International Litigation

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I. Service of Process Abroad[a]

A. INTRODUCTION

In federal courts, Rule 4 of the Federal Rules of Civil Procedure governs the service of process outside of the United States in civil actions.[1] In state courts, the particular procedures of the forum state apply. In either case, however, where service is to be made in a foreign state that is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (Hague Convention),[2] the Supreme Court has directed that the Hague Convention provides the exclusive means for effecting service on the territory of a signatory state.[3] Where service on a foreign party may be effected in the United States without the need for service abroad, the Supreme Court has held that the Hague Convention is not applicable.

B. DEVELOPMENTS UNDER THE HAGUE CONVENTION

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

One issue that continues to cause disagreement among federal and state courts is whether article 10(a) of the Hague Convention, preserving "the freedom to *send* judicial documents,

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1. There are several portions of Rule 4 of the Federal Rules of Civil Procedure that apply to service of process upon an international entity located outside of the United States including FED. R. CIV. P. 4(f) (service upon individuals in a foreign country); FED. R. CIV. P. 4(h) (service of process upon corporations and associations); FED. R. CIV. P. 4(k) (territorial limits of effective service). In addition, service of process on foreign states and their agencies and instrumentalities must generally be effected in accordance with the Foreign Sovereign Immunities Act, 28 U.S.C.§ 1608 (2006). The Federal Rules adopt state procedure in diversity-based cases.

2. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965 (entered into force February 10, 1969) [hereinafter Hague Convention].

3. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988).

by postal channels, directly to persons abroad,"[4] authorizes the *service* of judicial documents by mail, or whether it merely authorizes the mailing of documents other than process.

Early in 2005, a New York state trial-level court sided with the Second Circuit Court of Appeals and held that service by mail to a Canadian defendant was sufficient.[5] In its short opinion, the court noted that Canada had "expressly declined to object 'to service by postal channels.'"[6] Accordingly, the court cited *Ackermann v. Levine*[7] when stating that service by mail to an Ontario corporation was effective.[8] The court also observed that service by mail is permissible in Ontario, and thus found that the plaintiff's method of service was justified under article 19 of the Hague Convention, which permits service by any method allowed by the internal laws of the country in which service is being made.[9]

The district court of New Hampshire also followed the approach of the Second and Ninth Circuits to hold that article 10(a) authorizes service by mail.[10] In so doing, the court noted a split within its sister district courts in the First Circuit.[11] Two courts agreed with the *Bankston*[12]*-Nuovo Pignone*[13] approach and held that article 10(a) did not authorize service by mail.[14] Two others found the approach of *Ackermann*[15] and its progeny more persuasive and held that article 10(a) did authorize service by mail.[16] Although the New Hampshire court stated that article 10(a) authorizes service by mail generally, it held that service in the case at bar was insufficient because the mailing requirements of Fed. R. Civ. P. 4(f) were not satisfied.[17] First, the plaintiffs had mailed the service documents themselves, as opposed to having the clerk of the court mail them.[18] Second, the form of mail the plaintiffs used lacked the required signed receipt.[19]

In November 2005, a district court in Ohio, also lacking clear circuit precedent, held that service by mail on a corporate defendant in Québec, Canada was authorized by article 10(a) of the Hague Convention.[20] The Ohio court's holding was contrary to that of three of its sister courts within the Sixth Circuit.[21] The court focused on the intent of the Hague

4. Emphasis added. Article 10(a) of the Hague Convention provides in pertinent part: "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. . . ." Hague Convention, *supra* note 2, at art. 10.

5. Fernandez v. Univan Leasing, 790 N.Y.S.2d 155, 156 (N.Y. App. Div. 2005).

6. *Id.*

7. Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986).

8. *Fernandez*, 790 N.Y.S.2d at 156.

9. *Id.*

10. Ballard v. Tyco Int'l, Ltd., No. MD-02-1335-PB, 2005 WL 1863492 (D.N.H. Aug. 4, 2005) (not designated for publication).

11. *Id.* at *3.

12. Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989).

13. Nuovo Pignone, SPA v. Storman Asia M/V, 310 F.3d 374 (5th Cir. 2002).

14. Golub v. Isuzu Motors, 924 F. Supp. 324 (D. Mass. 1996); Cooper v. Makita, U.S.A., Inc. 117 F.R.D. 16 (D. Me. 1987).

15. *Ackermann*, 788 F.2d at 838.

16. Borschow Hosp. & Med. Supplies, Inc. v. Burdick-Siemens Corp., 143 F.R.D. 472 (D.P.R. 1992); Melia v. Les Grandes Chais de France, 135 F.R.D. 28 (D.R.I. 1991).

17. *Ballard*, 2005 WL 1863492, at *4.

18. *Id.*

19. *Id.*

20. Sibley v. Alcan, Inc., 400 F. Supp. 2d 1051 (N.D. Ohio 2005).

21. Cupp v. Alberto-Culver USA, Inc., 308 F. Supp. 2d 873 (W.D. Tenn. 2004); Uppendahl v. Am. Honda Motor Co., 291 F. Supp. 2d 531 (W.D. Ky. 2003); Wilson v. Honda Motor Co., 776 F. Supp. 339 (E.D. Tenn. 1991).

Convention and held that service of process by registered mail "provides an inexpensive and simpler method for service abroad, without running the risk that defendants will not receive actual notice of litigation."[22] Like the New York State court, the Ohio court held that because Canada had not objected to article 10(a), service by mail was sufficient.[23] Unlike the New York state court,[24] however, the Ohio court expressly declined to consider whether service by mail was authorized by the local laws of the forum in which service was being made (Québec).[25]

These decisions from the past year reflect the continuing diversity of judicial opinion regarding the service of process by mail under the Hague Convention. Absent controlling guidance from the courts of appeals or the Supreme Court, this uncertainty counsels practitioners to exercise caution and avoid reliance on service by mail under the Hague Convention.[26]

2. Direct Service under Article 10(c) of the Hague Convention

In *IM Partners v. Debit Direct Ltd.*, the Connecticut district court held that the plaintiffs could effect service of process on defendants in the Isle of Man by direct delivery under article 10(c) of the Hague Convention.[27] Article 10(c) provides that, if the state of destination does not object, service may be made "by any person interested in a judicial proceeding . . . directly through judicial officers, officials, or other competent persons of the State of destination."[28] The plaintiffs argued that the United Kingdom's declaration that "documents sent for service through official channels will be accepted in a territory listed in the Annex by the designated authority and only from judicial, consular, or diplomatic officers of other Contracting States" constituted a total rejection of direct service under article 10(c).[29] The court rejected that argument, noting that U.S. courts have consistently interpreted that reservation as regarding only "'documents sent for service through official channels,' which have been defined as 'documents from an embassy or consular official.'"[30] Thus, the court held that the Hague Convention authorized service by direct delivery in the Isle of Man.[31] Service in this case was made by the Coroner of Middle Sheading. The court found that "a coroner is a judicial officer or otherwise competent person" under Manx law. Therefore, service was proper.[32]

22. *Sibley*, 400 F. Supp. at 1054.
23. *Id.*
24. *Fernandez*, 790 N.Y.S.2d at 156.
25. *Sibley*, 400 F. Supp. at 1052.
26. For a more extensive, recent survey of the issues raised under article 10(a), *see generally* Alexandra Amiel, Note, *Recent Developments in the Interpretation of Article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 24 SUFFOLK TRANSNAT'L L. REV. 387 (2001).
27. IM Partners v. Debit Direct Ltd., 394 F. Supp. 2d 503 (D. Conn. 2005).
28. *Id.* at 512 (citing Hague Convention, art. 10(c)).
29. *Id.* (citing United Kingdom Declaration, (2)(d)).
30. *Id.* (citing Tax Lease Underwriters, Inc. v. Blackwall Green, Ltd., 106 F.R.D. 595, 596 (E.D. Mo. 1985)).
31. *Id.*
32. *Id.*

C. Developments Under Rule 4 of the Federal Rules of Civil Procedure

1. *Service by Electronic Mail under Rule 4(f)(3)*

Service by e-mail appears to be gradually increasing. Since the Ninth Circuit's 2002 decision in *Rio Properties, Inc. v. Rio International Interlink*,[33] a number of courts throughout the United States have allowed service on an international defendant via electronic mail. The common thread appears to be multiple, good faith, unsuccessful attempts by the plaintiff, and a recalcitrant defendant who engages in e-commerce.

At the end of 2004, a district court in Tennessee, apparently the first in the Sixth Circuit, allowed a plaintiff to serve the defendant by e-mail in a case where other means of service had failed.[34] The plaintiff alleged that the defendant was infringing upon and diluting its NETSTER trademark by directing web users to numerous pornographic websites.[35] The plaintiff petitioned the court for an order for service by e-mail under Rule 4(f)(3), which allows service to be made on an individual in another country by "means not prohibited by international agreement as may be directed by the court."[36] The court noted that the Hague Convention did not apply because the defendant's address was unknown.[37] After detailing nearly a dozen attempts to reach the defendant by registered mail and/or by e-mail (including a futile attempt under the Hague Convention), the court concluded that service by e-mail was authorized under Rule 4(f)(3), and, indeed, was "the method of service most likely to reach defendant."[38] The court also echoed the Ninth Circuit's language in *Rio* and held e-mail was the only means of effecting service of process "when faced with an international e-business scofflaw, playing hide-and-seek with the federal court . . . ."[39]

More recently, a West Virginia district court, also without circuit precedent, held that service by e-mail was authorized under Rule 4(f)(3) on an Australian defendant.[40] The plaintiff, Miss West Virginia 2003, sued multiple defendants, alleging that they falsely identified her on multiple websites in a graphic Internet video that juxtaposed her image as Miss West Virginia with sexually explicit images.[41] Australia is not a signatory to the Hague Convention, and no other international treaty applied, so the court found that service under Rule 4(f)(3) was permissible.[42] The record in this case "establishe[d] that the defendants are 'sophisticated participants in e-commerce.'"[43] As such, there was a "reliable channel of communication" to the defendant by way of "e-mail addresses linked to established websites that [the defendant] uses to conduct business."[44] Finally, the court observed that because the plaintiff had attempted service on many occasions, the defendant had actual knowledge that he was "sought for the receipt of legal documents from the United States."[45] "Rather

33. Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007 (9th Cir. 2002).
34. Popular Enters., LLC v. Webcom Media Group, Inc., 225 F.R.D. 560 (E.D. Tenn. 2004).
35. *Id.* at 561.
36. *Id.* (citing Fed. R. Civ. P. 4(f)(3)).
37. *Id.* at 562.
38. *Id.* at 563.
39. *Id.* (quoting *Rio*, 284 F.3d at 1018).
40. Williams v. Adver. Sex LLC, 231 F.R.D. 483 (N.D. W. Va. 2005).
41. *Id.* at 485.
42. *Id.* at 486.
43. *Id.* at 487.
44. *Id.*
45. *Id.* at 488.

than ease the process," the court stated, the defendant's knowledge "has only erected barriers to formal service."[46] Accordingly, the court issued an order for service by e-mail under Rule 4(f)(3).[47]

Another court recognized that service by electronic mail may be appropriate in some cases, but refused to allow it in a declaratory judgment action against a defendant in Saudi Arabia, who was a subject in the plaintiff's book regarding the financing of terrorism.[48] The plaintiff argued that her service options were limited because Saudi Arabia is not a signatory to the Hague Convention, and because it would be extremely difficult to find someone willing to attempt personal service on the defendant in Saudi Arabia.[49] Accordingly, she sought to serve the defendant by e-mail to information@binmahfouz.info, an address listed on a website allegedly affiliated with the defendant.[50] The court was sympathetic, but held that service via e-mail would not meet the constitutional standard that service be "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."[51] The court characterized the cases where e-mail service had been allowed as "involv[ing] e-mail addresses undisputedly connected to the defendants and that the defendants used for business purposes."[52] By contrast, there was no basis for the court to conclude that the defendant maintained the website the plaintiff cited, monitored its information@binmahfouz.info e-mail address, or would be likely to receive information sent to that address.[53] Accordingly, the court would not permit service by e-mail,[54] but instead ordered that service be made through the defendant's attorneys in the United States and the United Kingdom.[55]

2. Service through Attorney under Rule 4(f)(3)

In two companion cases, the Eastern District of Virginia permitted the plaintiffs to serve a Pakistani defendant through his U.S. attorneys.[56] The defendant, Dagra, was a "businessman who previously owned several businesses in Virginia, but is currently residing somewhere in Pakistan."[57] Dagra sought dismissal in the first case for failure to properly effect service.[58] Dagra admitted that the address the plaintiffs tried was previously a good one, but said it was no longer.[59] The court detailed the litany of the plaintiffs' attempts to determine Dagra's address to no avail.[60] Pakistan is a party to the Hague Convention, but

46. *Williams*, 231 F.R.D. at 488.

