International Litigation

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I. Parallel Proceedings: Treading Carefully

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Three possible responses exist when proceedings, asserting the same claims, are pending before both a domestic and a foreign court: (1) stay or dismiss the domestic action; (2) enjoin the parties from proceeding in the foreign forum (referred to as an antisuit injunction);[1] or (3) allow both suits to proceed simultaneously, with the likely attendant race to judgment. Thus the question of strategy is where to fight one's battles—here, there, or both places. While the 1996 *International Legal Developments in Review*[2] reflected some major decisions involving the antisuit injunction route, both here[3] and abroad,[4] this year's decisions reflect more interest in seeking to stay or dismiss the domestic litigation in deference to a foreign action. Many of the cases, especially those in the Southern District of New York, base their ruling on a stay or dismissal on comity.[5] Interestingly, this doctrine also appears as the support for the other two potential responses to parallel proceedings, *i.e.*, (1) refusing to grant antisuit injunctions,

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1. For a thorough discussion of antisuit injunctions, see George Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589 (1990); Note, *Antisuit Injunctions and International Comity*, 71 VA. L. REV. 1039 (1985).

2. *See* Louise Ellen Teitz, *International Litigation, I. Parallel Proceedings/Antisuit Injunctions*, 31 INT'L LAW. 317 (1997).

3. Kaepa, Inc. v. Achilles Corp., 76 F.3d 624 (5th Cir.), *cert. denied*, 117 S. Ct. 77 (1996).

4. Airbus Industrie GIE v. Jaisukh Arjun Bhai Patel, (C.A.) 31 July 1996 unreported (reproduced in THE TIMES 12 August 1996). The lower court opinion is reproduced in THE TIMES, 21 May 1996.

5. Comity has recently been providing justification for a multitude of actions (or inactions) and theories. While doctrinally part of the U.S. law in connection with the recognition and enforcement of foreign proceedings and judgments, as set out in the classic definition in Hilton v. Guyot, 159 U.S. 113, 163-64 (1895), it has become an all-inclusive doctrine, appearing in well over one hundred cases in the 12-month period ending May 1, 1997.

and (2) allowing parallel proceedings to continue simultaneously. Comity also increasingly appears as part of the doctrine of international abstention,[6] which is gaining increasing recognition, if not acceptance. Thus, this year's treatment of motions to stay or dismiss domestic litigation in favor of sister foreign actions illustrates a lack of consistency not only in outcome but also in the underlying legal theory.

A. Antisuit Injunction Cases From the Last Year

The case law concerning antisuit injunctions has remained stable; therefore, one is able to make some predictions based on the federal circuit where the domestic suit is pending.[7] In a recent Second Circuit opinion, *Computer Associates International, Inc. v. Altai, Inc.*,[8] the court continued to rely on *China Trade & Development Corp. v. M.V. Choong Yong*[9] and its accepted precedent that counsels restraint unless the foreign proceeding presents a threat to the public policy or to the jurisdiction of the enjoining court.[10] *China Trade* also listed five factors to consider: (1) whether a policy of the enjoining forum is being frustrated; (2) whether the maintenance of the action is vexatious; (3) whether the court's jurisdiction is threatened; (4) whether there are other equitable considerations; and (5) the delay, inconvenience, expense, and race to judgment that would result if the injunction is not granted.[11]

The *China Trade* factors used to decide whether to enjoin foreign actions were expressly adopted for determination of motions to stay domestic litigation in a recent New York federal court case. In *Nycal Corp. v. Inoco PLC*,[12] the court attempted to synthesize the analysis for two potential responses to parallel proceedings: (1) staying domestic litigation, and (2) enjoining the foreign action. "[I]t is apparent from the broad language in China Trade that the same factors [used for a motion to enjoin foreign proceedings] should guide a court in deciding whether to stay domestic litigation in favor of foreign litigation."[13] Unfortunately, this attempt to join the jurisprudence of image and reverse image is not widely followed; rather, courts slip into abstention or comity approaches intermittently.

B. Inconsistent Treatment of Motions to Stay or Dismiss

One recent case reflects the growing trend toward the use of comity as an all-purpose solution and also highlights the inconsistent treatment of motions to dismiss or to stay actions in reference (and deference) to foreign proceedings. *Dragon Capital Partners L.P. v. Merrill Lynch Capital Services Inc.*[14] involved parallel proceedings in New York and an earlier-filed suit in Hong Kong as well as a motion for forum nonconveniens dismissal. The first suit was filed in October

For example, it appears not only as the basis to allow parallel proceedings or to stay these proceedings, but also as part of the *Timberlane* balancing test in connection with the assertion of extraterritorial jurisdiction and as the basis for the enforcement of the Lloyd's of London forum and choice of law clauses discussed *infra* in Part III.

6. *See, e.g.*, Turner v. Entertainment Co. v. Degeto Film GmbH, 25 F.3d 1512, 1518 (11th Cir. 1994); *see generally* Louise Ellen Teitz, Transnational Litigation 239-41 (1996 and Supp. 1997).

7. *See* Teitz, *supra* note 2, at 317-18.

8. 126 F.3d 365 (2d Cir. 1997).

9. 837 F.2d 33 (2d Cir. 1987).

10. *See also* Farrell Lines Inc. v. Columbus Cello-Poly Corp., 1997 U.S. Dist. LEXIS 13897 (S.D.N.Y. Sept. 12, 1997) (considering antisuit injunction in context of COGSA action).

11. *See China Trade*, 837 F.2d at 36-37.

12. 968 F. Supp. 147 (S.D.N.Y. 1997).

13. *Id.* at 149 n.3.

14. 949 F. Supp. 1123 (S.D.N.Y. 1997).

1994 in Hong Kong by Dragon Capital against Merrill Lynch, primarily for damages for wrongful liquidation of accounts by Merrill Lynch's Asian-based brokers. Merrill Lynch filed a counterclaim. The litigation continued in Hong Kong, including a significant amount of discovery, until the Hong Kong action was stayed because Dragon Capital refused to pay a costs order to cover a potential costs award at the end of litigation. The stay was lifted in February 1996. On the same day, Dragon Capital told Merrill Lynch that it intended to apply to the Hong Kong court for leave to withdraw its action.

The second suit was filed by the same plaintiff but in a New York federal court. This second suit was filed a year and a half after the Hong Kong suit was commenced and certainly well beyond the initial stage of litigation in the Hong Kong court. The U.S. suit not only sought damages but also added claims of fraud and violation of the Commodities Exchange Act and the federal securities laws. In the New York suit, the defendants filed a motion to stay the second-filed action in deference to the earlier Hong Kong action, or in the alternative, to dismiss the New York action based on forum nonconveniens, with the more convenient forum being Hong Kong. The District Court, in ruling on these motions, pointed out the inconsistent and improper use of comity:

> The Defendants refer to this argument [to defer the proceedings] as International Comity. This is technically incorrect. As defined by Black's Law Dictionary . . . international comity is: "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the right of its own citizens or of other persons who are under the protection of its laws." . . . "[C]ourts use the terms comity and, to a lesser extent, international abstention, to refer to the doctrine of judicial deference to pending foreign proceedings, although neither of these terms is technically appropriate. Comity refers to deference to another sovereign's definitive law or judicial decision."[15]

The court considered the principles governing stays or dismissals in deference to foreign proceedings, acknowledging that the Supreme Court "has not yet articulated the standard for determining whether to stay or dismiss an action in deference to a foreign proceeding,"[16] and weighing several frequently cited factors derived from *Caspian Investments, Ltd. v. Viacom Holdings, Ltd.*:[17] (1) adequacy of relief available in alternative forum; (2) issues of fairness to and convenience of parties, counsel, and witnesses; (3) the possibility of prejudice to any of the parties; and (4) the temporal sequence of filing of the actions.[18] Significant weight was given to the last factor since here the plaintiff first selected Hong Kong and then sought to repudiate the choice. The plaintiff actually argued that the Hong Kong forum they selected was inadequate since Hong Kong has "an uncertain future." The court found that the factors favored a stay in deference to the Hong Kong proceedings. In addition, the district court engaged in a complete forum nonconveniens analysis which, when viewed together with the analysis for deferring to parallel proceedings, provided the basis for the district court to dismiss the New York action. Thus, comity provided the basis for inaction (stay) and action (dismissal for forum nonconveniens).

15. *Id.* at 1127 n.8 (quoting Advantage Int'l Management, Inc., v. Martinez, No. 93 Civ. 6227, 1994 WL 482114, at *4 n.2 (S.D.N.Y. Sep. 7, 1994) (citations omitted)).

16. *Id.* at 1127.

17. 770 F. Supp. 880, 884 (S.D.N.Y. 1991).

18. *Id.*

In another recent case out of the same court, *Evergreen Marine Corp. v. Welgrow International Inc.*,[19] the domestic action was also stayed, in favor of the earlier-filed proceeding in Belgium. In staying the later-filed domestic action, the court relied on the *Viacom* factors. Again, the factor of chronological sequence appears to have influenced the court. The plaintiff, a foreign corporation, initiated litigation first in Belgium, then later in New York, a forum that it subsequently preferred even though, as the court says, it claimed not to do business in New York. In rejecting the plaintiff's argument that no stay should be granted because the Belgium action might not resolve all of the claims of interested parties, the court indicated that it need not "be persuaded to a certainty that all disputes will be resolved in a single proceeding before it exercises its inherent power to stay an action in favor of foreign proceedings that are considerably more likely to provide an efficient resolution than would continued parallel proceedings."[20]

Viacom's factors and *Colorado River's*[21] "wise judicial administration" abstention[22] were combined into "principles of international comity . . . , counsel[ing] deference to the legislative, executive and judicial actions of foreign nations"[23] in another case seeking to stay parallel proceedings, this time in Canada. In *Efco Corp. v Aluma Systems, USA, Inc.*,[24] the court granted the stay of proceedings in an Iowa federal court based on comity. "Certainly if this court cannot extend comity to Canada, the comity principle has little vitality in our jurisprudence."[25]

Another recent district court decision, this time from Missouri, illustrates the inconsistent and unpredictable treatment of parallel proceedings when arising in the context of motions to dismiss or stay the domestic action. In *Abdullah Sayid Rajab Al-Rifai & Sons W.L.L. v. McDonnell Douglas Foreign Sales Corp.*,[26] the court refused to stay or dismiss a later-filed domestic action in response to a pending case in Kuwait, filed by the same plaintiff over two years earlier against another wholly-owned subsidiary of McDonnell Douglas. Both suits, although against different McDonnell Douglas subsidiaries, involved commissions allegedly owed to the plaintiff for a series of aircraft sales. In the Kuwaiti action, the plaintiff received a partial but not wholly favorable judgment in March 1996. The action was then referred to the Experts Department of the Kuwaiti Ministry of Justice for an accounting and recommendation, which was made in late October 1997 for an amount millions of dollars short of the plaintiff's U.S. claim. The action was then referred back to the Kuwaiti court for a final determination. Meanwhile, plaintiff filed the second action in a Missouri federal court in July 1997. In September 1997, the defendant moved to dismiss, or in the alternative, stay the later filed U.S. case in deference to the largely concluded Kuwaiti action. The plaintiff waited until after the Kuwaiti Experts Department issued its determination in late October 1997 of the amount due the plaintiff before filing a motion in Kuwait to dismiss that entire action. The plaintiff was obviously unsatisfied with the Kuwaiti court's likely rendition of a paltry $650,000, rather than the approximately $16 million that it was seeking. The subsequent dismissal motion in the Kuwaiti action smacks of forum and judge shopping, a fact hardly commented on by the Missouri judge.

19. 954 F. Supp. 101 (S.D.N.Y. 1997).

20. *Id.* at 105.

21. Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976); *see generally* Linda Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99 (1986); *see also* LOUISE ELLEN TEITZ, *supra* note 6, at 238-40.

22. Teitz, *supra* note 6, at 238-40.

23. Efco Corp. v. Aluma Sys., USA, Inc., 1997 U.S. Dist. LEXIS 17298 (S.D. Iowa Oct. 30, 1997).

24. *Id.*

25. *Id.* (quoting Brinco Min. Ltd. v. Fed. Ins. Co., 552 F. Supp. 1233, 1240 (D.D.C. 1982)).

