does with arbitration clauses and subsequent arbitral awards. Although only a small piece of the puzzle of a judgments convention, a large portion of multiple proceedings is generated by actions in contravention of forum selection clauses or seeking to enforce forum selection clauses. Reducing the friction generated from these cases would go a long way toward reducing the number and need for parallel litigation and providing predictability in planning transactions. Like Sisyphus' labors, the attempts to achieve a comprehensive judgments convention may slide backwards before making further progress.

international comity, deferred to English proceedings in *In re Maxwell Comm. Corp.*, 93 F.3d 1036 (2d Cir. 1996). The opposite result was reached in connection with parallel proceedings involving the United States and Nevis, in connection with Rimsat, a corporation organized under the laws of Nevis but with its headquarters in the United States. See *In re Rimsat, Ltd.*, 98 F.3d 956 (7th Cir. 1996). This past year there was parallel litigation and antisuit injunctions in *In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd.*, 272 B.R. 396 (Bankr. S.D.N.Y. 2002).

71. The newest draft of the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, an interim text, was drawn up at Part One of the Nineteenth Diplomatic Session, which was held from June 6-22, 2001. The draft text, *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference*, is available at the Hague Conference's Web site, www.hcch.net/e/workprog/jdgm.html (last visited July 3, 2002). Two other documents on the Hague Conference Web site, both produced by Avril D. Haines, provide insight into the problems facing the Conference, especially in connection with the Internet and also the problems related to choice of court agreements. See Avril D. Haines, *The Impact Of The Internet On The Judgments Project: Thoughts For The Future*, Hague Conference on Private International Law, Comm'n I, 19th Sess., Preliminary Document No. 17 (Feb. 2002), and Avril D. Haines, *Choice Of Court Agreements In International Litigation: Their Use And Legal Problems To Which They Give Rise In The Context Of The Interim Text*, Hague Conference on Private International Law, Comm'n I, 19th Sess., Preliminary Document No. 18 (Feb. 2002). Both available at www.hcch.net/e/workprog/jdgm.html.

Since June 2001, there have been informal meetings among different member nations, exploring ways to continue the work on the Judgments Convention. The United States held informal meetings with several of its trading partners during fall 2001 in preparation for a meeting of Hague Conference members in April 2002 (Commission I, 19th Session) to determine how, or if, to proceed with the project. For a discussion of the state of negotiations, see the document prepared by the Permanent Bureau, *Some Reflections On The Present State Of Negotiations On The Judgments Project In The Context Of The Future Work Programme Of The Conference*, Preliminary Document No. 16, available at www.hcch.net/e/workprog/jdgm.html.

72. See Preliminary Document No. 18, *supra* note 71.

II. Foreign Sovereign Immunity and the Foreign Sovereign Immunities Act

DOUGLAS K. MULLEN*

The Foreign Sovereign Immunities Act (FSIA)⁷³ is the sole basis for obtaining jurisdiction over a foreign state and its agencies and instrumentalities in a U.S. court.⁷⁴ The FSIA codifies the 'restrictive theory' of foreign sovereign immunity, which grants immunity to a foreign sovereign unless one of the enumerated exceptions applies.⁷⁵ In 2001, courts discussed retroactive application of the FSIA, the effect of tiered ownership interests, the waiver of immunity exception, FSIA and Head of State Immunity, and service of process requirements.

A. RETROACTIVE APPLICATION OF THE FSIA

In 1952, the United States indicated support for restrictive sovereign immunity by issuing the Tate Letter.⁷⁶ This position was later codified by the passage of the FSIA in 1976.⁷⁷ While the Circuits split on whether the FSIA can be applied retroactively,⁷⁸ courts this year followed a growing trend, applying the FSIA to current suits based on sovereign actions prior to 1952. Three district court cases in 2001 addressed claims arising out of human rights violations during World War II. In two, courts found that the FSIA applied retroactively (providing jurisdiction in one, barring it in the other), while in the third, the court did not reach the issue of retroactivity.

In *Altmann v. Republic of Austria*,⁷⁹ the U.S. District Court for the Central District of California applied the FSIA to a claim for original paintings by Gustav Klimt stolen by the Nazis during WWII and in the possession of the Austrian government.⁸⁰ Defendants argued their entitlement to absolute immunity because the claim was based on events prior to 1952.⁸¹ Following a trend developing since the Supreme Court's decision in *Landgraf* regarding retroactive application of statutes,⁸² the court found jurisdiction under the expro-

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73. 28 U.S.C. §§ 1602–11 (1989).

74. *Argentine Republic v. Amerasia Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

75. See 28 U.S.C. § 1604.

76. 26 Dep't St. Bull. 1982 at 984–85.

77. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983).

78. See, e.g., *Jackson v. Peoples Republic of China*, 794 F.2d 1490, 1497 (11th Cir. 1986) (refusing to apply the FSIA because it would be unfair to interfere with a foreign state's expectation of absolute immunity for acts committed in 1911); *Carl Marks & Co. v. U.S.S.R.*, 841 F.2d 26, 27 (2d Cir. 1988) (stating U.S.S.R.'s absolute immunity cannot be abrogated for claims based on debt instruments issued in 1916); *Slade v. United States of Mexico*, 617 F. Supp. 351, 356 (D.D.C. 1985); but see *Creighton Ltd. v. Gov't of Qatar*, 181 F.3d 118, 124 (D.C. Cir. 1999) (permitting the retroactive application of a 1988 FSIA amendment because the amendment was jurisdictional and did not affect substantive rights of the parties); *Haven v. Rzeczpospolita Polska*, 68 F. Supp. 2d 943, 946 (N.D. Ill. 1999) (permitting claims based on property expropriated during and after WWII because FSIA is jurisdictional and does not affect substantive rights).

79. *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Ca. 2001).

80. See *id.* at 1201.

81. See *id.* at 1199.

82. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (holding that if Congress has not expressly stated a statute's reach, and application would not impair a party's rights, as in the case of a jurisdictional statute, retroactive application is permitted); *Haven*, 68 F. Supp. 2d at 945 (allowing FSIA claims arising out of WWII events).

priation exception of the FSIA, holding that as a jurisdictional statute, the FSIA does not affect substantive rights but only changes the tribunal hearing the case and thus should be applied retroactively.⁸³

The FSIA is commonly understood to have narrowed the scope of sovereign immunity,⁸⁴ and thus its retroactive application is generally sought, where relevant, by plaintiffs suing sovereigns. However, presumably because it was clear no exceptions to immunity would apply, Plaintiffs in *Abrams v. Societe Nationale des Chemins de fer Francais*⁸⁵ argued that the FSIA did *not* apply retroactively to the WWII deportations of Jews by the French railroad at issue in their case. Plaintiffs instead sought jurisdiction on the basis of sovereign immunity law as it existed prior to the enactment of the FSIA. In addressing the question of retroactivity, the district court acknowledged the Second Circuit's 1988 decision in *Carl Marks* barring retroactive application,⁸⁶ relied on heavily by plaintiffs, but noted in dicta that *Landgraf* might mean *Carl Marks* was no longer good law.⁸⁷ In any event, the court found no need to confront the status of *Carl Marks* directly, finding it inapposite to the unusual posture of *Abrams*.⁸⁸ Applying the FSIA, the district court dismissed the complaint because none of the statutory exceptions to immunity applied and hence plaintiffs "failed to show a basis for subject matter jurisdiction under the FSIA."⁸⁹

In *Hwang v. Japan*,⁹⁰ the D.C. District Court identified, but found it did not need to decide, the question of whether the FSIA applies to pre-1952 events. Plaintiffs, so-called "comfort women," brought a class action on behalf of themselves and similarly situated women who alleged to have been victims of sexual slavery and torture by the Japanese military before and during WWII. The court dismissed the complaint without deciding whether the FSIA would apply retroactively, finding Japan to be immune from suit under either an absolute or restrictive immunity test because none of the FSIA exceptions to immunity applied.⁹¹ Thus, post-*Landgraf*, the courts of the D.C. Circuit have yet to address expressly the question of whether the FSIA applies to pre-1952 events, although the *Creighton* decision, allowing retroactive application of an FSIA amendment, suggests how the court may rule when the issue is presented squarely.⁹²

B. TIERING OF OWNERSHIP INTERESTS

The FSIA applies to defendants that fall within the definition of a "foreign state" or an "agency or instrumentality" of a foreign state.⁹³ The Circuits are split on the question of

83. See Altmann, 142 F. Supp. 2d at 1201.

84. See *Abrams v. Societe Nationale des Chemins de fer Francais*, 175 F. Supp. 2d 423, 443-44 (E.D.N.Y. 2001).

85. *Id.*

86. *Carl Marks*, 841 F.2d at 27.

87. *Abrams*, 175 F. Supp. 2d at 434.

88. *Id.* at 443-45.

89. *Id.* at 450.

90. *Hwan Geum Joo v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001).

91. See *id.* at 59-64 (finding the waiver and commercial activity exceptions to immunity do not apply in this case). As the Hwang court noted, it was in much the same position as the D.C. Circuit in *Princz*, for because none of the FSIA exceptions would apply, it was not necessary to "decide whether the FSIA applie[d] to pre-1952 events in order to resolve this case." *Id.* at 58 (quoting *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1170 (D.C. Cir. 1994)).

92. *Creighton*, 181 F.3d at 124.

whether an indirect or tiered majority ownership of a corporation or subsidiary is sufficient to qualify an entity as a foreign state under these definitions.⁹⁴

In *Patrickson v. Dole Food Co.*, the Ninth Circuit continued to stand alone in prohibiting tiering.⁹⁵ Plaintiffs, banana workers from Central American states, filed a class action suit against manufacturers of pesticides for exposure and injuries allegedly caused by pesticides in their home countries.⁹⁶ In direct opposition to the Fifth Circuit's holding last year in *Delgado v. Shell Oil*,⁹⁷ the Ninth Circuit held it did not have jurisdiction under the FSIA over the very same two "Dead Sea Companies" that had been at issue in *Delgado*, which were indirectly owned by the Israeli government during the time of the alleged conduct.

In contrast to the Ninth Circuit approach, district courts in New York and Ohio all permitted tiering in 2001, finding jurisdiction under the FSIA over companies owned indirectly by foreign sovereigns.⁹⁸

C. WAIVER OF IMMUNITY

Under the FSIA, a sovereign is not entitled to immunity where it has waived such immunity, either explicitly or implicitly.⁹⁹ In 2001, courts continued to interpret this exception narrowly. In *Sampson v. Federal Republic of Germany*,¹⁰⁰ Plaintiff sued Germany for his imprisonment in Nazi concentration camps during WWII, arguing that such violation of a *jus cogens* norm constituted a waiver of any sovereign immunity and vested the court with jurisdiction.¹⁰¹ The Seventh Circuit, following precedent, refused to recognize a *jus cogens* violation as an implied waiver of sovereign immunity, holding that the waiver exception

93. 28 U.S.C. § 1603(b). An "agency or instrumentality" of a foreign state includes any separate legal person that is an organ of a foreign state or political subdivision "or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision and which is neither a citizen of the United States nor created under the laws of a third country." *Id.*

94. See *Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000) (holding tiering is allowed for purposes of the FSIA); *In re Air Crash Disaster Near Roselawn, Ind.*, 96 F.3d 932, 941 (7th Cir. 1996) (same); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 448-50 (6th Cir. 1988) (same); but see *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir. 1995) (holding a corporation owned by an instrumentality of a foreign government is not an instrumentality of that government).

95. *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001). The court assumed without deciding that the FSIA applies to companies that were government owned at the time of the conduct but has since been privatized. See *id.* at 806.

96. See *id.* at 798. The class action was originally filed against Dole Food Co., which then impleaded Dead Sea Bromine Company and Bromine Compounds Limited (the "Dead Sea Companies"). The government of Israel owned a majority of shares in the Dead Sea Companies during the alleged conduct. See *id.*

97. *Delgado*, 231 F.3d at 176. For a fuller discussion of the *Delgado* opinion, see Douglas Mullen, *Foreign Sovereign Immunity and the Foreign Sovereign Immunities Act*, 35 INT'L LAW. 503, 504 (2001).