47. *Id.*

48. Ehrenfeld v. Salim a Bin Mahfouz, No. 04 Civ. 9641(RCC), 2005 WL 696769 (S.D.N.Y. March 23, 2003) (not designated for publication).

49. *Id.* at *2.

50. *Id.* at *3.

51. *Id.* at *3 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

52. *Id.* at *3.

53. *Id.*

54. *Ehrenfeld*, 2005 WL 696769, at *4. The court also refused to allow service by Federal Express to a business address in Saudi Arabia, because on the state of the record, the court had "no way of knowing whether service of process to this address will have any chance of reaching [the] Defendant." *Id.*

55. *Id.*; *see infra* Part D.2.

56. FMAC Loan Receivables v. Dagra, 228 F.R.D. 531 (E.D. Va. 2005); BP Prods. N. Am., Inc. v. Dagra, 232 F.R.D. 263, (E.D. Va. 2005).

57. *FMAC Loan*, 228 F.R.D. at 532.

58. *Id.*

59. *Id.* at 533.

60. *Id.* at 533-34.

the court found that the Convention did not apply because Dagra's address was unknown.[61] The court concluded that under the facts of the first case, Dagra would be given proper notice of the case if service was made on his U.S. attorney.[62] A clear undercurrent of the decision is the court's annoyance with what it perceived to be Dagra's catch me if you can attitude.[63]

The second Virginia case is shorter and, once again, the court was obviously frustrated with Dagra: "This Court has no doubt that the defendant is willfully evading the service of process in this case."[64] In cursory fashion, therefore, the court again concluded that service on Dagra's U.S. lawyer would be appropriate under Rule 4(f)(3).[65]

3. *Service by Courier under Rule 4(f)(2) and Rule 4(f)(3)*

In *Export-Import Bank of the United States v. Asia Pulp & Paper Co.*, the federal court for the Southern District of New York considered the plaintiff's attempted service by both international mail and DHL courier under both Rule 4(f)(2) and 4(f)(3).[66] The defendant was an Indonesian company—Indonesia is not a party to the Hague Convention or any other applicable service treaty or agreement.[67] The court found that the attempted service by international mail was ineffective because it was initiated by the plaintiff instead of the clerk of the court, and because the defendants did not sign receipts.[68] Next, the court also held that the attempted service by DHL was ineffective both because the clerk of the court did not initiate service, as required by Rule 4(f)(2)(C)(ii), and because Indonesian law prohibits service by international courier.[69] The court expressly declined to decide whether an international courier like DHL qualified as a form of mail for purposes of Rule 4(f)(2)(C)(ii).[70]

Although the court found that service was ineffective under Rule 4(f)(2), that did not "preclude a finding that service by mail or DHL may be effective under Rule 4(f)(3)."[71] Determining that the plaintiff's attempts at service were "hardly whimsical,"[72] the court found these means honored the spirit of the parties' agreements that apparently provided for "simple and inexpensive means of service."[73] The court held that, under the circumstances of the case, service was effective under Rule 4(f)(3) even if it violated Indonesian law.

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61. *Id.* at 534.

62. *Id.*

63. *FMAC Loan*, 228 F.R.D. at 534. "While Dagra argues that FMAC should be required to do more to obtain his current address, upon questioning by the Court, he could not define what additional steps should be required." *Id.* "It is also reasonable to infer in light of the numerous challenges that Dagra has made in his defense that he already has sufficient notice of the case. Dagra has not only filed two motions to dismiss based on deficient service, but has also filed several motions directly attacking the substance of the Complaint." *Id.* at 535. "In sum, Dagra cannot skirt the jurisdiction of this Court. From the facts of this case, it is obvious that Dagra is well aware of the current suit, but has purposely acted to conceal his whereabouts." *Id.* at 536.

64. *BP Prods. N. Am., Inc.*, 232 F.R.D. at 264.

65. *Id.* at 265.

66. Export-Import Bank of the United States v. Asia Pulp & Paper Co., No. 03 Civ. 8554 (LTS) (JCF), 2005 WL 1123755 (S.D.N.Y. May 11, 2005) (not designated for publication).

67. *Id.* at *2.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at *4.

72. *Export-Import Bank*, 2005 WL 1123755, at *4.

73. *Id.* at *5.

> In short, the agreements between the parties provided for simple and inexpensive means of service. The Subsidiaries thwarted service under these agreements. It would therefore be unduly burdensome to require Ex-Im to initiate letters rogatory in order to have the pleadings served by a bailiff in Indonesia. The alternative—service by an international courier—has already proven effective. *Even if it is technically in violation of Indonesian service requirements, any offense to that country's sovereignty is minimal.* Such service is not disruptive, and any party that engages in international transactions must anticipate the use of generally accepted forms of service, especially where it has, through its own actions, frustrated the methods of service provided for in the underlying transaction documents.[74]

In the end, the court allowed process to be served under Rule 4(f)(3), even though it had already held that the same service failed under Rule 4(f)(2) and violated Indonesian law. The court appeared to justify this rogue decision by the recalcitrance of the defendants. Nonetheless, the plaintiff's subsequent ability to enforce any judgment outside the U.S. may trigger a challenge based on service contrary to Indonesian law.

II. Personal Jurisdiction[b]

While 2005 saw no major changes in the law of personal jurisdiction, two cases may be of particular interest to participants in international litigation.

A. Consent to Personal Jurisdiction

In *Dow Chemical Co. v. Calderon*,[75] the Ninth Circuit considered a suit brought by Dow Chemical Company, Shell Oil Company, and Shell Chemical Company (the Companies) against 1030 Nicaraguan citizens, seeking a declaration that (1) the Companies were not liable for any injuries to the Nicaraguans caused by a toxic pesticide commonly known as DBPC and (2) any judgments of Nicaraguan courts to the contrary would not be enforceable in the United States. The Nicaraguan defendants sought dismissal on the ground that the district court lacked personal jurisdiction.

The underlying dispute in the case centered on the question of whether the Companies were liable for injuries suffered by Nicaraguan citizens, allegedly caused by exposure to DBCP, a pesticide manufactured by the Companies and used by fruit and vegetable growers throughout the world during the 1950s through the 1970s. In the 1990s, several Nicaraguan citizens had brought suit in Texas against the Companies for alleged continued use of DBCP in Nicaragua after it was banned in the United States.[76] But that suit was dismissed in 1995 on the basis of *forum non conveniens*, after the U.S. court determined that the Nicaraguan courts offered an adequate and more convenient alternative forum.[77]

In response to the 1995 *forum non conveniens* dismissal of the Texas action, the Nicaraguan National Assembly in 2001 enacted the Special Law for the Conduct of Lawsuits Filed By Persons Affected By The Use of Pesticides Manufactured with a DPCP Base (Special Law 364), the legislation on which the Companies relied for the appeal to the Ninth Circuit.

74. *Id.* (emphasis added).

b. Contributed by Nancy S. Eisenhauer, Attorney, State of New York.

75. Dow Chem. Co. v. Calderon, 422 F.3d 827 (9th Cir. 2005).

76. *See* Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1335-36 (S.D. Tex. 1995).

77. *Id.* at 1362, 1372-73.

Special Law 364 requires that defendants in suits brought under the Special Law deposit the sum of $100,000 with the Nicaraguan courts as a "procedural prerequisite for being able to take part in the lawsuit" and an additional $20 million "to guarantee potential judgments."[78] Defendants that do not deposit such sums "must subject themselves unconditionally to the jurisdiction of the courts of the United States of America for the final judgment of the case in question, expressly waiving the defense of *forum non conveniens* invoked in those courts."[79]

Suing under Special Law 364, Nicaraguans citizens have actually obtained more than $175 million in judgments in the Nicaraguan courts against U.S. companies, including the defendants in the 2005 Ninth Circuit case. These Nicaraguan judgments, however, have been in the nature of default judgments because U.S. companies have chosen not to participate in litigation in Nicaragua under the onerous terms of Special Law 364.[80]

Seeking to preempt any future attempts to enforce the Nicaraguan judgments, the Companies filed the declaratory action at issue in the Ninth Circuit appeal.[81] The Companies argued that the Nicaraguan citizens consented to personal jurisdiction in the courts of the United States by virtue of either (a) their decision to sue appellants in a Nicaraguan court under the special legislation Special law 364 or (b) their decision to defend on the merits a declaratory judgment action brought against them by a third party in the same U.S. district court, concerning the same set of underlying Nicaraguan judgments. Both the district court and the Ninth Circuit found for the Nicaraguans, concluding that they did not consent to personal jurisdiction in the *Dow Chemical Co.* case.[82]

Turning to the question of personal jurisdiction raised in the case, the Companies did not contend that the court had personal jurisdiction on the basis of minimum contacts. Instead, the companies argued that the Nicaraguans had consented to personal jurisdiction in one of two ways. First, they argued that Special Law 364 acted as a forum selection clause and that, by choosing to sue under the Law, the Nicaraguans were bound by its terms. The second argument was that 465 of the Nicaraguans, who previously had consented to personal jurisdiction in a separate declaratory action brought by Dole Food Company,[83] had also impliedly consented to jurisdiction in the declaratory action brought by the Companies.

The Companies argued, when the Nicaraguan plaintiffs (defendants-appellees here) had opted to sue under Special Law 364, they had also opted into this forum selection scheme. While the Companies were forced to concede that "it is an 'obvious proposition[]' that 'the Nicaraguan Legislature cannot confer personal jurisdiction over [Nicaraguan citizens] in United States courts,'"[84] they urged the court to analogize Special Law 364 to a forum selection clause in a private, commercial contract. While noting that the Companies' arguments were creative,[85] the court disagreed with the argument by distinguishing private, commercial contracts from Special Law 364, and also by examining the language of Special

78. *Dow Chem. Co.*, 422 F.3d at 829-30 (quoting an English translation of Special Law No. 364).
79. *Id.*
80. *Id.* at 830.
81. *Id.*
82. *Id.* at 836.
83. The Nicaraguans in that case waived objection to personal jurisdiction by filing a motion under Fed. R. Civ. P. 12(b)(6). *Id.*
84. *Dow Chem. Co.*, 422 F.3d at 832.
85. *Id.*

Law 364, which expressly spoke only to the question of the Companies consent to jurisdiction in the United States, not that of the Nicaraguan plaintiffs.[86] With respect to this argument, the Companies argued that the Ninth Circuit should "adopt for the first time in this circuit, the holdings of two out-of-circuit decisions":[87] *General Contracting & Trading Co. v. Interpole, from the First Circuit*;[88] and *International Transactions Ltd. v. Embotelladora Agral Regiomontana S.A. de C.V.*, from the federal district court for the Northern District of Texas.[89] While the Ninth Circuit "assume[d] without deciding that this circuit would follow *Interpole* and *Embotelladora*," it nevertheless concluded that "the analysis contained in those cases does not aid the Companies."[90] In *Interpole* and *Embotelladora*, the relevant courts found that personal jurisdiction exists "where a defendant also independently seeks *affirmative* relief in a separate action before the same court concerning the same transaction or occurrence," regardless when that affirmative relief is sought or the identity of the plaintiff.[91] Moreover, in *Interpole* and *Embotelladora*, the question whether the defendant had also sought affirmative relief was deemed relevant to a minimum contacts analysis, not to the question of consent to personal jurisdiction.[92] Finding that the 465 Nicaraguan defendants had only "defended against two separate actions concerning a single foreign judgment in the same court," rather than seeking affirmative relief, and that the Companies had eschewed the question of minimum contacts, the Ninth Circuit affirmed the dismissal of the case for lack of personal jurisdiction.[93]

B. Implied Authorization of Nationwide Service of Process Under Section 333(b) of the Tariff Act

In *United States International Trade Commission v. ASAT, Inc.*,[94] the U.S. Court of Appeals for the District of Columbia Circuit held for the first time that section 333(b) of the Tariff Act of 1930 (the Tariff Act)[95] impliedly authorizes nationwide service of process in actions to enforce U.S. International Trade Commission (the Commission) subpoenas. The subpoena underlying the case was issued to ASAT, Inc.—a non-party—during an investigation by the Commission under section 337 of the Tariff Act.[96]

86. *Id.* at 832-33.
87. *Id.* at 833-34.
88. Gen. Contracting & Trading Co. v. Interpole, Inc., 940 F.2d 20 (1st Cir. 1991).
89. Int'l Transactions, Ltd. v. Embotelladora Agral Regionmontana, 277 F.Supp.2d 654 (N.D. Tex. 2002).
90. *Dow Chem. Co.*, 422 F.3d at 834.
91. *Id.* (emphasis in original).
92. In support of its interpretation of *Interpole* and *Embotelladora*, the Ninth Circuit also cited two later decisions of the First Circuit, as well as decisions from the D.C. Circuit and the Fifth Circuit, interpreting the cases in a similar manner. *See id.* at 835 (citing Martel v. Stafford, 992 F.2d 1244, 1248 (1st Cir. 1993); Precision Etchings & Findings, Inc. v. LGP Gem Ltd., 953 F.2d 21, 25 (1st Cir. 1992); Rates Tech. Inc. v. Nortel Networks Corp., 399 F.3d 1302, 1308 n. 5 (D.C. Cir. 2005); PaineWebber Inc. v. Chase Manhattan Private Bank (Switzerland), 260 F.3d 453, 460 & N. 8 (5th Cir. 2001)).
93. *Id.* at 835-36.
94. United States Int'l Trade Comm'n v. ASAT, Inc., 411 F.3d 245 (D.C. Cir. 2005).
95. 19 U.S.C. § 1333(b) (2000).
96. For details about the investigation, *see* In Matter of Certain Encapsulated Integrated Circuit Devices & Products containing Same, Inv. No. 337-TA-501 (U.S.I.T.C.).