26. 1997 U.S. Dist. LEXIS 20587 (E.D. Mo. Dec. 10, 1997).

The district court denied the motion to dismiss the U.S. action, as well as the motion to stay, treating both issues separately, and in the process distorted two primarily domestic theories by transporting them *in toto* into transnational litigation. In rejecting the motion to dismiss, the court acknowledged that "[n]either the Supreme Court nor the Eighth Circuit Court of Appeals has squarely addressed the issue of whether a district court may dismiss a case based on the pendency of an action in a foreign country."[27] Nonetheless, the court, after discussing precedent for international abstention in the Southern District of New York, as well as Seventh and Eleventh Circuit precedents, relied on the recent Supreme Court decision in *Quackenbush v. Allstate Insurance Co.*[28] to refuse to dismiss the case. That case involved abstention in connection with purely domestic actions based on the *Burford*[29] abstention doctrine. The Missouri district court's reasoning was inconsistent since it first acknowledged that *Quackenbush*, in its survey of abstention doctrines (all of which are domestic, involving state/federal actions), did not mention any international abstention but then found *Quackenbush* to be controlling and to limit the power of courts to dismiss or stay nonequitable actions. The court failed to recognize that the various abstention doctrines developed in the context of state/federal relations, against a series of constitutional constraints and precedent defining that relationship. In contrast, parallel proceedings involving international litigation raise different issues, not the least of which is the potential for unrestrained and vexatious litigation in multiple countries.[30]

The court, after denying the motion to dismiss, turned to the motion to stay. At that point it changed direction and acknowledged that "in the interests of judicial economy and international relations, a federal court may stay an action in favor of pending foreign litigation."[31] The test used for the stay, taken from precedent in the Southern District of New York,[32] effectively comprised of the same factors that many federal courts have used to decide to dismiss a domestic action in deference to a foreign one: similarity of actions, status of foreign action, adequacy and appropriateness of foreign forum and judicial efficiency, and deference to foreign proceedings. The court acknowledged that both the Kuwaiti and U.S. actions involved the same aircraft sales, yet accepted the argument that different subsidiaries had been sued. Rather incredulously, the court, although acknowledging that the Kuwaiti action was filed over two years earlier, decided that since the plaintiff had moved in Kuwait to dismiss that earlier action in which a rather minor award of commissions was suggested by the expert, there was no need to defer to the foreign action because it would soon be nonexistent. "Although the Kuwait action has been proceeding for three years, any progress achieved in the determination of plaintiff's claims for commission will be voided by potential dismissal of the actions."[33] This excessive waste of judicial and party resources did not seem to bother the federal court. Nor

27. *Id.* at *12.

28. 517 U.S. 706 (1996).

29. Burford v. Sun Oil Co., 319 U.S. 315 (1943) (abstention proper when federal review would disrupt state efforts at regulation).

30. The inappropriateness of relying on domestic abstention doctrines, even the more closely aligned one, *Colorado River* abstention or "wise judicial administration," is mentioned also in *Evergreen Marine Corp. v. Welgrow Int'l Inc.*, 954 F. Supp. 101 (S.D.N.Y. 1997). While *Colorado River* and its progeny may be instructive in the present context, the considerations involved in deferring to state court proceedings are different from those involved in deferring to foreign proceedings, where concerns of international comity arise and issues of federalism and federal supremacy are not in play. *Id.* at 104; *see generally* Louise Ellen Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 INT'L LAW. 21 (1992).

31. *See Abdullah Sayid Rajab Al-Rafai*, 1997 U.S. Dist. LEXIS 20587 at *18.

32. *See supra* notes 18-19 and accompanying text.

33. *See Abdullah Sayid Rajab Al-Rafai*, 1997 U.S. Dist. LEXIS 20587, at *18.

was it disturbed by the blatant forum shopping. Instead, it attempted to bolster its decision with a forum nonconveniens-like analysis. While admitting that "Kuwaiti counsel have been involved in the litigation for some time and have no doubt developed a detailed familiarity with the facts in the case,"[34] it suggested that both parties now also had Missouri counsel. The analysis of the final factor reflected the narrow perspective of the judge, who again cited as support the plaintiff's motion to voluntarily dismiss all commission claims in Kuwait—the open attempt of the plaintiff to try a second bite with a different judge. Ironically, the judge cited *Dragon Capital*[35] for support on his rejection of comity, but failed to heed that case's disapproval of disappointed plaintiffs' seeking to avoid unsuccessful litigation by filing duplicative litigation in a second forum.

The *McDonnell Douglas* case reflects the continuing trend of courts to approach the issues of antisuit injunctions, motions to dismiss, and motions to stay as distinct problems rather than as different responses to the same problem that should be viewed within one jurisprudential and precedential unit. In addition, it reflects the importation of domestic theories of abstention into transnational litigation, detached from their jurisprudential underpinnings.

Basic v. Fitzroy Engineering, Ltd.[36] provides another recent example of parties trying to use parallel proceedings to race for res judicata, with the defendant seeking reverse declaratory relief in advance (before it had been rendered) of the unenforceability of any subsequent foreign judgment. It also highlights the potential for duplicative strategic litigation because of the lack of a multilateral convention on the enforcement of judgments.

In a simple contract dispute involving a construction contract in New Zealand, Fitzroy, a New Zealand construction company, hired Basic's engineering company as the subcontractor to design, manufacture, and install an incinerator unit at the Auckland International Airport. Following a dispute about performance, the parties entered into an arbitration agreement. Default was subsequently entered against Basic for not appearing for the arbitration hearing and an award was entered, and then confirmed in 1994, by the federal district court in Illinois for over $1.3 million. Almost a year later, Fitzroy filed another suit in New Zealand, alleging negligent misrepresentations made to induce Fitzroy to enter a contract with Basic. Basic challenged the New Zealand court's jurisdiction and also sought dismissal under forum nonconveniens. Two days after the New Zealand court heard argument on the personal jurisdiction and forum nonconveniens issues, Basic filed suit in an Illinois federal court, seeking declaratory relief arguing: (1) that the arbitration award barred Fitzroy's further suit in New Zealand; (2) that New Zealand lacked personal jurisdiction; and (3) that the New Zealand action was contrary to American public policy (a position never really explained). Then, almost four weeks later, Basic informed the New Zealand court of its filing of the Illinois federal action and suggested that it was evidence of the inconvenience of the New Zealand forum. The New Zealand court, not surprisingly, rejected this argument and suggested that Basic could have acted earlier in the United States and that the initiation of an action there was solely to preempt Fitzroy's action in New Zealand.

Fitzroy then moved to dismiss Basic's action in the Illinois federal court. The court decided that it did not have jurisdiction under the Declaratory Judgment Act. There was as yet no actual controversy in Basic's attempt to have a future foreign judgment held unenforceable

34. *Id.* at *25.

35. 949 F. Supp. 1123 (S.D.N.Y. 1997).

36. 949 F. Supp. 1333 (N.D. Ill. 1996), *aff'd*, 1997 U.S. App. LEXIS 3417 (7th Cir. Dec. 4, 1997) (order affirming and adopting lower court opinion).

and invalid even before entered or attempted to be confirmed in a U.S. court. Rather, the court pointed out that Basic would get its chance to raise these issues when and if enforcement of any New Zealand judgment was sought.

The more interesting part of the opinion is the district court's decision, in dicta, that even if it had subject matter jurisdiction under the Declaratory Judgment Act, it would decline to exercise it since the action would not serve a useful purpose. Rather, the court found, the action was basically forum shopping and procedural fencing. The court mentioned that a declaratory action would also "create friction" between courts based on a test used by the Seventh Circuit in situations of related state proceedings, *Nucor v. Aceros y Maquilas de Occidente*,[37] which test it adopted and incorporated into the context of parallel foreign litigation to support its refusal to exercise jurisdiction. It then waxed eloquent about "the international comity principle, also known as the 'comity of nations doctrine,' " relying on a wide number of cases from several contexts, including not just parallel proceedings but judgments, discovery, and acts of state:

> [T]he court finds that the "comity of nations" doctrine compels the court to decline the exercise of jurisdiction . . . and defer to New Zealand's own court . . . [to] make . . . decisions regarding its own jurisdictional and pleading rules, without an American federal court "looking over its proverbial shoulder," second-guessing each New Zealand court decision, and predicting possible foreign court judgments. Therefore, for the reasons of comity, and ever mindful of the "strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts . . . may hinder the conduct of foreign affairs" . . . the court finds that the instant action would serve only to interfere with New Zealand's sovereign right to decide cases brought to its own judicial forum.[38]

C. A Solution for Parallel Proceedings

As parallel proceedings continue to increase in frequency with no immediate relief in view, theoretical bases for analysis proliferate leaving the litigant with little certainty about what course to take and which litigation to pursue. Indeed, the myriad of approaches would induce many a litigant to file parallel proceedings to increase the cost to an opponent as well as to increase the likelihood of subsequent enforceability of a judgment.[39] The solution to the problem of parallel proceedings lies in part in addressing one of its main causes—the lack of a multilateral convention on the enforcement of judgments to which the United States is a party. Hope is on the horizon on this front in the continuing deliberations before the Hague Conference on Private International Law on an enforcement of judgments treaty with an optimistic signature date of 2000.[40] However, the other disease, vexatious litigation, will likely remain untreated unless parties are encouraged (1) to select and seek a determination of one adjudicating forum and (2) the subsequent enforceability of other judgments in parallel proceedings is restricted when parties have failed to obtain a designation. The ABA proposed Model Conflict of Jurisdiction Act[41] still offers the best hope for providing a consistent and unified approach to parallel proceedings in the future.

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37. 28 F.3d 572 (7th Cir. 1994).

38. *Basic*, 949 F. Supp. at 1340-41 (citation to *Tectonics*, 493 U.S. 400, 404 (1990) omitted).

39. *See* Teitz, *supra* note 30.

40. *See infra* Part VIII.

41. *See* Teitz, *supra* note 30, at Appendix I where the Conflict of Jurisdiction Model Act is reproduced in full.

II. Foreign Sovereign Immunity and the Foreign Sovereign Immunity Act

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The international law principle of foreign sovereign immunity is codified in the United States by the Foreign Sovereign Immunity Act of 1976 (FSIA).[42] The FSIA grants foreign governments immunity from the jurisdiction of U.S. courts subject to several broad statutory exceptions. Developments in 1997 centered on three exceptions to immunity: (1) the commercial activity exception;[43] (2) the attachment exception;[44] and (3) the arbitration exception.[45]

A. COMMERCIAL ACTIVITY EXCEPTION

Decisions announced in 1997 shed light on two important aspects of the commercial activity exception: (1) what conduct by states amounts to commercial activity as opposed to public acts; and (2) when there is a sufficient nexus between the commercial activity, the plaintiff's claim, and the United States for a waiver of immunity to be appropriate.[46]

1. *Public Acts versus Private Commercial Activity*

Decisions this year underscored that when state entities enter into contractual relationships much like those of private parties, courts will find the activity to be commercial in nature no matter what the purpose of the contract. Thus, in *Hirsh v. Israel*,[47] a New York district court found it to be "difficult to conceive of activities more quintessentially governmental than the payment of reparations to Holocaust survivors pursuant to a treaty between two nations."[48] The plaintiffs had sued Israel and Germany for failure to issue reparations in accordance with an international agreement.[49] The court concluded that reparations are sovereign and not commercial in nature, noting that a private person could not make such reparations.[50] An Illinois federal court reached a similar conclusion in addressing claims by another Holocaust survivor in *Sampson v. Federal Republic of Germany*,[51] finding the payment of reparations to be particularly sovereign and noting that "political acts by governments are not commercial activities."[52]

Also of interest in this general area was the Ninth Circuit's decision in *Phaneuf v. Republic of Indonesia*,[53] which analyzed whether an agent of a foreign state must act with actual authority in order for the state to engage in commercial activity that is not protected by sovereign

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42. 28 U.S.C. §§ 1602-1611 (1994).

43. *See* 28 U.S.C. § 1605(a)(2) (1994).

44. *See* 28 U.S.C. § 1609 (1994).

45. *See* 28 U.S.C. § 1605(a)(6) (1994).

46. *See* 28 U.S.C. § 1605(a)(2) (1994); Elliott v. British Tourist Auth., No. 96 Civ. 9154 (HB), 1997 WL 726009, at *5 (S.D.N.Y. Nov. 17, 1997).