98. See *Lehman Bros. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 169 F. Supp. 2d 186 (S.D.N.Y. 2001) (finding FSIA applied to a wholly-owned subsidiary of a company owned by the Chinese government); *Musopole v. S. African Airways Ltd.*, 172 F. Supp. 2d 443 (S.D.N.Y. 2001) (holding FSIA applied to a corporation in which the South African government indirectly had an 80% interest); *Watkiss v. Corporate Jets, Inc.*, 2001 U.S. Dist. Lexis 17839 (N.D. Ohio 2001) (finding jurisdiction under the FSIA where the French government owned a majority interest in a corporation that had a majority interest in the defendant helicopter manufacturing company).

99. See 28 U.S.C. § 1605(a)(1).

100. *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001).

101. See *id.* at 1146. A "*jus cogens*" norm is one "accepted and recognized by the international community . . . as a norm from which no derogation is permitted. . . ." *Id.* at 1149.

must be construed narrowly and U.S. courts cannot interpret federal statutes according to the "changing nuances of" customary law or *jus cogens* norms.¹⁰²

In a case of first impression, the Ninth Circuit in *Corzo v. Banco De Peru*,¹⁰³ considered whether a foreign sovereign's waiver to suit in its own country constituted an implied waiver to suit in the United States.¹⁰⁴ Plaintiff sought to enforce a controversial Peruvian judgment¹⁰⁵ against the Bank of Peru by attaching assets in the United States.¹⁰⁶ Plaintiff argued that because the bank submitted to litigation in Peru, it implicitly waived any immunity in the United States.¹⁰⁷ The court held that a sovereign's waiver of immunity in its own courts does not constitute a waiver in U.S. courts, hence there was no jurisdiction under the FSIA.¹⁰⁸

However in a more straightforward situation, *Lord Day v. Vietnam*,¹⁰⁹ the District Court for the Southern District of New York found that Vietnam waived its immunity by appearing to determine its entitlement to certain funds held by the court.¹¹⁰ The funds at issue constituted a settlement reached in 1975 for lost cargo owned by the Republic of Vietnam near the Panama Canal. The settlement funds were still held in the United States, because from 1975 to 1995 the U.S. government had banned all transfer of funds to the Socialist Republic of Vietnam.¹¹¹ Despite its appearance in the district court, Vietnam asserted sovereign immunity under FSIA as to all claims against it regarding the funds. However, the court held Vietnam could not make such a limited appearance to decide only its own entitlement to the funds, and thus found that Vietnam waived its immunity with respect to all claims related to the settlement funds.¹¹²

D. FSIA AND HEAD OF STATE IMMUNITY

Although traditionally the state and its ruler were considered as one entity, the FSIA is silent as to the issue of what sovereign immunity, if any, should be afforded to a sitting head of state. Further, not many cases have explored the question. In *Tachiona v. Mugabe*,¹¹³ the district court for the Southern District of New York examined whether the FSIA may be used to breach Head of State immunity where a head of state is individually named in the suit. Plaintiffs, citizens of Zimbabwe, alleged a campaign of violence against them by the

102. *See id.* at 1154.

103. *Corzo v. Banco Cent. De Reserva del Peru*, 243 F.3d 519 (9th Cir. 2001).

104. *See id.* at 522.

105. *See id.* Plaintiffs apparently received a valid final judgment by the Peruvian Supreme Court that had subsequently been declared null and void.

106. *See id.*

107. *See id.* at 522-23. The plaintiffs also argued the bank explicitly waived its sovereign immunity and presented expert opinions to show that under Peruvian law the bank was not immune from suit in the United States. The court ultimately rejected this argument. *See id.*

108. *See id.* at 524. In deciding this case the court examined opinions from other circuits that overwhelming ruled amenability to suit in one country does not automatically subject a foreign sovereign to suit in the United States. *See, e.g., Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1386 (8th Cir. 1992).

109. *Lord Day & Day v. Socialist Republic of Vietnam*, 134 F. Supp. 2d 549 (S.D.N.Y. 2001).

110. *See id.* at 557.

111. *See id.* at 554-55.

112. *See id.* at 559. The court held Vietnam implicitly waived its immunity only for the settlement funds, which were deposited with the court immunity was not waived for other claims plaintiffs argued for other property. *See id.*

113. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001).

President of Zimbabwe, other Government officials, and Zimbabwe's ruling political party.¹¹⁴ Relying on the Ninth Circuit's holding in *Chuidian*¹¹⁵ and its progeny, plaintiffs urged that the FSIA—and not pre-FSIA immunity doctrines—applies to claims against individuals as agents or instrumentalities of the foreign state, and that sovereign immunity ceases when such individuals act beyond the scope of their authority.¹¹⁶ Following its pre-FSIA practice, the U.S. State Department entered a suggestion of immunity on behalf of Mugabe and the Government officials. Following a different strand of case law than that recommended by Plaintiffs, the court deferred to the State Department's suggestion of immunity as had been the practice prior to the FSIA, and held the Government officials retained immunity.¹¹⁷ However, the court did find jurisdiction over the ruling political party, which enjoyed no immunity.¹¹⁸

E. SERVICE OF PROCESS

The FSIA provides explicit requirements for service of process for a foreign sovereign or political subdivision and an agency or instrumentality of a foreign state.¹¹⁹ Courts have interpreted service requirements differently depending on whether a foreign state, agency or instrumentality is to be served.¹²⁰ In *Magness v. Russian Federation*,¹²¹ the Fifth Circuit joined the majority of circuits finding strict compliance necessary for service of a foreign state or political subdivision, while substantial compliance is permissible for service of an agency or instrumentality of a foreign state. Plaintiffs are descendants of Russian citizens whose property was expropriated during the Bolshevik Revolution in 1918.¹²² Having been unable to regain their property from Russian officials, they sued to attach Russian assets located in the United States.¹²³ The court remanded the case to the district court, finding that plaintiffs neither strictly complied with service procedures for a foreign state nor substantially complied with service procedures for an agency or instrumentality of a foreign state.¹²⁴

114. See *id.* Plaintiffs claims included murder, torture, terrorism, rape, beatings, and destruction of property brought under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1998), and Torture Victim Protection Act, 28 U.S.C. § 1350 (1998). These acts allegedly were committed to suppress political opposition groups prior to Zimbabwe's June 2000 Parliamentary elections.

115. *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990).

116. See *Tachiona*, 169 F. Supp. 2d at 281–84.

117. See *id.* at 296–97. In dicta, the court was less clear as to whether it would honor a Suggestion of Immunity by the State Department if the head of state's conduct fell under one of the commercial activity exceptions of the FSIA. See *id.* at 296. Interestingly, the court did not explicitly discuss the terrorist acts exception to immunity in the FSIA that was added in 1996. See 28 U.S.C. § 1605(a)(7).

118. See *Tachiona*, 169 F. Supp. 2d at 296.

119. See 28 U.S.C. § 1608(a–b).

120. See *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994) (requiring strict compliance with section 1608(a) and substantial compliance with section 1608(b)); *Gray v. Permanent Mission of People's Republic of Congo*, 580 F.2d 1044 (2d Cir. 1978) (holding 1608(a) requires strict compliance); *Aberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (same); *Sherer v. Construcciones Aeronauticas S.A.*, 987 F.2d 1246 (6th Cir. 1993) (holding substantial compliance is permitted for section 1608(b)); *Straub v. A.P. Green, Inc.*, 38 F.3d 448, 453 (9th Cir. 1994) (same); but see *LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400 (E.D. Va. 1988) (requiring strict compliance for section 1608(b)).

121. *Magness v. Russian Fed'n*, 247 F.3d 609 (5th Cir. 2001).

122. See *id.*

123. See *id.*

124. See *id.* at 617. Upon remand the court ordered the district court to allow the plaintiffs time to perfect service upon the defendants. See *id.* at 618.

III. Personal Jurisdiction

DAVID A. LOMBARDERO*

A. DEVELOPMENTS UNDER RULE 4(k)(2)

Rule 4(k)(2) of the Federal Rules of Civil Procedure was added in 1993. It provides:

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons . . . is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

The purpose of the rule is to "extend[] the reach of federal courts to impose jurisdiction over the person of all defendants against whom federal law claims are made and who can be constitutionally subjected to the jurisdiction of the courts of the United States."¹²⁵ Prior to the adoption of Rule 4(k)(2), a federal court could only exercise jurisdiction over a defendant if a state court in the same state could do so, or if there was a federal statute that specifically conferred jurisdiction.

1. *Fiduciary Shield Doctrine Inapplicable When Jurisdiction Rests on 4(k)(2)*

In *ISI International, Inc. v. Borden Ladner Gervais LLP*,¹²⁶ plaintiff corporation had sued the defendant Canadian law firm for fraud, interference with contract, violation of the Lanham Act, malpractice, and breach of fiduciary duty. The district court dismissed for lack of personal jurisdiction in Illinois, finding that the law firm had no contacts with Illinois, and, even if it did, there was no federal jurisdiction because Illinois courts would decline to exercise jurisdiction under the "fiduciary shield" doctrine because defendant's acts were done solely in a fiduciary capacity to another client.¹²⁷

The Court of Appeals reversed. Relying on Rule 4(k)(2), which the district court had not invoked, the Seventh Circuit held that, with respect to claims based upon federal law, the "minimum contacts" that must be analyzed are those with the United States as a whole, rather than the particular forum state.¹²⁸ Because the defendant had ample contacts with the United States and had failed to show that it was amenable to personal jurisdiction elsewhere, the exercise of jurisdiction in Illinois was proper.¹²⁹

The court then went on to reject application of the fiduciary shield doctrine. The court characterized this doctrine as a creation of state courts to limit exercise of their jurisdiction over defendants who act purely in a fiduciary capacity, the effect of which is to force venue in the home state of the fiduciary.¹³⁰ The court held this doctrine inappropriate when jurisdiction is based on 4(k)(2), as it would preclude any federal jurisdiction, and in any event

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125. Fed. R. Civ. P. 4 advisory committee's note (1993).

126. *ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548 (7th Cir. 2001).

127. This analysis ignored the plaintiff's allegations that the defendant law firm was in fact engaged to represent it, rather than another client that now was adverse. *Id.* at 550.

128. *See id.* at 551–52.

129. *See id.* at 552.

130. *See id.* at 552–53.

"its legitimate function is served by the doctrine of *forum non conveniens*."¹³¹ The court remanded for a full *forum non conveniens* analysis.¹³²

2. Establishing Jurisdiction When Defendant Defaults

System Pipe & Supply, Inc. v. M/V Viktor Kurnatovskiy was an admiralty case against a vessel and its owner, Azov, in which plaintiff alleged that its cargo was damaged in transit to Texas.¹³³ After being served with process in the Ukraine where it was based, Azov defaulted.¹³⁴ The district court then dismissed the action *sua sponte*, stating that plaintiff had failed to establish that Azov was subject to either special or general jurisdiction in Texas.¹³⁵ Plaintiff appealed.

The Fifth Circuit reversed and remanded for evaluation of whether, in this federal admiralty claim, Azov was subject to general jurisdiction under Rule 4(k)(2) because of its more extensive contacts with the United States as a whole rather than just with Texas.¹³⁶ The court further held that although it is proper for a court to raise the issue of personal jurisdiction *sua sponte*, the plaintiff must be given an opportunity to respond and present evidence supporting jurisdiction.¹³⁷

B. TRANSIENT JURISDICTION: TEMPORARY PRESENCE OF DEFENDANT IN FORUM AS BASIS FOR PERSONAL JURISDICTION

Although it may seem antiquated and at odds with the more modern minimum contacts analysis used for assessing personal jurisdiction, defendants remain subject to general personal jurisdiction if served with process while in the forum state.¹³⁸ In *Northern Light Technology, Inc. v. Northern Lights Club*,¹³⁹ the First Circuit confronted the issue of whether jurisdiction could be founded on service of process on the defendant while he was in the forum attending a hearing in the matter in which he was served.