ASAT challenged enforcement of the Commission subpoena on the ground, among others, that the district court lacked personal jurisdiction.[97] But the D.C. Circuit upheld the district court's ruling in favor of the Commission. The appeal focused on the question of whether federal law, and in particular section 333(b) of the Tariff Act, authorizes nationwide service of process.[98] The Tariff Act contains no express language authorizing such service of process.[99]

The D.C. Circuit reached its decision by examining the language of section 333(b). The court noted that "[o]n two occasions the court has confronted identical or strikingly similar language in other statutes and concluded that Congress intended to *imply* nationwide service of process."[100] Citing to these two prior occasions (one involving the Federal Trade Commission Act[101] and one involving the Federal Election Campaign Act of 1971[102]), the court held that "nationwide service of process exists for subpoena enforcement actions under section 333 (b) of the Tariff Act."[103] In addition to this textual analysis, the court also supported its holding by reference to the Commission's nationwide jurisdiction to conduct investigations. According to the court, "it is necessary to imply nationwide service of process . . . because there otherwise could be a gap in the Commission's enforcement regime where no judicial district could enforce a Commission subpoena without the party voluntarily submitting to the court's jurisdiction."[104]

While ASAT argued that the Supreme Court's 1987 decision in *Omni Capital International v. Rudolf Wolff & Co.*[105] altered this analysis, the D.C. Circuit disagreed and distinguished the case on three grounds. First, unlike the instant case and the two prior cases on which the D.C. Circuit had relied, *Omni Capital* involved a private cause of action, not agency enforcement proceedings.[106] Second, the language of the statute at issue in *Omni Capital*, the Commodity Exchange Act, is different from the language of the Tariff Act. Although the relevant provision in both Acts is silent on the question of service of process, other provisions of the Commodity Exchange Act expressly address the question of nationwide service of process with respect to other causes of action, unlike the other provisions of the Tariff Act. According to the court,

97. In the district court, the Commission also sought enforcement of subpoenas issued to ASAT's parent (a Hong Kong corporation) and one of the parent's holding companies (a Cayman Island's corporation). The district court quashed the subpoenas for improper service, and the Commission did not appeal.

98. Rule 4(k)(1) of the Federal Rules of Civil Procedure authorizes extraterritorial service of process consistent with *either* the long-arm state of the state (or the District of Columbia, *see* Fed. R. Civ. P. 81(e)) in which the district court sits *or* as otherwise provided by federal law. In this case, the Commission did *not* contend that the District of Columbia's long-arm statute authorized service of process on ASAT. Thus, the only question on appeal was whether federal law authorized such service.

99. Section 333(b) authorizes enforcement of Commission subpoenas by district or territorial courts "within the jurisdiction of which such inquiry is carried on . . . ." 19 U.S.C. § 1333(b).

100. *ASAT, Inc.*, 411 F.3d. at 250-51 (emphasis added).

101. Federal Trade Commission Act, 15 U.S.C. § 49 (2006) (interpreted as implying nationwide service of process in FTC v. Browning, 435 F.2d 96, 100 (D.C. Cir. 1970)).

102. Federal Election Campaign Act of 1971, 2 U.S.C. § 437d(b) (2006) (interpreted as implying nationwide service of process in FEC v. Committee to Elect Lyndon LaRouche, 613 F.2d 859, 862 (D.C. Cir. 1979)).

103. *ASAT, Inc.*, 411 F.3d at 251.

104. *Id.* at 252

105. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97 (1987).

106. *ASAT, Inc.*, 411 F.3d at 251-52.

> [s]ilence throughout the statute [as in the instant case and the Tariff Act] is weaker evidence of congressional intent to preclude nationwide service of process than in *Omni Capital* because there is no indication that Congress considered and rejected nationwide service of process for actions under section 333(b) [as it did with private causes of action under the Commodity Exchange Act].[107]

Third, while *Omni Capital* does counsel against implying nationwide service lightly, express language is unnecessary when it is clear that Congress would have desired nationwide service of process to effectuate the underlying statute's purpose.[108]

III. Foreign Sovereign Immunities Act[c]

A. The FSIA and Agencies or Instrumentalities of Foreign States

The Foreign Sovereign Immunities Act (FSIA) provides that a foreign state and its agencies and instrumentalities are immune from jurisdiction in United States courts unless certain exceptions apply.[109] An agency or instrumentality of a foreign state means "any entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country."[110]

In *Enahoro v. Abubakar*,[111] the Seventh Circuit held that an individual who served as Nigeria's head of state and as a member of a military junta that ruled the country was not an "agency or instrumentality" of Nigeria because the FSIA "does not apply to individuals."[112] The court noted that the FSIA "has been applied to individuals, but in those cases one thing is clear: the individual must be acting in his official capacity. If he is not, there is no immunity."[113] The court held that the former head of state was not entitled to sovereign immunity under the FSIA for claims of torture and murder, although it found that he was entitled to "common law immunity for the year that he was head of state."[114]

B. Exceptions to Sovereign Immunity

1. *Waiver Exception*

The FSIA's exceptions include one for waiver of sovereign immunity. It provides that "a foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case—(1) in which the foreign state has waived its immunity either

107. *Id.* at 251.

108. *Id.* Omni Capital's significance decreased in light of the adoption of Rule 4(b)(2) in 1993, a nationwide long-arm statute for jurisdictional federal question cases.

c. Contributed by John J.P. Howley, a partner in Kaye Scholer LLP in New York City.

109. 28 U.S.C. §§ 1603(a), 1604 (2005).

110. *Id.* § 1603(a).

111. Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005).

112. *Id.* at 879.

113. *Id.* at 882.

114. *Id.* at 879.

explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver."[115]

In *Calzadilla v. Banco Latino Internacional*,[116] plaintiff alleged that a Venezuelan government agency had implicitly waived sovereign immunity by maliciously prosecuting claims against the plaintiff in a prior lawsuit in a United States court.[117] The Eleventh Circuit disagreed and affirmed dismissal of the action for lack of subject matter jurisdiction. The court noted that the implied waiver provision "is narrow and that it generally does not apply unless the foreign state reveals its intent to waive its immunity by: (1) agreeing to arbitration in another country, (2) agreeing that the law of a particular country should govern a contract, or (3) filing a responsive pleading in an action without raising the defense of sovereign immunity."[118] Absent one of these specific circumstances, the court held there could be no implicit waiver.[119]

The court also found the assertion of waiver inconsistent with 28 U.S.C. § 1605(a)(5)(B), which expressly excludes "any claim arising out of malicious prosecution" from the exception to sovereign immunity for noncommercial torts. The court concluded that this language would be "superfluous" if a malicious prosecution were found to constitute an implicit waiver of sovereign immunity. "[I]f a foreign state could implicitly waive its foreign sovereign immunity under the FSIA by maliciously prosecuting a claim in a United States court against an individual, then there would be no need for the malicious prosecution exception to the noncommercial tort exemption, which expressly provides that a foreign state retains its immunity under such a circumstance."[120]

2. *Commercial Activity Exception*

In *Mwani v. Bin Laden*,[121] plaintiffs brought claims against the Government of Afghanistan for providing logistical support to terrorist organizations that allegedly facilitated the bombing of the American embassy in Nairobi, Kenya. Although the FSIA contains an exception to immunity for terrorist activities, that exception applies only where the state in question has been listed by the U.S. Department of State as "a state sponsor of terrorism."[122] As Afghanistan has never been listed as a sponsor of terrorism by the U.S. government, that exception was not available in this case.[123] Plaintiffs asserted, instead, the exception to immunity for actions "'based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.'"[124] Plaintiffs asserted that the commercial activity in the instant case consisted of actively aiding Osama Bin Laden "'by assigning him guards for security, permitting him to build and maintain terrorist camps, and refusing to cooperate

115. 28 U.S.C. § 1605(a)(1).
116. Calzadilla v. Banco Latino Internacional, 413 F.3d 1285 (11th Cir. 2005).
117. *Id.* at 1288.
118. *Id.* at 1287.
119. *Id.*
120. *Id.* at 1288.
121. Mwani v. Bin Laden, 417 F.3d 1 (D.C. Cir. 2005).
122. *Id.* at 15 n.15 (citing Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 89 (D.C. Cir. 2002)).
123. *Id.*
124. *Id.* at 15 (quoting 28 U.S.C. § 1605(a)(2)).

with efforts by the international community to extradite him.'"[125] Bin Laden allegedly "'provided approximately $10-$20 million per year to the Taliban in return for safe haven.'"[126]

The D.C. Circuit affirmed dismissal of the action against Afghanistan because the alleged conduct did not constitute "the *type* of actions by which a private party engages in 'trade and traffic or commerce.'"[127] The court found that "[g]ranting refuge to terrorist training camps is a uniquely sovereign act; it is not the sort of benefit that a commercial landlord can bestow upon a commercial tenant."[128] The court also found that the assignment of security guards and the refusal to extradite Bin Laden were part of the exercise of police powers and "'cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such.'"[129]

In *BP Chemicals Ltd. v. Jiangsu SOPO Corp.*,[130] plaintiff brought an action for misappropriation of trade secrets against a number of companies, including Jiangsu SOPO Corporation ("SOPO"), a Chinese chemical company wholly owned by the Chinese government.[131] Plaintiff alleged that its trade secrets, which had been licensed to one of the defendants, were being used by SOPO to construct a chemical plant in China. Plaintiff alleged that jurisdiction existed under the commercial activity exception to immunity in the FSIA for "commercial activity carried on in the United States."[132]

Plaintiff alleged that its claim was based on commercial activity in the United States because SOPO had used or disclosed its trade secrets in meetings with U.S. vendors who were fabricating equipment for use in the Chinese chemical plant.[133] The complaint alleged that this disclosure occurred in three ways: during direct meetings between SOPO and the U.S. vendors; in meetings between the U.S. vendors and another company, SPECO, that allegedly was acting as SOPO's agent; and as part of a civil conspiracy between SOPO and SPECO.[134]

The district court held that these allegations, if true, were sufficient to establish the exception to immunity. Accordingly, it allowed jurisdictional discovery, after which it held an evidentiary hearing. The district court found that the facts were insufficient to support the allegation that SPECO was acting as SOPO's agent or to support the conspiracy theory. The court did agree, however, that "SOPO's own activity within the United States was sufficient for jurisdiction under the FSIA."[135] This included direct meetings between SOPO representatives and the U.S. vendors to inspect the equipment and to participate in testing the equipment.[136]

On appeal, SOPO argued that although the meetings had occurred, there was no direct evidence that any trade secrets were disclosed or used during these meetings. The Eighth Circuit rejected this argument, finding that the disclosure or use of trade secrets at the

