

International Litigation

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I. Foreign Sovereign Immunities Act*

A. FSIA CASES BEFORE THE SUPREME COURT

Under the Foreign Sovereign Immunities Act (the FSIA), a foreign state is presumptively immune from suit.¹ In *Republic of Philippines v. Pimentel*, the Supreme Court of the United States addressed the interaction between FSIA immunity and Federal Rule of Civil Procedure 19, which governs the joinder of required parties in any federal action.²

The case involved conflicting claims to assets that the former President of the Philippines, Ferdinand Marcos, had improperly transferred from the government treasury to a closely held Panamanian corporation. The funds were subsequently invested in a brokerage account with Merrill Lynch in New York. Facing claims from various Marcos credi-

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1. See Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1604, 1609 (1976). The presumption can only be overcome if one of the exceptions enumerated in the FSIA applies. See *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

2. See *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180 (2008).

tors, Merrill Lynch filed an interpleader action in the U.S. District Court for the District of Hawaii, where other related litigation was pending. The interpleaded defendants included the Republic of the Philippines, a governmental commission (Commission) set up by the Republic to recover funds wrongfully taken by Marcos, and a class of human rights victims to whom the district court had awarded a two billion dollar judgment against Marcos and his estate. (The Commission had brought separate litigation in the Philippines to determine whether any property Marcos had obtained through the misuse of his office was forfeited to the Republic under Philippine law.)

As a defense to the interpleader action, the Republic and the Commission asserted sovereign immunity from suit under the FSIA. They further moved to dismiss the entire action pursuant to Rule 19, arguing that the case could not proceed in their absence because it would unduly prejudice their legal interests in the property at issue.³ In the course of two interlocutory appeals, the Ninth Circuit held that although the Republic and the Commission were necessary parties under Rule 19(a) and entitled to be dismissed as parties based on sovereign immunity, the action could proceed without them because their claim to the disputed assets was unlikely to succeed on the merits.⁴

The Supreme Court reversed, holding that it violated principles of sovereign immunity to address the likelihood of success on the merits of the foreign sovereign entities' claims in their absence.⁵ In an opinion by Justice Kennedy, the Court stated that, where sovereign immunity is properly asserted "and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is potential for injury to the interests of the absent sovereign."⁶ The Court cited deference to the unique comity and dignity interests of the Republic and the Commission "in determining if, and how, the assets should be used to compensate those persons who suffered grievous injury under Marcos" and the desirability of avoiding the "specific affront that could result to the Republic and the Commission if the property they claim is seized by the decree of a foreign court."⁷ With respect to the related litigation pending in the Philippines, the Court noted that "[t]here is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so."⁸ These comity principles precluded awarding the assets at issue to

3. Under Rule 19, a person must be joined as a required party to an action if, *inter alia*, "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." FED. R. CIV. P. 19(a)(1)(B). If such a required party *cannot* be joined, the court "must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." FED. R. CIV. P. 19(b).

4. See *In re Republic of Philippines*, 309 F.3d 1143, 1149-52 (9th Cir. 2002); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp.*, 464 F.3d 885 (9th Cir. 2006).

5. See *Pimentel*, 128 S. Ct. at 2189 ("The court's consideration of the merits was itself an infringement on foreign sovereign immunity . . .").

6. *Id.* at 2191. The Court of Appeals had held that the Republic and the Commission's claims were likely to fail because a misappropriation claim under New York law would be untimely under the six-year statute of limitations. The Supreme Court found fault with that analysis because the Republic and the Commission had other possible causes of action that would not be time-barred, including potential claims under Philippine law. See *id.* The Court therefore concluded that the Republic's and the Commission's claims were non-frivolous.

7. *Id.* at 2190.

8. *Id.*

another party where the sovereign entities had an interest in the property and had properly asserted sovereign immunity.

B. AGENCIES AND INSTRUMENTALITIES OF A FOREIGN STATE

1. “An Organ” of a Foreign State or Its Subdivision

The FSIA defines a “foreign state” to include an “agency or instrumentality” thereof, i.e. “a separate legal person” that is either “an organ of” or majority owned by the state itself or one of its political subdivisions.⁹ In *In re Terrorist Attacks on September 11, 2001*, the Second Circuit held that the Saudi High Commission for Relief to Bosnia and Herzegovina (SHC) was entitled to immunity as an “organ of a foreign state” under Section 1603(b)(2) of the FSIA.¹⁰ Applying the five-factor *Filler* test, the Court of Appeals reasoned that “[t]he SHC was created for a national purpose (channeling humanitarian aid to Bosnian Muslims); the Kingdom actively supervises it; many SHC workers are Kingdom employees who remain on the Kingdom’s payroll; the SHC holds the ‘sole authority’ to collect and distribute charity to Bosnia; and it can be sued in administrative court in the Kingdom.”¹¹

In *California Department of Water Resources v. Powerex Corp.*, the Ninth Circuit likewise found that Powerex, a Canadian power corporation, was an organ of British Columbia, applying the principle that “an entity is an organ of a foreign state (or political subdivision thereof) if it ‘engages in a public activity on behalf of the foreign government.’”¹² Powerex’s parent company, BC Hydro, created by British Columbia to promote hydroelectric development, had been previously determined to be an organ of the province, because it performed “sovereign functions, not commercial ones.”¹³ In turn, Powerex, a wholly owned subsidiary of BC Hydro, was created to market the export of power outside the province, which the Ninth Circuit found to be a similarly sovereign purpose.¹⁴ According to the Court of Appeals, Powerex’s organ status was in no way rebutted by the fact that British Columbia did not supervise Powerex directly, but rather through BC Hydro.¹⁵

9. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1603(a), (b) (1976).

10. See *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 85-86 (2d Cir. 2008).

11. *Id.* (quoting the test from *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004) (“(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.”)).

12. *Department of Water Resources v. Powerex Corp.*, 533 F.3d 1087, 1098 (9th Cir. 2008) (quoting *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001)). Cf. *Filler*, 378 F.3d at 220 (Korean Deposit Insurance Corporation was an organ of a foreign state because it served a “public function”).

13. *Powerex*, 533 F.3d at 1099 (quoting *California v. NRG Energy Inc.*, 391 F.3d 1011, 1024 (9th Cir. 2004)).

14. As other indicia of the corporation’s sovereign nature, the court noted its sole beneficial ownership by the provincial government, its immunity from federal and provincial income tax, and its role in implementing international agreements at the government’s direction. See *id.* at 1101-02. That Powerex’s employees were not civil servants did not change the analysis. See *id.* at 1102.

15. See *id.* at 1101 (“There is no reason to think Congress cared for the *manner* in which foreign states interacted with their organs—i.e., whether the foreign state supervises the organ directly, or through an incorporated agent.”). In contrast, the distinction between direct and indirect subsidiaries of a foreign state becomes critical when the entity’s claim to being categorized as an “instrumentality” under § 1603(b)(2) of the

2. *Individuals Acting in Official Government Capacities*

This year, the Second Circuit considered whether an individual official of a foreign state acting in his or her official capacity may qualify as an "agency or instrumentality" of the state and accordingly be protected by FSIA immunity.¹⁶ In answering that question in the affirmative, the Second Circuit joined five other circuits.¹⁷ The Court of Appeals held that the four defendant Saudi princes must have acted in their official capacities in directing and monitoring the channeling of funds to Islamic charities abroad; alternative claims against them in their personal capacities failed for lack of personal jurisdiction.¹⁸

The D.C. Circuit reaffirmed the applicability of FSIA immunity to individual government officials in *Belhas v. Ya'alon*.¹⁹ Absent any allegation in the complaint that the challenged actions of the defendant Israeli military officer were other than in his official capacity, the case was dismissed for lack of jurisdiction under the FSIA.²⁰ The court found no merit to plaintiff's argument that the FSIA should not apply to a foreign official who had left office between the time of the commission of the challenged acts and the commencement of the litigation.²¹

The D.C. District Court applied the same principles in *Allen v. Russian Federation*, where Russian government officials were sued for their alleged "misstatements directed at the United States and Global securities markets" concerning Yukos, a Russian oil company.²² Based on uncontested facts, the court found that the individuals made the statements in their official capacities and were therefore entitled to FSIA immunity.²³

FSIA is based on the majority ownership by the foreign state rather than on its alleged "organ" status. *See Allen v. Russian Federation*, 522 F. Supp. 2d 167, 185 (D.D.C. 2007) (declining to find that "an indirect subsidiary of the Russian Federation" is its "instrumentality" under the FSIA) (citing *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003)).