47. 962 F. Supp. 377 (S.D.N.Y. 1997).

48. *Id.* at 382.

49. *Id.* at 378 (describing the international agreement in question as a 1952 treaty between Israel and West Germany to compensate Holocaust survivors for their loss of freedom, loss of income, pain and suffering, bodily injury, and property damages inflicted by the Nazis during World War II).

50. *Id.* at 382.

51. 975 F. Supp. 1108 (N.D. Ill. 1997).

52. *Id.* at 1117; *see also* Doe v. Unocol, 963 F. Supp. 880, 887 (C.D. Cal. 1997) (human rights violations such as torture and pillaging are "peculiarly sovereign in nature").

53. 106 F.3d 302 (9th Cir. 1997).

immunity.[54] Recognizing that a foreign state can only act through its agents, the Ninth Circuit held that when the agent acts beyond the scope of his authority, that "agent is not doing business which the sovereign has empowered him to do."[55] The court declined to find acts by an agent exceeding his authority to constitute commercial activity within the exception to the FSIA.

2. *Direct Effects*

In *Doe v. Unocal*,[56] a California district court examined whether the commercial activity exception encompassed alleged acts of torture purportedly effected in order to obtain forced labor and thereby reduce the cost of a joint venture for a gas pipeline in Burma.[57] The court reasoned that, even if the joint venture had obtained a competitive advantage in the U.S. gas market as a result of the alleged human rights atrocities, no legally significant act relating to plaintiffs' human rights claims took place in the United States and the "direct effect" in the United States required for the commercial activity exception was lacking.[58]

In *Hanil Bank v. PT. Bank Negara Indonesia*,[59] the court took the Supreme Court's decision in *Republic of Argentina v. Weltover, Inc.*[60] to its logical conclusion, holding that where a financial instrument provided for payment according to the instructions of the creditor, but specified no particular place of payment, the FSIA permitted the creditor to bring an action on the instrument if the creditor designated a U.S. city as the place where payment should be made. Because "plaintiff's after-the-fact designation of the payment site" resulted in an immediate obligation for defendant, an instrumentality of Indonesia, to pay in New York, the *Hanil Bank* court found the defendant's failure to make payment to cause a "direct effect" in the United States for purposes of the commercial activity exception.[61]

In *WMW Mach. Inc. v. Werkzeugmaschinenhandel GmbH im Aufbau*,[62] after the reunification of East and West Germany, an East German state agency failed to ensure that a New Jersey company's distribution rights were respected during privatization, and this failure caused the distributor financial losses.[63] The court denied the agency's summary judgment motion and held that the company's loss occurred as "an immediate consequence of defendant's nonperformance of the contractual obligations," causing a "direct effect" on plaintiff's commercial activity in the United States.[64]

B. The Arbitration and Attachment Exceptions

In *Skandia American Reinsurance Corp. v. Caja Nacional de Aborro y Segoro*,[65] a New York district court analyzed the arbitration and attachment exceptions in the context of the Convention

54. *Id.* at 307.
55. *Id.* at 308.
56. 963 F. Supp. 880 (C.D. Cal. 1997).
57. *Id.* at 888.
58. *Id.*
59. No. 96 Civ. 3201 (JFK), 1997 U.S. Dist. LEXIS 10450, at *1 (S.D.N.Y. July 18, 1997).
60. 504 U.S. 607 (1992). In *Weltover*, the instruments at issue listed New York as one of four locations where payment could be made, at the election of the creditor. Because the creditors in question designated New York and no payment was made, the Court found the requisite "direct effect" in the United States to be present.
61. *Hanil Bank*, 1997 U.S. Dist. LEXIS 10450, at *10.
62. 960 F. Supp. 734 (S.D.N.Y. 1997).
63. *Id.* at 736.
64. *Id.* at 740.
65. No. 96 Civ. 2301 (KMW), 1997 WL 278054 (S.D.N.Y. May 21, 1997).

on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[66] A U.S. insurance company moved to confirm an arbitration award against the defendant, an instrumentality of Argentina, and requested defendant to post security to secure payment of any final judgment.[67] The court initially found that requiring a security to be posted was tantamount to issuing an order of attachment for purposes of the FSIA—which, even where an exception to the foreign sovereign's immunity from suit applies, permits prejudgment attachment only in expressly delimited circumstances.[68] The New York Convention constituted an international agreement to which the FSIA by its own terms was subject, however.[69] Because article VI of the New York Convention explicitly contemplated the posting of security where a party sought to set aside or suspend an arbitral award, the security sought by the petitioner was permissible under the FSIA.[70]

C. Discovery and the FSIA

In *Millicom International Cellular, S.A. v. Republic of Costa Rica*, a district court in the District of Columbia concluded that "plaintiffs who are facing a motion to dismiss on the basis of foreign sovereign immunity have a right to conduct preliminary discovery, as long as it is reasonably calculated to elucidate whether an F.S.I.A. jurisdictional exception applies."[71]

III. Forum Selection and Forum NonConveniens

Ranjit S. Dhindsa and Michael M. Ostrove*

Because the choice of the forum in which a dispute is heard can be outcome-determinative, contracting parties often include forum selection clauses in international agreements. Under U.S. law, these clauses are presumptively valid where the underlying transaction is fundamentally international in character,[72] and U.S. courts generally enforce such clauses as a matter of international comity.[73] While the enforceability of forum selection clauses is generally a matter

66. June 7, 1959, U.S.T. 2517, T.K.A.S. No. 6997, 330 U.N.T.S. 38.

67. Skandia Am. Reins. Corp., 1997 U.S. Dist. LEXIS 7221, at *6 (citing N.Y. Ins. Law § 1213(c) ("a foreign insurer is required to post security before filing pleadings or an answer to a suit, and if the foreign insurer fails to do so the court may grant a default judgment upon motion of the movant")).

68. *Skandia Am. Reins. Corp.*, 1997 WL 278054, at *3-*4 (citing Stephens v. National Distillers & Chem. Co., 69 F.2d 1226, 1229 (2d Cir. 1996)); *see* 28 U.S.C. § 1609 ("[s]ubject to existing international agreements to which the United States is a party . . . the property of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 . . ."); *id.* § 1610(d) (describing circumstances under which property of a foreign state is not immune from pre-judgment attachment).

69. *Skandia Am. Reins. Corp.*, 1997 WL 278054, at *4 (citing 28 U.S.C. § 1609).

70. *Id.* at *5-*6 (noting that "Article VI of the New York convention provides that, if an application for the setting aside or suspension of the award has been made . . . , the authority before which the award is sought to be relied upon may, if it considers it proper, . . . on the application of the party claiming enforcement of the award, order the other party to give suitable security.") (internal quotation omitted). In addition, in July 1997, Congressman McCollum introduced a bill (currently pending) entitled "International Arbitration Enforcement Act of 1997" in the House of Representatives that would provide judicial remedies to United States citizens injured as a result of arbitration agreements violated by foreign states. *See* 143 Cong. Rec. H2141 (daily ed. July 16, 1997) (statement of Rep. McCollum).

71. 1997 WL 527340 (D.D.C. Aug. 18, 1997).

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72. *See, e.g.*, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

73. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985). This presumption of validity, however, may be overcome by a clear showing that the clauses are "unreasonable under the circumstances." *See Bremen*, 407 U.S. at 10. The Supreme Court has construed this exception very narrowly in

of contract law, the doctrine of forum nonconveniens empowers a court to refuse to exercise jurisdiction even where venue is proper if the balance of conveniences is heavily weighted in favor of an alternative forum.[74] Important developments in 1997 in this area reflect a continuing dialogue between plaintiffs wishing to take advantage of favorable U.S. laws and defendants who desire to litigate in foreign fora with laws perceived as less favorable to plaintiffs.

A. Forum Selection and the Anti-Waiver Provision of the Federal Securities Laws

The Fifth Circuit held in *Haynsworth v. The Corporation*[75] that the anti-waiver provisions of the U.S. securities laws[76] do not prohibit enforcement of the forum selection and choice of law clauses used by Lloyd's of London—which call for application of English law by an English forum. The court thus permitted parties to contract out of U.S. securities laws that might otherwise have applied to the transactions. In *Haynsworth*, the Fifth Circuit joined the Second, Fourth, Seventh, and Tenth Circuits in reaching this conclusion—all in cases involving claims against Lloyd's of London.[77] The Ninth Circuit is the only U.S. Court of Appeals to have taken a contrary position, with a panel refusing in *Richards v. Lloyd's of London*[78] to enforce the Lloyd's of London forum selection and choice of law clauses on the ground that they violated the securities laws' anti-waiver provisions. The Ninth Circuit panel recognized that it was creating a conflict among the circuits, but it stated that the "reasonableness" test applied by other courts to uphold the contractual waiver of U.S. law was inappropriate in the face of an express congressional statement that the securities laws must apply.[79] The Ninth Circuit heard reargument of the appeal en banc in October 1997.[80]

While it remains to be seen whether the Ninth Circuit en banc will stand by the panel's holding, the *Richards* decision has received favorable treatment elsewhere. In *Stamm v. Corporation of Lloyd's*,[81] a district court in New York found that a change in the SEC's position called into question the Second Circuit's previous enforcement of the clauses. Based on a recent statement by the SEC that the Lloyd's forum selection and choice of law clauses do violate the U.S.

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suggesting that forum selection and choice of law clauses would only be deemed unreasonable: (1) if they were incorporated into the agreement by fraud or overreaching, Carnival Cruise Lines v. Shute, 499 U.S. 585, 595 (1991); *see also Bremen*, 407 U.S. at 12-13; (2) if the complainant "will for all practical purposes be deprived of his day in court" on account of the grave inconvenience or unfairness of the chosen forum, *see Bremen*, 407 U.S. at 18; (3) if the fundamental unfairness of the selected law may deprive plaintiff of a remedy, *see, Carnival Cruise Lines*, 499 U.S. at 595; or (4) if the clauses contravene a strong public policy of the forum state, *see Bremen*, 407 U.S. at 15.

74. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (setting out factors, public and private, by which a court evaluates whether to exercise its discretion to dismiss a case where an alternative forum has jurisdiction).

75. 121 F.3d 956 (5th Cir. 1997).

76. *E.g.*, 15 U.S.C. § 77n ("Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void").

77. The Tenth Circuit case, Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir.), *cert. denied*, 506 U.S. 1021 (1992), did not explicitly address the statutory antiwaiver provisions in enforcing the forum selection clauses. Addressing a related issue, the Sixth Circuit has held that application of Ohio securities laws could be overcome by a forum selection/choice of law clause. Shell v. R.W. Sturge, Ltd., 55 F.3d 1227, 1229-32 (6th Cir. 1995).

78. 107 F.3d 1422, *reh'g en banc granted*, 121 F.3d 565 (9th Cir. 1997).

79. *Id.* at 1428-29.