125. *Id.* at 16 (citation omitted).
126. *Id.* (citation omitted).
127. *Mwani*, 417 F.3d at 16 (citation omitted).
128. *Id.* at 17.
129. *Id.* (quoting Saudi Arabia v. Nelson, 507 U.S. 349, 362 (1993)).
130. BP Chems. Ltd. v. Jiangsu SOPO Corporation, 420 F.3d 810 (8th Cir. 2005).
131. *Id.* at 811-12.
132. *Id.* at 813 (quoting 28 U.S.C. § 1605(a)(2)).
133. *Id.*
134. *Id.*
135. *Id.* at 814.
136. *BP Chems. Ltd.*, 420 F.3d at 814.

meetings could be inferred from the evidence. This included evidence that the specifications for SOPO's plant in China were "shameless copies" of specifications for plants using plaintiff's trade secrets, "in some cases replicating typographical errors made in the specs used on those projects."[137] The court was satisfied that plaintiff's complaint "identifies with particularity the nature of the trade secrets and confidential information allegedly used," and that its evidence "specifically identifies multiple instances in which its engineering drawings were copied and used."[138] "[W]hile the district court did not identify the specific equipment discussed at each vendor meeting, it is reasonable to infer . . . that *all* the equipment provided by [the U.S. vendor] was discussed."[139] "It would be odd, indeed, if the Chinese government required SOPO to attend these meetings and inspections, and then not require them to inspect all the equipment."[140]

The Eighth Circuit also rejected SOPO's argument that the evidence was insufficient to establish other elements of plaintiff's claim. At the jurisdictional stage of the case, plaintiff "need only show that one element of its claim is connected to commercial activity in the United States."[141]

In *Kirkham v. Societe Air France*,[142] an American passenger who suffered an injury to her foot at the airport in Orly, France asserted a negligence claim against Air France. As Air France is majority owned by the Republic of France, the airline moved to dismiss for lack of subject matter jurisdiction under the FSIA. Plaintiff responded that jurisdiction existed under the commercial activity exception in 28 U.S.C. § 1605(2)(a). Curiously, although the accident occurred in France, the passenger did not assert the exception for commercial activity "outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[143] Instead, the passenger asserted the exception to sovereign immunity where "the action is based upon a commercial activity carried on in the United States by the foreign state."[144]

The district court agreed and the D.C. Circuit affirmed the denial of Air France's motion to dismiss. Air France conceded that the ticket sale had occurred in the United States, and that such a sale constituted commercial activity. It argued, however, that plaintiff's action was not "based upon" that commercial activity as required by the exception to immunity. The D.C. Circuit disagreed because the purchase of the ticket was a necessary element of the passenger's negligence claim. Specifically, the ticket sale formed the basis of the duty element of the passenger's claim. The D.C. Circuit held that, because "Kirkham *must* show she purchased a plane ticket in order to establish a passenger-carrier relationship with the airline, the ticket sale is necessary to the 'duty of care' element of her negligence claim."[145]

3. *Expropriation Exception*

In *Peterson v. Royal Kingdom of Saudi Arabia*,[146] the D.C. Circuit addressed the exception to sovereign immunity for actions "in which rights in property taken in violation of inter-

137. *Id.* at 813.
138. *Id.* at 817.
139. *Id.* at 818.
140. *Id.*
141. *Id.* at 818 n.5.
142. Kirkham v. Societe Air France, No. 04-7209, 2005 WL 3108467 (D.C. Cir. Nov. 22, 2005).
143. 28 U.S.C. § 1605(a)(2).
144. *Kirkham*, 2005 WL 3108467, at *1 (quoting 28 U.S.C. § 1605(a)(2)).
145. *Id.* at *3 (citation omitted).
146. Peterson v. Royal Kingdom of Saudi Arabia, 416 F.3d 83 (D.C. Cir. 2005).

national law are in issue and that property or any property exchanged for such property is present in the United States in connection with commercial activity carried on in the United States by the foreign state."[147] Plaintiff had been employed by a private employer in Saudi Arabia. By royal decree, the government had established a mandatory retirement program called the General Organization of Social Insurance ("GOSI"). Under the program, plaintiff was required to contribute five percent of his income to GOSI, and his employer was required to contribute an additional eight percent. Upon retirement, GOSI was to pay plaintiff an annuity based on a formula that considered his income during a period of years preceding retirement.

After plaintiff and his employer had made several years worth of contributions, the Government of Saudi Arabia changed the GOSI system to exclude non-Saudi workers from the annuity program. Plaintiff received a refund of the five percent contribution that he had made into GOSI, but not the eight percent contribution that his employer had made on his behalf. He brought an action against the government alleging an "arbitrary and discriminatory expropriation of his property in violation of international law."[148]

The D.C. Circuit refused to find that the "expropriation exception" to the FSIA applied. Under 28 U.S.C. § 1605(a)(3), in order for the exception to apply "at issue must be (1) 'rights in property' that (2) were taken in violation of international law and (3) the property at issue (or any property exchanged for it) must either (a) be present in the United States 'in connection with a commercial activity carried on in the United States by the foreign state' or (b) 'owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality' engages in commercial activity in the United States."[149] Plaintiff's argument failed at the first hurdle because the court held that he had no "rights in property" with respect to the eight percent contribution that his employer had made to GOSI. Distinguishing between a social insurance scheme like GOSI and a personal pension plan (like a 401(k) plan in the United States), the court found determinative that even if GOSI had remained in force with respect to foreign workers, the benefit due to plaintiff would have been unconnected to his (and his employer's) actual contributions but instead would have been based on a formula corresponding to his average income during a period of years preceding retirement. On the basis of this distinction the court concluded, plaintiff "had no right, contractual or otherwise," to his employer's GOSI contributions.[150]

4. *Immovable Property Exception*

The FSIA provides an exception to sovereign immunity for actions "in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue."[151] In *City of New York v. Permanent Mission of India to the United Nations*,[152] the City sought a declaration of validity for tax liens on buildings housing the Indian and Mongolian Permanent Missions to the United Nations.[153] The

147. 28 U.S.C. § 1605(a)(3).

148. *Peterson*, 416 F.3d at 85.

149. *Id.* at 86-87 (quoting 28 U.S.C. § 1605(a)(3)).

150. *Id.* at 87.

151. 28 U.S.C. § 1605(a)(4).

152. City of New York v. Permanent Mission of India to the United Nations, 376 F. Supp. 2d 429 (S.D.N.Y. 2005).

153. *Id.* at 430.

City asserted that jurisdiction existed under the commercial activities exception because both nations had engaged in commercial activity by housing diplomatic staff in the Mission buildings, and that jurisdiction also existed under the immovable property exception because the tax lien constituted a right in immovable property.[154]

The district court did not address the commercial activity exception because it found jurisdiction under the rights in immovable property exception.[155] The court held that a tax lien constitutes a right in immovable property because it "runs with the land" and "directly affect[s] the property owner's rights to alienate or convey the property."[156]

C. Jurisdictional Discovery

In *Beecham v. Socialist People's Libyan Arab Jamahiriya*,[157] plaintiffs brought an action against the Government of Libya seeking damages related to the bombing of a discotheque in West Berlin. The district court found that the allegations in the complaint and Libya's denials required "'initial targeted discovery' to resolve subject matter jurisdiction" under the FSIA.[158] Accordingly, the district court ordered the parties to confer and submit "'a joint report proposing a plan for conducting discovery limited to facts bearing upon the court's subject matter jurisdiction.'"[159] Libya sought to appeal from this order and asserted appellate jurisdiction under the collateral order doctrine.[160] The D.C. Circuit dismissed the appeal for lack of appellate jurisdiction. Finding that the district court's order did not order any discovery of any scope, but merely required the parties to confer on a joint discovery plan, the court held that the order appealed from was not a "final decision" because it did "not by any stretch resolve important issues in the case and [did] not 'conclusively determine' the scope of jurisdictional discovery."[161] Although not raised by Libya, the court also addressed the possibility of mandamus and found that would not provide a basis for appellate jurisdiction either. "Only if the court orders jurisdictional discovery and clearly abuses its discretion in determining the scope of discovery could mandamus possibly lie."[162]

Other cases this year have held that jurisdictional discovery is appropriate only when factual disputes must be resolved to determine the jurisdictional issue. For example, in *Mwani v. Bin Laden*,[163] the D.C. Circuit held that the district court did not abuse its discretion by denying jurisdictional discovery against the Government of Afghanistan because "even assuming that the Taliban engaged in all of the conduct alleged in the complaint, the commercial activity exception would not apply."[164]

154. *Id.*
155. *Id.* at 432 & n.4.
156. *Id.* at 436.
157. Beecham v. Socialist People's Libyan Arab Jamahiriya, 424 F.3d 1109 (D.C. Cir. 2005).
158. *Id.* at 1110-11.
159. *Id.* at 1111.
160. *Id.* (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)).
161. *Id.*
162. *Id.* at 1112.
163. *Mwani*, 417 F.3d at 1.
164. *Id.* at 17.

IV. The Act of State Doctrine[d]

A. Introduction

The act of state doctrine bars U.S. courts from judging the validity of acts by a "recognized foreign sovereign power committed within its own territory."[165] The policies of international comity, respect for the sovereignty of foreign nations on their own territory, and concerns for the domestic separation of powers underlie the doctrine,[166] which is solely a prudential limitation and is neither jurisdictional nor constitutionally mandated.[167]

The act of state doctrine only applies in actions where the relief sought or defense interposed would require a U.S. court to declare a foreign sovereign's official act invalid. The doctrine's operation leaves such challenges exclusively to the political branches of the U.S. government.[168] In analyzing act of state doctrine issues, courts consider a three-factor framework announced by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*. The three factors include (1) the degree of consensus on a given area of international law; (2) the dispute's foreign relations implications to the U.S. government; and (3) if "the government which perpetrated the challenged act of state is no longer in existence."[169] Some courts also ask "whether the foreign state was acting in the public interest."[170]

The act of state doctrine is a binding rule of decision, rather than a doctrine of abstention.[171] Once invoked, it requires U.S. courts to deem valid the acts of foreign sovereigns committed within those sovereigns' own boundaries.[172] The doctrine provides foreign states with a substantive defense on the merits. An act of state defense thus differs from a claim of sovereign immunity, which raises only a jurisdictional defense.[173] The burden of proving that the act of state doctrine applies rests with the party attempting to invoke it as a basis for dismissing the action.[174]

B. Judicial Determinations as Acts of State

In *Philippine National Bank v. United States District Court*, part of a long-running dispute over the assets of former Philippine President Ferdinand E. Marcos's estate, the Ninth Circuit held that the act of state doctrine prevents a district court from declaring a foreign court's forfeiture judgment invalid.[175] The case arose from a dispute between class plaintiffs, who had won a judgment against the estate's assets for human rights violations, and the Philippine government, which claimed rights to the assets under the theory that Marcos had stolen them from the Republic and its people. Some of the disputed assets resided in Swiss banks. On a request from the Philippine government, the Swiss government first

d. Contributed by Emma Prete, Associate, Debevoise & Plimpton LLP, New York, New York.

165. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964).

166. *Id.* at 428.

167. Doe v. Qi, 349 F. Supp. 2d 1258 (N.D. Cal. 2004).

168. *See* W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 404 (1990).

169. *Id.* at 427-28.

170. *Qi*, 349 F. Supp. 2d at 1290.

171. See W.S. Kirkpatrick, 493 U.S. at 406.

172. *See id.*; *see also* World Wide Minerals, Ltd. v. Republic of Kazakhstan, 296 F.3d 1154 (D.C. Cir. 2002).

173. *See* Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004).

174. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 691 (1976).

175. Philippine Nat'l Bank v. United States Dist. Ct., 397 F.3d 768 (9th Cir. 2005).

froze the assets and later transferred them to the Singapore branch of the Philippine National Bank, to be held in escrow pending a determination of rightful ownership by a competent Philippine court. The Philippine Supreme Court later declared that the assets had been forfeited to the Republic of the Philippines.