16. *See In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 80-81.

17. *See id.* at 81 (citing *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir.1999); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir.1997); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101-03 (9th Cir. 1990)). Only the Seventh Circuit has reached the opposite conclusion, holding that "[i]f Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms." *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005). As the Second Circuit noted, Congress does make specific reference to "an official, employee or agent" of the foreign state in the newly enacted § 1605A of the FSIA. *In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 84 (quoting 28 U.S.C. § 1605A(a)(1)).

18. *See In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 93.

19. *See Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008).

20. *See id.* at 1284. The court also confirmed that "the FSIA contains no unenumerated exception for violations of *jus cogens* norms." *Id.* at 1287 (citing authorities).

21. *See id.* at 1285-86 (distinguishing the Supreme Court's holding in *Dole*, 538 U.S. at 478, that a corporation's instrumentality status is defined at the time the suit is filed, on the ground that "the relationship between the state and its officials" is governed by different rules). *Cf. Olympia Express, Inc. v. Linee Aeree Italiane, S.P.A.*, 509 F.3d 347, 349 (7th Cir. 2007) (the Italian government's privatization of the defendant airline after the suit was filed did not change its status under the FSIA or the jurisdictional basis of the action) (citing *Dole*, 538 U.S. at 478).

22. *Allen*, 522 F. Supp. 2d at 190 (citing *Jungquist*, 115 F.3d at 1027-28).

23. *See id.* at 190-91.

C. EXCEPTIONS TO JURISDICTIONAL IMMUNITY

1. *The Waiver Exception*

The waiver exception to jurisdictional immunity under Section 1605(a)(1) of the FSIA provides that a foreign state is not immune from suit where it has “waived its immunity either explicitly or by implication.” In *In re Terrorist Attacks on September 11, 2001*, the Second Circuit reiterated the principle that the implied waiver provision should be construed narrowly.²⁴ That the SHC, an agency or instrumentality of Saudi Arabia created to manage humanitarian aid to Bosnian Muslims, had identified itself as “nongovernmental” on a registration document filed with Bosnian authorities was deemed insufficient to constitute an implied waiver under section 1605(a)(1) of the FSIA: “Registering as a humanitarian organization in Bosnia does not reflect a conscious decision by the SHC to waive its sovereign immunity in American courts.”²⁵

In another case declining to find an implied waiver, *Good v. Fuji Fire & Marine Ins. Co.*, the Tenth Circuit held that the Japanese government did not waive immunity from suit in the United States on behalf of its own ministries when it served them with process in Tokyo pursuant to its international obligations as a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.²⁶

In *Heroth v. Kingdom of Saudi Arabia*, the D.C. District Court concluded that, “[e]ven if Saudi Arabia waived its sovereign immunity” in an inter-governmental agreement with the United States, that waiver could not be invoked by employees of a U.S. corporate contractor performing work in Saudi Arabia, because “a contractual waiver of immunity does not apply to third parties who are not privy to the contract,” and there was no language in the contract showing that the parties “intended to directly benefit the Plaintiffs as individuals.”²⁷

2. *The Commercial Activity Exception*

In *In re Terrorist Attacks on September 11, 2001*, the Second Circuit held that donating to charities—even with the intent that the funds be used for commercial purchases—was not commercial activity under section 1605(a)(2) of the FSIA.²⁸ Applying the principle that the character of an activity should be determined by its nature and not its purpose, the Court of Appeals concluded that giving away money was not the type of action “by which a private party engages in ‘trade and traffic or commerce,’” and thus was not in the nature of commercial activity.²⁹

In *Agrocomplex AD v. Republic of Iraq*, the D.C. District Court held that, in a breach of contract context, commercial activity must “directly affect the plaintiff” in order for a claim arising from that activity to satisfy the “based upon” requirement of section

24. See *In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 86.

25. *Id.*

26. See *Good v. Fuji Fire & Marine Ins. Co.*, 271 Fed. Appx 756, 758 (10th Cir. 2008).

27. *Heroth v. Kingdom of Saudi Arabia*, 565 F. Supp. 2d 59, 65 (D.D.C. 2008).

28. See *In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 92.

29. *Id.* (quoting *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992)).

1605(a)(2).³⁰ Likewise, where goods and services were not contractually mandated or expected to be supplied from the United States, but only allegedly chosen by plaintiff after the contract was executed, there was no sufficient basis to show a “direct effect” in the United States under section 1605(a)(2).³¹

3. *The Expropriation Exception*

In *Agudas Chasidei Chabad of United States v. Russian Federation*, the D.C. Circuit held that the plaintiffs’ claims to property rights in a Jewish religious archive allegedly expropriated by Russia were non-frivolous and could provide a basis for jurisdiction under section 1605(a)(3) of the FSIA.³² By contrast, in *Allen*, the D.C. District Court found that section 1605(a)(3) could not possibly apply to claims by investors of a bankrupt Russian oil company: as shareholders, the plaintiffs failed to demonstrate any property right in the allegedly expropriated corporate assets.³³

4. *The Terrorism Exception*

This year, Congress amended the FSIA by enacting a new section 1605A, which replaced the former section 1605(a)(7) and significantly transformed the scope and application of the terrorism exception to foreign sovereign immunity.³⁴ Included as part of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), the most notable changes brought about by the legislation are as follows:

- Subsection 1605A(c) creates a new private right of action against a foreign state for personal injury or death caused by acts of terrorism.³⁵

30. *Agrocomplect AD v. Republic of Iraq*, 524 F. Supp. 2d 16, 28 (D.D.C. 2007), *aff’d*, No. 07-718, 2008 WL 5455695 (D.C. Cir. Nov. 14, 2008). The authors’ firm represented the Republic of Iraq in this action.

31. *Id.* at 32. *See also Allen*, 522 F. Supp. 2d at 189-90 (Russia’s activities “within its own territory that resulted in reduced funds flowing to the [equity] investors in a Russian company” could not be characterized as a “direct effect” in the United States where there was no obligation to direct funds to individuals in the United States). Multiple other district courts also applied the concept of “commercial activity” under § 1605(a)(2) in the recent year. *See, e.g., Hilaturas Miel, S.L. v. Republic of Iraq*, 573 F. Supp. 2d 781 (S.D.N.Y. 2008) (sale of yarn was commercial activity, even if under the auspices of the U.N. Oil for Food Program); *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia*, No. SA-04-CA-1008-WRF, 2008 WL 2946059, at *11 (W.D. Tex. July 25, 2008) (contracts by Saudi Arabia for the upgrade and maintenance of its Air Force were commercial activity because, regardless of their purpose, the contracts for goods and services exemplified “conduct typically engaged in by private parties”); *Amorrortu v. Republic of Peru*, 570 F. Supp. 2d 916, 923 (S.D. Tex. 2008) (“confiscation and expropriation are not commercial actions, for they are not actions of a nature that a private person would, or could, engage in for profit”); *Allen*, 522 F. Supp. 2d at 188 (actions by a foreign state in connection with an alleged expropriation were not commercial activity, even if a subsequent disposition of the assets benefited some commercial entities at the expense of others).

32. *See Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934, 942-49 (D.C. Cir. 2008).

33. *See Allen*, 522 F. Supp. 2d at 185-87.

34. *See National Defense Authorization Act for Fiscal Year 2008 (NDAA)*, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-344 (2008); 28 U.S.C.A. § 1605A.