Defendant Bugar, a resident of Canada, was sued in Massachusetts district court based upon both federal and state law claims regarding his use of an internet domain name that allegedly was confusingly similar to the plaintiff's.¹⁴⁰ Bugar apparently was served with process in Canada and contested jurisdiction. He traveled to Boston to attend a hearing on personal jurisdiction and the issuance of a temporary restraining order in the same case. Just before the hearing, he was again served with process.¹⁴¹ The district court granted the

131. *Id.* at 553.

132. *See id.* at 554. The court did not discuss whether, if the district court retained jurisdiction over the Lanham Act claims, it would have jurisdiction over the state law cases. The text of Rule 4(k)(2), as well as the numerous decisions dealing with the necessity to evaluate jurisdiction over each claim separately, suggest otherwise.

133. *System Pipe & Supply, Inc. v. M/V Viktor Kurnatovskiy*, 242 F.3d 322 (5th Cir. 2001).

134. *See id.*

135. *See id.* at 324.

136. *See id.* at 324–25.

137. *See id.* at 325.

138. *Burnham v. Superior Court*, 495 U.S. 604 (1990) (holding that a court's exercise of personal jurisdiction based upon the defendant's presence in the forum state on unrelated business when served with process comported with due process).

139. *Northern Light Technology, Inc. v. Northern Lights Club*, 236 F.3d 57 (1st Cir. 2001).

140. *See id.* at 58–60.

141. *See id.* at 60.

TRO application. It subsequently ruled that, independent of the service at the courthouse, the court had jurisdiction based upon Bugar's contacts with Massachusetts; found in favor of the plaintiff on the merits; and converted the TRO into a preliminary injunction.¹⁴² Bugar appealed.

The Court of Appeal affirmed. Rather than basing jurisdiction on Bugar's contacts with the forum, however, the court looked to the service of process made while he was in court for the hearing. Relying upon *Burnham* and Massachusetts state law precedent, the court held that such service comported with due process.¹⁴³ The court then rejected Bugar's argument that he was immune from service of process because he was in Massachusetts for the sole purpose of attending a personal jurisdiction hearing in the same lawsuit. The court held that such immunity is at the discretion, and for the convenience, of the court holding the hearing in order to further judicial administration, and not for the benefit of the party seeking to avoid service.¹⁴⁴ In addition, such immunity from service of process historically had been limited to service in judicial proceedings unrelated to that for which the defendant had traveled to the forum.¹⁴⁵ Because Bugar had not sought or obtained immunity from service of process prior to traveling to Massachusetts, and did not present a compelling case why such immunity should be extended, the service was valid and conferred jurisdiction over him.¹⁴⁶

C. PERSONAL JURISDICTION UPHELD AGAINST INDIVIDUAL BASED UPON SINGLE TRANSACTION CONDUCTED OUT-OF-STATE

In *Neal v. Janssen*,¹⁴⁷ plaintiffs were Tennessee residents who owned a horse boarded in the Netherlands. Plaintiffs met with defendant Janssen, a Belgian citizen, at a house that he then owned in Florida, and agreed to pay him a 10 percent commission if he arranged an acceptable sale of their horse.¹⁴⁸

After calling in and faxing several offers that plaintiffs found unacceptable, Janssen called to present an offer from a third party that was substantially below their offering price. Plaintiffs accepted this final offer when Janssen insisted they were asking too much and agreed to waive his commission. After receiving payment, the Neals learned that the third party actually paid Janssen nearly \$150,000 more for the horse than they received. Plaintiffs brought suit against Janssen in federal court in Tennessee, seeking damages for fraud and breach of fiduciary duty.¹⁴⁹ Janssen unsuccessfully moved to dismiss for lack of personal jurisdiction.¹⁵⁰ He then declined to defend, and judgment was entered in favor of the plaintiffs. Janssen appealed the jurisdictional ruling.

The Court of Appeal affirmed. The court held that the "purposeful availment" requirement for minimum contacts was satisfied by Janssen's calls and faxes to Tennessee because the fraudulent calls and faxes formed the basis for plaintiffs' tort claims.¹⁵¹

142. *See id.* at 60–61.

143. *Id.* at 61–62.

144. *See id.* at 62.

145. *See id.* at 62–63.

146. *See id.* at 63.

147. *Neal V. Janssen*, 270 F.3d 328 (6th Cir. 2001).

148. *See id.*

149. *See id.*

150. *See id.* at 330–31.

151. *See id.* at 332.

This case is noteworthy primarily because courts have shown more reluctance to exercise long-arm jurisdiction over foreign individuals than over corporations. The court concluded, however, that the exercise of jurisdiction over Janssen in Tennessee was reasonable despite his Belgian citizenship based on the quality of his connections with Tennessee, coupled with Janssen's international travel and former ownership of a house in Florida.¹⁵²

D. JURISDICTION OVER FOREIGN SOVEREIGNS WITHOUT REGARD TO MINIMUM CONTACTS

Altmann v. Republic of Austria,¹⁵³ arose out of the World War II appropriation of original Gustav Klimt paintings belonging to plaintiff's uncle. After encountering prohibitive filing fees in Austria because of the value of the paintings, plaintiff brought suit in federal court in Los Angeles.¹⁵⁴ Defendants moved to dismiss for lack of jurisdiction.¹⁵⁵

The court first held that defendants could not invoke sovereign immunity to preclude subject matter jurisdiction.¹⁵⁶ With regard to personal jurisdiction, the court followed a "suggestion" from the Supreme Court¹⁵⁷ and decisions from the D.C. District Court,¹⁵⁸ holding that foreign states are not "persons" protected by the Due Process Clause of the U.S. Constitution.¹⁵⁹ Accordingly, the court held that as long as the requirements of FSIA jurisdiction are satisfied, the court has personal jurisdiction over defendants regardless of whether their contacts with the forum are sufficient to satisfy a minimum contacts analysis.

This question does not usually arise in typical commercial cases against sovereigns, because under the FSIA such "commercial exception" litigation requires a showing of commercial activity in or directed at the United States, which most likely also would suffice to show minimum contacts. As a result, appellate courts generally assume without analysis that the minimum contacts analysis applies to foreign governments and agencies thereof.¹⁶⁰

E. LEGISLATIVE JURISDICTION

"Legislative jurisdiction" refers to a state's lawmaking powers — specifically the power of a state to apply its laws to specific facts and persons. Thus, legislative jurisdiction is integral to the concept of extraterritoriality, rather than personal jurisdiction. Nonetheless, in recent years the concepts have intersected when states have attempted to use their reg-

152. *Id.* at 333.

153. *Altman v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001).

154. *See id.* at 1196.

155. *See id.* at 1197.

156. *See id.* at 1203–05. For a description of the FSIA issues, see *supra*, at text accompanying notes 78–82.

157. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) (explicitly declining to decide whether a foreign state is a "person" under the Due Process Clause, because due process was clearly satisfied) (citing *Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966) (holding that states are not "persons" under the Due Process Clause)).

158. *See World Wide Minerals Ltd. v. Republic of Kazakhstan*, 116 F. Supp. 2d 98 (D.D.C. 2000); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998). The L.A. district court also cited several circuit court decisions since *Weltover*, where the courts have declined to decide whether foreign states are persons under the Due Process Clause. *See Theo. H. Davies & Co. v. Republic of the Marshall Islands*, 174 F.3d 969 (9th Cir. 1998); *S. & Davis Int'l, Inc. v. The Republic of Yemen*, 218 F.3d 1292 (11th Cir. 2000); *Hanil Bank v. PT Bank Negara Indonesia*, 148 F.3d 127 (2d Cir. 1998).

159. *See Altmann*, 142 F. Supp. 2d at 1206–08.

160. *See, e.g., U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 151–53 (2d Cir. 2001).

ulatory powers to reach affiliates of companies that do business in the state. Courts have borrowed the due process concepts applicable to personal jurisdiction to analyze the permissibility of such regulation.

In *Gerling Global Reinsurance Corp. v. Gallagher*,¹⁶¹ several insurers operating in Florida challenged the constitutionality of Florida's Holocaust Victims Insurance Act (Holocaust Act). Plaintiffs, U.S.-based insurers, had been subpoenaed under the Act to produce information regarding Holocaust-era policies issued by insurance companies with merely a corporate affiliation with the plaintiff insurers and no contacts in Florida.¹⁶² Under the Holocaust Act, plaintiffs could have been required to pay claims by Florida residents against their affiliates, and could be subject to private civil suits and penalties for failing to do so.¹⁶³

Plaintiff insurers contended, *inter alia*, that the Holocaust Act violated their rights to Due Process under the U.S. Constitution.¹⁶⁴ The trial court and the Court of Appeals agreed. The Eleventh Circuit held that a minimal contacts analysis similar to that applied in personal jurisdiction cases must be used to evaluate the constitutionality of exercising legislative jurisdiction, holding that "[t]he relevant question is whether there exists some minimal contact between a State and the regulated *subject*," requiring an inquiry "not only into the contacts between the regulated party and the state, but also into the contacts between the regulated *subject matter* and the state."¹⁶⁵

The appellate court concluded that the purpose of the Holocaust Act was not to regulate insurers doing business in Florida, but rather to force the payment of claims by insurers that had no contacts with Florida, under policies that had also nothing to do with Florida.¹⁶⁶ Because there was no agency or control relationship (such as alter ego) between the plaintiff insurers and the insurers that issued the policies, there were insufficient contacts to the subject being regulated. Consequently, Florida's Holocaust Act "violate[d] Due Process Limits on legislative jurisdiction."¹⁶⁷

IV. Discovery

JOSEPH J. DEHNER*

Despite the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention),¹⁶⁸ U.S. federal courts continue to ap-

161. *Gerling Global Reinsurance Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001).

162. *See id.* at 1231.

163. *See id.* at 1230-31.

164. *See id.* at 1232. The United States intervened on behalf of the insurers, arguing that Florida's Holocaust Act violated the dormant Commerce Clause and the foreign affairs powers of the federal government. The court did not reach these issues. *Id.* at 1234 n.4.

165. *See id.* at 1236 (internal quotes omitted; emphasis in original). Prior Supreme Court precedents to which the court looked included *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992) (taxation); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981) (insurance); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (insurance); and *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954) (insurance). These cases involve issues of choice-of-law and extraterritoriality, as well as personal jurisdiction.

166. *See Gerling Global*, 267 F.3d at 1238.

167. *Id.* at 1240.

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168. Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 744 [Hague Evidence Convention].

ply the discovery provisions of the Federal Rules of Civil Procedure. Decisions reported in 2001 reflected attentiveness to discovery abuse against foreign parties and witnesses, but basic application of familiar U.S. discovery principles, in accordance with *Societe National Aerospatiale v. United States*.¹⁶⁹ Several courts used the Hague Evidence Convention as a reason to send cases to foreign courts, where discovery of key foreign witnesses would be more likely. Finally, U.S. courts continued to assist foreign governments in discovery related to civil and criminal proceedings.

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

1. *Discovery Of Foreign Party Witnesses Allowed under Federal Rules—but with Limits*

Aerospatiale influenced several recent decisions involving discovery of foreign party witnesses, such that courts applied the Federal Rules of Civil Procedure rather than the Hague Evidence Convention. Nevertheless, attention to the principles of the Hague Evidence Convention resulted in narrowed discovery in several cases, and none at all in one dispute.