In the first instance, the United States District Court for the District of Hawaii then held that the Philippine forfeiture judgment was invalid, finding that the court had "violated 'due process by any standard.'"[176] On appeal, the Ninth Circuit reversed, holding that the act of state doctrine encompassed more than just legislative or executive acts. Because "[t]he forfeiture action was not a mere dispute between private parties" but "an action initiated by the Philippine government pursuant to its 'statutory mandate to recover property allegedly stolen from the treasury,'" the Republic's actions qualified as governmental and the act of state doctrine barred the district court from considering the underlying subject matter.[177] According to the Ninth Circuit, the district court had exceeded its authority by examining the validity of the Philippine forfeiture judgment, which qualified as an act of state.

The class plaintiffs also argued the act of state doctrine should not apply because the disputed assets were not present within the territory of the Philippines. According to the Ninth Circuit, however, "[t]he [act of state] doctrine is to be applied pragmatically and flexibly, with reference to its underlying considerations."[178] The Ninth Circuit stated that, even assuming that the assets were located outside the Philippines, the factors underlying the act of state doctrine were still relevant, given the "extraordinary circumstances of [the] case," where both the Swiss and Philippine governments had agreed the assets should be held in Singapore, pending determination of their ownership by a Philippine court.[179]

C. Alleged Jus Cogens Violations

In 2005, a district court ruled that the act of state doctrine prevented it from considering Palestinian plaintiffs' claims that Israeli government defendants had committed various torts against them by supporting the establishment of Israeli settlements in the West Bank.[180] The court first stated that the case revolved around the second *Sabbatino* factor of potential interference with the United States' foreign relations. It then went on to label the alleged Israeli government actions as classic acts of state and found that any judgment on the validity of Israel's actions with regard to the occupation by its citizens of land arguably within its own territory would create a clear danger to amicable relations between Israel and the United States.[181] In reaching this decision, the court found that the first *Sabbatino* factor—the degree of consensus on a particular area of international law—was unsettled because "the Israeli-Palestinian conflict has sharply divided the world."[182] According to the court, the fact that the plaintiffs' complaint included allegations of *jus cogens* violations did not

176. *Id.* at 771.
177. *Id.* at 773.
178. *Id.* at 773 (quoting Tchacosh Co. v. Rockwell Int'l Corp., 776 F.2d 1333, 1337 (9th Cir. 1985)).
179. *Id.* at 773-74.
180. Doe v. State of Israel, 400 F. Supp. 2d 86 (D.D.C. 2005) (mem).
181. *Id.* at 114.
182. *Id.* at 113.

swing the calculus in their favor, since adjudicating the dispute would unavoidably cause serious interference with the United States' foreign policy in the Middle East.[183]

In another case, Abiola v. Gen. Abdusalami Abubakar, however, a district court for the Northern District of Illinois found that the act of state doctrine did not apply where the plaintiffs alleged jus cogens violations against General Abdusalami Abubakar, a member of the ruling military regime in Nigeria from 1993 to 1999.[184] In analyzing the *Sabbatino* factors, the court gave heavy weight to the severity of the human rights violations that the plaintiffs alleged.[185] In addition, the fact that the defendant's military regime had since been replaced by a democratically elected government also weighed in the plaintiffs' favor, since the change of regime largely removed the possibility of diplomatic tension between the United States and Nigeria should the court consider the plaintiffs' claims against Abubakar.[186] The District Court for the District of Columbia mirrored this reasoning in *Owens v. Repbulic of Sudan*, in refusing to dismiss a claim brought against Sudanese defendants by plaintiffs injured in terrorist attacks on U.S. embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya.[187] The court noted that few acts "more clearly violate international law than a terrorist attack on innocent civilians."[188]

The severity of the violations alleged also tipped the balance in the plaintiffs' favor in *Mujica v. Occidental Petroleum Corp.*, a case that arose after the Columbian Air Force, acting in cooperation with a private oil company, bombed and raided a village in an attempt to further the oil company's security interests.[189] The court found that the act of state doctrine did not apply, largely because of the severity of the claimed violations.[190] The court noted that "[s]ince the alleged actions of Defendant violated binding international law norms, [we] cannot conclude Colombia was acting pursuant to the public interest."[191] The severity of the conduct alleged thus also influenced the court's treatment of the sometimes-considered fourth factor of whether the foreign government was acting in the public interest. Nevertheless, despite finding that the act of state doctrine did not bar further litigation, the court went on to dismiss the case because it raised a non-justiciable political question.[192]

D. Other Cases

In *Glen v. Club Mediterranee S.A.*, a case involving real property claims against a Cuban resort for trespass and unjust enrichment, a district court reiterated that the act of state

183. *Id.* at 60.

184. Abiola v. Gen. Abdusalami Abubakar, No. 02 C 6093, 2005 U.S. Dist. LEXIS 27831 (N.D. Ill. Nov. 8, 2005).

185. *Id.* at *5.

186. *Id.* at *6.

187. Owens v. Repbulic of Sudan, 374 F. Supp. 2d 1 (D.D.C. 2005).

188. *Id.* at 27. In conducting its analysis, the court also explained that the potential for interference with the diplomatic work of other government branches is reduced in this context, since the executive branch had already designated the state at issue as a state sponsor of terrorism under the relevant provision of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7). *Id.* The court does, however, seem to misunderstand the second factor of regime change, indicating that a regime change would tip the balance in favor of applying the act of state doctrine to bar further review when a regime change would normally make a court less hesitant to bar review of the former government's actions. *Id.* ("This case does not present a circumstance in which a change of government—in Iran or Sudan—warrants application of the act of state doctrine.").

189. Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164 (C.D. Cal. 2005).

190. *Id.* at 1190.

191. *Id.* at 1191.

192. *Id.* at 1195.

doctrine bars claims even between private litigants if such claims would require the court to examine the validity of a foreign government's official act.[193] The plaintiffs' claim rested on their assertion that they still rightfully owned property expropriated by the Cuban government in 1959.[194] The court held that the act of state doctrine barred it from considering the plaintiffs' claim against the private hotel because "[t]he doctrine does not simply relieve the foreign government of liability for its acts, but operates as an issue preclusive device, foreclosing judicial inquiry into the validity or propriety of such acts in litigation between any set of parties."[195] Because deciding the case would necessarily require the court to examine the validity of the Cuban government's 1959 seizure of the plaintiffs' property, the act of state doctrine required dismissal.[196]

Also this year, a California district court held in *Cruz v. United States* that the act of state doctrine did not bar consideration of whether Mexican state-owned bank defendants improperly refused to disgorge funds claimed by plaintiffs.[197] The same court in *Dugong v. Rumsfeld* denied summary judgment for the defendants, the Secretary and Department of Defense, because the facts were not fully developed enough to tell whether the relevant foreign government, here Japan, or the U.S. government had committed the acts on which the plaintiffs' complaint was based.[198]

V. International Discovery[e]

A. Obtaining U.S. Discovery for Use in Foreign Proceedings

In 2005, there were a number of cases applying 28 U.S.C. § 1782, which provides that the district court "in which a person resides or is found may order him to give his testimony or statement . . . or other thing for use in a proceeding in a foreign or international tribunal."[199] The court in *Norex Petroleum Ltd. v. Chubb Inurance. Co. of Canada*[200] was asked by a party to litigation in Canada to order the production of documents from a U.S. nonparty, BP America. The documents being sought were not located in the United States, but rather in Canada, in the possession of BP America's foreign parent corporation.[201] The court noted that the issue of whether § 1782 may be used to obtain documents located abroad had been previously addressed by courts in dicta, but that the question was otherwise one of first impression. It concluded that § 1782 does not authorize the production of

193. Glen v. Club Mediterranee S.A., 365 F. Supp. 2d. 1263 (S.D. Fla. 2005).

194. *Id.* at 1267.

195. *Id.* at 1271.

196. *See id.*

197. Cruz v. United States, 387 F. Supp. 2d 1057 (N.D. Cal. 2005). Citing Alfred Dunhill v. Republic of Cuba, 485 U.S. 682 (1976), the court resolved the act of state issue against defendants because the Mexico had not formally repudiated its obligation to repay the money in the plaintiffs' savings funds. According to the court, an act of some kind, even an act signifying the intent to not act, is required. "[M]ere failure to pay, without having admitted an obligation and then formally repudiated it, [is] insufficient to support a finding that the nonpayment was invested with the sovereign authority of the state." *Id.* at 1069.

198. Dugong v. Rumsfeld, No. C 03-4350, 2005 U.S. Dist. LEXIS 3123, at *65-66 (N.D. Cal. Mar. 1, 2005).

e. Contributed by Glenn P. Hendrix, Partner, Arnall Golden Gregory LLP, Atlanta, Georgia.

199. 28 U.S.C. §1782 (2006).

200. Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada, 384 F. Supp. 2d 45 (D.D.C. 2005).

201. *Id.* at 46.

documents located outside the United States and that a contrary interpretation "would not be in keeping with the aims of the statute."[202]

In *In re Application of Imanagement Services Ltd.*,[203] the Bank of New York (BNY) sought to vacate a section 1782 order directing that it provide discovery in support of an action pending in Russia. The Russian court had refused to stay its proceedings pending the discovery on the ground that under Russian civil procedure, "a transcript of witness testimony obtained without an order from the Russian court may not 'serve as due evidence.'"[204] In opposing the discovery, BNY cited the 2004 ruling by the U.S. Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*,[205] which held that in considering a § 1782 request, the U.S. court should consider "the receptivity of the foreign government or the court or agency abroad to U.S. federal -court judicial assistance." The district court read this instruction narrowly. Citing pre-*Intel* Second Circuit precedent,[206] the court stated that its "'inquiry into the discoverability of requested materials should consider only *authoritative proof* that a foreign tribunal would reject evidence obtained with the aid of § 1782.'"[207] The court declined to find such authoritative proof in the record, observing that "BNY does not assert that the Russian court has asked this Court to deny [the] discovery request or otherwise explicitly signaled its general lack of receptivity to outside discovery assistance."[208] The court noted further that even if the transcript resulting from the deposition in the United States was itself inadmissible in Russia, there was no "indication, let alone authoritative proof, that the Russian court would reject as evidence documents gathered with the aid of the witnesses' deposition testimony."[209]

In re Application of Hill[210] involved a § 1782 order in support of a liquidation proceeding in Hong Kong. The target of the discovery request, Ernst & Young (E&Y), argued that the Hong Kong case was not a proceeding in which an adjudicative function was being exercised and was therefore beyond the scope of § 1782. The court held that if the proceeding served merely to enforce prior judgments, it would not have qualified as adjudicative,[211] but observed that the Hong Kong proceeding would involve the resolution of competing creditors' claims and a determination of the value of the debtors' estates, thereby satisfying the adjudicative function requirement. The court also rejected an argument by E&Y that the request should be denied on the ground that the requested discovery was not for use in the Hong Kong proceeding. In that regard, E&Y contended that the liquidators were "brazenly trawling for information to determine whether any claims [against third parties] exist," that such claims must be asserted in separate proceedings, and that the discovery would be for use in those proceedings as opposed to the Hong Kong liquidation proceeding.[212] The court nevertheless allowed the discovery, holding that the "fact that the Liquidators may use the fruits of discovery to pursue potential claims against third parties

202. *Id.* at 55.
203. *In re* Imanagement Servs. Ltd., No. Misc. 05-89(FB) 2005 WL 1959702 (E.D.N.Y. Aug. 16, 2005).
204. *Id.* at *1.
205. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).
206. *In re* Application of Euromepa, 154 F.3d 24 (2d Cir. 1998).
207. *Imanagement Services*, 2005 WL 1959702, at *4 (quoting Euromepa, 51 F.3d at 1100).
208. *Id.* at *4.
209. *Id.*
210. *In re* Hill, No. M19-117 (RJH), 2005 WL 1330769 (S.D.N.Y. June 3, 2005).
211. The court cited *Euromepa*, 154 F.3d at 28, for this proposition.
212. *Hill*, 2005 WL 1330769 at *4

does not undermine their equally legitimate goals" of using the information in the liquidation proceeding.[213]

B. Obtaining Discovery from Abroad for Use in U.S. Proceedings—Documents

Document discovery under the Federal Rules of Civil Procedure may be obtained from a foreign non-party if the non-party is subject to the personal jurisdiction of the U.S. court. To date, most federal courts apply the same standards in evaluating the existence of personal jurisdiction with respect to both defendants and non-party witnesses.[214] In the case of *In re Automotive Refinishing Paint Antitrust Litigation*,[215] the court considered whether it should examine the foreign non-party's contacts with the United States as a whole, using a national contacts test, or only with the forum from which the subpoena issued, the District of Columbia. Citing authority from the First, Fifth, Seventh, and Eleventh Circuits[216] in the context of assessing jurisdiction over a defendant, the court held that since the action arose under federal law (the Clayton Act), the relevant forum for assessing a non-party witness' contacts was the United States as a whole.