35. The former § 1605(a)(7) was strictly jurisdictional in nature and required plaintiffs to look elsewhere for a cause of action, whereas the Flatow Amendment, Pub. L. 104-208, 110 Stat. 3009-172 (2000) (published as a note to 28 U.S.C.A. § 1605), provided for a cause of action only against agents, officials or employees of a foreign state but not against the foreign state itself. *See Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53, 65 (D.D.C. Sept. 26, 2008) (citing *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1027 (D.C. Cir. 2004)). In *Gates*, the D.C. District Court also held that, as a result of the new federal cause of action created

- The same subsection explicitly provides that money damages in such an action may include economic damages, solatium, pain and suffering, and—for the first time under the FSIA—punitive damages.³⁶
- Where an action under section 1605A(c) has been brought, section 1605A(d) creates a further right of action for reasonably foreseeable property loss, third party liability, and loss claims under life and property insurance policies arising from the same acts.³⁷
- Subsection 1605A(g) provides for an extremely broad and almost automatic prejudgment attachment of any real or tangible personal property located in the district, titled in the name of any defendant or “any entity controlled by any defendant,” and amenable to attachment under section 1610.³⁸
- The new section expands the jurisdictional scope of the terrorism exception by including cases where the claimant or the victim was a member of the armed forces, or was a U.S. government employee or individual contractor acting within the scope of employment.³⁹
- Appeals in actions brought under section § 1605A are limited to those from orders “conclusively ending the litigation” or those certified for appeal pursuant to 28 U.S.C. § 1292(b).⁴⁰
- Where a foreign state becomes undesignated as a state sponsor of terrorism, sovereign immunity is reinstated six months thereafter, i.e. any new claims under the terrorism exception must be filed within that period to be jurisdictionally viable.⁴¹

Implementation of the new section 1605A has given rise to some transitional issues. The D.C. Circuit, for example, confirmed that following the enactment of section 1605A courts retain jurisdiction over cases previously filed under section 1605(a)(7).⁴² On the other hand, the NDAA also provides that any action commenced under the former section 1605(a)(7), which had been adversely affected by the failure of that provision to create a cause of action against the foreign state would, upon motion by plaintiffs within sixty days of the enactment of section 1605A, be treated as if it had been brought under the new

by § 1605A(c), plaintiffs can no longer rely on substantive state law for additional causes of action against foreign states for engaging in state-sponsored terrorism.

36. 28 U.S.C.A. § 1605A(c); cf. 28 U.S.C.A. § 1606, generally barring imposition of punitive damages against a foreign state. The D.C. District Court has already applied § 1605A(c) in entering a default judgment against Syria for almost \$113 million, plus \$300 million in punitive damages, for providing material support to a terrorist group that captured and beheaded two civilian U.S. contractors in Iraq. *Gates*, 580 F. Supp. 2d, at 69-75.

37. *La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 533 F.3d 837, 844 (D.C. Cir. 2008), held that an assignee or subrogee insurance company could bring claims under the former § 1605(a)(7) to the same extent as its policy holder victims. The new § 1605A(d) appears to codify this right.

38. 28 U.S.C.A. § 1605A(g).

39. See 28 U.S.C.A. §§ 1605A(a)(2)(A)(ii)(II)-(III). Section 1605A continues to provide subject matter jurisdiction over cases where the claimant or victim is a U.S. national. See § 1605A(a)(2)(A)(ii)(I); 28 U.S.C. § 1605(a)(7)(B)(2) (repealed 2007).

40. 28 U.S.C.A. § 1605A(f). This provision appears to preclude interlocutory appeals under the collateral order doctrine and under 28 U.S.C.A. § 1292(a), including those involving injunctions and receiverships—which could be especially critical in conjunction with the draconian prejudgment attachments authorized by § 1605A(g).

41. 28 U.S.C.A. § 1605A(a)(2)(A)(i)(I).

42. See *Simon v. Republic of Iraq*, 529 F.3d 1187, 1192-94 (D.C. Cir. 2008) (discussing NDAA §§ 1083(c)-(d)).

provision, as long as the case was still “before the courts in any form,” including on appeal or on motion for relief from a final judgment under Fed. R. Civ. P. 60(b).⁴³ Actions related to an earlier action properly filed under section 1605(a)(7) may also be brought under section 1605A if filed within sixty days of the later of the enactment of section 1605A or the entry of judgment in the original action.⁴⁴

Only a few cases under the new section 1605A have so far reached appellate courts. Most significantly, in *In re Terrorist Attacks on September 11, 2001*, the Second Circuit considered whether an action against the Kingdom and several agents of Saudi Arabia, which had not been designated a state sponsor of terrorism so as to permit suit under section 1605A, could instead be brought under the non-commercial tort exception to immunity of section 1605(a)(5).⁴⁵ The Court of Appeals answered in the negative, concluding that it would be impermissible to allow plaintiffs to “shoehorn a claim properly brought under one exception into another” in order to “evade and frustrate” the express safeguards that Congress put in place to limit claims against foreign states arising from terrorist acts only to the designated state sponsors of terrorism.⁴⁶

In two cases this year, the D.C. Circuit addressed facial challenges to the terrorism exception.⁴⁷ In *Owens v. Republic of Sudan*, the Court of Appeals held that the requirement for a determination by the U.S. Secretary of State whether a state was a designated state sponsor of terrorism as a predicate for jurisdiction under the terrorism exception was not an unconstitutional delegation by Congress of its power to define the jurisdiction of the lower federal courts.⁴⁸ In *Wyatt v. Syrian Arab Republic*, the Court of Appeals held that the possibility for some states to be designated as state sponsors of terrorism, and thus to be subjected to greater liability in U.S. courts, did not expressly conflict with the principle of sovereign equality enunciated in Article 2(1) of the United Nations Charter; accordingly, application of the terrorism exception was not precluded by the clause of section 1604 of the FSIA that makes the statute subject to “existing international agreements.”⁴⁹

43. Nat'l Def. Authorization Act for Fiscal Year 2008 § 1083(c)(2)(C), 28 U.S.C.A. § 1605A. Notably, the D.C. District Court has held that, once a final judgment has been entered, the case is no longer “before the courts in any form,” even if plaintiffs are still seeking to execute on the judgment. See, e.g., *Holland v. Islamic Republic of Iran*, 545 F. Supp. 2d 120, 121-22 (D.D.C. 2008).

44. See Nat'l Def. Authorization Act for Fiscal Year 2008 § 1083(c)(3), 28 U.S.C.A. § 1605A.

45. See *In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 71 (2d Cir. 2008).

46. *Id.* at 89. Notably, the D.C. District Court held to the contrary in *Doe v. Bin Laden*, 580 F. Supp. 2d 93 (D.D.C. 2008), concluding that claims against Afghanistan for terrorism-related acts could be brought under the non-commercial tort exception. The court reasoned that barring U.S. citizens from bringing any such tort claims against foreign states, other than in the small number of cases involving designated state sponsors of terrorism, would be a “peculiar result” that should counsel against such a construction of the FSIA. *Id.* at 97.

47. While both cases specifically addressed the former § 1605(a)(7), the substance of the challenge and the Court of Appeals' reasoning should be equally applicable to § 1605A.

48. See *Owens v. Republic of Sudan*, 531 F.3d 884, 892 (D.C. Cir. 2008).

49. *Wyatt v. Syrian Arab Republic*, 266 Fed. Appx. 1, 12 (D.C. Cir. 2008) (quoting 28 U.S.C. § 1604).

II. Service of Process Abroad*

A. INTERNATIONAL SERVICE VIA REGISTERED MAIL

The service of process upon an individual in a foreign country in civil actions brought in federal courts is governed by Rule 4(f) of the Federal Rules of Civil Procedure. In *Volkswagenwerk Akteingesellschaft v. Schlunk*, the Supreme Court held that when service of process is to be made in a foreign country that is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (Hague Convention), Rule 4(f) requires that the Hague Convention's provisions are the exclusive means to effectuate process.⁵⁰ In applying the provisions of the Hague Convention through Rule 4(f), one issue of recurrent debate is whether the Convention allows for the service of process via international registered mail.

Article 10(a) of the Hague Convention states that as long as the foreign state "does not object, the present Convention shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to persons abroad." U.S. courts have long struggled with whether this language, particularly the (undefined) terms "send" and "judicial documents," allows for service of process via international registered mail. In 2008, the issue was once again the subject of litigation.