The *Vitamin Antitrust* litigation saw a court order extensive merits discovery of defendants from Japan, Germany, and Switzerland.¹⁷⁰ Because Japan is not a member of the Hague Convention, the court applied the Federal Rules without further analysis, forcing Japanese defendants to respond to Rule 33 & 34 discovery requests. German and Swiss defendants, whose nations are Convention members, objected to broad interrogatories and document requests seeking over twenty years of financial data and the identification of company personnel. Noting that, almost without exception, courts have allowed merits discovery against foreign entities to proceed under the Federal Rules, the special master affirmed by the court, addressed three *Aerospatiale* factors. It found that both the facts of the case and the conclusion that Hague Evidence Convention procedures would not prove effective strongly favored Federal Rule usage. The balancing of sovereign interests also slightly favored the Federal Rules, given the United States' strong interest in antitrust enforcement.¹⁷¹

Similarly, district courts in New York¹⁷² and California¹⁷³ applied the Federal Rules to force foreign parties to provide U.S.-style discovery, including depositions to be taken in the United States. However, at the jurisdictional contest stage of a litigation against Michelin, a district court in Iowa granted a protective order strictly limiting deposition discovery, barring depositions of senior personnel of foreign parties.¹⁷⁴

169. *Aerospatiale v. United States*, 482 U.S. 522 (1987).

170. *In re Vitamin Antitrust Litigation*, 2001 U.S. Dist. LEXIS 11536 (D.D.C. April 23, 2001). A prior decision in the same case upheld Federal Rule discovery for jurisdictional purposes. See Joseph Dehner, *Discovery*, 35 INT'L LAW. 520-21 (2001).

171. *Id.* at 35, 45.

172. *Bodner v. Banque Paribas*, 202 F.R.D. 370 (E.D.N.Y. 2000) (French privacy, bank secrecy, and other laws did not justify protective order against discovery from foreign bank involving World War II funds of Jewish customer; "close supervision" of discovery promised).

173. *In re Air Crash at Taipei, Taiwan*, 2001 U.S. Dist. LEXIS 19981 (C.D. Cal. Nov. 21, 2001) (denying protective order requiring all 30(b)(6) depositions be held in Singapore and ordering Rule 30(b)(1) depositions in the United States of Singapore Airlines and Rule 30(b)(1) depositions in Singapore of airline pilots, based on determination that pilots are "managing agents" of an airline), *aff'd in part* by 2002 U.S. Dist. LEXIS 466 (C.D. Cal. Jan. 1, 2002) (denying determination that first officers were managing agents).

174. *Bandag, Inc. v. Michelin Retread Tech., Inc.*, 202 F.R.D. 597 (S.D. Iowa 2001) (limiting plaintiff to 30(b)(6) depositions at this time).

2. *IRS Could Compel Foreign Resident to Respond to Administrative Summons*

In a 2001 opinion, the IRS concluded that it could use the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters to force a U.S. citizen residing in the United Kingdom to appear in London to answer questions in aid of a U.S. tax audit.¹⁷⁵

3. *Hague Evidence Convention a Reason to Deny U.S. Venue of Disputes Involving Foreign Witnesses*

Based in part on the perceived inability to obtain discovery of foreign witnesses if a U.S. court were to proceed to litigate disputes where foreign witness testimony was important, four U.S. courts dismissed proceedings on *forum non conveniens* grounds. In *Valarezo v. Ecuadorian Line, Inc.*¹⁷⁶ and *Ramakrishna v. Besser Co.*¹⁷⁷ district courts dismissed in favor of proceedings abroad—in Ecuador and India respectively, which are non-signatories to the Hague Evidence Convention—making discovery in the United States extremely difficult. Similarly, in both *Durkin v. Intervac, Inc.*¹⁷⁸ and *First Union National Bank v. Banque Paribas*¹⁷⁹ the district courts granted motions to dismiss for *forum non conveniens* upon balancing the public and private interest factors and finding that the cases had greater connection to foreign jurisdictions. Although Australia and the United Kingdom are signatories to the Hague Evidence Convention, their opting out of the Convention's letters of request provision made it equally difficult to access and question the relevant witnesses in the United States

B. U.S. DISCOVERY FOR USE IN FOREIGN PROCEEDINGS

In addition to addressing the question of discovery from foreign entities for use in U.S. proceedings, U.S. courts assist foreign courts in obtaining evidence from U.S. residents in civil and criminal matters. *In re Request from Canada*¹⁸⁰ involved a Canadian Government investigation of smuggling and tax evasion. Applying the U.S.-Canadian Treaty on Mutual Legal Assistance in Criminal Matters, the district court enforced subpoenas ordering a U.S. resident to provide testimony that was arguably not discoverable in Canada. Faced with a split of authority over whether a U.S. court should apply foreign discovery rules when responding to foreign government requests for discovery assistance, the court ordered U.S.-style discovery, but observed that the Canadian courts could later determine its admissibility in the Canadian proceeding.¹⁸¹

175. IRS CCA 200143032; 2001 WTD 210-19.

176. *Valarezo v. Ecuadorian Line, Inc.*, 2001 U.S. Dist. LEXIS 8942, *4 (S.D.N.Y. June 29, 2001).

177. *Ramakrishna v. Besser Co.*, 172 F. Supp. 2d 926 (E.D. Mich. 2001) (dismissing case involving Indian joint venture, noting that India is not a signatory to the Hague Evidence Convention, so that letters of request were not available and "only India can provide the required compulsory process" for Indian witnesses).

178. *Durkin v. Intervac, Inc.*, 258 Conn. 454, 782 A.2d 103 (S. Ct. Conn. 2001) (dismissing case involving military crash in Australia, noting Australia's opting out of Article 23, such that it need not execute letters of request, and noting that the foreign defendants had offered to provide proper discovery in Australia if the case proceeded there).

179. *First Union Nat'l Bank v. Banque Paribas*, 135 F. Supp. 2d 443 (S.D.N.Y. 2001).

180. *In re Request from Canada*, 155 F. Supp. 2d 515 (M.D.N.C. 2001).

181. *See id.* at 520.

V. Service of Process Abroad

JULIAN KU*

In 2001, federal appellate courts maintained their silence on significant questions involving the service of process abroad. Those state and federal district courts faced with questions involving service of process abroad continued to focus on the interpretation of the Hague Convention's provisions governing service by mail and service by private persons. Additionally, a few courts continued to develop the law governing the service of process abroad in countries not signatory to the Hague Convention.

A. DEVELOPMENTS UNDER THE HAGUE CONVENTION

1. *Service by Mail under Article 10(a)*

State and federal courts continued to disagree on whether language in Article 10(a) of the Hague Convention granting "the freedom to send judicial documents, by postal channels, directly to persons abroad," authorizes service of process by mail or whether it merely authorizes the transmission of documents other than process by mail.¹⁸²

The central disagreement turns on the reading of "send" in Article 10(a). While two federal district courts continued to adhere to a liberal reading of "send" authorizing service by mail as long as the signatory country has not objected,¹⁸³ a key New York state appeals court reversed its earlier adherence to the liberal position declaring that "we are now convinced that the contrary interpretation . . . is the better reasoned especially in light of the U.S. Supreme Court's reading of 'service' in the Hague Convention as a term of art, referring specifically to the process that initiates a lawsuit and secures jurisdiction over an adversary party."¹⁸⁴

Other courts, one state and one federal, also endorsed this narrow reading.¹⁸⁵ This continuing disagreement over the scope of Article 10(a), which has split federal and state appellate circuits as well as federal and state district courts, suggests that plaintiffs should, in the abundance of caution, avoid reliance on service of process by mail pursuant to the Hague Convention.

2. *Service by Private Persons*

Courts were also faced with issues arising out of plaintiffs' attempts to effect service of process by private persons. The general view, unchanged in 2001, is that service of process

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182. Article 10(a) of the Hague Convention reads: "Provided the State of destination does not object, the present Convention shall not interfere with (a) the freedom to send judicial documents, by postal channels, directly to persons abroad. . . ."

183. *Nuovo Pignone Spa v. M/V Storman Asia*, 167 F. Supp. 2d 911, 914-15 (E.D. La. 2001); *McCarron v. British Telecom*, No. Civ.A. 00-CV-6123, 2001 WL 632927, *2 (E.D. Pa., June 6, 2001).

184. *Sardanis v. Sumitomo Corp.*, 279 A.D.2d 225, 229 (1st Dep't 2001) (reversing earlier decision in *Philip v. Monarch Knitting Mach. Corp.*, 169 A.D.2d 603, 565 N.Y.S.2d 21 (1st Dep't 1991) and citing *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694 (1988)).

185. *Eggear v. Shibusawa Warehouse Co., Ltd.*, No. CIV.A. 00-CV-4636, 2001 WL 267881, *5-*6 (E.D. Pa., March 19, 2001) (recognizing split within Eastern District of Pennsylvania); *Bednarsky v. Rose Wreath & Tree*, No. CV010379777S, 2001 WL 1004372, *2-*3 (Conn. Super. July 27, 2001) (citing consistent Connecticut authority in support of narrow reading but finding such authority unnecessary to reach holding).

by private persons is authorized by Article 10(c) of the Hague Convention as long as (1) the foreign signatory has not objected to service under Article 10(c); and (2) service was effected by a "competent person[]" as defined by the State of destination.¹⁸⁶ Moreover, service under this provision need not conform to service regulations (such as provided in translation form) imposed on service through the Central Authority under Article 5.

Where service by private persons does not conform to the internal law of the state of destination, courts have rejected attempts to justify service by private persons under the broad language of Article 19 authorizing service by any method "permitted" by the "internal law of the contracting State." Specifically, courts have refused to read "permits" in Article 19 to allow any alternative service method to which the signatory State has not explicitly objected.¹⁸⁷ Such a broad reading, the Supreme Court of Nevada observed, would undermine the Hague Convention's goals for creating uniformity when effecting service abroad because the broad reading would require signatory states to "embrace a multifarious set of service methods."¹⁸⁸ Similarly, the U.S. District Court for the Eastern District of Virginia explained that the broad reading would place contracting states in the "awkward and difficult position of having to imagine every sort of objectionable or obnoxious mode of service."¹⁸⁹ In doing so, both courts acknowledged that their narrow reading of Article 19 was inconsistent with results reached by other courts as well as views expressed by some commentators.¹⁹⁰

3. *Additional Signatories to the Hague Convention*

Three countries became signatories to the Hague Convention in 2001: Ukraine on February 1, 2001; Argentina on February 2, 2001; and the Russian Federation on May 1, 2001.

B. SERVICE ABROAD IN NON-SIGNATORIES OF THE HAGUE CONVENTION

Courts also confronted cases where plaintiffs sought to effect service in circumstances where the Hague Convention does not apply. Where a defendant resided in Haiti, a non-signatory country, personal service of process consistent with state law is still not proper absent proof that Haitian law permits service of process by that method.¹⁹¹ On the other hand, where the defendants' precise whereabouts are unknown and are not amenable to service by any method recognized in either the Hague Convention or federal law, service can be effectuated by publication for six weeks in media outlets reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.¹⁹² The court carefully noted that the de-

186. See *Ingram Micro, Inc. v. Liaifaison Rapide Peguin, Inc.*, No. 99 Civ. 12480 (SAS), 2001 WL 282696, *5-6 (S.D.N.Y. Mar. 22, 2001).

187. *EPLUS Technology v. Aboud*, 155 F. Supp. 2d 692, 697 (E.D. Va. 2001), *Dahye v. Second Judicial District of Nevada*, 19 P.3d 239, 243-45 (Nev. 2001).

188. *Dahye*, 19 P.3d at 243.

189. *EPLUS*, 155 F. Supp. 2d at 700.

190. See, e.g., *Boro Latino, S.A.C.A., v. Gomex Lopez*, 53 F. Supp. 2d 1273, 1279-80 (S.D.Fla. 1999); Donald Siegle, Supplemental Practice Commentaries, § C-4-24 and 64, following 28 U.S.C.A. Rules of Civil Procedure, Rule 9 (West 1998).

191. *Jacques v. Jacques*, No. FA000162261S, 2001 WL 576667, *2 (Conn. Sup., May 10, 2001).