The court in *Estate of Unger v. Palestinian Authority*[217] applied a similar analysis, but in a more restrictive manner. The proponent of the request had obtained a judgment under the federal Antiterrorism Act (ATA) against the Palestinian Authority (PA) and the Palestine Liberation Organization. It subpoenaed a non-party Egyptian telecommunications company (Orascom) in an effort to obtain discovery regarding Orascom's debt to the PA's investment fund. The court held that even in a federal question case, a national contacts test would be applied only if the applicable federal statute provides for national service of process.[218] The court noted that the ATA permits national service of process, but rejected the judgment creditor's argument that the ATA's jurisdictional reach applied to ancillary enforcement proceedings as well.[219] The court also rejected the creditor's argument that personal jurisdiction attached under Fed. R. Civ. P. 4(k)(2), which permits service of a summons "with respect to claims arising under federal law" on the ground that this "statute limits its reach to *defendants*" and simply does not apply to third-party subpoenas.[220] Thus, the court considered only Orascom's contacts with New York.

C. Obtaining Discovery from Abroad for Use in U.S. Proceedings—Testimony

In *Minebea Co. v. Papst*,[221] the court ordered the defendant in a patent license dispute (Papst) to produce certain German witnesses at the trial of the case in the United States. The witnesses, who were the inventors under the patent, were not subject to the personal jurisdiction of the court and were not officers, directors, or managing agents of Papst.[222]

213. *Id.*
214. *See* Note, Ryan W. Scott, *Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery*, 88 Minn. L. Rev. 968 (2004).
215. *In re* Automotive Refinishing Paint Antitrust Litig., 229 F.R.D. 482 (E.D. Pa. 2005).
216. *Id.*
217. Ungar v. Palestinian Authority, 400 F. Supp. 2d 541 (S.D.N.Y. 2005).
218. *Id.* at 547.
219. *Id.* at 548.
220. *Id.* at 552 (emphasis in original).
221. Minebea Co. v. Papst, 370 F. Supp. 2d 302 (D.D.C. 2005).
222. *Id.* at 306-07.

Nevertheless, each had executed patent assignment agreements, which included commitments to provide testimony at Papst's request. Papst argued that this provision was intended to benefit only Papst itself and did not create a benefit by which a third party could demand testimony from the inventors.[223] The court disagreed, interpreting the clause to mean that the inventors agreed to testify in any legal proceedings, not just those in which Papst would like them to testify.[224] The court directed that if Papst failed to produce the witnesses for testimony at trial, it would instruct the jury as to adverse inferences to be drawn from their absence.[225]

VI. Choice of Law[f]

A. Choice of Law and Contractual Set-Off Rights

In *Finance One Public Co. v. Lehman Brothers Special Financing, Inc.*, the Second Circuit Court of Appeals affirmed the district court's determination that Thai law governed extra-contractual set-off disputes, but ultimately reversed the district court's application of Thai law.[226] The case involved a standard Master Agreement published by the International Swaps and Derivatives Association, which contained a choice-of-law clause directing the parties to specific governing law in the Schedule to the Master Agreement and a forum selection clause requiring the parties to submit to the jurisdiction of either English or New York courts.[227]

In this diversity action, the Second Circuit applied the forum state's (New York) choice-of-law rules. The threshold validity of the choice-of-law clause was assumed, but the parties disputed its scope, which the court also addressed as a threshold issue under the forum state's law.[228] Applying a substantive choice of law analysis, the Second Circuit held that the choice-of-law clause, interpreted under New York law, was not broad enough to encompass the extra-contractual set-off rights at issue.[229] The court noted that New York courts are reluctant to read choice-of-law clauses broadly and that the parties could have included a provision creating set-off rights within their agreement.[230] Because the court held that the set-off issue was not within the scope of the choice-of-law clause of the Master Agreement, it applied New York's interest analysis to determine what law applied to the set-off issue. Concluding that the contacts with Thailand were stronger than the contacts with New York, the court affirmed the district court's ruling that Thai law applied to the set-off claim.[231] Applying Thai law, however, the Second Circuit reached a different substantive result than the lower court and reversed the judgment and remanded for entry of judgment for defendant.[232]

223. *Id.* at 307.
224. *Id.* at 308-09.
225. *Id.* at 310.
f. Contributed by Meshach Y. Rhoades and Barry C. Bartel, Associates, Holland & Hart LLP, Denver, Colorado.
226. Finance One Pub. Co. v. Lehman Bros. Special Fin., 414 F.3d 325 (2d Cir. 2005).
227. *Id.* at 327-28
228. *Id.* at 333.
229. *Id.* at 335-36.
230. *Id.* at 337.
231. *Id.* at 337-28.
232. *Finance One Pub. Co.*, 414 F.3d at 340-45.

B. Choice of Law and Copyright

In *Films By Jove, Inc. v. Berov*, the Eastern District of New York held that it would not defer to a post-judgment Russian ministerial directive, which retroactively expropriated the ownership and property of an American company's copyright license.[233] In 1992, the parties entered into an exclusive copyright license for worldwide distribution outside of the former Soviet Union.[234] In response to a 1998 action for copyright infringement brought by Films By Jove, the defendant disputed the validity of the licensing agreement based on claims regarding ownership of the licensing rights.[235] Thereafter, the Russian Federation issued a ministerial directive effectively divesting Films By Jove of its copyright property rights.[236]

The court determined that the Russian directive was invalid because it constituted a direct attempt to confiscate, without compensation, a U.S. company's property rights in the United States.[237] In effect, the court invalidated the Russian directive because it amounted to a taking of U.S. property and an attempt to overturn an existing Russian copyright to effect that taking.

The court rejected the defendant's argument that the act of state doctrine precludes the United States courts from inquiring into the validity of the Russian directive.[238] In so holding, the court established that the act of state doctrine, which normally precludes U.S. courts from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory, does not extend to takings of property located outside of the foreign sovereign's territory at the time of the taking.[239] The court determined that Films By Jove's licensing rights were located in the United States, as this was where the rights were to be distributed, as well as where Films By Jove was domiciled.

Further, the court held that although comity is applied more broadly than the act of state doctrine, it could not be applied in contravention of public policy principles.[240] Finally, the court held that its ruling did not contradict the Berne Convention's principle of national treatment, which essentially grants a foreign copyright holder the same protections in U.S. courts as an U.S. copyright holder.[241]

C. Choice of Law and Foreign Privilege

In *In re Philip Services Corp. Securities Litigation*, the Southern District of New York further limited the use of foreign privilege law when it held that courts examining communications involving foreign attorneys, or occurring in foreign countries, must apply the law of the country that has the predominant or "most direct and compelling interest" in the communications and maintenance of their confidentiality.[242]

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233. Films By Jove, Inc. v. Berov, 341 F. Supp.2d 199 (E.D.N.Y. 2004). This case is the third in a series of cases. *See* 154 F. Supp.2d 432 (E.D.N.Y. 2001) and 250 F. Supp.2d 156 (E.D.N.Y. 2003).

234. *Id.* at 200-01.

235. *Id.* at 201.

236. *Id.*

237. *Id.* at 214.

238. *Id.* at 206-07.

239. *Films By Jove*, 341 F. Supp.2d at 207.

240. *Id.* at 212-13.

241. In fact, in a significant number of cases, the country of infringement was also the country where the action for infringement was brought.

242. *In re* Philip Servs. Corp. Sec. Litig., No. 98CIV0835 MBM DF, 2005 WL 2482494 (S.D.N.Y. Oct. 7, 2005).

The court in *Philip Services* determined that where attorney-client communications take place in a foreign country, the court should use a "comity or 'touching base' approach" to resolve which country's law applies.[243] Communications touching base with the United States will be governed by federal discovery rules, while applicable foreign law will govern communications related to matters solely involving a foreign country.[244] The dispute involved attorney opinion letters authored by a Canadian law firm and several U.S. attorneys, concerning a planned public offering of securities in the United States.[245] The letters were shared with an independent auditor and subsequently produced in response to a discovery request. Despite the argument that Canadian privilege law applied to these documents, the court held that the opinion letters sufficiently touched base with the United States because the letters were not only authored by both U.S. and Canadian attorneys, but also rendered legal advice concerning a public offering of securities in the United States.[246] The court granted the motion for an order compelling a non-party and defendant to testify concerning certain attorney opinion letters that were claimed to be privileged.[247]

VII. Extraterritorial Application of United States Law[g]

A. Introduction

The principles set forth in the Restatement (Third) of Foreign Relations concerns the extraterritorial application of U.S. law that permits a state to exercise prescriptive jurisdiction where the conduct in question "has or is intended to have substantial effect within its territory."[248] A court seeking to apply a given U.S. law extraterritorially must consider the following factors: (1) the extent of the domestic effect of the conduct; (2) the connections between the United States and the persons engaging in the conduct in question; (3) the character of the conduct and the extent to which it is regulated elsewhere; (4) the degree to which justified expectations would be affected; (5) the importance of the regulation internationally; (6) consistency with international custom; (7) the extent of another state's interests; and (8) whether extraterritorial application would create a conflict with the laws of a foreign jurisdiction.[249]

In the past year, U.S. courts have applied these principles in a wide variety of fields. court decisions have considered extraterritoriality in disputes involving the federal habeas corpus statute, as well as intellectual property, antitrust, securities, employment, disabilities, tort claims, criminal law, and immigration issues.

243. *Id.* at *1 (quoting Astra Aktiebolag v. Andrx Pharms., 208 F.R.D. 92, 98 (S.D.N.Y. 2002)).

244. *Id.*

245. *Id.*

246. *Id.* at *2.

247. *Id.* at *2-3.

g. Contributed by Vincent Chirico, Associate, Silverman Sclar Shin & Byrne, PLLC; Adjunct Professor of Legal Writing and Reasoning, Appellate Advocacy and Persuasion, New York Law School. Zena L. Spektor assisted in the preparation of this article, for which the author is grateful.

248. Restatement (Third) of Foreign Relations §§ 402-403 (1987).

249. *Id.*

B. Presidential Power and the Federal Habeas Corpus Statute

In last year's review,[250] we considered the United States Supreme Court's decision in *Rasul v. Bush*,[251] which held that detainees at the U.S. base in Guantanamo Bay, Cuba, were entitled to seek federal habeas relief. In a 5 to 4 decision, the majority found that the ordinary presumption that Congressional legislation does not have extraterritorial application unless such intent is clearly manifested did not apply in the application of the habeas statute to persons detained at Guantanamo Bay because such persons were within the territorial jurisdiction of the United States, whether citizens or not.[252] In *Rasul*'s wake, numerous habeas petitions were filed on behalf of various Guantanamo Bay detainees, leading to conflicting decisions.

In *Khalid v. Bush*,[253] District Judge Richard J. Leon of the United States District Court for the District of Columbia held that there was no viable legal theory under which a federal court could issue a writ of habeas corpus challenging the legality of the detention of nonresident aliens detained outside of the territorial sovereignty of the United States. The court found that in *Rasul*, the Supreme Court had limited its inquiry merely to whether federal courts had subject matter jurisdiction to review challenges to detention in Guantanamo Bay under the habeas statute, and did not address the issue of whether detainees actually had any substantive constitutional rights. Recognizing that none of the detainees had any connection to the United States, Judge Leon held that the detainees had no right to challenge the President's political authority under either the Constitution or the September 18, 2001 Congressional Authorization of Use of Military Force, issued in response to the September 11, 2001 attacks on the World Trade Center and the Pentagon.

Twelve days later, Judge Joyce Hens Green of the same court held that eleven enemy combatants stated valid constitutional claims under the Due Process clause of the Fifth Amendment, and that at least some also stated valid claims under the Third Geneva Convention.[254] In *In re Guantanamo Detainee Cases*,[255] Judge Green held that subjecting detainees to indefinite detention violated the petitioners' due process rights under the Fifth Amendment. The court reasoned that

> there can be no question that the *Fifth Amendment* right asserted by the Guantanamo detainees in this litigation—the right not to be deprived of liberty without due process of law—is one of the most fundamental rights recognized by the U.S. Constitution. In light of the Supreme Court's decision in Rasul, it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply. Accordingly . . . respondents' contention that the Guantanamo detainees have no constitutional rights is rejected . . . .[256]

The government has appealed Judge Green's decision and, as of this writing, its resolution is pending.