In *Zelasko v. Comerio*, the defendant, an Italian business, filed a motion to dismiss on the grounds that service by mail of untranslated documents was improper.⁵¹ The district court rejected the motion, noting that the Seventh Circuit has held that service by certified mail is permitted by Article 10(a) of the Hague Convention and that the plain language of Article 10(a) permits service by mail.⁵² To address the issue of whether or not the receiving State, Italy, a signatory to the Hague Convention, objects to the service of process by mail, the court relied upon the State Department's website, which has a webpage dedicated to Hague Convention.⁵³

With respect to whether the Hague Convention required that the documents be translated into Italian, the district court noted that Article 5 of the Convention states that the foreign country *may* require documents to be translated if the documents are served through the central authority.⁵⁴ Thus, the court concluded, the Hague Convention itself does not mandate translation as a general matter. Moreover, because in this case the plaintiff did not use the central authority to begin with, there could be no translation requirement. Notably, the court did not delve into the issue of whether Italy's central authority requires translation for documents served through its offices. Instead, the court merely observed that the defendant did not argue that it did not understand the documents or that it had not otherwise received adequate notice.⁵⁵

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50. See *Volkswagenwerk Akteingesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988).

51. See *Zelasko v. Comerio*, No. 08-366-MJR, 2008 U.S. Dist. LEXIS 53316, *1 (S.D. Ill. July 14, 2008).

52. See *id.* at *4-5.

53. See *id.* at *4. The State Department website address referenced by the court is http://travel.state.gov/law/info/judicial/judicial_686.html.

54. See *id.* at *5.

55. See *id.*

In *Wong v. Partygaming Ltd.*, the Northern District for the District of Ohio similarly held that a complaint sent via registered international mail to Gibraltar was proper.⁵⁶ In analyzing the issue, the court first noted that the United Kingdom was a signatory to the Hague Convention and thus by extension so was Gibraltar and, second, that while the United Kingdom has objected to Articles 10(b) and 10(c), it has not objected to Article 10(a).⁵⁷ Although the defendant argued that no court in the Sixth Circuit had found that an initial complaint mailed to Gibraltar complied with the Hague Convention, the court was not persuaded that to do so was improper, especially considering that the defendants were not prejudiced.⁵⁸ The court tacitly accepted that the terms “send” and “judicial documents” in Article 10(a) encompassed the mailing of an initial complaint.

In *United States Aviation Underwriters, Inc. v. Nabtesco Corp.*, the plaintiff requested the court’s authorization to serve process on a Japanese defendant by international certified mail, fax, e-mail, or Federal Express.⁵⁹ Citing a 2004 Ninth Circuit case and “persuasive authority cited in plaintiff’s motion,” the court authorized the use of international certified mail.⁶⁰ With respect to the alternative methods of service requested by the plaintiff, the court noted that while the authorization of alternate means was within the court’s discretion under Rule 4, the plaintiff’s stated reasons for the request—“it ‘will be much faster, thus moving this case forward in an expeditious and cost-effective manner’”—were insufficient, particularly as the plaintiff had offered no evidence to suggest that service by mail would be ineffective.⁶¹

Finally, in *LG Philips LCD Co., Ltd. v. Chi Mei Optoelectronics Corp.* the District Court for the District of Delaware was presented with the question of whether service of a summons and complaint by international registered mail on a Taiwanese defendant complied with Rule 4(f)(2).⁶² Because Taiwan is not a signatory to the Hague Convention, the court was obligated to look to Rule 4 for guidance. Rule 4(f)(2) allows for overseas service in any manner prescribed by the law of the foreign country. The court noted that according to the State Department’s website, Taiwan allows for service or proves to be effected by international mail/return receipt.⁶³ Accordingly, the court concluded that the plaintiff’s service of process was valid.⁶⁴

C. OTHER ISSUES ARISING UNDER THE HAGUE CONVENTION

The issue of untranslated documents was before the court in *Albo v. Suzuki Motor Corp.*⁶⁵ There, the plaintiff, the widow of a motorcycle crash victim, attempted to serve

56. See *Wong v. Partygaming Ltd.*, No. 06-CV-2376, 2008 U.S. Dist. LEXIS 37039, at *7 (N.D. Ohio May 6, 2008).

57. See *id.* at *6.

58. See *id.* at *10-*11.

59. See *U.S. Aviation Underwriters, Inc. v. Nabtesco Corp.*, No. C07-1221RSL, 2007 U.S. Dist. LEXIS 79278, at *1 (W.D. Wash. Oct. 10, 2007).

60. *Id.* at *3 (citing *Brockmeyer v. May*, 383 F.3d 798, 803 (9th Cir. 2004)).

61. See *id.* at *5.

62. See *LG Philips LCD Co., Ltd. v. Chi Mei Optoelectronics, Corp.*, 551 F. Supp. 2d 333, 341 (D. Del. 2008).

63. See *id.* at 342.

64. See *id.*

65. *Albo v. Suzuki Motor Corp.* No. 08-cv-0139, 2008 U.S. Dist. LEXIS 62913, at *5-8 (W.D. Tex. July 2, 2008).

process on the Japanese defendant by registered mail directly to Japan. The defendant, a motorcycle company, alleged a failure to comply with the Hague Convention because the documents were in English, not translated into Japanese, and not sent through the Japanese central authority.

Although the plaintiff admitted improper service (and, remarkably, had done so in past, unrelated cases), the court still granted the plaintiff leave of sixteen weeks to translate the complaint and effect service.⁶⁶ The Court noted that the defendant did not state any facts showing that it was prejudiced by the improper service, and that the favored remedy for non-compliance with the Hague Convention is an appropriate time to serve properly.⁶⁷ This focus on actual notice and whether or not the defendant is prejudiced is similar to the approach taken by the court in *Zelasko*.

Interesting issues concerning the actions of the foreign country's central authority arose in a number of cases. In *Unite National Retirement Fund v. Ariela, Inc.*, the district court addressed a situation in which the central authority of Mexico verified service of process yet the defendant argued that service was insufficient because the service did not comply with Mexican law and because the certificate returned by the central authority was not the model form.⁶⁸ The defendant asserted that a court clerk in Mexico charged with serving process merely affixed the documents to a wire door after being unable to get the defendant to exit his house.

In addressing the defendant's arguments, the court noted that it is prima facie evidence that service was made in compliance with the Hague Convention when a central authority has certified service.⁶⁹ Accordingly, the court would not delve into the issue of what Mexican law requires of the Mexican central authority. Further, the court noted that the form of the certification from the central authority was not critical. What was relevant to the court was the fact that the defendant received actual notice.⁷⁰ The defendant did not contend that he did not have actual notice, but instead argued a technicality that was non-prejudicial. In relying on actual notice, the court observed that "[s]ervice of process is not intended to be a game of cat and mouse."⁷¹

Further highlighting that actual notice is the cornerstone of any service of process issue, is *Coombs v. Iorio*.⁷² In *Coombs*, the issue was whether the lack of an original certificate of service as required by the Hague Convention from the Kuwaiti Ministry of Justice was fatal to the plaintiff's case. Finding that the record reflected that the defendant's were actually served, and thus had actual notice, and that the plaintiff had made a good faith effort to obtain the certificate, the court concluded that service of process was properly effected.⁷³ As in the *Albo*, *Zelasko*, and *Ariela* cases discussed above, the primary focus was on actual notice.

66. *See id.* at *10.

67. *See id.* at *9.

68. *See* *Unite Nat'l Retirement Fund v. Ariela, Inc.*, No. 06-cv-0055, 2008 U.S. Dist. LEXIS 66717 (S.D.N.Y. June 24, 2008).

69. *See id.* at *15.

70. *See id.* at *18.

71. *Id.* at 20.

72. *Coombs v. Iono* No. 06-060-SPS, 2008 U.S. Dist. LEXIS 66251 (E.D. Olka. Aug. 28, 2008).

73. *See id.* at *7.