192. *Smith v. Islamic Emirate of Afghanistan*, Nos. 01 CIV 10132 (HB) 01 CIV 10144 (HB), 2001 WL 1658211, *2-*3 (S.D.N.Y. Dec. 26, 2001).

feudants, Osama bin Laden and members of al Qaeda, may later choose to contest the court's jurisdiction as well as the means of service.

C. DEVELOPMENTS UNDER THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY

There were no new signatories to the Inter-American Convention on Letters Rogatory or the Additional Protocol to the Convention in 2001.

VI. Enforcement of Foreign Judgments

GLENN W. RHODES AND LISA S. BUCCINO*

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards governs recognition and enforcement by U.S. courts of foreign arbitration awards.¹⁹³ The principles of comity as set forth in *Hilton v. Guyot* govern recognition and enforcement by U.S. courts of foreign court judgments.¹⁹⁴ Although no federal statute or treaty covers the enforcement of foreign court judgments, many states have adopted the Uniform Foreign Money-Judgments Recognition Act, which codifies the principles set forth in *Hilton*.¹⁹⁵

A Special Commission of the Hague Conference on Private International Law is preparing a draft Convention on international jurisdiction and the effects of foreign judgments. This Special Commission conducted the second in a series of four meetings at The Hague from March 3–13, 1998.¹⁹⁶ On June 18, 1999, the Special Commission provisionally adopted a preliminary draft Convention.¹⁹⁷ The Special Commission revised the draft Convention at a meeting held at The Hague during October 1999.¹⁹⁸ The Diplomatic Conference to prepare the final text of the Convention will be conducted in two sessions. The first session was held in June 2001.¹⁹⁹ The second session will be held sometime during the course of 2002.²⁰⁰

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193. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, TIAS 6997, 330 U.N.T.S. 38, implemented by 9 U.S.C. §§ 201–208 (the "Convention").

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

195. See generally Christopher Givson, *International Litigation*, 31 INT'L LAW. 347 (1997) (discussing the recognition of foreign judgments by U.S. courts).

196. Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, Prel. Doc. No. 9, at 11 (1999), available at <http://www.hcch.net/e/workprog/jdgm.html>. The first meeting took place at The Hague in June 1997, and is reported in Synthesis of the Work of the Special Commission of June 1997 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, Prel. Doc. No. 8 (Nov. 1997), available at www.hcch.net/e/workprog/jdgm.html (last visited July 3, 2002).

197. The status of the work being performed by the Special Commission of the Hague Conference on Private International Law can be found at www.hcch.net/e/workprog/jdgm.html. The *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, adopted by the Special Commission on October 30, 1999 can be found at www.hcch.net/e/conventions/draft36e.html (last visited July 3, 2002).

198. See Gen. Elec. Co., *supra* note 1.

199. An outline of the session entitled Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference June 6–20, 2001, can be found at ftp://hcch.net/doc/jdgm2001draft_e.doc.

200. *Id.*

A. CASES CONCERNING THE RECOGNITION OF FOREIGN ARBITRAL AWARDS

1. *Defenses to Recognition of Foreign Arbitral Awards Based on Immunity*

The Foreign Sovereign Immunities Act (FSIA)²⁰¹ grants immunity to foreign states from suit in the United States unless an exception applies.²⁰² One exception arises when the foreign sovereign has agreed to arbitration in a Convention state. In *International Insurance Co. v. Caja Nacional de Ahorro Y Seguro*,²⁰³ the issue was whether the FSIA exempted the defendant from posting a security bond prior to filing an answer in proceedings to confirm an arbitral award. After receiving an arbitration award against Caja Nacional de Ahorro Y Seguro (Caja), International Insurance filed a petition in district court to confirm the award. Caja filed an answer, and International Insurance moved for an order to require Caja to post a security bond and to strike Caja's answer. Caja asserted that under the FSIA,²⁰⁴ it was immune from the requirement to post a security bond because it was an instrumentality of a foreign government and that the posting of a security bond amounted to a pre-judgment attachment.²⁰⁵ The district court disagreed because the FSIA provision asserted by Caja as a basis for exemption was subject to the provisions of the New York Convention.²⁰⁶ The district court observed that Article VI of the New York Convention permitted the court to order a party challenging an arbitral award to post a security bond if the challenger applied to set aside or suspend the award.²⁰⁷ The district court concluded that, in effect, Caja had moved to suspend or set aside the award by filing an answer and asserting twenty-six affirmative defenses.²⁰⁸ Accordingly, the court held that under the New York Convention, Caja was not immune from posting a security bond.²⁰⁹

2. *Decisions Subject to Confirmation under the Convention*

A foreign judgment confirming a foreign arbitral award may not necessarily be enforceable in the United States under the New York Convention. It may, however, be enforceable under the Uniform Foreign Money-Judgment Act and the principles of comity. In *Ocean Warehousing B.V. v. Baron Metals and Alloys, Inc.*,²¹⁰ a dispute arose amongst a Netherlands-

201. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (1994). For a discussion of the FSIA, see *International Litigation*, 34 INT'L LAW. 553 (2000).

202. See 28 U.S.C. § 1604.

203. 2001 WL 322005 (N.D. Ill.).

204. 28 U.S.C. § 1609 states that:

[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act the property of the United States or a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of the chapter.

205. See *Int'l Ins.*, 2001 WL 322005 at 1. The plaintiff relied on the Illinois insurance law, which requires a foreign or alien company to post a pre-judgment security bond prior to filing any pleadings with the court to secure payment of any final judgment entered by the court. See *id.* (citing 215 ILCS 5/123(5)). Caja alleged that under New York insurance law, the posting of a security bond constituted a pre-judgment attachment under the FSIA. See *id.* (citing *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1230 (2d Cir. 1995)).

206. See *id.* FSIA section 1609 provides that it is "subject to existing international agreements." The district court noted that the New York Convention was enacted prior to the FSIA and that both the United States and Argentina were signatories to the New York Convention. *Id.*

207. See *id.* at 2 (citing 9 U.S.C. § 201; *Skandia America Reinsurance Corp. v. Caja Nacional de Ahorro y Seguro*, 1997 WL 278054 (S.D.N.Y.)).

208. See *id.*

209. See *id.*

210. *Ocean Warehousing B.U. v. Baron Metals and Alloys, Inc.*, 157 F. Supp. 2d 245 (S.D.N.Y. 2001).

based forwarding agent (Ocean Warehousing) and importers and exporters of metal goods. The dispute arose when the defendants, Baron Metals and Alloys, a New York corporation (Baron), and Marco International (Marco), a Hong Kong corporation having a place of business in New York, failed to reimburse Ocean Warehousing for money it advanced to the Dutch government for taxes.²¹¹ In keeping with the terms of their correspondence, Ocean Warehousing commenced arbitration proceedings in the Netherlands in accordance with the Dutch Forwarding Conditions.²¹² Baron and Marco failed to appear in the arbitration proceedings, and a default judgment was entered against the defendants by the arbitration panel.²¹³ The district court in Rotterdam confirmed the arbitral award as a Dutch judgment.²¹⁴ Ocean Engineering then sought to enforce the Dutch arbitral award in the United States under the New York Convention, and the district court granted an *ex parte* order of attachment against Baron and Marco.²¹⁵ As Ocean Engineering moved to confirm the attachment, Baron and Marco filed cross-motions to vacate the attachment. The defendants asserted that the attachment order should be vacated, arguing Ocean Engineering's inability to demonstrate a likelihood of success on the merits of its confirmation action. Specifically, the defendants asserted that Dutch law failed to provide an opportunity to raise the Convention-enumerated defenses during the Dutch court proceedings confirming the arbitral award as a Dutch judgment. The district court rejected the defendants' arguments. The district court observed that attachment was authorized where a judgment qualifies for recognition under Article 53, New York's codification of the Uniform Foreign Money-Judgments Recognition Act.²¹⁶ The district court noted that New York law requires recognition of a final, enforceable and conclusive foreign money-judgment, stating that "[t]he Convention defenses simply do not apply to an Article 53 proceeding seeking recognition and enforcement of a foreign judgment, even if that judgment was based on a foreign arbitral award."²¹⁷

The district court distinguished two cases cited by the defendants for the proposition that a foreign judgment based on a domestic arbitral award is invalid if the foreign forum failed to allow assertion of the Convention-enumerated defenses.²¹⁸ In the first case, *Fotochrome, Inc. v. Copal Co.*,²¹⁹ a Japanese creditor's bankruptcy action based on a Japanese arbitral award and brought in New York, the district court noted that under Japanese law an arbitral award is given the same effect as a final and conclusive judgment between the parties.²²⁰ However, the district court found that the Second Circuit declined to recognize the Japanese arbitral award as a final judgment under the Bankruptcy Act because the "self-executing" judgment failed to provide the losing party with an opportunity to assert the

211. *See id.* at 247.

212. *See id.* The communications from Ocean Engineering, such as price quotes and invoices, contained standard language, in both Dutch and English, providing that Ocean Engineering's services were always governed by the latest version of the Dutch Forwarding Conditions, including the arbitration clauses. *See id.* The arbitration clause mandates that disputes be resolved by arbitration. *See id.* at n.2.

213. *See id.* at 247.

214. *See id.*

215. *See id.* at 246.

216. *See id.* at 248.

217. *Id.* at 249.

218. *See id.* at 251.

219. *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975).

220. *Ocean Warehousing*, 157 F. Supp. 2d at 245.

Convention-enumerated defenses.²²¹ The district court noted that both Baron and Marco had the opportunity to contest the arbitral award in the Netherlands before the award was confirmed as a Dutch judgment, but failed to do so.²²² The second case, *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*,²²³ involved a French decree conferring *exequatur* on an arbitral award obtained in a non-domestic (i.e., non-French) proceeding to which the Convention defenses applied.²²⁴ The district court noted that in *Seetransport*, the Second Circuit found that the French process of obtaining *exequatur* allows the losing party to challenge the arbitral award based on the Convention-enumerated defenses, unlike the circumstances underlying the Second Circuit's *Fotochrome* decision.²²⁵ The district court concluded, however, that the Second Circuit's decision in *Seetransport*, failed to support the defendants' contention "that a foreign judgment is only enforceable under Article 53 where the foreign proceeding afforded the losing party the opportunity to raise the Convention defenses."²²⁶ Rather, the district court observed that *Seetransport* involved a foreign proceeding confirming a non-domestic arbitral award, hence distinguishing *Seetransport* from the circumstances in *Ocean Warehousing* where the foreign judgment confirmed a domestic arbitral award.²²⁷

3. *Oppositions to Enforcement of Foreign Arbitral Awards*

Attempting to overturn an award during the confirmation proceeding is difficult. The Convention restricts a district court's ability to review an award for its validity.²²⁸ The district court must confirm the award unless it finds one of the Convention-enumerated grounds for refusing or deferring recognition of the award.²²⁹ The party challenging con-

221. *See id.*

222. *See id.* The district court also added that the defendants would be permitted to raise the Convention defenses when the court determined whether to recognize the foreign arbitral award as a U.S. judgment, but considered the Convention defenses to be irrelevant where the issue was whether the attachment should be confirmed or vacated. *See id.* Nevertheless, the district court also noted that some doubt existed as to whether the court would ever address the merits of the defendants' Convention defenses given the ability of the court to either convert the foreign judgment or the foreign arbitral award to a U.S. judgment. *See id.* at n. 8 (citing *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1323 (2d Cir. 1973)).

223. *Seetransport Wiking Trader Schiffahrtsgesellschaft MBB & Co. v. Navimpex Centrala, Navala*, 29 F.3d 79 (2d Cir. 1994).

224. *See Ocean Warehousing*, 157 F. Supp. 2d at 250-51.

225. *See id.*

226. *Id.* at 251.

227. *See id.*

228. *See, e.g., Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1042 (1998).