250. Vincent Chirico, *Extraterritorial Application of United States Law*, 38 Int'l Law. 347, 348 (2004).
251. Rasul v. Bush, 542 U.S. 466 (2004).
252. *Id.* at 481.
253. Khalid v. Bush, 355 F. Supp.2d 311, 314 (D.D.C. 2005).
254. In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005).
255. *Id.*
256. *Id.* at 464 (emphasis in original).

C. Intellectual Property

In *McBee v. Delica Co.*[257] the First Circuit addressed the issue of when extraterritorial application of the Lanham Act is proper. Plaintiff, a well-known American jazz musician, sued Delica, a Japanese company, for false endorsement and dilution under the Lanham Act, after Delica had adopted the name "Cecil McBee" for its adolescent female clothing line. In this case of first impression, the First Circuit declined to follow precedent from the Second and Ninth Circuits. Specifically, the court refused to follow the Second Circuit's *Vanity Fair* test, which requires courts to determine whether (1) the defendant is an American citizen, (2) the defendant's actions have a substantial effect on United States commerce, and (3) relief would create a conflict with foreign law.[258] Rather, the *McBee* court held that the inquiry should only determine the first two issues.[259] According to the First Circuit, the third issue, principles of comity (i.e., whether relief under the Lanham Act would create a conflict with foreign law), should only be considered once a court has determined that subject matter jurisdiction under the Lanham Act exists.

D. Criminal Statutes

The Supreme Court recently held that Canadian individuals who carried out a scheme in New York and Maryland to smuggle large quantities of liquor into Canada in order to evade Canadian alcohol import taxes were properly convicted of violating the federal wire fraud statute. In *Pasquantino v. United States*[260] Justice Thomas, in a 5 to 4 decision, found that the common law revenue rule, which bars a U.S. court from enforcing a foreign sovereign's tax laws, did not preclude this prosecution because any resulting enforcement of the Canadian revenue law was merely a collateral consequence of the government's independent interest in punishing domestic criminal conduct.

In dissent, Justice Ginsburg stated that the majority opinion "ascribed an exorbitant scope to the wire fraud statute, in disregard of our repeated recognition that 'Congress legislates against the backdrop of the presumption against extraterritoriality.'"[261] The dissent also noted that "tax collection internationally is an area in which treaties hold sway," and that the majority's novel decision failed to "take account of Canada's primary interest . . . [in] decid[ing] 'whether, and to what extent, the defendants have defrauded the governments of Canada and Ontario out of tax revenues owed pursuant to their own, sovereign, excise laws.'"[262]

The court's decision in *Pasquantino* had an immediate effect on a case considered in the 2003 review,[263] *European Community v. RJR Nabisco, Inc.*[264] In *European Community*, the Second Circuit had held that the legislative history of the Patriot Act did not abrogate the common law revenue rule and that, accordingly, the European Community and several

257. McBee v. Delica Co., 417 F.3d 107 (1st Cir. 2005).

258. Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir. 1956).

259. *McBee*, 417 F.3d at 111.

260. Pasquantino v. United States, 125 S. Ct. 1766 (2005).

261. *Id.* at 1782 (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

262. *Id.* at 1782-83 (citing Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 336 F.3d 321, 343 (4th Cir. 2003)).

263. Chirico, *supra* note 251, at 347.

264. European Community v. RJR Nabisco, Inc., 355 F.3d 123 (2d Cir. 2004).

other sovereign plaintiffs could not use the Racketeer Influenced and Corrupt Organizations Act (RICO) to recover lost tax revenue resulting from alleged cigarette smuggling and money laundering in their territories by several tobacco companies. In light of *Pasquantino*, however, the Supreme Court vacated and remanded *European Community* for further consideration.[265] On remand, the Second Circuit held fast to its original decision, distinguishing *Pasquantino* as a situation where the link between the prosecution and foreign tax collection was "incidental and attenuated at best."[266] In *European Community*, by contrast, the Second Circuit held, "the 'whole object' of the present suit is to collect tax revenue and the costs associated with its collection."[267] Accordingly, the common law revenue rule continued to preclude the claims at issue regardless of *Pasquantino*.

In another decision involving the extraterritorial application of criminal law, the Fifth Circuit considered, for the first time, whether 8 U.S.C. § 1324(a)(2)(B)(ii) could support a conviction for conspiring to smuggle undocumented aliens into the United States for commercial gain. In *United States v. Villanueva*,[268] the court affirmed the defendants' convictions for conspiracy, holding that Congress explicitly intended to apply the statute extraterritorially. The court based its interpretation of the statute on several grounds:. First, the 1986 Immigration Reform and Control Act changed the statute's phrase "'brings into' to 'brings to' in order to 'deter potential transporters from inundating U.S. Ports of entry with undocumented aliens.'"[269] Second, the statute criminalizes not only the act of smuggling undocumented aliens into the United States, but also criminalizes attempts to bring undocumented aliens into the United States. Third, immigration statutes by their very nature intend to regulate conduct occurring near international borders, with some activity taking place on the foreign side of those borders.[270]

E. Antitrust

In last year's review,[271] we considered *F. Hoffman-La Roche Ltd. v. Empagran S.A.*,[272] wherein the Supreme Court, in a unanimous decision, held that the Foreign Trade Antitrust Improvements Act and comity principles supported a finding that the Sherman Act would not apply to conduct involving trade or commerce with foreign nations unless the conduct affects trade or commerce in the United States in a reasonably foreseeable, direct, and substantial manner. In that case, foreign companies who purchased vitamin products outside the United States claimed price-fixing in violation of the Sherman Act.

After remand, the District of Columbia Circuit held that the maintenance of supercompetitive prices in the United States by foreign manufacturers, which may have facilitated a scheme to charge comparable prices abroad, did not give rise to extraterritorial application of the Sherman Act because the claimants did not establish that increased domestic prices

265. European Community v. RJR Nabisco, Inc., 125 S. Ct. 1968 (2005).
266. Pasquantino, 125 S. Ct. at 1766.
267. European Community v. RJR Nabisco, Inc., 424 F.3d 175, 181 (2005).
268. United States v. Villanueva, 408 F.3d 193 (5th Cir. 2005).
269. *Id.* at 198 (citing H.R. Rep. No. 682(I), 99th Cong. 2d Sess. 65-66 (1986)).
270. *Id.* at 199.
271. Chirico, *supra*, note 251.
272. F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

proximately caused those foreign injuries and no direct ties to United States commerce were identified.[273] The foreign manufacturers have filed a writ of certiorari.[274]

F. Labor Standards

The District of Columbia Circuit recently held that Title VII does not apply to a United States permanent resident alien employed outside the United States. In *Shekoyan v. Sibley International*,[275] the plaintiff, an economist, had immigrated to the United States from Armenia in 1994 and was granted permanent resident alien status in 1996. Sibely hired him as a training advisor on an accounting reform project conducted in the Republic of Georgia. The contract listed the plaintiff's place of employment as Tbilisi, Georgia. After his contract was not renewed, the plaintiff brought suit, alleging employment discrimination based on national origin. The District Court dismissed the complaint, finding that since the plaintiff was a permanent resident alien employed extraterritorially, he was outside the scope of Title VII's protections.[276]

On appeal, the District of Columbia Circuit noted that Congress had amended Title VII in order to include protections to U.S. citizens employed abroad. The plaintiff argued that his permanent resident alien status made him a "U.S. national, thereby placing him in statutory limbo between a protected citizen and an excluded alien."[277] The court disagreed.

> Title VII does more than merely exclude an alien employed overseas from protection: it affirmatively grants protection only to 'a citizen of the United States.' Especially in light of the presumption against extraterritoriality, the Congress's express language extending the extraterritorial reach of Title VII only to American citizens controls.[278]

Similarly, in *Ofori-Tenkorang v. American International Group*,[279] the Southern District of New York dismissed discrimination and retaliation claims under 42 U.S.C. § 1981 brought by a permanent resident alien assigned to work temporarily in South Africa.[280]

273. Empagran v. F. Hoffman-La Roche Ltd., 417 F.3d 1267, 1271 (D.C. Cir. 2005).

274. Empagran v. F. Hoffman-La Roche Ltd., 417 F.3d 1267, 1271 (D.C. Cir. 2005), petition for cert. filed, 74 U.S.L.W. 3288 (Oct 26, 2005) (No 05-541).

275. Shekoyan v. Sibley Int'l, 409 F.3d 414 (D.C. Cir. 2005).

276. Shekoyan v. Sibley Int'l Corp., 217 F. Supp.2d 59 (D.D.C. 2002).

277. Shekoyan, 409 F.3d at 421.

278. *Id.*

279. Ofori-Tenkorang v. Am. Int'l Group, Inc., No. 05 Civ.2921 DLC, 2005 WL 2280211 (S.D.N.Y. 2005).

280. The court held that

> [t]he language of Section 1981 does not indicate a congressional purpose to extend coverage beyond the territorial jurisdiction of the United States. On the contrary, it affirmatively reinforces its domestic application where it states that it applies to "[a]ll persons within the jurisdiction of the United States" with the goal of securing equal rights "in every State and Territory."

Id. at 14.

VIII. Enforcement of Foreign Arbitral Awards and Judgments[h]

A. Introduction

Recognition and enforcement of foreign arbitral awards and foreign court judgments are governed by two separate regimes in United States courts. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on June 10, 1958 (New York Convention) normally governs the recognition and enforcement of foreign arbitral awards.[281] State law, on the other hand, governs the enforcement of foreign judgments. In the event that no statute governs the enforcement of judgments in a particular state, courts often apply the comity-based common law principles set forth in the Supreme Court's decision in *Hilton v. Guyot*.[282] But many states have adopted the Uniform Foreign Money-Judgments Recognition Act (Uniform Act) that largely codifies the *Hilton* principles, to govern the enforcement of foreign court judgments.

One important development regarding enforcement of foreign judgments is the Hague Conference on Private International Law's conclusion of the Convention on Choice of Court Agreements on June 30, 2005.[283] The Convention includes provisions that govern the recognition and enforcement of foreign judgments that result from proceedings based upon exclusive choice of court agreements.[284]

B. Recognition and Enforcement of Foreign Arbitral Awards

1. *Applicability of the New York Convention to an Award Made and Sought to be Enforced in the United States*

In *Jacada (Europe), Ltd. v. International Marketing Strategies*, the Sixth Circuit addressed the question of whether an arbitral award made in the United States could be considered non-domestic for the purpose of enforcement under the New York Convention.[285] Jacada and International Marketing Strategies (IMS) had entered into a contract that included a general choice of law provision designating the laws of Michigan as the law governing the contract. The contract also included an arbitration clause, providing that disputes would be decided in Kalamazoo, Michigan by the American Arbitration Association (AAA) in

h. Contributed by Jennifer Toole, Attorney-Adviser, Office of the Legal Adviser, United States Department of State. The views expressed are those of the author and not necessarily those of the Department of State or the United States Government.

281. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), June 10, 1958, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 38, implemented by Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208 (2005). The New York Convention does not apply in cases where a non-signatory State is party to the underlying arbitration. *See, e.g.*, Int'l Bechtel Co., Ltd. v. Dept. of Civil Aviation of Dubai, 360 F. Supp.2d 136 (D.D.C. 2005) (applying 9 U.S.C. §§ 1 and 9 to the dispute rather than 9 U.S.C. §§ 201-208 because Dubai was not a signatory to the New York Convention).

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

283. The text of the Convention is reprinted in 44 I.L.M. 1291 (Nov. 2005).

284. An exclusive choice of court agreement, as defined by article 3(a) of the Convention is an agreement that "designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts."

285. *See* Jacada (Europe), Ltd. v. Int'l Mktng. Strategies, Inc., 401 F.3d 701 (6th Cir. 2005).

accordance with the AAA arbitration rules.[286] Following a dispute between the parties, the AAA issued an award in favor of IMS. On the same day, Jacada filed an action to vacate the arbitral award in Michigan state court and IMS filed an action to enforce the award in federal district court. The state vacatur action was removed to the district court and consolidated with the enforcement action. The district court upheld the arbitration award.