80. Docket Nos. 95-55747, 95-56467 (9th Cir. Oct. 23, 1997) (docket entry).

81. [1997 Transfer Binder] Fed. Sec. L. Rep. & 99,540, 1997 WL 438773 (S.D.N.Y. Aug. 4, 1997), *appeal pending*, No. 97-9118 (2d Cir.).

securities laws' anti-waiver provisions, the district court stated in dicta that the Second Circuit's decision in *Roby v. Corporation of Lloyd's*[82] "might . . . no longer require the enforcement of Lloyd's" . . . clauses.[83] The question in *Stamm* was rendered somewhat moot because the court held the securities law claims in that case to be, in any event, time-barred. An appeal in *Stamm* is pending, however, and the Second Circuit thus may soon have a chance to revisit its earlier decision.[84]

B. Forum NonConveniens

In *Republic of Panama v. BCCI Holdings (Luxembourg), S.A.*,[85] the Eleventh Circuit affirmed the dismissal on forum nonconveniens grounds of claims by Panama that the defendants had violated the federal Racketeer Influenced and Corrupt Organizations Act (RICO) by aiding a former military official to illegally divert government funds to his own personal use. Panama argued that its inability to assert a treble damage RICO claim in the court-ordered liquidation proceedings then underway in the Cayman Islands, England, and Luxembourg precluded these fora from constituting adequate alternatives.[86]

The *Republic of Panama* court ruled that an adequate alternative forum was available, and that the private and public interest factors weighed in favor of dismissal.[87] In accord with three other circuits that have addressed this issue, the Eleventh Circuit found that the inapplicability of RICO did not render the foreign fora inadequate, since Panama could assert fraud, conversion, and breach of fiduciary duty claims that would provide Panama a sufficient remedy.[88]

The Eleventh Circuit also found the relevant private and public factors to support dismissal.[89] The majority of the alleged fraudulent acts occurred abroad, the critical documents and witnesses were located across the world, and because the BCCI defendants had no assets remaining in the United States, Panama would in any event have to proceed in one of the liquidation proceedings to enforce any judgment obtained in the United States.[90] Finally, the *Republic of Panama* court concluded that the Cayman Islands, Luxembourg, and England had stronger interests than the United States in hosting the proceedings.[91]

IV. Extraterritorial Application of U.S. Law

Michael M. Ostrove*

U.S. courts have continued to balance international comity against the potential extraterritorial application of U.S. law in light of the Supreme Court's 1993 decision in *Hartford Fire Insurance Co. v. California*.[92] In 1997, the First Circuit reviewed this issue in a criminal antitrust

82. 996 F.2d 1353 (2d Cir. 1993).
83. *Stamm*, 1997 WL 438773, at *3.
84. Docket No. 97-9118 (2d Cir.). Briefs were filed on the appeal in December 1997. At the time of this writing, oral argument was proposed for the week of March 30, 1998.
85. 119 F.3d 935, 938-39 (11th Cir. 1997).
86. *Id.* at 951-52.
87. *Id.* at 952.
88. *Id.*
89. *Id.* at 952-53.
90. *Id.*
91. *Id.* at 953.
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92. 509 U.S. 764 (1993).

enforcement context in *United States v. Nippon Paper Industries Co.*[93] Regarding another extraterritoriality question, the Fifth Circuit took sides in a circuit split regarding the extent of domestic conduct required in order for U.S. courts to exercise jurisdiction over a securities law suit.

A. The Role of Conflict Analysis in International Comity determinations

U.S. courts traditionally refused to apply U.S. law extraterritorially when a review of international comity factors weighed, on balance, against extraterritorial application.[94] The Supreme Court introduced uncertainty into this jurisprudence when it held in *Hartford Fire* that, for the purposes of a comity analysis, a true conflict between foreign and domestic law exists only if the foreign law "requires [a person] to act in some fashion prohibited by the law of the United States."[95] Some courts have read the *Hartford Fire* decision narrowly to mean that, absent such a conflict, international comity cannot preclude extraterritorial application of U.S. law. Under that view, the balancing test previously employed is no longer appropriate.[96] Other courts have, more persuasively, read *Hartford Fire*'s holding merely to mean that where a request for deference to international comity is based solely on a claimed conflict between foreign and domestic law, only a true conflict will suffice.[97]

The First Circuit addressed this conflict of laws and comity debate this year in *Nippon Paper*. In that case, the court reviewed a Sherman Act[98] indictment alleging that Nippon Paper Industries Company and others had conspired to fix the price of fax paper in North America. It held that the indictment could be based on alleged activities taking place entirely in Japan.[99] In the main opinion, the court proceeded with the fairly narrow reading of *Hartford Fire*, noting that comity's "growth in the antitrust sphere has been stunted by *Hartford Fire*, in which the Court *suggested* that comity concerns [apply] . . . only in those few cases in which" a true conflict exists.[100] Without extensive explanation as to why it did so, the *Nippon Paper* court nonetheless undertook a limited comity analysis and invoked the Restatement's requirement that the exercise of jurisdiction be reasonable.[101] The court noted that the activities charged were "illegal under both Japanese and American laws" and found that "to the extent that comity is informed by

93. 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998).

94. The so-called balancing test was set forth in Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 614-15 (9th Cir. 1976).

95. 509 U.S. at 799.

96. *See, e.g.*, In re Maxwell Communication Corp. plc by Homan, 93 F.3d 1036, 1049 (2d Cir. 1996) ("International comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction.") (citing *Hartford Fire*, 509 U.S. at 798). The Second Circuit nevertheless found a way to incorporate a balancing test into its analysis. *See* Richard Diwan, *International Litigation; Extraterritorial Application of U.S. Law*, 31 Int'l Law. 333-34 (1997).

97. *See, e.g.*, Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 846 n.5 (9th Cir. 1996) ("While *Hartford Fire* overruled our holding . . . that a foreign government's encouragement of conduct which the United States prohibits would amount to a conflict of law, it did not question the propriety of the jurisdictional rule of reason or the seven comity factors set forth in *Timberlane* . . ."). In *Hartford Fire*, the Supreme Court itself noted that (*i*) the Court of Appeals had found that "other [comity] factors . . . outweighed the supposed conflict and required the exercise of jurisdiction," (*ii*) the "only substantial question in this litigation is whether there is in fact a true conflict between domestic and foreign law," and (*iii*) it had "no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on the grounds of international comity." 509 U.S. at 798-99 (internal quotations and citations omitted).

98. 15 U.S.C. § 1 (1994).

99. 109 F.3d at 9.

100. *Id.* at 8 (emphasis supplied).

101. *Id.* at 12. *See* Restatement (Third) of Foreign Relations Law § 403. The Restatement rule itself finds support in the balancing test of *Timberlane*. *See Hartford Fire*, 509 U.S. at 818 (Scalia, J., dissenting).

general principles of reasonableness . . . the indictment lodged against NP1 [Nippon Paper] is well within the pale."[102]

In a concurring opinion in *Nippon Paper*, Judge Lynch found an indirect means to focus. on a comity balancing test. Reviewing international law regarding criminal cases, Judge Lynch argued that the extraterritoriality test in the criminal context must be stricter than that used by the Supreme Court in *Hartford Fire*, thereby eschewing the unitary conflict analysis of the *Hartford Fire* opinion in favor of the Restatement reasonableness rule and a balancing test. After a more thorough review of comity factors, Judge Lynch agreed with the majority opinion that, under the facts of *Nippon Paper*, extraterritorial jurisdiction was reasonable because, inter alia, the United States' interest in the litigation was much greater than that of Japan.[103]

The Second Circuit should soon have an opportunity to review the continuing vitality of a comity balancing test in *Filetech, S.A.R.L. v. France Telecom, S.A.*[104] In an extensive opinion, a federal district court in New York rejected the First Circuit's narrow reading in *Nippon Paper* and agreed with the Ninth Circuit's reasoning[105] that a broad balancing test still governs comity analysis.[106] The *Filetech* district court nevertheless found itself constrained to "conclude . . . that under controlling Second Circuit law, a party seeking the dismissal of a Sherman Act case on the ground of international comity must first demonstrate that a true conflict exists between the Sherman Act and relevant foreign law."[107] In 1998, the Second Circuit will have the chance to revisit its interpretation of *Hartford Fire* and address whether a true conflict finding is indeed the threshold requirement of a comity analysis.[108]

B. Circuit Split in the Securities Context

In *Robinson v. TCI/U.S. West Communications Inc.*,[109] a foreign plaintiff brought claims under section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, alleging fraud based on conduct occurring largely in England. Only one key communication was alleged to have originated in the United States, and the plaintiff did not claim that the alleged fraud had an effect in the United States. The Fifth Circuit analyzed conflicting tests in other circuits as to the minimum level of domestic conduct that can support subject matter jurisdiction under U.S. securities laws for otherwise extraterritorial events. Joining the Second and D.C. Circuits, it held that the domestic conduct must be "of material importance to" or have "directly caused" the alleged fraud.[110] In so holding, the Fifth Circuit rejected the position of the Third, Eighth, and Ninth Circuits, which requires that domestic conduct merely be "significant" to the fraud in order to justify invocation of jurisdiction. The Fifth Circuit reasoned that the stricter threshold it adopted was more in keeping with the general presumption against extraterritoriality of U.S.

102. 109 F.3d at 8.

103. *Id.* at 12 (Lynch, J., concurring).

104. Docket No. 97-9258. At the time of this writing, in December 1997, briefing of the appeal was scheduled to continue through March 1998.

105. Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 846 n.5 (9th Cir. 1996).

106. Filetech S.A.R.L. v. France Telecom, 978 F. Supp. 464, 476 (S.D.N.Y. 1997), *appeal pending*, No. 97-9258 (2d Cir.).

107. *Id.* at 478.

108. *Id.* ("the Second Circuit's rationale in *Maxwell* appears to identify the existence of a true conflict of law as the threshold requirement, the condition precedent, the *sine qua non*, of any international comity analysis") (citing In re Maxwell Communication Corp. plc by Homan, 93 F.3d 1036, 1049 (2d Cir. 1996)).

109. 117 F.3d 900 (5th Cir. 1997).

110. *Id.* at 905-06.

statutes,[111] but it found that in *Robinson*, the one U.S.-based communication that took place met its higher standard.

V. Discovery

CHRISTOPHER JOSEPH BORGEN*

U.S. law provides litigants with a variety of means to obtain evidence from foreign jurisdictions. The Federal Rules of Civil Procedure (the Federal Rules) and rules of state courts may be used if a U.S. court has jurisdiction over the person who is in control of the evidence in question.[112] Section 1783 of title 28 of the United States Code provides a means for serving a subpoena on U.S. nationals or residents abroad. Litigants may also obtain foreign discovery through letters rogatory as permitted by 28 U.S.C. § 1781 and treaties such as the Hague Convention on Taking Evidence (the Hague Convention).[113] U.S. law also provides litigants, who are before foreign or international tribunals, access to evidence in the United States through letters rogatory, the Hague Convention, and the extraordinarily generous procedure prescribed by 28 U.S.C. § 1782. Varying discovery procedures sounding in international conventions or domestic statutes coexist in the American court system; federal courts are given discretion in crafting the solution which best fits the case at bar.[114]

A. DISCOVERY IN AID OF FOREIGN PROCEEDINGS UNDER 28 U.S.C. § 1782.

There were a number of noteworthy developments in 1997 involving section 1782 in the Second Circuit, the jurisdiction with perhaps the most developed—and the most generous—caselaw on the statute.

1. *Section 1782 May Not Reach Evidence Abroad*

Although the discussion was dicta, the Second Circuit indicated that section 1782 could not be used to reach evidence located outside of the United States but still under the control of persons or entities resident in the United States. In *In re Application of Sarrio, S.A.*,[115] the court noted first that "[o]n its face, § 1782 does not limit its discovery power to documents located in the United States." Based on the legislative history[116] and a declaration by Professor Hans Smit, who had assisted in drafting the final version of the statute,[117] however, the Second Circuit concluded that "despite the statute's unrestrictive language, there is reason to think that Congress intended to reach only evidence located within the United States."[118]

111. *Id.* at 906 (citing Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).

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112. *See, e.g.*, FED. R. CIV. P. 28(b).

113. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444.

114. *See generally* Societe Nationale Industielle Aerospatiale v. United States District Court for the Southern District of Texas, 482 U.S. 522 (1987).

115. 119 F.3d 143, 147 (2d Cir. 1997).

116. *Id.* (quoting S. REP. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788 (emphasizing that purpose of statute is "in obtaining oral and documentary evidence *in the United States*.")) (emphasis added by court).

117. *Id.* (stating that if the statute were interpreted to have such an extraterritorial reach, United States courts would become the "clearing houses" for discovery the world over).

118. *Id.*

2. *The Second Circuit Reinforces Its Position that Evidence Sought Under Section 1782 Need Not Be Discoverable in the Foreign Court*

Unlike most other circuits, the Second Circuit has held that there is no requirement that evidence requested pursuant to section 1782 be discoverable under the rules of the foreign or international tribunal.[119] In particular two decisions in the past year—one from the District of Connecticut and one from the Second Circuit itself—illustrate the strict constraints that the Second Circuit places on a district court's discretion in assessing discovery requests for proceedings before foreign tribunals.