229. 9 U.S.C. § 207 (1999). Article V of the Convention sets forth five grounds for refusing to recognize a foreign arbitral award as follows: (a) The parties to the agreement referred to in Article II were under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. Convention, art. V(1). Two other grounds are possible under the Convention as well. Enforcement can be refused if the subject matter being arbitrated is not capable of being settled by arbitration, or the recognition of the award would be contrary to public policy. Convention, art. V(2).

firmation of the arbitral award bears the burden of proving the existence of one of the enumerated grounds barring recognition of the award.²³⁰

a. Lack of Notice

Under Article V(1)(b), lack of proper notice is grounds for a court's refusal to recognize and enforce an award. In *First State Insurance Co. v. Banco de Seguros del Estado*,²³¹ a series of treaties governed the obligations of thirty-one reinsurers to reinsure First State's casualty business. After a dispute arose concerning the obligations under the treaties, First State invoked the treaties' arbitration provisions. The arbitration panel issued two awards. The first award was directed to the group of reinsurers and the second award was directed to Banco specifically.²³² Banco refused to comply with the awards, and First State filed suit to enforce the awards in U.S. district court pursuant to the Convention on Recognition and Enforcement of Foreign Arbitral Awards.²³³ Banco denied receiving actual or proper notice of the arbitration proceedings and moved to vacate the awards under Article V(1)(b) of the Convention.²³⁴

The district court concluded that Banco received proper notice under the Convention, and Banco appealed.²³⁵ The First Circuit noted the following undisputed facts contained in the record. First State sent a notice demanding arbitration to Banco via registered mail. Although no mail receipt was in evidence, there was no evidence that First State's notice was returned. In addition, the intermediary (G.L. Hodson & Sons) pursuant to the Intermediary Clause of the Treaties received a copy of notice sent by First State, as did Grupe Kleber, the underwriting pool through which Banco reinsured First State. Group Kleber acknowledged receipt of the notice and requested additional time to appoint an arbitrator on behalf of the reinsurers, including Banco. Thereafter, a London law firm advised First State that it had been contacted by Banco regarding the arbitration, and an attorney for a New York firm advised First State that his firm had been retained to represent the reinsurers, including Banco, in the arbitration proceedings. The New York attorney signed the Terms of Reference with First State before the arbitration panel on behalf of the reinsurers, including Banco, which provided that notice to counsel is deemed notice to the parties. During the course of the arbitration hearings, the panel ordered Banco to post security, which Banco failed to do. Banco then notified its London law firm and Groupe Kleber that it had not received any arbitration notice from First State. In addition, the New York attorney representing the reinsurers notified the arbitration panel that Banco declined to post security, that Banco maintained it was not a party to the arbitration, and that it was questionable whether he had authority to act further on behalf of Banco in the arbitration.²³⁶

The First Circuit concluded that Banco received proper notice, directly and indirectly, through Groupe Kleber and the contractually established intermediary, G.L. Hodson & Sons.²³⁷ Since the intermediary was designated by the reinsurers to receive all communi-

230. *First State Ins. Co. v. Banco de Seguros Del Estado*, 254 F.3d 354, 357 (1st Cir. 2001) (citing *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 336 (5th Cir. 1976)).

231. *First State Ins. Co. v. Banco Seguros del Estado*, 254 F.3d 354 (1st Cir. 2001).

232. *See id.*

233. *See id.* (citing 9 U.S.C. § 203 (hereinafter "the Convention")).

234. *See id.*

235. *See id.*

236. *See id.* at 356.

237. *See id.* at 357.

cations on their behalf, the First Circuit concluded that notice to G.L. Hodson & Sons was sufficient notice to Banco under the intermediary provision of the Treaty.²³⁸ The First Circuit further noted that Banco's interests in the arbitration were represented by persons of "apparent authority and mutuality of interests,"²³⁹ and that "Banco can only blame its own administration or that of its agents or representatives whom it deems to have acted without actual authority or who may have failed to comply with their duties or obligations."²⁴⁰

b. Waiver and Due Process

Waiver is not one of the enumerated defenses to the enforcement of a foreign arbitral award under Article (V)(1). In *Conсорico Rive, S.A. de C.V. v. Briggs of Cancun, Inc.*,²⁴¹ Conсорico Rive (Rive) sought to enforce its Mexican arbitral award in U.S. district court against Briggs of Cancun (Briggs). The arbitration pertained to an agreement entered into between Rive and Briggs wherein Rive provided property to Briggs for operation of a restaurant in Cancun.²⁴² As a defense to enforcement of the award, Briggs asserted that Rive waived the right to arbitration when Rive's attorney filed a Criminal Statement of Facts requesting the attorney general of Quintana Roo, Mexico to commence an investigation into whether David A. Briggs, Jr. and others conspired to deprive Rive of certain property interests in the property at issue.²⁴³ The district court concluded that as a matter of law Briggs's waiver defense was unavailing because waiver of the right to arbitrate "is not among the seven defenses to enforcement of a foreign arbitral award set forth in the Convention."²⁴⁴ The district court further observed that Fifth Circuit law did not favor a finding of waiver to arbitrate,²⁴⁵ noting further the Supreme Court's instruction that doubts over the scope of arbitral issues should be resolved in favor of arbitration regardless of whether the issue relates to contract construction or defenses to arbitrability such as waiver or delay.²⁴⁶ Moreover, even if waiver was available as a defense, Fifth Circuit law instructs that waiver occurs only when the judicial process is substantially invoked by the party seeking arbitration to the detriment or prejudice of the other party.²⁴⁷ The district court commented that for the invocation of the judicial process to be "substantial," the act must be inconsistent with a desire to arbitrate, such as some combination of answering a complaint, preparing a counterclaim or participating in discovery.²⁴⁸ Prejudice results from forcing a party to participate in and bear the expense of litigation, which arbitration is designed to avoid.²⁴⁹ In concluding

238. *See id.*

239. *Id.*

240. *Id.* at 358. The First Circuit noted that proper notice is notice that satisfies due process under the forum state's laws. *See id.* at 357 (citing *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145-46 (2d Cir. 1992)). The First Circuit noted that under our law, the opportunity to be heard at a meaningful time, and to be heard in a meaningful manner, constituted the fundamental requirement of due process. *See id.* at 358 (citing *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976)).

241. *Conсорico Rive, S.A. de C.V. v. Briggs of Cancun, Inc.*, 134 F. Supp. 2d 789 (E.D. La 2001).

242. *See id.* at 790-91.

243. *See id.* at 791.

244. *Id.* at 795.

245. *See id.*

246. *See id.* (citing *Moses H. Cone Mem'l.*, 460 U.S. at 24-25).

247. *See id.*

248. *Id.*

249. *See id.*

that Rive failed to waive arbitration, the district court found that the Statement of Facts filed by Rive's attorney was not inconsistent with Rive's desire to arbitrate, noting that the Statement was filed some eight months after the request for arbitration was made, and that Briggs's was not prejudiced by Rive's isolated action of merely filing the Statement.²⁵⁰

Also at issue was whether Briggs was unable to present its case during the arbitration in violation of the due process guarantee of Article V(1)(b) of the Convention. Although Briggs filed a responsive brief, with attachments, addressing the allegations raised by Rive, Briggs refused to participate in further arbitration proceedings due to alleged criminal proceedings in Cancun, citing as evidence a letter from the United Mexican States Solicitor of the General Republic requesting the appearance of David Briggs. The letter inferred that David Briggs could be subject to arrest for failure to appear.²⁵¹ David Briggs testified that he voluntarily decided to not comply with the appearance request, and that he did not seek alternative means to attend the arbitration proceedings. In addition, David Briggs testified that he did not send a company representative to appear at the proceedings, nor did Briggs's Mexican counsel attend the proceedings. The district court found that Briggs could have participated in the proceedings by alternative means, such as by phone, sending a company representative, or by sending Mexican counsel.²⁵² Accordingly, the district court concluded that a defense to enforcement of the arbitral award was unavailable under Article V(1)(b).²⁵³

c. Setting Aside Arbitration Awards

The grounds for vacating an arbitration award under the Convention are limited to the justifications supplied by Article V of the Convention.²⁵⁴ According to Article V(1)(e), a court shall not recognize an arbitration award which has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.²⁵⁵ In *P.M.I. Trading Ltd. v. Farstad Oil*, Petitioner, P.M.I. Trading (PMI) sought to confirm an arbitration award for damages resulting out of a contractual dispute.²⁵⁶ Respondent, Farstad, argued that the court should not confirm the award because the arbitration panel exhibited manifest disregard of the law when interpreting a term in the parties' contract. Under the contract, Farstad had an obligation to deliver to PMI certain quantities of liquified petroleum gas via railcar to a PMI terminal in Mexico where an independent inspector would assess the amount of gas and credit PMI for any amount for which it paid but did not receive. This extra amount was referred to as the "volume remaining on board."²⁵⁷ Despite the use of an independent inspector, the parties disagreed as to how calculate the remaining volume. PMI and the inspector concluded that the remaining volume should include the vapor product still left in the railcar following delivery. Farstad

250. See *id.* at 795–96.

251. See *id.* at 791–92.

252. See *id.* at 796.

253. See *id.* at 796–97 (citing *Empresa Constructora Contex Limitada v. Iseki*, 106 F. Supp. 2d 1020, 1026 (S.D. Cal. 2000) (finding that corporate entity that failed to attend arbitration held in Chile could have been adequately represented by counsel at the proceedings and finding no violation of Article (V)(1)(b)). The district court distinguished the situation between an arrest warrant that might be pending for David Briggs, and whether the corporate entity Briggs of Cancun could be entitled to a defense under Article V(1)(b). In addition, the district court noted that a "fear of arrest or extradition do not constitute an inability to attend an arbitration hearing." *Id.* at 797 (citing *Nat'l Dev. Co. v. Khashoggi*, 781 F. Supp. 959 (S.D.N.Y. 1992)).

254. *P.M.I. Trading Ltd. v. Farstad Oil*, 2001 WL 38282 at 2 (S.D.N.Y. 2001).

255. See 9 U.S.C. § 201.

256. *P.M.I. Trading Ltd.*, 2001 WL 38282 at 1.

257. *Id.*

disagreed, contending that only liquid should be included in the calculation. Thus, pursuant to the parties' contract, the dispute was submitted to arbitration in New York to be governed by New York law.²⁵⁸ The reviewing arbitration panel ruled in favor of PMI finding that the term 'volume' as used in the parties' contract included both liquid and vapor.²⁵⁹ PMI then sought an order from the court confirming the award pursuant to the Convention; Farstad opposed the petition demanding that the order be vacated because the panel failed to consider the common trade usage of the term volume.²⁶⁰

Upon review, the New York district court relied not on the Convention, but on case law interpreting section 10 of the Federal Arbitration Act (FAA).²⁶¹ Since the award was rendered in the United States and confirmation and vacatur were sought in the United States, the court looked to section 10 to resolve the dispute.²⁶² Ultimately, the court ruled that manifest disregard of the law is a judicially created ground for vacating an arbitration award.²⁶³ Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law.²⁶⁴ According to the court, the error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.²⁶⁵ In this case, the court was unpersuaded by Farstad's arguments that the parties explicitly contracted for how volume would be determined. Thus, the customary procedure for such a calculation was deemed irrelevant and PMI's award was confirmed.²⁶⁶

d. Awards Outside the Scope of Submission

The Convention allows a court to deny a foreign arbitral award if the award deals with a difference not contemplated or not falling within the terms of the submission to the arbitration, or if it contains decision on matters beyond the scope of the submission to the arbitration.²⁶⁷ However, a litigant challenging an arbitration award has a heavy burden when attempting to prove that an award should not be confirmed on these grounds.²⁶⁸

This exception was discussed in *CBS Corporation v. WAK Orient Power and Light Limited*, where the contractors of a Pakistani company moved to confirm an arbitral award rendered against the company by a foreign arbitration court.²⁶⁹ The original dispute arose between WAK Orient Power and Light (WAK) and Westinghouse Electric Corporation (Westinghouse).²⁷⁰ Westinghouse (plaintiff CBS's predecessor in interest) and WAK entered into an agreement whereby Westinghouse would engineer, design, and construct a barge-mounted power generating plant for WAK to use in Port Quasim, Karachi, Pakistan.²⁷¹ To help

258. *See id.*

259. *See id.*

260. *See id.*

261. *See id.* at 2.