In *U.S. Commodity Futures Trading Commission v. Lake Shore Asset Management Ltd.*, the plaintiff, Commodity Futures Trading Commission (CFTC), served various entities of Lake Shore Asset Management located in England, the British Virgin Islands, the Turks & Caicos Islands, and the Isle of Man.⁷⁴ CFTC served the defendants by using persons authorized under the law of each jurisdiction to serve judicial documents.

In determining that CFTC's service of process was valid, the court employed a two-step analysis. First, noting that the United Kingdom is a signatory to the Hague Convention, the court concluded that the Hague Convention extends throughout the United Kingdom, including the British Virgin Islands, the Isle of Mann, and the Turks & Caicos Islands.⁷⁵ Next, the court looked to Articles 10(c) and 19 of the Hague Convention.⁷⁶ Article 10(c) allows direct service through judicial officers or competent persons if the receiving country does not object. Article 19 states that any method of service is effective if allowed by the contracting state. Relying on an affidavit from a solicitor of the Supreme Court of England and Wales summarizing the laws governing service of process in each jurisdiction that supported service of process through authorized persons, the court held that CFTC's service of process was proper under Articles 10(c) and 19.⁷⁷

III. Personal Jurisdiction*

Federal personal jurisdiction jurisprudence experienced little to no change in 2008, with few published cases even addressing the topic with any substance. The most interesting developments were in the area of so-called libel tourism and its impact on the enforcement of foreign judgments; the remaining cases are illustrative of the current state of the law as to due process minimum contacts and the capacity to waive jurisdiction in forum selection clauses.

A. ENFORCEMENT OF FOREIGN JUDGMENTS

In *Ehrenfeld v. Mahfouz*, the Second Circuit affirmed the dismissal for lack of personal jurisdiction of an American author's attempt to enjoin enforcement of a foreign judgment.⁷⁸ In its decision, the Second Circuit relied on the New York Court of Appeals' interpretation that New York's long-arm statute does not apply when a person's contacts with the forum are only based on seeking enforcement of a foreign judgment.⁷⁹ In response to the New York Court of Appeals' decision, the New York legislature amended its long-arm statute to apply to "any person who obtains a judgment in a defamation pro-

74. See *U.S. Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd.*, No. 07-C-3598, 2008 U.S. Dist. LEXIS 33773, *7-8 (N.D. Ill. Apr. 24, 2008).

75. See *id.* at *14-15.

76. See *id.* at *15.

77. See *id.* at *17.

* Jarrett B. Perlow, Staff Attorney, United States Court of Appeals for the Armed Forces. The views expressed are those of the author and not necessarily those of the court or the United States Government.

78. *Ehrenfeld v. Mahfouz*, 489 F.3d 542 (2d Cir. 2007) (certifying questions to *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830 (N.Y. 2007); *Ehrenfeld v. Mahfouz*, 518 F.3d 102 (2d Cir. 2008) (aff'g original dismissal for lack of personal jurisdiction). See generally *International Litigation: Personal Jurisdiction*, 42 INT'L LAW 415, 431-32 (2008).

79. *Id.* at 104-05.

ceeding outside the United States against any person who is a resident of New York [and other categories of relation to New York].”⁸⁰ But the new law extends jurisdiction “only for the purposes of rendering declaratory relief with respect to that person’s liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable” under New York law.⁸¹ In Congress, two related, pending bills would create a federal cause of action to recover from a foreign judgment for defamation based on “any writing, utterance, or other speech by that person that has been published, uttered, or otherwise disseminated in the United States.”⁸² In both proposals personal jurisdiction would stem from a foreigner filing suit against a “United States person” or against someone with assets in the United States that could be used to enforce the foreign judgment.⁸³ Should either bill become federal law, we will likely see a constitutional due process challenge to the personal jurisdiction provision if and when the first action is filed in federal court.

B. SUFFICIENT MINIMUM CONTACTS

Although it did not break new legal ground, the Tenth Circuit’s opinion in *AST Sports Science, Inc., v. CLF Distribution Ltd*, provides a concise summary of the current state of federal personal jurisdiction law, as well as an illustration of how one state’s long-arm statute applies in a tort and contract dispute.⁸⁴ AST, a Colorado corporation, entered into an agreement with CLF, an English corporation, where CLF would be the sole distributor of AST’s products in Europe.⁸⁵ After CLF did not pay AST, AST sued in diversity for breach of contract and for fraud in the inducement.⁸⁶ The district court granted CLF’s motion to dismiss for lack of personal jurisdiction, concluding that the court lacked specific jurisdiction over CLF for these claims.⁸⁷ On appeal, the Tenth Circuit reversed, finding that CLF was subject to the specific jurisdiction of the district court.⁸⁸ While a contract alone would not support the minimum contacts requirement, the court found that CLF had created “continuing obligations” and “substantial connection” through (1) CLF’s approaching AST in Colorado about forming a business relationship, (2) the perpetuation of an ongoing business relationship with AST in Colorado to further the contract,⁸⁹ and (3) the ongoing, seven-year physical presence of CLF’s president in

80. N.Y. C.P.L.R. 302(d) (McKinney 2008) (effective Apr. 28, 2008); see also Vincent C. Alexander, SUPPLEMENTARY PRACTICE COMMENTARIES, C302:17, “Libel Terrorism Protection Act” (2008) (explaining that the new provision intended to overrule the New York state *Ebrenfeld* decision) (electronic supplement available through Westlaw’s McKinney database).

81. N.Y. C.P.L.R. 302(d) (McKinney 2008).

82. The Free Speech Protection Act of 2008, H.R. 5814, 110th Cong. § 3; The Free Speech Protection Act of 2008, S. 2977, 110th Cong. § 3; see also Sen. Arlen Specter & Sen. Joe Lieberman, *Foreign Courts Take Aim at Our Free Speech*, WALL. ST. J., July 14, 2008, at A15, available at http://online.wsj.com/article/SB121599561708449643.html?mod=Googlenews_wsj (last visited Nov. 14, 2008) (discussing the issue of libel tourism and their proposed legislation).

83. H.R. 5814, 110th Cong. § 3 (2008); S. 2977, 110th Cong. § 3 (2008).

84. See *AST Sports Sci., Inc., v. CLF Distribution Ltd*, 514 F.3d 1054 (10th Cir. 2008).

85. See *id.* at 1055-56.

86. See *id.* at 1055.

87. See *id.* at 1058.

88. See *id.* at 1058, 1061.

89. The court noted that the advent of modern communications provides a substitute for the longstanding physical presence requirement in the forum jurisdiction, as these communications, such as those in this case,

Colorado.⁹⁰ On the tort claim, the court noted that Colorado courts base tort jurisdiction on whether the tortious injury, not act, occurred in Colorado; under that principle, the tortious injury occurred in Colorado as AST suffered exclusively in Colorado from CLF's non-payment.⁹¹ Because CLF had sufficient minimum contacts with Colorado, the court then considered whether it was still reasonable to exercise personal jurisdiction over CLF. The court concluded that jurisdiction was reasonable, in part, because of (1) the defendant's familiarity with Colorado, (2) Colorado law would govern the contract, (3) the case had no legal connection to England, and (4) the litigation was complicated by AST's pending bankruptcy proceeding in Colorado.⁹²

On the other hand, courts are still reluctant to find personal jurisdiction over foreign defendants when they are not directly connected to the forum or alleged cause of action. In a tort action in response to the terrorist attacks on September 11, 2001, the families of the deceased victims and the victims of the attacks sued several foreign parties, including Saudi Arabia and four Saudi princes, on a theory that these parties provided financial and logistical support to the perpetrators of the attacks.⁹³ The Second Circuit affirmed dismissal for lack of personal jurisdiction, rejecting the argument that indirect support of "a terrorist attack on a citizen of the United States constitutes purposeful direction at this forum 'such that [they] should reasonably anticipate being hauled into court' here."⁹⁴ In reaching its conclusion, the court surveyed five earlier terrorist attack cases where courts exercised personal jurisdiction over foreign defendants who were "primary participants in terrorist acts."⁹⁵ The court reasoned that, unlike in these earlier cases, the defendants' donation of money to charities that later used the donations to fund and to support terrorism was too tenuous to find any "intentional conduct" directed at the United States.⁹⁶ Similarly, "the provision of financial services to an entity that carries out a terrorist attack" would not form a basis for personal jurisdiction unless the "managers of those financial institutions 'purposefully directed' their 'activities at residents of [this] forum.'"⁹⁷ Because the plaintiffs could not show that the defendants directed their financial contributions

"provide additional evidence" of a continuous business relationship. *Id.* at 1059 (quoting *Pro Access v. Orlux Distrib., Inc.*, 428 F.3d 1270, 1278 (10th Cir. 2005)).