In *In re Application of Metallgesellschaft AG*, the Second Circuit reiterated its rejection of any requirement that evidence sought in the United States pursuant to § 1782(a) be discoverable under the laws of the foreign country that is the locus of the underlying proceeding; "[s]imilarly, we have held that a district court may not refuse a request for discovery pursuant to § 1782 because a foreign tribunal has not yet had the opportunity to consider the request."[120] The court reversed the district court's denial of the section 1782 petition, which had been based on a concern that granting U.S.-style discovery would skew the foreign litigation. The denial was an abuse of discretion because the proper response to such a concern was to craft a "closely tailored discovery order rather than . . . simply denying relief outright."[121]

Following the Second Circuit's dictate that discoverability in the foreign jurisdiction is not a valid factor, the district court in *In re Application of CBG Corporation Geneva*,[122] observed that "[t]he American litigation should not become, as here, a battle-by-affidavit of international legal experts."[123] Noting that under the Second Circuit's standard only authoritative proof that a foreign tribunal would reject the requested evidence could be considered, the district court granted the petition.[124] However, what precisely constituted authoritative proof, short of the tribunal itself ruling that it would not accept the evidence in question, was left unclear by the court's ruling.[125]

Although the view that discoverability may not be considered on a section 1782 application is most closely linked to the Second Circuit's line of cases, certain other courts have applied a similar rule. See, for instance, *In re Geert Duizenstraal*, a case from the Northern District of Texas in which the district court found that, based on the statutory text, Fifth Circuit precedent, and Second Circuit precedent, there was no discoverability requirement in section 1782.[126]

3. *Section 1782 May Not Be Invoked in Favor of Private Arbitrations*

In *In the Matter of Application of Medway Power Limited*, a New York district court held that an "arbitration is not a tribunal for the purposes of § 1782."[127] A critical difference for the

119. *See* Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095 (2d Cir. 1995).

120. 121 F.3d 77, 79 (S.D.N.Y. 1997) (citation omitted).

121. *Id.* at 80 (quoting *Euromepa*, 51 F.3d at 1101).

122. 1997 WL 348053 (D.Conn. 1997).

123. *Id.* at *3.

124. *Id.* at *4.

125. *See id.* at *5. (stating that whether or not a deposition is allowed under British law should not be decided based on affidavits, but left to the British judicial officer); *compare* In re Application of Noboa, No. M18-302, 1995 U.S. Dist. LEXIS 14402 (S.D.N.Y. Oct 4, 1995) (delaying deposition in order to prevent potentially duplicative discovery, because, unlike the facts in *CBG*, time was not of the essence); *see also International Legal Development Year In Review*, 31 INT'L LAW. 335 (1996).

126. 1997 WL 195443 at *2 (N.D. Tex. Apr. 16, 1997); *see also* In re Letters Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venezuela, 42 F.3d 308, 310 (5th Cir. 1995).

127. 985 F. Supp. 402, 403 (S.D.N.Y 1997), *appeal dismissed*, No. 97-9540 (2d Cir. Dec. 24, 1997).

court was that "arbitrators are not officials of foreign sovereign governments, but private persons tested with their decision-making authority most commonly as a result of private parties' entering into contractual arrangements for their private resolution of disputes."[128] In 1964, section 1782 was amended such that "judicial proceeding" was replaced by "proceeding in a foreign or international tribunal."[129] This change was not meant to sweep in arbitrations, but rather "was intended to make the statute available to foreign governmental agencies exercising a judicial or quasi-judicial function as well as to 'conventional' courts."[130]

In reaching this decision, the district court distinguished *In re Application of Technostroyexport*,[131] finding that its statement that an arbitrator or arbitration panel is a tribunal under section 1782 was dicta and without support. Moreover, the parties in *Technostroyexport* were bound by an arbitration agreement, while the person from whom discovery was sought in *Medway* was a third party that was not contractually obligated to recognize the arbitrator's authority.

The district court concluded by stating that the proper procedure would be for the arbitrator to begin proceedings for an order of compulsion before a real tribunal, in this case an English court.[132] The English court could then compel a non-party to provide evidence.

B. International Discovery in Proceedings before U.S. Courts.

1. *The Relationship of the Federal Rules of Civil Procedure to the Hague Convention*

Decisions in 1997 have provided further proof that, given a choice between the Federal Rules of Civil Procedure and the Hague Convention in cases involving international litigants, U.S. federal courts are strongly inclined to resort to the Federal Rules, finding that the Hague Convention does not trump the Federal Rules, and that the latter are often preferable for reasons of efficiency.

In *In re Aircrash Disaster Near Roselawn Indiana*, the defendants, foreign aircraft manufacturers, argued that they were not subject to discovery under the Federal Rules of Civil Procedure, as discovery in such a case must proceed exclusively under the Hague Convention.[133] Moreover, the defendants argued that, in deference to French sovereign interests, the French civil code should control the discovery of documents found in France.[134]

Noting that the discovery rules set forth in the Federal Rules of Civil Procedure and the Hague Convention are both the law of the United States and that there was nothing in the record "showing that the Hague Convention discovery would prove any more effective than" the Federal Rules, the district court stated that "[i]t is easily apparent from applicable case law, that there is absolutely no valid reason or justification for abandoning the Federal Rules of Civil Procedure in favor of the Hague Convention method of discovery."[135] Not only had the foreign defendants not shown that French law was in jeopardy, they also ignored the sovereign interests of the United States in protecting its own citizens and the fact that "[m]anufac-

128. *Id.* (quoting Lawrence W. Newman & Rafael Castilla, *Production of Evidence Through U.S. Courts for Use in International Arbitration*, 9 J. Int'l Arb. 61, 69 (June 1992)).

129. *Id.* at 404.

130. *Id*

131. 853 F. Supp. 695 (S.D.N.Y. 1994).

132. *Medway Power Limited*, 985 F. Supp. at 405. As this article was being submitted for publication, another judge of the same court reached the same conclusion as that in *Medway*. In re National Broadcasting Co., No. M-77 (RWS) (S.D.N.Y. Jan. 16, 1998).

133. 172 F.R.D. 295, 298 (N.D. Ill. 1997).

134. *Id.* at 307

135. *Id.* at 308.

turers producing products abroad for use in the United States are subject to the laws of the United States."[136] Moreover, use of Hague Convention procedures could cause delay and frustrate U.S. policy of facilitating just, speedy, and inexpensive litigation.[137]

Similarly, in *Fishel v. BASF Group,* an Iowa district court rejected German defendants' arguments that the Hague Convention should take primacy over the Federal Rules.[138] Quoting *Aerospatiale*, the district court agreed that Hague Convention procedures can be "unduly time consuming and expensive."[139]

In *In re First American Corporation,* a New York district court used a four-prong analysis to determine the reasonableness of a foreign discovery request.[140] The factors considered were: (1) the competing interests of the nations whose laws are in conflict; (2) the hardship of compliance on the party or witness from whom discovery is sought; (3) the importance of the information and documents requested; and, (4) the good faith of the party requesting discovery.[141]

2. *The Relationship of the Federal Rules of Civil Procedure to Foreign Discovery Rules.*

Other 1997 decisions also assessed the role of international comity in determining the scope of discovery in federal court proceedings. In *Odone v. Cropda International PLC*, the court had to decide whether or not to limit discovery by applying a foreign privilege statute.[142] The plaintiff had requested discovery of documents exchanged between the defendant and its British patent agent. The defendant declined to produce the materials, arguing that the communications were privileged under British copyright law, and that, in the interest of comity and because the communications did not "touch base" in the United States, the British privilege should be honored.[143]

The district court in *Odone* stated that where a federal district court has jurisdiction over a foreign company or individual, it is not required to defer to international comity and that the court can and should mandate compliance with the discovery rules of the Federal Rules of Civil Procedure.[144] Where federal courts have deferred to foreign statutes governing the privilege of patent agents, the common denominator has been that the communications related solely to activities outside the United States. That was not the case here. Moreover,

> [i]t would be against U.S. public policy to limit discovery—thus preclude or hinder claims by United States citizens of patent infringement, by awarding comity to the restrictive discovery laws of Great Britain while at the same time extending the full panoply of our open discovery privileges to foreign defendants that have availed themselves to the protections of U.S. patent and trademark law pursuant to the Patent Cooperation Treaty.[145]

The issue of fairness in discovery procedures was also considered in *Minnesota Mining & Manufacturing Company v. Nippon Carbide Industries Co.*, in which the district court ordered the inspection of defendant's plant in Japan, even though such an inspection might not comport

136. *Id.* at 309
137. *Id.* at 310-11.
138. 175 F.D.R. 525 (S.D. Iowa 1997).
139. *Id.* at 529.
140. 1997 U.S. Dist. LEXIS 20137 (S.D.N.Y. Dec. 19, 1997).
141. *Id.* at *30.
142. 950 F. Supp. 10 (D.D.C. 1997).
143. *Id.* at 12
144. *Id.*
145. *Id.* at 14

with Japanese law.[146] The court explained: "[a]lthough we are keenly sensitive to the promotion of international comity, we cannot ignore the fact that NCI is properly within the jurisdiction of this Court, and therefore, is 'subject to the same legal constraints, including the burdens associated with American judicial procedures, as their American competitors.' "[147]

VI. Personal Jurisdiction

Daniel C. Malone*

U.S. courts continued in 1997 to refine the legal principles governing when they may properly adjudicate cases involving foreign parties and events. Notable developments in the law of personal jurisdiction focused on national contacts based jurisdiction under Federal Rule of Civil Procedure 4(k)(2) and assertions of personal jurisdiction over a foreign defendant based on its activity on the Internet.

A. Developments in Jurisdiction Based on Rule 4(k)(2)

Federal Rule of Civil Procedure 4(k)(2), adopted in 1993, authorizes the exercise of personal jurisdiction by federal courts based on contacts with the nation as a whole, rather than contacts limited to the state of the forum.[148] The outer bounds of rule 4(k)(2)'s expansion of jurisdiction, however, have proved as yet unfixed.

1. *National Contacts Based Personal Jurisdiction in Admiralty Cases*

While courts and commentators have sometimes assumed that the provisions of rule 4(k)(2) support personal jurisdiction in the federal courts only in cases where subject matter jurisdiction is premised on the federal question statute,[149] some courts have found the rule to encompass all cases raising questions of law fundamentally federal in nature. Several courts in the past year have considered the availability of rule 4(k)(2) as a basis of personal jurisdiction in admiralty cases.

In *World Tanker Carriers Corp. v. MV Ya Mawlaya*,[150] the lower court had held that rule 4(k)(2) applied only in cases where federal jurisdiction was based on a federal question; the rule could not support personal jurisdiction in a suit under general maritime law. The Fifth Circuit reversed, finding the proper analysis under rule 4(k)(2) to be whether federal substantive law provided the rule of decision, not whether federal jurisdiction was based on the federal question statute.[151] Although the federal question statute did not necessarily provide federal

146. 171 F.R.D. 246 (D. Minn. 1997).

147. *Id.* at 249 (quoting Societe Nationale Industielle Aerospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. at 540 n.25).

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148. Fed. R. Civ. P. 4(k)(2) provides:

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

149. 28 U.S.C. § 1331; *see, e.g.*, Eskofot A/S v. E.I. Du Pont de Nemours & Co., 872 F. Supp. 81, 87 (S.D.N.Y. 1995) ("Rule 4(k)(2) only provides federal courts with personal jurisdiction over a foreign defendant in federal question cases . . .") (dictum).

150. 99 F.3d 717 (5th Cir. 1996).

151. *Id.* at 720-22.

courts with subject matter jurisdiction over admiralty cases,[152] the maritime law that supplied the rule of decision in such cases was fundamentally federal in nature.[153] Because maritime law was federal law, rule 4(k)(2) authorized service in admiralty cases. The Fifth Circuit therefore reversed and remanded the case for discovery of jurisdictional facts that might establish the defendants' minimum contacts with the United States as a whole.

The Fifth Circuit's *World Tanker* decision accords with prior district court precedent[154] and has been cited as persuasive authority by several 1997 district court decisions, including *Western Equities Ltd. v. Hanseatic, Ltd.*,[155] *Warn v. M/Y Maridome*,[156] and *West Africa Trading & Shipping Co. v. London International Group*.[157] The *World Tanker* decision thus appears to anchor a growing weight of authority that rule 4(k)(2) provides a basis of personal jurisdiction applicable to all federal substantive law cases. Given the low burden in establishing jurisdiction based on national contacts,[158] this development may result in a significant expansion in the exercise of federal personal jurisdiction, particularly in admiralty.[159]

2. *Divergence in the Application of Rule 4(k)(2)'s No State Jurisdiction Requirement*

The year, 1997, witnessed considerable disagreement among the courts in construing rule 4(k)(2)'s prerequisite that a defendant not be subject to the jurisdiction of any state court. Faced with the rule's silence on how such a negative is to be proved and by whom, the courts have divided, with some assigning to plaintiffs the difficult task of demonstrating that a defendant is not subject to personal jurisdiction in all 50 states,[160] and others upholding rule 4(k)(2)'s applicability on much lesser showings by the plaintiffs.