262. *See id.*

263. *See id.*

264. *See id.*

265. *See id.*

266. *See id.* at 3.

267. *See CBS Corp. v. Wak Orient Power & Light Ltd.*, 168 F. Supp. 2d 403, 411 (E.D. Penn. 2001) (citing Convention, art. (V)(1)(c)).

268. *See id.* at 414–15 (citing *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 770 (9th Cir. 1992)).

269. *See id.* at 403.

270. *See id.* at 406.

271. *See id.* at 405.

achieve the level of credit needed for WAK to implement the power supply project, WAK requested a letter of credit from Westinghouse. Ultimately, the power project did not succeed because the Pakistani Private Power and Infrastructure Board determined that WAK had failed to fulfill the letter of credit and terminated their agreement.²⁷² As a result, several parties with whom WAK had contracted (including Westinghouse/CBS) filed a request for arbitration in London with the International Chamber of Commerce's Court of Arbitration (ICC), claiming that WAK had defaulted on payments that were owed to them. Even though it was obligated to bring all disputes before the ICC, WAK simultaneously filed a civil suit in Pakistan claiming that CBS as well as the other subcontractors breached their duty to provide WAK with the necessary funding for the power supply contract. The Pakistani trial court found in favor of WAK, but the appellate court overturned the decision because the lower court erred in dismissing the defendant's defenses.²⁷³ Meanwhile, the ICC arbitration went forward. Ultimately, the ICC ruled against WAK with a finding in favor of CBS.²⁷⁴ CBS then sought to enforce the award in Pennsylvania.

During the U.S. proceedings, WAK opposed the arbitration award arguing that the ICC did not have jurisdiction to join CBS as a party. In an ICC arbitration, the Terms of Reference can include a list of issues to be determined.²⁷⁵ In this case, WAK signed the Terms of Reference, which included a section entitled "The issues to be determined."²⁷⁶ This section expressly stated that one of the issues that may be determined by the arbitral tribunal was whether the tribunal had jurisdiction over the claims that were submitted in the arbitration.²⁷⁷ Despite WAK's arguments to the contrary, the U.S. court found that WAK unmistakably agreed to submit to arbitration the question of whether the ICC had jurisdiction to join CBS as a party to the arbitration proceedings by signing the Terms of Reference.²⁷⁸ The U.S. court concluded that the issues submitted to the arbitrators did not go beyond the scope of agreement and confirmed the award.²⁷⁹

Similarly, the defendant in *Dandong Shuguang Axel Corporation v. Brilliance Machinery Company*, also tried to assert that the plaintiff's arbitration award should not be confirmed because the issues arbitrated were not contemplated by the parties' original contract.²⁸⁰ Plaintiff Dandong Shuguang Axel Corporation (Dandong), a Chinese automobile axle manufacturing company, entered into a joint venture agreement with Brilliance Machinery Company (Brilliance) to form a new company. The mission of the new company was to invest in and operate a gear manufacturing plant in China, from which Dandong would purchase gears. The agreement provided that any contract disputes would be governed by Chinese law and provided that all disputes "occurring in carrying out or concerned with" the joint venture agreement would be submitted to arbitration by the China International Committee of Economic-Trade Arbitration (CICETA).²⁸¹ The underlying dispute arose when Dandong, after paying the \$100,000 down payment and paying for 49 percent of the

272. *See id.* at 406-07.

273. *See id.* at 409.

274. *See id.*

275. *See id.*

276. *Id.* at 412.

277. *See id.*

278. *See id.*

279. *See id.* at 414.

280. *Dandong Shuguang Axel Corporation v. Brilliance Machinery Co.*, 2001 WL 637446, 4 (N.D. Cal. 2001).

281. *Id.* at 1.

needed equipment, could not open the requisite letter of credit. Dandong claimed that it could not open the letter of credit because Brilliance changed the directions for opening the letter and because of a banking holiday. Brilliance asserted that Dandong's letters of credit were inadequate and refused to ship any of the equipment to Dandong. Thus, Dandong took the matter before the CICETA, which determined that the letters of credit were sufficient and that Brilliance had breached the agreement by failing to ship the equipment.²⁸² Dandong then sought to confirm the order in California.

In response to Dandong's motion for summary judgment confirming the arbitration order, Brilliance argued that the CICETA decision was outside the scope of issues appropriate for arbitration because the dispute arose out of a separate and distinct contract which did not include an arbitration clause. The district court was unpersuaded, particularly because the parties' original joint agreement contemplated latter agreements.²⁸³ The court held that ancillary contracts that do not contain separate arbitration provisions generally fall within the scope of an arbitration clause in a more general contract.²⁸⁴ Therefore, because Brilliance was unable to meet its burden of proof establishing that the arbitration award was outside the scope of the joint venture agreement, Dandong was entitled to summary judgment.²⁸⁵

e. Enforcement of Awards Contrary to Public Policy

Another exception to the law requiring that U.S. courts confirm foreign arbitral awards falling under the Convention exists when confirming the award would contradict U.S. public policy.²⁸⁶ This exception is very narrow.²⁸⁷ Courts have held that the exception is only applied when enforcement would violate the forum state's most basic notions of morality and justice.²⁸⁸

In addition to their arguments concerning the scope of submission, defendants in *CBS v. WAK Orient Power and Light Ltd.* also argued that the U.S. court should not approve the arbitration award against them because to do so would be contrary to the public policy of the United States.²⁸⁹ WAK claimed that public policy would be violated because the decision of the Pakistani trial court as to arbitrability should be granted comity. The U.S. district court disagreed, finding that WAK incorrectly argued the decision of the Pakistani appellate court.²⁹⁰ The U.S. court determined that the appellate court in Pakistan ruled that CBS was never given the opportunity to argue that the claims were arbitrable because the trial court incorrectly struck CBS's defenses.²⁹¹ Therefore, the Pakistani appellate court remanded the case and at the time of the U.S. proceedings there had been no valid decision by a Pakistani court which could be said to be entitled to recognition as a matter of comity or as a matter of law.²⁹² Given that WAK did not prove that confirming the award would

282. *See id.*

283. *See id.* at 4.

284. *See id.* (citing *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile*, 863 F.2d 315, 318–20 (4th Cir. 1988)).

285. *See id.* at 5.

286. Convention, art. V(2)(b). *See also* *CBS Corp. v. WAK Orient Power and Light Ltd.*, 168 F. Supp. 2d 403 (E.D. Penn. 2001).

287. *Id.*

288. *Id.* (citing *Parsons & Whittemore Overseas Co. v. RAKTA*, 508 F.2d 969, 976 (2d Cir. 1974)).

289. *See id.* at 415.

290. *See id.*

291. *See id.*

292. *See id.*

violate the basic U.S. notions of morality and justice, the court was required to confirm the arbitration award.²⁹³

Likewise, the court in *Dandong Shuguang Axel Corporation v. Brilliance Machinery Company* also found the public policy exception inapplicable to the arbitration award.²⁹⁴ Brilliance argued that enforcing the arbitration award would contradict U.S. public policy because the award was based on false statements that Dandong made to the arbitration panel, and that the enforcement of the monetary penalty (\$100,000) was punitive in nature.²⁹⁵ Under Chapter 1 of the FAA, arbitration awards based on corruption, fraud, or undue means may be vacated by a reviewing court.²⁹⁶ However, the district court here found that Brilliance failed to set forth specific facts supporting its allegation that Dandong made false statements in the arbitration hearing. The court was also unpersuaded by Brilliance's argument that the monetary penalty was punitive in nature.²⁹⁷ Brilliance relied on *Garrity v. Lyle Smart Inc.*,²⁹⁸ for the proposition that punitive damages in arbitration are against public policy. However, the court discounted this argument on several grounds. The court stated that the Federal Arbitration Act preempts state law so that when the arbitration rules allow punitive damages, a state law or policy against them will not preclude enforcement.²⁹⁹ Additionally, federal courts have upheld punitive damages awarded in arbitration.³⁰⁰ Therefore, the court was obligated to confirm the foreign arbitration award favoring Dandong.³⁰¹

B. CASES CONCERNING THE RECOGNITION OF FOREIGN COURT JUDGMENTS

The party asserting that a foreign judgment should be recognized in a U.S. court has the burden of proof.³⁰² Following the principles set forth in *Hilton v. Guyot*,³⁰³ a foreign judgment should be recognized if the foreign forum (1) allowed for a court of competent jurisdiction to give a full and fair trial on the issues presented, (2) ensured that justice was impartially administered, (3) ensured that the trial was free of fraud or prejudice, (4) had proper jurisdiction over the parties, and (4) the judgment of the foreign forum did not violate public policy.³⁰⁴

1. Preclusive Effect of Foreign Judgments

a. Res Judicata

In *Black Clawson Company v. Kroenert Corporation*, a licensee with exclusive rights to a licensor's technology brought an unfair competition suit in the United States against a German equipment manufacturer.³⁰⁵ Plaintiff, Black Clawson, was an Ohio corporation who

293. See *id.*

294. *Dandong Shuguang Axel Corp.*, 2001 WL 637446 (N.D. Cal. 2001).

295. See *id.*

296. 9 U.S.C. § 10(a)(1).

297. *Dandong*, 2001 WL 637446 at 6.

298. *Garrity v. Lyle Smart, Inc.*, 40 N.Y. 2d 354 (1976).

299. *Dandong*, 2001 WL 637446 at 6 (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)).

300. See *id.* (citing *Raytheon Co. v. Automated Bus. Sys. Inc.*, 1989 WL 32149 (D. Mass. 1989); *Todd Shipyards Corp. v. Cunard Line Ltd.*, 943 F.2d 1056, 1062 (9th Cir. 1991); *Barnes v. Logan*, 122 F.3d 820, 822-24 (9th Cir. 1997)).

301. *Dandong*, 2001 WL 637446 at 6.

302. *Shen v. Leo A. Daly Co.*, 222 F.3d 472, 476 (8th Cir. 2000).

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

304. *Shen*, 222 F.3d at 476.

licensed certain intellectual property owned by Pagendarm, a German corporation. The agreement was an exclusive licensing agreement whereby Black Clawson had the exclusive right to use Pagendarm's proprietary information in its manufacturing business in North America. Prior to executing this agreement, however, certain former Pagendarm employees stole the licensed technology and created two companies, one in Germany, and one in the United States under the names of Maschinenfabrik Max Kroenert GmbH (MMK) and Kroenert Corporation (Kroenert), respectively. Kroenert Corporation, a Delaware corporation, manufactured products in direct competition with the technology licensed by Black Clawson. As a result, Black Clawson filed suit against Kroenert alleging unfair competition and violations of the Racketeering Influenced and Corrupt Organizations Act (RICO). Similarly, a German corporation, Pagendarm BTT (BTT) licensed the same technology as Black Clawson but for use exclusively within Europe. As such, BTT also brought suit against Kroenert's German parent, MMK, for misappropriation and improper use of the technology in Europe. Ultimately, Pagendarm and BTT entered into a settlement agreement with MMK resolving and dismissing the German litigation with prejudice.³⁰⁶ The German defendants attempted to induce Black Clawson to intervene in the German case and dismiss the American litigation. Black Clawson refused and did not participate in the German proceedings. Kroenert then made a motion for summary judgment arguing that the principle of *res judicata* prohibited Black Clawson from seeking relief in the United States because the German settlement agreement released Kroenert of any further liability arising out of the defendant's use of the technology at issue.³⁰⁷ The district court agreed finding that the settlement agreement precluded Black Clawson's claims.³⁰⁸

On review, however, the Eight Circuit reversed on the grounds that although Pagendarm and Black Clawson had a close business relationship, their interests were not identical.³⁰⁹ The reviewing court reiterated the rule that the party against whom *res judicata* is asserted must have had a full and fair opportunity to litigate the matter in the proceeding that is to be given preclusive effect.³¹⁰ The party is not, however, required to intervene voluntarily in a separate pending suit merely because it is permissible to do so.³¹¹ Thus, because Pagendarm assigned its rights in the United States, the only party who would be harmed by defendants' improper importation and use of the technology in the United States was Black Clawson.³¹² The acts committed by defendants occurred in the United States during the effective period of the license and caused injury to Black Clawson.³¹³ Black Clawson had standing as an assignee to bring its own claims against the defendants independent of Pagendarm.³¹⁴ Thus, Pagendarm could not release defendants from claims or causes of action to which it was not entitled.³¹⁵ Accordingly, the Eighth Circuit reversed the trial court's decision and remanded the case for further consideration.³¹⁶

305. Black Clawson Co., Inc. v. Kroenert Corp., 245 F.3d 759 (8th Cir. 2001).

306. *See id.*

307. *See id.* at 763.