90. *See id.* at 1058-60 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). As the court stated bluntly, "[i]t should not be a surprise to defendants that this continuing relationship and the resulting obligations to plaintiff subjects them to regulations and sanctions in Colorado for the consequences of their alleged activities." *Id.* at 1059-60 (citation omitted).

91. *See id.* at 1060-61 (explaining that the district court misapplied Colorado case law).

92. *See id.* at 1061-63.

93. *See In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 71 (2d Cir. 2008).

94. *Id.* at 93 (quoting *Burger King*, 471 U.S. at 474). The court also affirmed dismissal for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976. *See id.* at 80-93.

95. *Id.* at 94 (discussing *Mwani v. bin Laden*, 417 F.3d 1 (D.C. Cir. 2003) (jurisdiction over al Qaeda and Osama bin Laden for the embassy bombings in Kenya and Tanzania); *Morris v. Khadr*, 415 F. Supp. 2d 1323 (D. Utah 2006) (jurisdiction over al Qaeda member for attack on soldiers in Afghanistan); *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54, 59 (D.D.C. 2003) (jurisdiction over Libyan government for commercial aircraft bombing); *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y. 1998) (same); *Daliberti v. Rep. of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000) (jurisdiction over Iraq for state-sponsored terrorism).

96. *In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 95 ("[T]he plaintiffs must establish that [defendants] 'expressly aimed' intentional tortious acts at residents of the United States") (quoting *Calder v. Jones*, 465 U.S. 783, 789 (1984)).

97. *Id.* at 96 (quoting *Burger King*, 471 U.S. at 472) (edit in original).

with the intent of committing the attacks, the district court properly dismissed the claims for lack of personal jurisdiction.⁹⁸

C. WAIVER OF PERSONAL JURISDICTION

Finally, in a patent infringement suit by Bradford, a Michigan corporation, against conTeyor Multibag (conTeyor), a Belgium corporation, and its North American subsidiary, conTeyor North America, Inc. (conTeyor N.A.),⁹⁹ conTeyor moved to dismiss for lack of personal jurisdiction. In granting the motion, the district court rejected Bradford's allegation that conTeyor previously consented to personal jurisdiction in Ohio through forum selection clauses in conTeyor's license agreement with Bradford and distributorship agreement with a non-party.¹⁰⁰ The court noted that while forum selection clauses can waive personal jurisdiction objections, the waiver extends only to disputes under the contract and is not of general applicability to all potential suits.¹⁰¹ The court went on to reject Bradford's five additional theories of personal jurisdiction over conTeyor based upon the acts of conTeyor N.A.,¹⁰² finding that he failed to present "sufficient evidence to make a prima facie showing" in support of personal jurisdiction over conTeyor.¹⁰³

IV. The Act of State Doctrine*

A. INTRODUCTION

The act of state doctrine is a prudential limitation on the exercise of judicial review¹⁰⁴ and reflects judicial reluctance to interfere in matters of foreign relations more appropriately left to the other branches of government.¹⁰⁵ Applying the doctrine, U.S. courts will avoid reviewing cases or controversies that require passing judgment on the validity of the official acts of a foreign State performed in its own territory.¹⁰⁶

98. *See id.* at 95, 96.

99. *See Bradford Co. v. Afco Mfg., Inc.*, 560 F. Supp. 2d 612 (S.D. Ohio 2008). Additional defendants were corporations in Michigan and Ohio but had already reached settlements with Bradford. *Id.* at 617.

100. *See id.* at 621.

101. *See id.* at 621-22 ("Plaintiff has presented no authority or arguments to ameliorate the Court's previously expressed concern that such a far-reaching interpretation of a forum selection clause infringes upon a party's due process rights.")

102. Bradford's five theories of personal jurisdiction included (1) agency, (2) attribution, (3) merger, (4) alter ego, and (5) joint venture. *See id.* at 617.

103. *See id.* at 635.

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104. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Credit Suisse v. U. S. Dist. Court*, 130 F.3d 1342, 1346 (9th Cir. 1997).

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

106. *See Sabbatino*, 376 U.S. 398 ; *Credit Suisse*, 130 F.3d 1342.

B. COLLABORATION WITH A FOREIGN STATE DOES NOT SHIELD A U.S. FEDERAL DEPARTMENT FROM SCRUTINY

In *Okinawa Dugong v. Gates*, the district court for the Northern District of California explained that when a foreign State acts in collaboration with a U.S. federal department, the act of state doctrine does not prevent a court from assessing whether the federal department acted in compliance with U.S. law.¹⁰⁷ *Okinawa Dugong* involved a challenge to steps taken by Japan and the United States to relocate the United States Marine Corps Air Station Futenma, Japan to a site off the coast of Okinawa, Japan. Plaintiffs alleged that in proposing the new location, the U.S. Department of Defense (DoD) failed to consider the effect of the relocation on the dugong, an endangered marine mammal, in violation of the National Historic Preservation Act (NHPA).¹⁰⁸

The district court held that it had jurisdiction to review DoD's compliance with the NHPA, stating that the additional involvement of a foreign State in the matter did "not by itself implicate the act of state doctrine."¹⁰⁹ While the various activities involved were divided between foreign and U.S. entities, the court analyzed the nature of each activity that it would review in order to decide whether it would risk declaring "invalid the official act of a foreign sovereign performed within its own territory."¹¹⁰

C. REGIME CHANGE ALONE IS INSUFFICIENT TO SET ASIDE THE DOCTRINE

In *Agudas Chasidei Chabad of United States v. Russian Federation*, the D.C. Circuit analyzed the applicability of the act of state doctrine where the government that took the challenged actions no longer exists.¹¹¹ Previously, the Supreme Court in *Sabbatino* had included the lack of continuing existence of a foreign government as a factor potentially warranting the non-application of the act of state doctrine.¹¹² *Chabad* involved claims by a Jewish religious organization against the Russian Federation for the return of books, manuscripts and documents of faith that Russia's government seized during two periods: the years following the October Revolution (1917-1925) and following the end of World War II.¹¹³

107. See *Okinawa Dugong v. Gates*, 543 F.Supp. 2d 1082 (N.D. Cal. 2008).

108. Congress amended the NHPA in 1980 to include a provision that governed United States undertakings abroad and required the lead federal agency undertaking the matter to evaluate the effects of such an undertaking on protected properties under the World Heritage List or foreign equivalents of the National Register. 16 U.S.C. § 470f (1966). The dugong is a protected "natural monument" listed on the Japanese Register of Cultural Properties. See *Okinawa Dugong*, 543 F.Supp. 2d at 1084. In a previous ruling in 2005, the district court for the Northern District of California had determined that the act of state doctrine does not cover the planning processes between DoD and the Government of Japan because that planning process was not an official act by a foreign sovereign on foreign soil. See *Dugong v. Rumsfeld*, No. C 03-4350 MHP, 2005 U.S. Dist. LEXIS 3123,*67 (N.D. Cal. 2005).

109. *Okinawa Dugong*, 543 F.Supp. 2d at 1099.

110. *Id.* The Court was also persuaded by the fact that Japan had initially preferred a site that avoided the habitat of the dugong and that it was DoD that had insisted on the coastal water site for operational reasons. *Id.* at 1098.