Among the decisions requiring a lesser showing was *United States v. International Brotherhood of Teamsters*,[161] where the district court examined the possibility of jurisdiction only in the state of the forum.[162] Finding none, the court evaluated the Canadian defendant's national contacts and determined that the court had jurisdiction based on rule 4(k)(2).[163]

In *In re Pintlar Corp.*,[164] the Ninth Circuit affirmed an Idaho district court's finding of

152. *Id.* at 722 (citing Romero v. International Terminal Operating Co., 358 U.S. 354 (1959)).

153. *Id.* at 722-23.

154. *See, e.g.*, United Trading Co. S.A. v. M.V. Sakura Reefer, 1996 WL 374154 (S.D.N.Y July 2, 1996); Nissho Iwai Corp. v. M/V Star Sapphire, 1995 WL 847172 (S.D. Tex. Aug. 24, 1995); *In re* Libel and Petition of Gemini Navigation, S.A. (Liberia), 1996 WL 544236, at *4 n.10 (S.D. Tex. Mar. 1, 1996); Pacific Employers Ins. Co. v. M/T Iver Champion, 1995 WL 295293, at *4-*6 (E.D. La. May 11, 1995).

155. 956 F. Supp. 1232 (D. V.I. 1997).

156. 961 F. Supp. 1357 (S.D. Cal. 1997).

157. 968 F. Supp. 996 (D.N.J. 1997).

158. *Cf., e.g.*, Vlasak v. Rapid Collection Sys., Inc., 962 F. Supp. 1096, 1098 (N.D. Ill. 1997) ("most challenges to personal jurisdiction in federal question cases revolve around the defendant's amenability to service, since the due process requirement is easily satisfied") (citing cases).

159. *But see* Carter v. LaGloria Shipping, 1997 WL 423101 (E.D. La. July 24, 1997) (charter parties' fifteen port calls in United States and time charter agreement selecting U.S. law insufficient to support jurisdiction under Rule 4(k)(2)).

160. *See* Gary B. Born and Andrew N. Vollmer, *The Effect of the Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service, and Discovery in International Cases*, 150 F.R.D. 221, 226-27 nn. 31-33 and accompanying text (1993).

161. 945 F. Supp. 609 (S.D.N.Y. 1996).

162. *Id.* at 618-20. In particular, the district court did not examine jurisdiction based on the affiliations of the defendant's seventy-percent owned American subsidiary incorporated in Delaware with its principal place of business in Connecticut. *Id.* at 614-15.

163. *Id.* at 616. The *Teamsters* court's decision is also noteworthy for finding jurisdiction over a foreign corporation for purposes of enforcing a consent decree and for applying a federal consent decree extraterritorially.

164. 127 F.3d 1182 (9th Cir. 1997).

jurisdiction on the basis of rule 4(k)(2). Curiously, the court did so despite the lower court's holding that the defendant directors and corporation, all citizens of the United Kingdom, were subject to jurisdiction in Idaho's courts of general jurisdiction under the Idaho long-arm statute. Without expressly disapproving of the lower court's finding of jurisdiction under Idaho law, the Ninth Circuit appeared to accept as dispositive the fact that "defendants' position is that they are not subject to the jurisdiction of Idaho (and, so far as appears in the record, of any other state)."[165] The court thus seemed to place the burden on the defendants of demonstrating both that they were not subject to the forum state's jurisdiction and that they were subject to the jurisdiction of some other U.S. state.

In *Pyrenee, Ltd. v. Wocom Commodities Ltd.*,[166] the district court treated the plaintiff as having no affirmative burden even in pleading:

> Since Pyrenee does not contend that Wocom's contacts with this forum satisfy the Illinois long-arm statute, and relies exclusively on Rule 4(k)(2) to establish personal jurisdiction, we will limit our analysis to determining whether Wocom maintains sufficient contacts with the United States for personal jurisdiction to lie under Rule 4(k)(2).[167]

Other courts have construed the no state jurisdiction requirement strictly. In *Dorian v. Harich Tahoe Development*,[168] a class action alleging RICO and other civil claims, the district court stated that "[r]ule 4(k)(2) contemplates that the law of the fifty states and the relationship of a defendant to each state must be reviewed in order to decide whether the Rule is applicable."[169] The plaintiffs' failure following jurisdictional discovery to make even a minimal showing that one of the defendants, a Canadian corporation, was not subject to personal jurisdiction in any state foreclosed resort to rule 4(k)(2).[170] In *CFMT Inc. v. Steag Microtech, Inc.*,[171] the magistrate judge interpreted the rule to "require that the party opposing the motion to dismiss to affirmatively represent and demonstrate that the defendant is not subject to the jurisdiction of any state, not solely the state in which the district court is located."[172] Holding that the plaintiffs had failed to do so explicitly, the magistrate recommended dismissal.

B. Internet Activity as the Basis for Personal Jurisdiction

Cases in the past year have tested the use of a foreign defendant's activity on the Internet as the basis of personal jurisdiction in U.S. courts.[173] In *Weber v. Jolly Hotels*,[174] defendant Jolly Hotels, an Italian corporation, had not conducted any business in the forum state, New Jersey. Plaintiff opposed dismissal of her personal injury claims based in part on Jolly Hotels' maintenance of an Internet site displaying pictures of hotel rooms, descriptions of hotel facilities, and

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165. *Id.* at 1186. Oddly, the Ninth Circuit then noted as "compelling" evidence of jurisdiction under rule 4(k)(2) bankruptcy court findings that strongly suggested that the courts of New York and Texas would have had jurisdiction. *Id.* at 1187.

166. 984 F. Supp. 1148 (N.D. Ill. 1997).

167. *Id.* at 1160. *See also In re* Pintlar, 127 F.3d at 1186 ("the *defendants'* position is that they are not subject to the jurisdiction of Idaho (and, so far as appears in the record, of any other state)") (emphasis added).

168. No. C-94-3387 DLJ, 1997 WL 626109 (N.D. Cal. Oct. 11, 1997).

169. *Id.* at *5.

170. *Id.*

171. No. C.I.V.A. 95-442-LON, 1997 WL 313161 (D. Del Jan. 9, 1997).

172. *Id.* at *7 n.10.

173. For a general description of the Internet and World Wide Web, see American Civil Liberties Union v. Reno, 929 F. Supp. 824, 830-38 (E.D. Pa. 1996).

174. 977 F. Supp. 327 (D.N.J. 1997).

telephone numbers. Plaintiff claimed that the Internet site was the equivalent of advertising in New Jersey.

In considering the motion, the district court relied heavily on the analytic framework first presented in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,[175] which divided Internet cases into three categories. The first included defendants that actively did business over the Internet, entering into contracts and knowingly and repeatedly transmitting files over the Internet; such activity was held to support jurisdiction.[176] The second addressed defendants that permitted consumers to exchange information with the defendants' host computer; in these cases, jurisdiction depended on the level of interactivity and commercial nature of the information exchanged on the site.[177] The third category involved passive Web sites that merely provided information or advertising. Such passive sites did not support a finding of jurisdiction.[178] The district court concluded that Jolly Hotels' passive Internet advertising was equivalent to national magazine advertising and provided a constitutionally insufficient basis for the exercise of jurisdiction.[179]

As Internet cases make their way through the courts, they may press the Supreme Court to revisit the issue of personal jurisdiction over nonforum defendants. In particular, Justice O'Connor's plurality opinion in the Court's last major case on personal jurisdiction, *Asahi Metal Industries Co., Ltd. v. Superior Court*,[180] may not suit controversies in which commerce has taken place through a plaintiff's downloading and transmission of files from and to a defendant's Web site, without any forum directed acts by the defendant. The Due Process Clause might permit the exercise of personal jurisdiction in such cases, even though the defendant has not purposely availed itself of the benefits of the forum, as Justice O'Connor's opinion would appear to require.

VII. Service of Process Abroad

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The past year yielded no significant federal appellate decisions on service of process abroad. However, courts applying state law decided several cases validating personal service on foreign defendants and the District of New Jersey joined those courts that have held that the Hague Convention[181] authorizes service by mail. These decisions, along with a ruling by a Florida appellate court limiting the service requirements of the Hague Convention to the commencement of litigation, increase the options open to U.S. litigants wishing to serve foreign parties and thus the likelihood that foreign parties will be haled into U.S. courts against their wishes.

175. 952 F. Supp. 1119 (W.D. Pa. 1997).

176. 977 F. Supp. at 333 (citing Zippo Mfg. Co., 952 F. Supp. at 1124 (citing CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)).

177. *Id.* (citing Zippo Mfg. Co., 952 F. Supp. at 1124 (citing Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996)).

178. *Id.* (citing Bensusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996) and Hearst Corp. v. Goldberger, No. 96 Civ. 3620, 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997)) (exercising jurisdiction over a defendant who merely advertises on the Internet would violate the Due Process Clause) (other citations omitted).

179. *Id.* at 333-34. *See also* Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356 (W.D. Ark. 1997) (under *Zippo* analysis, Hong Kong manufacturer's Internet advertisement insufficient to support jurisdiction).

180. 480 U.S. 102 (1987).

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181. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Feb. 10, 1969, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Convention].

A. Service Abroad Under Rule 4(f)

A Virginia district court decided, in *Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd.*,[182] that a mode of service of process that is not provided for by foreign law is not necessarily prohibited within the meaning of rule 4(f)(2)(C) of the Federal Rules of Civil Procedure. The plaintiff, Dee-K Enterprises Inc., had the clerk of court serve the Indonesian and Malaysian corporate defendants, in their respective countries, via DHL courier. Neither Indonesia nor Malaysia is a party to the Hague Convention and Dee-K did not ask the court to issue letters rogatory or to give direction on appropriate means of service. The court therefore evaluated sufficiency of service under rule 4(f)(2)(C)(ii), which provides for service on foreign parties by "any form of mail requiring a signed receipt," unless "prohibited" by the law of the foreign country.[183]

Since Indonesian and Malaysian law do not provide for service by international courier, the defendants argued that service by DHL is prohibited by the laws of both countries and, thus, was not permissible under rule 4(f)(2)(C)(ii). The district court rejected this argument for two reasons. First, the court defined "prohibit" as "to forbid by authority or command" and concluded that a form of service is not necessarily "forbidden by authority" where it is not explicitly "prescribed" by the laws of a foreign country.[184] Second, the court found that if "subsection (f)(2)(C) [were] inapplicable where a form of return receipt mail is simply not prescribed by the laws of a foreign country, this subsection would be superfluous to subsection (f)(2)(A), which allows service in a foreign country in any manner 'prescribed' by the law of that country."[185]

B. Personal Service on Foreign Corporations Under State Law

1. *Service on Officers or Directors*

Applying Illinois law, an Illinois district court determined, in *S.T.R. Industries, Inc. v. Palmer Industries, Inc.*,[186] that a Taiwanese corporation could not avoid personal service by contending that the person served was not an officer of the corporation where copies of correspondence and invoices showed that the alleged officer's involvement in the Taiwanese corporation's business affairs was "frequent and substantial."[187] The court held that, at minimum, he was an agent capable of accepting personal service for the corporation.

2. *Service on Contractually Designated Agents*

Applying New York law, a New York district court ruled, in *Recyclers Consulting Group, Inc. v. IBM-Japan, Ltd.*,[188] that service on a foreign defendant's contractually designated agent for service of process was proper regardless of whether the foreign defendant had informed the agent of its appointment under the contract or whether the agent had accepted that appointment. The defendant, IBM-Japan, Ltd., removed this breach of contract action from New York state court. The plaintiff, Recyclers Consulting Group, Inc. (RCG), moved to remand to state court pursuant to 28 U.S.C. § 1447(c), alleging that IBM-Japan had untimely removed.