308. *See id.*

309. *See id.* at 764.

310. *See id.* at 764 (citing *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 673 (8th Cir. 1998)).

311. *See id.*

312. *See id.*

313. *See id.* at 765.

314. *See id.*

315. *See id.*

316. *See id.*

b. Collateral Estoppel

In addition to *res judicata*, the principle of collateral estoppel may also be used to enforce or preclude foreign judgments in the United States. In *Pony Express Records v. Bruce Springsteen*, the defendant, a popular recording artist, sought to estop plaintiffs from asserting claims of copyright infringement where the issue had already been litigated in the United Kingdom.³¹⁷ Originally, Springsteen brought suit in the United Kingdom against a distributing company called Masquerade Music Limited for unauthorized distributions of Springsteen's music compositions and sound recordings.³¹⁸ Masquerade's defense to the suit was that it had the right to exploit the compositions pursuant to a purported license from Pony Express and JEC. The British High Court held in favor of Springsteen, finding that the rights to the artist's songs did not transfer from the original contracting party (Sioux City Limited) to Pony Express and/or JEC.³¹⁹ Therefore, the rights could not be licensed further to Masquerade.

Despite the decision of the High Court, plaintiff, Pony Express, filed a complaint against Springsteen in the U.S. District Court in New Jersey alleging copyright infringement, conversion, breach of contract, unfair competition, and civil conspiracy. Springsteen counterclaimed on similar grounds. Springsteen also moved for summary judgment on the grounds that the U.K. judgment estopped Pony Express from litigating the critical issue of copyright ownership. The trial court took a two-pronged approach to determine (1) whether plaintiffs had a full and fair opportunity to participate in the litigation and (2) if so, that the issues litigated in the U.K. were identical to those presented in the United States.³²⁰

During trial, plaintiffs argued that they did not have a full and fair opportunity to participate in the U.K. litigation because Masquerade prevented them from doing so. The court, however, disagreed finding that even though the parties were not in privity with one another, the original license which plaintiffs granted to Masquerade provided the plaintiffs with the *opportunity* to participate in the U.K. proceedings.³²¹ Simply because Masquerade did not let plaintiffs join in their suit, does not mean that plaintiffs were without recourse.³²² Since plaintiffs made no effort to enforce their legal right to participate in the U.K. litigation, the U.S. court could not conclude that plaintiffs were denied the *opportunity* to exercise that right.³²³ Secondly, the court also found that the issues presented to the High Court were identical to those being litigated in the United States.³²⁴ Accepting the High Court's determination that Springsteen's copyrights were transferred to Sioux Limited (and not to Pony Express), the court was precluded from deciding in favor of plaintiffs.³²⁵

c. Conflict of Law

U.S. courts generally recognize foreign judgments and decrees unless enforcement would be prejudicial or contrary to the country's interests.³²⁶ For example, in *Yahoo! Inc., v. La*

317. *Pony Express Records v. Bruce Springsteen*, 163 F. Supp. 2d 465 (D.N.J. 2001).

318. *See id.* at 469.

319. *See id.*

320. *See id.* at 475-76.

321. *See id.* at 475.

322. *See id.*

323. *See id.*

324. *See id.* at 476.

325. *See id.*

326. *Yahoo!*, 169 F. Supp. 2d at 1181 (citing *Somportex Ltd., v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971)).

Ligue Contre Le Racisme Et L'Antisemitisme, plaintiff Yahoo!, was able to obtain a declaratory judgment against a French citizens' group where the enforcement of the French judgment in the United States would have violated Yahoo!'s First Amendment rights.³²⁷ The issue presented to the court was whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a U.S. resident within the United States on the basis that such speech can be accessed by Internet users in that nation.³²⁸ The U.S. district court held that the French order's content and viewpoint-based regulation of the web pages and auction site on Yahoo.com, while entitled to great deference as an articulation of French law, would clearly be inconsistent with the First Amendment if mandated by a court in the United States.³²⁹ According to the court, absent a body of law establishing international standards with respect to speech on the Internet or an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the court's obligation to uphold the First Amendment.³³⁰

In another case involving a French court order, a U.S. district court did grant comity to a French decision concerning certain patent ownership rights.³³¹ In *International Nutrition Company v. Horphag Research Ltd.*, the issue was whether or not a patent assignee, International Nutrition Company (INC) could litigate patent ownership rights in the United States which had already been determined by a French court.³³² On appeal, the Federal Circuit found that the district court's grant of comity and summary judgment favoring defendants, Horphag Research (Horphag), was not an abuse of discretion.³³³ The Federal Circuit was not persuaded by INC's argument that the ownership of a U.S. patent was a matter of U.S. patent law and that granting comity based on a determination of ownership under French law would be contrary to U.S. patent law.³³⁴ Rather, the court found that comity was appropriate because the French courts had determined who owned a U.S. patent pursuant to a French contract.³³⁵ Contrary to INC's position, the question of who owns patent rights, and on what terms, is typically a question for state courts and not one arising under U.S. patent laws.³³⁶ Therefore, because the parties had an agreement to apply French law as to patent ownership disputes, the contract law issue was properly resolved by the French court and there was no conflict between the foreign decision and U.S. patent law.³³⁷

2. Foreign Money Judgment Act

In *Dresdner Bank AG v. Imbad Haque*,³³⁸ Dresdner Bank (Dresdner) brought an action in a New York district court against Imhad Haque (Haque) to enforce a money judgment

327. *Id.* For a discussion of the Yahoo! Litigation see *supra* Teitz, *Parallel Proceedings—Sisyphus Progress*, at text accompanying notes 7–21.

328. *See id.*

329. *See id.* at 1192.

330. *See id.* at 1193.

331. *Int'l Nutrition Co. v. Horphag Research Ltd.*, 257 F.3d 1324 (Fed. Cir. 2001).

332. *See id.* at 1328.

333. *See id.* at 1131.

334. *See id.* at 1329.

335. *See id.*

336. *See id.* (citing *Jim Arnold Corp. v. Hydrotech Sys. Inc.*, 109 F.3d 1567, 1572 (Fed. Cir. 1997)).

337. *Int'l Nutrition Co.*, 257 F.3d at 1130.

338. *Dresdner Bank Ag v. Imbad Hague*, 161 F. Supp. 2d 259 (S.D.N.Y. 2001).

awarded by a German court. The German judgment was the result of a suit brought by Dresdner against Haque to enforce Haque's personal guaranty of the obligations of a German corporate entity. The case was tried before a three-judge panel in Germany, which found in favor of Dresdner, awarding the plaintiff three million Deutsche Marks in damages, plus interest. Dresdner then sought to enforce the money judgment against Haque in the United States. Applying New York law, the district court found that the judgment was fully enforceable in the United States as prescribed by Article 53 of the New York Civil Practice Law and Rules (CPLR) and New York common law.³³⁹ Under Article 53 of the CPLR, a foreign country judgment must be recognized unless (1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law, or (2) the foreign court did not have personal jurisdiction over the defendant.³⁴⁰ As such, the court granted plaintiff Dresdner's motion for summary judgment finding that Germany has impartial tribunals and procedures compatible with due process and the German court had personal jurisdiction over defendant.³⁴¹

VII. Act of State

KRISTEN BOON*

The act of state doctrine serves as grounds for abstention where U.S. courts are called to assess the validity of an official act of a foreign state. Although frequently raised by states as a defense, the doctrine is in fact rarely applied. Furthermore, although originally developed to balance the power of courts with the prerogatives of diplomacy, the doctrine has been narrowed in recent years, suggesting that domestic courts are increasingly serving as the final arbiters in private disputes with foreign states.

A. U.S. COURTS CANNOT ASSESS THE VALIDITY OF FOREIGN STATE ACTS

The Supreme Court's decision in *W.S. Kirkpatrick & Co. v. Environmental Techtonics Corp.*,³⁴² set out the parameters of the modern act of state doctrine: domestic courts are barred from considering cases involving foreign states where resolution of those claims turn on the legality or illegality of official actions by foreign sovereigns on their own territory. A straightforward application of this doctrine recently arose in *World Wide Minerals Ltd. v. The Republic of Kazakhstan*,³⁴³ where the D.C. district court declined to consider claims against Kazakhstan that would require a determination of the validity of official acts. The case involved a contract dispute between a Canadian company, World Wide Minerals, and the government of Kazakhstan for the mining and exporting of uranium. In 1996 and 1997, World Wide entered a number of agreements with Kazakhstan relating to the management of a northern mines complex in Kazakhstan. World Wide was never able to sell the uranium from the mines however, since Kazakhstan later determined it could not provide an export license due to a prior confidential agreement with an American company

339. *See id.*

340. *See id.* at 262.

341. *See id.* at 263.

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342. *W.S. Kirkpatrick & Co. v. Environmental Techtonics Corp.*, 493 U.S. 400, 406 (1990).

343. *World Wide Minerals Ltd. v. The Republic of Kazakhstan*, 116 F. Supp. 2d 98 (D.D.C. 2000).

for the exclusive marketing of the uranium. In response to World Wide's suit, Kazakhstan raised the act of state doctrine as a defense. The district court upheld the defense, stating that under the test set out in *Kirkpatrick*, no relief was available to World Wide. The court reasoned that it could not assess the legality of Kazakhstan's denial of the export license when to do so would require an assessment of the validity of regulations enacted for national and international security which are matters of foreign sovereign activity.³⁴⁴

B. SUBSEQUENT GOVERNMENTS AND TERRORIST STATES NOT PROTECTED

Recent decisions also suggest that the underlying policy of the act of state doctrine, that the political branches of government should reign in the realm of foreign affairs, is increasingly being assessed against the likely impact on international relations. Thus, where "adjudication would embarrass or hinder the executive in the realm of foreign relations, the court should refrain from inquiring into the validity of the foreign state's acts."³⁴⁵ A number of courts have recently decided not to abstain on act of state grounds where the incident giving rise to the claim occurred under former regimes.³⁴⁶ In a similar vein, the District Court of Columbia declined to uphold Iraq's act of state defense in a case alleging official torture of several U.S. citizens in Iraq, on the grounds that the policy underlying the act of state doctrine does not deter a court from considering a case against a nation designated as a terrorist state.³⁴⁷

344. See *id.* at 104 (citing *Mol. Inc. v. Peoples Republic of Bangladesh*, 572 F. Supp. 79, 85 (D. Or. 1983)).

345. *Bigio v. Coca-Cola Co.*, 239 F. 3d 440, 452 (2d Cir. 2000). See also *Republic of Philippines v. Marcos*, 806 F.2d 344, 359 (2d Cir. 1986).

346. See *id.* (alleged expropriation under Nasser regime in Egypt will not embarrass current government which repudiated the act); *Bodner v. Banqu Paribas et al.*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (official acts of Vichy Regime have been rejected by subsequent French governments).

347. See *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 50 (D.C.C. 2000) ("for this court to grant defendant's motion to dismiss on act of state grounds would constitute more of a judicial interference in the announced foreign policy of the political branches of government than to allow the suit to proceed under the explicit authorization of Congress").