On appeal, Jacada complained that its vacatur action should never have been removed to federal court because the arbitration agreement was not within the scope of the New York Convention. In order to address this complaint, the Sixth Circuit undertook an analysis of what constitutes non-domestic for purposes of the New York Convention. It rejected Jacada's argument that it should apply the common law standard set forth in *Lander Co. v. MMP Investments, Inc.* for determining whether an award is foreign or domestic.[287] Instead, the court found that the New York Convention's implementing legislation creates a definition of what is non-domestic: "[a]n agreement or award . . . which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."[288] Because Jacada was incorporated in the United Kingdom, the contract contemplated overseas performance and the underlying dispute involved events taking place abroad, the court concluded that the award was non-domestic under the New York Convention and the action for vacatur was properly removed to federal court.[289]

Having decided that the New York Convention was applicable, the court next turned to the question of whether any of the grounds set forth in article V of the Convention permitted refusal of enforcement. Specifically, the court considered article V(1)(e), which permits the refusal of enforcement where "the award . . . 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."[290] In order to decide this issue, the court analyzed whether the district court had erred in denying Jacada's request for vacatur.

First, the Court of Appeals determined that it was appropriate for the district court to apply the federal standard of vacatur, which is less thorough than the Michigan standard that Jacada had argued for. It held that the Michigan choice of law clause in the contract did not displace the federal standard for vacatur under the Federal Arbitration Act.[291] Second, the court determined that the arbitration panel's decision to disregard a limited liability provision in the contract did not amount to a manifest disregard of the law, which would have required vacatur under the FAA.[292] In the underlying arbitration, the AAA panel disregarded the limited liability provision on the grounds that it was "unreasonable and un-

286. *See id.* at 703.

287. Under the Lander standard, "[a]n arbitration award made in *and* sought to be enforced in the United States is a domestic award according to traditional principles of Anglo-American conflicts of law, under which the law of the place of the award determines whether the award is valid." Lander Co., Inc. v. MMP Inv., Inc., 107 F.3d 476, 482 (7th Cir. 1997) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 220, cmt. C (1971)) (emphasis added).

288. *Jacada (Europe)*, 401 F.3d at 706 (quoting 9 U.S.C. § 202).

289. *Id.* at 709.

290. *Id.*

291. *See id.* at 709-12.

292. *See id.* at 712-15.

conscionable and . . . that it fails of its essential purpose."[293] The court concluded that "the arbitrators' award does not display manifest disregard of Michigan's law concerning failure of an essential purpose or unconsionability."[294] As a result, the court affirmed the district court's judgment upholding the arbitration award.

2. *The Improper Composition of the Arbitral Tribunal as a Ground for Non-Enforcement*

In *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, the Second Circuit reviewed a district court's denial of enforcement of an arbitral award rendered in Luxembourg.[295] The first ground invoked by Encyclopaedia Britannica (EB) in defense of enforcement was found in article V(1)(d) of the New York Convention that permits denial of enforcement upon a showing that "the composition of the arbitral authority or the arbitral procedure was not in accordance with the parties' agreement."[296] The underlying arbitration agreement had set forth specific procedures for the composition of the arbitral tribunal that were not followed.[297] The court agreed with the district court that enforcement should be refused under the New York Convention because the third arbitrator was selected through a procedure not agreed upon by the parties.[298]

The Court of Appeals did not agree, however, with the district court's denial of enforcement on the second ground invoked by EB, that the arbitrators exceeded their powers. In reaching its conclusion, the district court relied on two cases where enforcement was refused under grounds set forth in the Federal Arbitration Act, other than from the exclusive grounds enumerated in article V of the New York Convention. The Circuit Court explained, "[w]hile it is true that the FAA and the New York Convention provide 'overlapping coverage' to the extent they do not conflict, we have held that a district court is strictly limited to the seven defenses under the New York Convention when considering whether to confirm a foreign award."[299] Because the New York Convention does not permit the refusal of enforcement in the event that arbitrators exceed their powers, the court reversed the district court's holding on this ground.[300]

293. *Id.* at 712.

294. *Jacada (Europe)*, 401 F.3d at 715. On this point, Circuit Judge Clay dissented from the majority opinion on the ground that the arbitrators ignored Michigan law in disregarding the limited liability provision. Judge Clay believed that the portion of the award that involved the calculation of damages should be remanded to the arbitrators for further findings under Michigan law. *See id.* at 715-18 (concurring and dissenting in part).

295. Encyclopedia Universalis S.A. v. Encyclopedia Brittanica, Inc., 403 F.3d 85 (2d Cir. 2005).

296. *Id.* at 91-91.

297. These included that "(1) the arbitrators must 'disagree' before appointing a third arbitrator; (2) the two party-appointed arbitrators must attempt to choose a third arbitrator; and (3) upon the failure of the two party-appointed arbitrators to agree on a third, the Tribunal must appoint one from the [British Chamber of Commerce's] list." *Id.* at 90.

298. *See id.* at 91-92.

299. *Id.* at 92 (internal citations omitted).

300. The Circuit Court also vacated the district court's issuance of a supplemental remedy. After it denied enforcement of the arbitral award, the district court had ordered that Encyclopaedia Universalis's party-appointed arbitrator and the third arbitrator were disqualified from any future arbitration. It also held that upon disagreement between the new party-appointed arbitrators as to the appointment of a third, an arbitrator should be selected from the London Court of International Arbitration (as the appointing authority agreed upon in the arbitration clause no longer existed). The Circuit Court found that the district court lacked the authority to create this supplemental remedy. *See id.* at 92.

C. Recognition and Enforcement of Foreign Court Judgments

1. *Application of the Uniform Act and Principles of Comity*

In *Society of Lloyd's v. Reinhart*, the Tenth Circuit affirmed two district courts' grants of summary judgment recognizing English money judgments against nine American defendants.[301] A number of district courts in other states granted summary judgment to the Society of Lloyds in similar enforcement actions this year.[302] These enforcement proceedings all arose from suits brought by Lloyds in England against multiple American insurance underwriters (members of Lloyds, commonly referred to as "Names") who did not pay reinsurance premiums assessed by Lloyds as part of a reorganization program.[303] Lloyds paid the premiums, received an assignment, and sued the non-paying Names in English court for the amounts paid.[304] The English court ruled in Lloyds' favor, entering a judgment against each of the Names.[305]

In *Reinhart*, federal district courts in New Mexico and Utah separately reached the same conclusion that Lloyd's motions for summary judgment enforcing the English judgments should be granted. The Tenth Circuit consolidated the cases on appeal. In examining the New Mexican Name's defenses to enforcement, the court applied the Uniform Money-Judgment Recognition Act (Uniform Act), adopted by the State of New Mexico.[306] In the Utah case, however, the court examined the defenses of the Utah Names under principles of comity because Utah has not adopted the Uniform Act.[307]

The New Mexico Name opposed enforcement of the English judgment against it on the grounds that it was denied due process and that the judgment was repugnant to New Mexico's public policy. The Court of Appeals rejected both arguments. First, the court stressed that it was not the fairness of the specific judgment that was to be evaluated, but instead whether the English judicial system itself comported with due process principles. On this point, it concluded that "when we look to the basic fairness of the system, the answer is clear: 'Our courts have long recognized that the courts of England are fair and

301. Society of Lloyds v. Reinhart, 402 F.3d 982 (10th Cir. 2005).

302. *See, e.g.*, Society of Lloyds v. Edelman, No. 03 Civ. 4921 (WHP), 2005 U.S. Dist. LEXIS 4231 (S.D.N.Y. Mar. 21, 2005); Society of Lloyds v. Shell, C-1-04-188, 2005 U.S. Dist. LEXIS 22104 (S.D. Ohio Sept. 30, 2005); Society of Lloyds v. Campbell-White, No. 03-10950-RCL, 2005 U.S. Dist. 22403 (D. Mass. Aug. 20, 2005); *see also* Society of Lloyds v. Blackwell, No. 03-56144, 2005 U.S. App. LEXIS 6455 (unpublished) (affirming summary judgment of district court).

303. *See Reinhart*, 402 F.3d at 988-92 (discussing the facts of the underlying English litigation common to the Lloyds enforcement actions across the United States).

304. *See id.* at 991.

305. *See id.*

306. *See id.* at 994. Under the Uniform Act, as incorporated into the New Mexico Code,

> "[a] foreign judgment is not conclusive" if the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law; and it "need not be recognized if:" (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend; (2) the judgment was obtained by fraud; [or] (3) the cause of action on which the judgment is based is repugnant to the public policy of [the] state . . . .

Id. (quoting N.M. Stat. Ann. § 39-4B-5) (emphasis removed).

307. *Id.* at 998-99.

neutral forums.'"[308] Second, the court reviewed and denied the New Mexico Name's various claims that the English judgment was repugnant to New Mexico's public policy.[309]

In evaluating the Utah Names' defenses, the court applied the comity-based principles set forth in *Hilton v. Guyot*.[310] As it did with respect to the New Mexico Name's due process complaint, the court evaluated the English system of justice, rather than the fairness of the particular judgments against the Utah Names and reiterated that "the English judicial system is procedurally beyond reproach."[311] It then went on to reject the Utah Names' allegations of error by the district court with respect to matters of discovery and certification of state law.[312] But it did find that the district court erred in one material respect. The court held that the district court had improperly assessed post-judgment interest at the English rate (8 percent), rather than the applicable U.S. rate (1.16 percent), and remanded this narrow issue to the district court with instructions.[313]

2. *Non-Enforcement Based on Repugnance to Public Policy*

In Sarl Louis Feraud International v. Viewfinder, Inc, the United States District Court for the Southern District of New York denied enforcement of a French judgment on the ground that it was "repugnant to the public policy" of the State of New York.[314] Sarl Louis Feraud and Pierre Balmain, French corporations in the business of designing and marketing high-fashion clothing, brought suit against Viewfinder, an American corporation that maintains a fashion-dedicated website, in French court for unauthorized use of intellectual property and unfair competition. Viewfinder did not appear in the French action and a default judgment was issued against it.

The court evaluated Viewfinder's defenses to enforcement under New York's Uniform Foreign Judgment Recognition Act. Aside from an argument that was mooted by events,[315] Viewfinder based its defenses on the Uniform Act's exception to the presumption of enforcement in cases where to do so would be contrary to public policy. In the first place,

308. *Id.* at 994 (internal citation omitted).

309. The Court (1) declined to apply or find a conflict with New Mexico's securities laws; (2) found no unconscionability in the contracts upon which the English judgments were based; (3) did not consider the agreements between the New Mexico Name and Lloyds to amount to a cognovit note prohibited under New Mexico law; and (4) found that the New Mexico Unfair Practices Act did not apply. *See Reinhart*, 402 F.3d at 995-98.

310. Under these principles foreign judgments deserve recognition where

> (1) there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, (2) conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, (3) under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, (4) there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or (5) no other special reason exists indicating why the comity of this nation should not allow it full effect.

Hilton, 159 U.S. at 202.

311. *Reinhart*, 402 F.3d at 1000.

312. *Id.* at 1000-02. It also rejected arguments, unique to one of the Utah Names, that no diversity jurisdiction was present and that the English judgment was in conflict with the Utah Securities Act. *Id.* at 1002-03.

313. *Id.* at 1003-05.

314. Sarl Louis Feraud Int'l v. Viewfinder, Inc., 406 F. Supp. 2d 274 (S.D.N.Y. 2005).

315. Viewfinder's original motion included an argument that the French judgment was not a final judgment, and therefore not enforceable. Subsequently, the plaintiffs took steps to have matters finalized. *See id.* at 277.

Viewfinder argued that the French law governing the calculation of damages involved an approach that was disfavored in New York and that therefore the judgment should not be enforced. The court, however, declined to find that this difference in approach amounted to repugnance.[316] Nor did the court find that differences between U.S. copyright law and French copyright law as applied in the judgment were sufficient to block enforcement "since the alleged differences do not involve 'fundamental notions of what is decent and just' in New York."[317] The court did, however, ultimately deny enforcement because it found that Viewfinder's conduct—a form of expression through the postings on its website—was unquestionably protected by the First Amendment of the U.S. Constitution and article One, Section Eight of the New York State Constitution.[318] The court held, therefore, that to enforce the French judgment penalizing such expression would be repugnant to the public policy of New York.[319]

316. *Id.* at 279-80.

317. *Id.* at 281.

318. *Id.* at 281-85.

319. *Id.* The First Amendment issue in connection with a foreign judgment has also been addressed in Yahoo v. LICRA, 433 F.3d 1199 (9th Cir. 2006).