182. 174 F.R.D. 376 (E.D. Va. 1997).
183. Fed. R. Civ. P. 4(f)(2)(C)(ii).
184. *Dee-K Enters.*, 174 F.R.D. at 379-80.
185. *Id.* at 380.
186. No. 96-C4251, 1996 WL 717468 (N.D. Ill. Dec. 9, 1996).
187. *Id.* at *4.
188. No. 96 Civ. 2137, 1997 WL 615014 (S.D.N.Y. Oct. 3, 1997).

The court granted RCG's motion, finding that RCG had properly served IBM-Japan's apparent U.S. agent more than thirty days before IBM-Japan filed its notice of removal.[189]

The court concluded that by designating CT Corporation as its agent in its contract with RCG, IBM-Japan cloaked CT Corporation with apparent authority to accept service on its behalf. RCG reasonably relied on the apparent agency, despite the fact that CT Corporation returned the complaint to RCG and claimed no knowledge of its appointment by IBM-Japan. Resistance or rejection of service by agents is not uncommon, reasoned the court, and does not necessarily invalidate service. In addition, IBM-Japan failed to inform RCG that CT Corporation was not its agent.

The court stressed that service upon a defendant's designated agent constitutes actual receipt of the complaint by the defendant. The court concluded that defendants should be estopped from denying service when their failure to receive pleadings results from their own "lack of diligence."[190]

3. *Alternatives to the Inter-American Convention on Letters Rogatory*

A unanimous panel of a New York intermediate appellate court ruled, in *Laino v. Cuprum S.A. de C.V.*,[191] that the Inter-American Convention on Letters Rogatory[192] is not the exclusive means of service between residents of signatory nations. The *Laino* plaintiffs brought a personal injury and products liability suit against Cuprum S.A. de C.V., a Mexican company not authorized to do business in New York. The plaintiffs recruited a Mexican attorney to serve Cuprum personally in Mexico. The attorney went to Cuprum's principal place of business in Mexico and attempted to serve an employee who was reputedly empowered to accept service. After the employee refused to accept service, the plaintiffs' attorney delivered the summons and complaint to a security guard.

Cuprum moved to dismiss the complaint for lack of personal jurisdiction, arguing that under article 10 of the Inter-American Convention,[193] Laino's exclusive means of service was by letter rogatory in accordance with Mexican law. The *Laino* court disagreed, holding that while the Inter-American Convention applies to all letters rogatory between signatory nations, it does not exclude other means of service.[194]

The court relied on three factors in reaching its decision. First, the court found nothing in the terms of the Inter-American Convention expressing an intent to supplant alternative methods of service of process. The Inter-American Convention states only that it "shall apply to letters rogatory."[195] Second, the court contrasted this limited language with the mandatory and preemptive language of the Hague Convention.[196] The court noted that the Hague Convention expressly

189. *See* 28 U.S.C. § 1446(b) ("The notice of removal . . . shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief. . . .").

190. *Recyclers Consulting*, 1997 WL 615014, at *4.

191. 663 N.Y.S.2d 275 (N.Y. App. Div. 1997).

192. Jan. 30, 1975, S. TREATY DOC. No. 98-27, 14 I.L.M. 339 (1984) [hereinafter "Inter-American Convention"].

193. *Id.* art. 10 ("Letters rogatory shall be executed in accordance with the laws and procedural rules of the State of destination.").

194. Although it reversed dismissal of the complaint, the Appellate Division found an issue of fact concerning whether Cuprum was properly served, given the refusal of its employee to accept service. The court remitted the matter to New York Supreme Court for a hearing on that issue. *Laino*, 663 N.Y.S.2d at 279.

195. Inter-American Convention, *supra* note 192, art. 2.

196. *Laino*, 663 N.Y.S.2d at 278.

applies " 'in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad'."[197] Third, the court noted that Federal Rule of Civil Procedure 4(f) permits other means of service when an international agreement on service of process is not exclusive, such as personal delivery of the summons and complaint to the foreign individual.[198]

The *Laino* panel's holding, on an issue of apparent first impression in the New York appellate courts, accords with prior decisions by federal courts including the Fifth Circuit court of appeals.[199] *Laino* should prove welcome to plaintiffs (especially given the long delays associated with letters rogatory)[200] as, like *Recyclers Consulting, Laino* expands the available means to effect service on foreign parties under New York law. Conversely, these decisions should remind foreign companies operating in the United States that U.S. courts, in assessing the sufficiency of international service, tend to focus primarily on whether the defending party had actual notice of the action.[201]

C. Developments Concerning the Hague Convention

1. *Service by Mail under the Hague Convention*

The conflict between U.S. appeals courts over article 10(a) of the Hague Convention[202] over whether or not it authorizes service of process on a foreign defendant by registered mail, where the foreign signatory state has not objected to such service remains unresolved. So far, the Second and Eighth Circuits are the only federal appellate courts to construe article 10(a). Last year, however, the District of New Jersey weighed in with a detailed opinion concurring with the Second Circuit's approach in *Ackermann v. Levine*,[203] in which the Second Circuit determined that article 10(a) permits service by mail, rather than the Eighth Circuit's approach in *Bankston v. Toyota Motor Corp.*,[204] which concluded that the plain language of the Hague Convention does not authorize "service" by postal means, but only the "sending" of subsequent judicial documents by mail.[205]

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197. *Id.* (quoting Hague Convention, *supra* note 181, art. 1).

198. The *Laino* plaintiffs attempted service under section 311 of the New York Civil Practice Law and Rules (N.Y. C.P.L.R. § 311 [McKinney 1990]), rather than under Federal Rule of Civil Procedure 4 ("rule 4"). *Laino*, 663 N.Y.S.2d at 279. The opinion did not imply that the plaintiffs served, or could have served, Cuprum under rule 4; the court simply "buttressed" its conclusions about the non-exclusivity of the Inter-American Convention by reviewing the alternative means of service provided by rule 4. *Id.* at 278.

199. Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 637-44 (5th Cir. 1994), *cert. denied*, 513 U.S. 1016 (1994); Chem. Waste Mgmt., Inc. v. Hernandez, No. 95 Civ. 9650, 1997 WL 47811, at *2 n.1 (S.D.N.Y. Feb. 5, 1997); Mayatextil, S.A. v. Liztex U.S.A., Inc., No. 92 Civ. 4528, 1994 WL 198696, at *5 (S.D.N.Y. May 19, 1994); Pizzabioche v. Vinelli, 772 F. Supp. 1245, 1249 (M.D. Fla. 1991).

200. *See Kreimerman*, 22 F.3d at 645-46 n.70 ("If the machinery provided by the [Inter-American] Convention does not work very well, we should be loathe to condemn United States residents to use such an ineffective apparatus."); Kenneth B. Reisenfeld, *Service of United States Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure*, 24 Int'l Law. 55, 60 (1990) ("Letters rogatory, the method of last resort, generally is the slowest service method.").

201. *See* Henderson v. United States, 517 U.S. 654 (1996) ("[The] essential purpose [of service of process] is auxiliary, a purpose distinct from the substantive matters aired in . . . [the dissent]. Instead, the core function of service is to supply notice of the pendency of a legal action. . . .").

202. Hague Convention, *supra* note 181, art. 10(a) ("Provided the State of destination does not object, the present Convention shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to persons abroad. . . .").

203. 788 F.2d 830 (2d Cir. 1986).

204. 889 F.2d 172 (8th Cir. 1989).

205. *Id.* at 174.

The *Ackermann* line of cases argue that article 10(a) would be "superfluous" unless it was included for the purpose of service.[206] They also find the context of article 10 to be significant, noting that articles 8, 9, 11, and 19 all propose alternate mechanisms for service not involving the Central Authority of the foreign state.[207] *Ackermann* and its progeny therefore conclude that service by mail is consistent with the overall purpose and scope of the Hague Convention.[208]

The *Bankston* line asserts that there is a plain difference in meaning between "send" in article 10(a) and "service" in other sections, including articles 10(b) and (c).[209] These cases find it unlikely that the same treaty that establishes elaborate procedures for service of process, such as Central Authorities, would permit litigants to circumvent those procedures simply "by sending something through the mail."[210] In support of the *Bankston* approach, some commentators have cited the principle of international comity and the need to respect the legal traditions of civil law nations, such as Japan or Switzerland, which regard service of process as an act of sovereignty.[211]

The District of New Jersey's opinion in *EOI Corp. v. Medical Marketing Ltd.*[212] analyzed both lines of authority in the article 10(a) controversy and found the *Ackermann* approach more persuasive. The court (perhaps unfairly) compared "the overwhelming weight of scholarly authority" for service by mail with the "paucity of analysis" in *Bankston* and its progeny.[213] The court held that the plain meaning of article 10(a) (which refers to "the freedom to send judicial documents, by postal channels, directly to persons abroad"[214]) permits service of process by mail because a summons and complaint are judicial documents. Finally, the court made a practical argument that litigation with foreigners would be "severely burdensome, if not impossible," without service by mail.[215]

Like the personal service cases, *EOI* represents an effort by courts to provide litigants with cheaper and more efficient methods of service on foreign parties. However, the apparent focus of these U.S. courts on the efficient provision of notice may shortchange the sovereignty interests of foreign states.[216]

2. *Scope of the Hague Convention*

A Florida intermediate appellate court, in *Chabert v. Bacquié*,[217] held that the service requirements of the Hague Convention apply only to service of initial process, not to later notices, here, a notice of appeal was sent during the course of a litigation. Bacquié sued Chabert in Florida seeking to enforce a French appellate court default judgment against Chabert, who had taken up residence in the United States after receiving a French trial court judgment in his favor. Chabert contended "that the Hague Convention required that the notice sent [to him]

206. *See, e.g., Ackermann*, 788 F.2d at 839.

207. *See, e.g.*, R. Griggs Group Ltd. v. Filanto Spa, 920 F. Supp. 1100, 1104-05 (D. Nev. 1996).

208. *Id.*

209. *See, e.g., Bankston*, 889 F.2d at 173-74.

210. *See, e.g.*, Golub v. Isuzu Motors, 924 F. Supp. 324, 327 (D. Mass. 1996); Raffa v. Nissan Motor Co. Ltd., 141 F.R.D. 45, 47 (E.D. Pa. 1991).

211. *See, e.g.*, L. Andrew Cooper, *International Service of Process by Mail Under the Hague Service Convention*, 13 MICH. J. INT'L L. 698, 711-15 (1992).

212. 172 F.R.D. 133 (D.N.J. 1997).

213. *Id.* at 141.

214. Hague Convention, *supra* note 181, art. 10(a).

215. *EOI*, 172 F.R.D. at 141.

216. *See* Cooper, *supra* note 211.

217. 694 So. 2d 805 (Fla. Dist. Ct. App. 1997).

by Bacquié's French appellate attorney . . . be served with all the formality of service of initial process at the commencement of a lawsuit."[218] The Florida court enforced the French judgment, holding that the personal service requirement in article 15 of the Hague Convention[219] did not apply to notice of the French appellate proceeding, instead characterizing that notice as the sending of papers under article 10(a).

3. *New Signatories to the Hague Convention*

There were no new signatories to the Hague Convention in 1997.

VIII. Enforcement of Foreign Judgments

ROGER ALFORD AND CHRISTOPHER GIBSON*

As was the case last year, neither the Supreme Court nor Congress addressed the general area of enforcement of foreign judgments in 1997. The new cases therefore continue to reflect the well established comity principles articulated in the Supreme Court's seminal 1895 decision in *Hilton v. Guyot*.[220] Several developments occurred with respect to two cases that were discussed in last year's section, and these cases are given first treatment below. In The Hague, The Netherlands, the first in a series of four meetings was convened in June 1997 by a Special Commission of the Hague Conference on Private International Law. The goal of the Special Commission is to prepare a draft Convention on international jurisdiction and the effects of foreign judgments. Among the particular objectives, the Convention must be "adapted to the technical, economic, sociological, and legal developments of the twenty-first century."[221] A preliminary draft of this Convention is expected in November 1998.