111. See *Agudas Chasidei Chabad of U. S. v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008).

112. See *Sabbatino*, 376 U.S. at 428.

113. See *Agudas Chasidei Chabad of U.S.*, 528 F.3d at 938-40.

In connection with the 1917-1925 seizures, the court agreed with the Russian Federation's argument that the act of state doctrine was still applicable—even though the Soviet government that had taken the act at issue was no longer in power—because the current government stood by the decision.¹¹⁴ In refusing to relax the act of state doctrine, the court recognized that *Sabbatino's* invitation for flexibility in applying the doctrine was “at its apex where the taking government has been succeeded by a radically different regime.”¹¹⁵ Though the D.C. Circuit noted that other courts had set aside the act of state doctrine based on a regime change, it distinguished those cases on the ground that in each of them the State was not a defendant; instead, the defendant was a private corporation or an ousted ruler.¹¹⁶ In *Chabad*, on the other hand, the Russian Federation was the defendant and stood by the action of the former regime, thereby implicating many of the policies underlying the act of state doctrine.¹¹⁷ Furthermore, relying on the change of regime alone imperiled U.S. foreign policy sufficiently to require applicability of the act of state doctrine:

[W]hile no one doubts that the collapse of the Soviet Union has entailed radical political and economic changes in the territory of what is now the Russian Federation, application of *Sabbatino's* invitation to flexibility would here embroil the court in a seemingly rather political evaluation of the character of the regime change itself—in comparison, for example, to de-Nazification and other aspects of Germany's post-war history. It is hard to imagine that we are qualified to make such judgments. Moreover, our plunging into the process would seem likely, at least in the absence of an authoritative lead from the political branches, to entail just the implications for foreign affairs that the doctrine is designed to avert.¹¹⁸

The plaintiff also argued that the act of state doctrine should not apply because the seizures were undertaken in order to suppress the practice of Judaism, and so violated well-settled *jus cogens* norms analogous to those prohibiting racial discrimination.¹¹⁹ The Court stated that it was reluctant to evaluate “violations of international law on a spectrum, dispensing with the act of state doctrine for the vilest,” and was also unclear on what would need to be established in order to satisfy “consensus” under *Sabbatino*.¹²⁰ The court deferred judgment on plaintiff's *jus cogens* theory and remanded the issue for further development of this issue.¹²¹

D. THE TERRITORIAL LIMITATION TO THE DOCTRINE

The second seizure of books in *Agudas Casidei Chabad* alleged to have occurred at the end of World War II raised the question of the territorial application of the act of state

114. *See id.* at 954.

115. *Id.* at 953.

116. *See id.* at 954.

117. *See id.*

118. *Agudas Chasidei Chabad of U.S.*, 528 F.3d at 954.

119. *See id.* (stating the proposition that “the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it” (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964))).

120. *Id.* at 955.

121. *See id.*

doctrine. As the D.C. Circuit explained: “[t]he act of state doctrine applies only when a seizure occurs within the expropriator’s sovereign territory[,]” as the act of state doctrine only applies when the foreign State’s act occurs within its sovereign territory.¹²² The court explained that because the seizure at the end of World War II most likely occurred in post-war Poland, and not Russia, the Russian Federation could not rely upon the doctrine because it had not met the territorial element for establishing its claim to the invocation of the act of state doctrine.¹²³

In *Universal Trading & Investment Co. v. Kiritchenko*, the District Court for the Northern District of California similarly confirmed the inapplicability of the act of state doctrine to “judicial review of the extraterritorial effects of acts of state.”¹²⁴ In *Universal Trading*, the plaintiff—who sued on behalf of the Government of Ukraine—claimed that the Government of Ukraine had assigned to it the right of recovery of damages and assets for theft claims against the defendant, Kiritchenko.¹²⁵ The defendant challenged the assignment. The court agreed with the defendant that the mere fact that the Prosecutor Generals of Ukraine had made the assignment did not insulate its legality from judicial review under the act of state doctrine, given that the assignment was made to a U.S. company for the intended purpose of litigation in the United States.¹²⁶ For the doctrine to apply, the entirety of the action must have occurred in the foreign territory. Since the assignment purportedly was made in order to allow for litigation in the United States to recover assets in the United States, the court found that “the act in question was not committed entirely within Ukraine.”¹²⁷

E. THE WELL-PLEADED COMPLAINT RULE

In *A.A.Z.A. v. Doe Run Resources Corp.*, the district court for the Eastern District of Missouri held that *Sabbatino* did not create an exception to the well-pleaded complaint rule.¹²⁸ In *A.A.Z.A.*, 137 citizens of Peru filed an action claiming that they had been exposed to lead and other substances that had been released by an entity owned by U.S. companies that at one time was state-owned.¹²⁹

The defendants removed the action to federal court under 28 U.S.C. § 1446. In opposing the plaintiffs’ motion to remand, the defendants argued that removal was warranted on the ground that their defense raised federal question subject-matter jurisdiction under the federal common law of foreign relations “because the lawsuit implicates the vital economic and sovereign interests of Peru.”¹³⁰ Agreeing with the Ninth Circuit holding in *Patrickson v. Dole Food Co.*¹³¹ that “*Sabbatino* did not create an exception to the well-pleaded com-

122. *Id.* at 952.

123. *See id.*

124. *Universal Trading & Inv. Co. v. Kiritchenko*, No. C-99-3073 MMC, 2007 WL 2669841 at *8 (N.D. Cal. Sep. 7, 2007).

125. *See id.* at *1.

126. *See id.* at *8.

127. *Id.*

128. *A.A.Z.A. v. Doe Run Res. Corp.*, No. 07CV1874, 2008 U.S. Dist. LEXIS 21298 (E.D. Mo. 2008).

129. *Id.* at *3.

130. *Id.* at *7.

131. *Patrickson v. Dole Food Co.* 251 F.3d 795 (9th Cir. 2001).

plaint rule,” the court looked to the complaint.¹³² Since the complaint alleged state law claims and did not seek to impose liability on the government of Peru (or for that matter allege misconduct by the government), the court concluded that the complaint did not include any matters that constituted an act of state or otherwise implicated international legal principles.¹³³ Consequently, the court remanded the case to state court.¹³⁴

F. OTHER DEVELOPMENTS

In *Nocula v. UGS Corp.*, the Seventh Circuit held that the act of state doctrine applied to bar a lawsuit seeking to reclaim property and associated losses in connection with the Polish police’s seizure of property as part of the enforcement of Polish criminal laws.¹³⁵ The court explained that it could not rule on the validity of the seizure without calling into question the enforcement actions of the police.¹³⁶

In *United States v. Lazarenko*, the court allowed a forfeiture proceeding to go forward in connection with funds allegedly laundered by former Ukrainian Prime Minister Pavel Lazarenko through an Antinguan bank account later frozen by the Antinguan authorities.¹³⁷ The court held that the act of state doctrine was inapplicable because the requested forfeiture would not invalidate or contravene any order of the Antinguan court.¹³⁸

In *Reyes-Vasquez v. United States Attorney General*, the petitioner challenged his extradition to the United States, claiming that he was not extradited pursuant to the laws of the Dominican Republic.¹³⁹ The District Court for the Middle District of Pennsylvania found that “determining whether the President of the Dominican Republic may lawfully authorize an extradition despite the prohibition of the extradition under Dominican law is a question for the courts of the Dominican Republic.”¹⁴⁰ The court found that petitioner’s claim invited the court to pass judgment on the legality of the President’s acts that were committed within the Dominican Republic. The court held that the petitioner lacked standing because under the act of state doctrine the court was powerless to declare that the actions of the Dominican Republic were invalid.¹⁴¹

132. *AZZA*, 2008 U.S. Dist. LEXIS 21298, at *11.

133. *See id.* at *10–11. The Court explained that defendants’ contention that the Government of Peru was implicated in the activities and shares liability for the acts is a defense and cannot serve as a basis for federal question jurisdiction under the well-pleaded complaint rule. *Id.* The Court thus did not follow the approach of the Fifth Circuit in *Torres v. S. Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997), which articulates a variety of factors to be considered to determine whether a “foreign state’s vital economic interests and sovereignty were at stake.” Under this approach to determining the existence of federal question jurisdiction, a district court would accept as decisive a foreign state’s well-supported statement that the suit would affect its interest. *Torres*, 113 F.3d at 543.