In *In re Chromalloy Aeroservices v. Arab Republic of Egypt*, discussed in last year's section,[222] a District of Columbia federal court confirmed an arbitral award made in Egypt, notwithstanding an Egyptian Court of Appeals decision nullifying that award. No appeal was taken from the district court's ruling. Subsequently, in *Arab Republic of Egypt v. Chromalloy Aero Services Co.*,[223] the Court of Appeals of Paris, in a ruling dated January 14, 1997, reached the same conclusion and upheld a lower court order executing in France the $17.2 million arbitration award in favor of the U.S. company, Chromalloy, also despite the annulment of the award by the Egyptian Court of Appeals.

218. *Id.* at 811.

219. Hague Convention, *supra* note 181, art. 15 ("Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that—(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or (b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend. . . .").

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220. 159 U.S. 113 (1895).

221. *Synthesis of the work of the Special Commission of June 1997 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters*, Prel. Doc. No. 8, at p. 11 (November 1997).

222. 939 F. Supp. 907 (D.D.C. 1996), discussed in 31 INT'L LAW. 348-49 (1997).

223. General Register No. 95/23029, Paris App., 1st Chamber, Sect. C, *reprinted in* 12 No. 4 MEALEY'S INT'L ARB. REP. 5.

The Arab Republic of Egypt argued several grounds on appeal, including that the French order of execution ignored article 33 of the Franco-Egyptian Convention on Judicial Cooperation and article VI of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The French appeals court found, however, that France and Egypt had "implicitly accepted" the exception in article VII of the New York Convention,[224] whereby a party may not be deprived from being able to seek enforcement "in a manner and to the extent admitted by the legislation or treaties of the country" where the award is invoked.[225] Thus, Chromalloy could seek enforcement under the relevant provision of the French New Civil Procedure Code,[226] which listed grounds a French court must apply when considering refusal of recognition and execution of a foreign arbitration award. These grounds did not include those set forth under article V of the New York Convention. The arbitration award thus was considered to be an "international verdict" that remained in existence despite its annulment in Egypt, and "its recognition in France [was considered] not contrary to international public order."[227]

In *Wilson v. Marchington*[228] the Ninth Circuit reversed the summary judgment entered by the lower court discussed in this section last year.[229] The Ninth Circuit ruled that because a tribal court lacked competent jurisdiction, its judgment was not entitled to recognition or enforcement in United States courts.[230]

The case involved a car accident on an interstate highway running though the Blackfeet Indian Reservation in Montana, and presented "the question of whether, and under what circumstances, a tribal court tort judgment is entitled to recognition in United States Courts."[231] Like the district court, the Ninth Circuit found that "[f]ull faith and credit is not extended to tribal judgments by the Constitution or Congressional act."[232] Therefore, "the recognition and enforcement of tribal judgments in federal court must inevitably rest on principles of comity."[233]

Similar to the district court's view, the Ninth Circuit noted that "[c]omity does not require that a tribe utilize judicial procedures identical to those used in the United States Courts."[234] While rejecting an argument "to adopt reciprocity as a judicially-created mandatory requirement" in the comity analysis because "the reciprocity requirement has fallen into disfavor,"[235] the Court of Appeals ruled, on the other hand, that two factors, lack of tribal jurisdiction and absence of due process, were mandatory reasons for rejecting a tribal judgment. The Court of Appeals determined that the 1997 Supreme Court decision in *Strate v. A-1 Contractors*[236] required it to find that the tribal court did not have jurisdiction because "tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent statute or treaty authorizing the tribe to govern conduct of nonmembers on the highway in

224. *Id.*
225. *Id.*
226. N.C.P.C. art. 1502.
227. 12 No. 4 MEALEY'S INT'L ARB. REP. 5, *supra* note 223.
228. 127 F.3d 805 (9th Cir. 1997).
229. 31 INT'L LAW. 351 (1997) (discussing 934 F. Supp. 1187 (D. Mont. 1996)).
230. *Wilson*, 127 F.3d at 815.
231. *Id.* at 807.
232. *Id.* at 809.
233. *Id.*
234. *Id.* at 811.
235. *Id.* at 811-12.
236. 117 S. Ct. 1404 (1997).

question."[237] Therefore, because "[p]rinciples of comity require that a tribal court have competent jurisdiction before its judgment will be recognized by United States courts,"[238] the district court's decision recognizing the tribal court's judgment was reversed.

In *Saroop v. Garcia*,[239] Lolita Saroop, while awaiting trial in the United States Virgin Islands for drug-trafficking and conspiracy, filed a habeas corpus petition[240] in the district court contending that her extradition to the United States was unlawful because there was no valid extradition treaty between the United States and Trinidad and Tobago. Saroop had already raised this contention and it had been rejected in the courts of Trinidad and Tobago. First, the High Court of Justice of Trinidad and Tobago found that a 1931 extradition treaty between the United States and Great Britain had been incorporated into the law of the independent nation of Trinidad and Tobago and was still binding. Saroop then petitioned the Privy Council (the court of last resort in the British Commonwealth, of which Trinidad and Tobago is a participating member), which denied her petition without a hearing. The United States district court, finding that a valid treaty existed between the two nations, also denied Saroop's petition.

On appeal, the Third Circuit determined that, while under the circumstances Saroop had standing to contest whether the extradition treaty was valid, her petition was deficient for two reasons. The court ruled that, under the doctrine of international comity, it would recognize as binding the judgment of the High Court of Justice for Trinidad and Tobago on the question of the validity of the 1931 extradition treaty. "While the comity doctrine does not reach the force of obligation, it creates a strong presumption in favor of recognizing foreign judicial decrees."[241] The Third Circuit observed that Saroop, a Trinidadian citizen, had chosen to file her action in the Trinidad and Tobago courts, and did not contend that the judicial procedures there "violated the stricture set forth in Hilton."[242] The court alternatively held that there was a valid and enforceable extradition treaty between the United States and Trinidad and Tobago based on the nations' respective intent and actions.

In *Alfadda v. Fenn*,[243] a New York federal court examined whether the doctrine of issue preclusion barred relitigation of facts resolved in a French litigation. Relying on *Hilton*, the court first addressed whether lack of reciprocity should bar recognition of the French judgment.[244] The court found reciprocity to have no application because there was no evidence that France did not accord recognition to foreign country judgments and because the reciprocity requirement was no longer recognized by the Second Circuit or New York state courts.

Having recognized the French judgment, the court then turned to the nettlesome question of what law governed the preclusive effect of the French judgment. Noting a conflict of authority on the subject, the court analyzed the question based on the policy underlying the recognition of foreign judgments—international comity—as well as those policies that underpin the doctrine of issue preclusion, including the desire for finality of litigation, the promotion of judicial

237. *Id.* at 1408.
238. *Wilson*, 127 F.3d at 815.
239. 109 F.3d 165 (3d Cir. 1997).
240. 28 U.S.C. § 2255 (1994).
241. *Saroop*, 109 F.3d at 169.
242. *Id.* at 170.
243. 966 F. Supp. 1317 (S.D.N.Y. 1997).
244. In *Hilton*, the Supreme Court held that a foreign country judgment will be denied recognition for want of reciprocity. *See Hilton*, 159 U.S. at 210. The requirement of reciprocity has since been severely criticized and rejected by at least nineteen U.S. states that have adopted the Uniform Foreign Money Judgment Recognition Act, 13 Uniform Laws Ann. 261 (1986). *See* Van den Biggelaar v. Wagner, 978 F. Supp. 848, 860-61 (N.D. Ind. 1997).

economy and, in certain circumstances, federalism principles of due recognition of state court judgments. Finding the latter principles inapplicable to foreign judgments, the court concluded "that a federal court should normally apply either federal or state law, depending on the nature of the claim, to determine the preclusive effect of a foreign country judgment."[245] Applying the federal law of issue preclusion,[246] the court concluded that the French judgment should be accorded recognition to preclude the plaintiffs from relitigating the issues resolved in the French litigation.

IX. Act of State

PRAKASH RAJAMANI*

"[T]he courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[247] The act of state doctrine contains elements of both choice of law and separation of powers analysis. The doctrine is invoked with far greater frequency than it is actually applied. When the courts do apply the doctrine, they are essentially deferring to the executive branch of the government in the conduct of foreign affairs.

Under the act of state doctrine, a state declines to enforce its own public policy rules in the face of a foreign act of state. This past year has continued the trend toward limited application of the doctrine established by the United States Supreme Court in *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp. International*[248] in which the Court stated that "[a]ct of state issues only arise when a court must decide—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine."[249] This year's cases illustrate the point.

In *National Coalition Government of the Union of Burma v. Unocal, Inc.*,[250] a California federal court held that the act of state doctrine did not preclude review of claims against the Burmese government and Unocal based on allegations of torture and forced labor. The doctrine was applied, however, to claims for expropriation of property.[251] Plaintiffs, the Federation of Trade Unions of Burma (FTUB), alleged that in connection with the construction of a gas pipeline, it had been injured as a result of violations of international human rights allegedly committed by the controlling government in Burma, the State Law and Order Restoration Council (SLORC).[252] According to plaintiffs, SLORC had engaged in numerous human rights abuses, including torture, forced labor and confiscation of property.[253] Defendant Unocal argued that by adjudicat-

245. *See Alfadda*, 966 F. Supp. at 1329.

246. In addition to the factors traditionally used to determine issue preclusion, *see id.* at 1330 (citing General Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A., 56 F.3d 359, 368 (2d Cir. 1995)), the court also recognized additional factors in the international context that might be relevant. These included (i) avoidance of duplicative effort; (ii) avoidance of harassing or evasive tactics by the previously unsuccessful party; (iii) avoidance of the availability of local enforcement at the decisive element in the choice of forum; (iv) fostering stability and unity in an international order; and (v) a finding that the rendering jurisdiction is the more appropriate forum than the recognizing jurisdiction.

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247. Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

248. 493 U.S. 400 (1990).

249. *Id.* at 406.

250. 176 F.R.D. 329 (C.D. Cal. 1997).

251. *See id.* at 357.

252. *See id.* at 334.

253. *See id.*

ing plaintiffs' claims, the court necessarily would "pass judgment on the validity of SLORC's official acts, thereby interfering with the foreign policy efforts of the United States Congress and the President."[254]

Applying the *Kirkpatrick* standard, the court examined whether SLORC was a foreign sovereign, whether the case turned on SLORC's official actions and whether the *Sabbatino* factors supported or undermined application of the act of state doctrine to bar plaintiffs' claims.[255] The court determined that the act of state doctrine precluded a review of plaintiffs' claims for expropriation of property, (*viz. Sabbatino*), but did not preclude a review of plaintiffs' claims based on allegations of torture and forced labor for which there was no "public interest" justification.[256]

In *Allstate Insurance Co. v. Administratia Asigurarilor de Stat,*[257] a New York federal court denied defendant's motion for summary judgment, because defendant had not met its burden to establish the applicability of the act of state doctrine in the case.[258] The case arose from a complex series of international insurance, reinsurance, and retrocession transactions. Allstate, the plaintiff and insurer, sued thirty-three reinsurance companies for breach of contract, claiming that defendants had breached their retrocession contracts. One of the retrocessionnaires, Administratia Asigurarilor de Stat (ADAS) was an insurance company organized under the laws of Romania.[259] ADAS asserted that pursuant to a Romanian government executive order, ADAS had been dissolved and the U.S. no longer could sue or be sued.[260] ADAS invoked a Romanian government executive order that allegedly provided that ADAS had "ceased to exist as a juridical entity on the day of its dissolution."[261] In support of its motion, ADAS proffered only the claim and a conclusory affidavit of an ADAS employee.[262] The court was not persuaded by this evidence and stated that it was an inadequate foundation upon which to base a grant of summary judgment.[263] Thus, since neither the affidavit nor any of defendant's submissions addressed the crucial issues of Romanian or American foreign relations interests in the proceeding, the court denied ADAS's motion for summary judgment.[264]

254. *See id.* at 349.

255. *See id.* at 351. In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964), the United States Supreme Court articulated the following factors to determine whether the policies underlying the act of state doctrine militated against its application: (1) international consensus; (2) sensitivity of national nerves; and (3) whether the government at issue still exists.

256. *See Unocal,* 176 F.R.D. at 357.

257. 962 F. Supp. 420 (S.D.N.Y. 1997).

258. *See id.* at 428.

259. *See id.* at 422.

260. *See id.* at 426.

261. *Id.*

262. *See id.* at 427.

263. *See id.* at 428.

264. *See id.*