134. *See AZZA*, 2008 U.S. Dist. LEXIS 21298, at *11.

135. *See Nocula v. UGS Corp.*, 520 F.3d 719, 728 (7th Cir. 2008).

136. *See id.*

137. *See United States v. Lazarenko*, 575 F. Supp. 2d 1139, 1141 (N.D. Cal. 2008).

138. *See id.* at 1152–53.

139. *See Reyes-Vasquez v. United States Att’y Gen.*, NO. 3:07-CV-1460, 2007 U.S. Dist. LEXIS 82967 (M.D. Pa. Nov. 8, 2007), *aff’d*, 2008 U.S. App. LEXIS 26254 (3d Cir. Dec. 23, 2008).

140. *Id.* at *6.

141. *See id.* at *6–7. The Court’s ruling is consistent with the position taken by the Northern District of California in *Trading & Inv. Co. v. Kiritchenko*, No. C-99-3073 MMC, 2007 WL 2669841, at *7 (N.D. Cal. Sept. 7, 2007), discussed *supra* note 124, which denied the doctrine’s applicability because it found that the Ukrainian government, by the decisions of its courts, had already invalidated the assignment at issue. .

V. International Discovery*

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

In 2008, U.S. federal courts expanded on earlier jurisprudence concerning the requirements for obtaining discovery in the United States for use in foreign proceedings pursuant to 28 U.S.C. § 1782(a).¹⁴²

Several district court decisions analyzed the factors set out by the statute and by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.* to determine whether to exercise discretion and allow discovery pursuant to section 1782(a).¹⁴³ The District Court for the Southern District of New York examined the issue of “relevance” in *In re 28 U.S.C. § 1782*.¹⁴⁴ The court permitted discovery under section 1782(a) over one party’s objection that the evidence was “irrelevant,” observing the “broadly permissive standard by which a court evaluates the relevance of discoverable material.”¹⁴⁵ The court further observed that a court whose only connection with a case is supervision of ancillary disclosure “should be especially hesitant to pass judgment on what constitutes relevant evidence thereunder.”¹⁴⁶ In another case, the District Court of the Middle District of Florida allowed discovery under section 1782(a) even where the case was already on appeal in the other jurisdiction and there was a question of whether the foreign court would look at the evidence.¹⁴⁷

The controversy continued over whether section 1782(a) applies to documents outside the United States. In considering this issue, the District Court for the Southern District of New York in *In re Application of Godfrey* disagreed with an earlier holding in the same court to conclude that section 1782(a) was not applicable to evidence located outside the United States.¹⁴⁸

* Contributed by Howard S. Zelbo, Partner at Cleary Gottlieb Steen & Hamilton LLP in New York, New York, with assistance from Ram Murali and Ann Nee, associates at the same firm. The authors’ firm represented the respondents in *In re 28 U.S.C. § 1782*, 249 F.R.D. 96 (S.D.N.Y. 2008) and *In re 28 U.S.C. § 1782*, No. M19-70, 2008 WL 4935873 (S.D.N.Y. Oct. 2, 2008), which are discussed *infra* note 144, and *Credit Lyonnais in Strauss v. Credit Lyonnais S.A.*, 249 F.R.D. 429, 473 & 447-49 (E.D.N.Y. 2008), which is discussed *infra* note 161.

142. See 28 U.S.C.A. § 1782(a) (West 1996) (“The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.”).

143. In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the Supreme Court listed several factors for a court to consider in determining whether to exercise its discretion under section 1782(a). These factors include: whether the person for whom discovery is sought is a participant in the foreign proceeding; the nature of the proceedings and the “receptivity” of the foreign court to United States federal court assistance; whether the application is an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country; and whether the request is unduly burdensome or intrusive. *Id.* at 264-65.

144. See *In re 28 U.S.C. § 1782*, 249 F.R.D. 96 (S.D.N.Y. 2008). The court subsequently limited the scope of discovery in this case on the grounds that the specific discovery sought was “unwarranted as repetitive and inefficient.” *In re Application of Syeaas*, No. M19-70, 2008 WL 4935873, at *1 (S.D.N.Y. Oct. 2, 2008). The authors’ firm represented the respondents in these actions.

145. *Id.* at 107.

146. *Id.* (internal quotation marks and citation omitted).

147. See *In re Application of Carsten Rehder Schiffsmakler und Reederi GmbH & Co.*, No. No. 6:08-mc-108-Orl-35DAB, 2008 WL 4642378, at *2 (M.D. Fla. Oct. 17, 2008).

148. See *In re Application of Godfrey*, 526 F. Supp. 2d 417 (S.D.N.Y. 2007), *declining to follow In re Gemeinschaftspraxis*, No. Civ. M19-88 (BSJ), 2006 WL 3844464, at *5 (S.D.N.Y. Dec. 29, 2006).

Other cases weighed in on the types of tribunals that should be included under Section 1782(a). U.S. courts have held in the past that private commercial arbitral bodies are not included in the types of tribunals to which section 1782(a) applies.¹⁴⁹ Since the Supreme Court's decision in *Intel*, however, a number of district courts have come to the opposite conclusion.¹⁵⁰ In *In re Application of Babcock Borsig AG*, the District Court for the District of Massachusetts applied the reasoning and dicta of *Intel* to hold that private commercial arbitral bodies are in fact included in the scope of section 1782(a): "There is no textual basis upon which to draw a distinction between public and private arbitral tribunals, and the Supreme court in *Intel* repeatedly refused to place 'categorical limitations' on the availability of § 1782(a)."¹⁵¹ Similarly, the District Court for the Northern District of New York, in *In re Application of Minatec Finance S.à.R.L.*, held that discovery under section 1782(a) was available for a foreign tax audit, because a tax audit is "an administrative proceeding that can be reviewed by a [national] court."¹⁵²

The availability of discovery under 28 U.S.C. § 1728 may have relevance in a forum non conveniens analysis. In *In re Air Crash*, the District Court for the Eastern District of New York held that defendants' concession to discovery under section 1782(a) was a factor militating in favor of dismissal on the basis of forum non conveniens.¹⁵³ The District Court for the District of New Jersey reached a similar conclusion in *Windt v. Qwest Communications International, Inc.*, observing that "the holding of *Intel* (as does the language of § 1782) stands to ensure that Plaintiffs are likely to have ample access to any evidentiary matters Plaintiffs might need if Plaintiffs are to commence this action in the Netherlands."¹⁵⁴

Finally, in 2008 U.S. courts also applied section 1782(a) to criminal proceedings. In *In re Czech Republic*, the Czech Republic asked for assistance in obtaining information and documents from a Florida-domiciled corporation concerning an ongoing criminal prosecution in the Czech Republic. The District Court for the Middle District of Florida applied the statute and the *Intel* standards in granting the application for assistance and, further, appointed an Assistant United States Attorney as a Commissioner of the court. The Commissioner was given the authority to obtain the evidence, to seek further orders of the court, and to submit the evidence to the Department of Justice for transmission to

149. See, e.g., *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999) (holding that "tribunals" under Section 1782(a) are limited to government bodies); *Republic of Kaz. v. Biederman Int'l*, 168 F.3d 880 (5th Cir. 1999) (same).

150. *Intel* held that the Commission of the European Communities was a "tribunal" for purposes of the statute. *Intel Corp.*, 542 U.S. at 257-58. In reaching this conclusion, the Court emphasized the 1964 amendment to the statute, which broadened the statute's scope from any foreign "judicial proceeding" to any "proceeding in a foreign or international tribunal." *Id.* at 258 (internal quotation marks omitted).

151. *In re Application of Babcock Borsig AG*, 583 F. Supp. 2d 233, 240 (D. Mass. 2008) (internal citation omitted). See also *In re Application of Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 957 (D. Minn. 2007) (applying *Intel* and holding that a private arbitral tribunal was a "tribunal" under section 1782(a); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1225-26 (N.D. Ga. 2006) (same).

152. *In re Minatec Fin. S.à.R.L.*, Civ. No. 1:08-CV-269 (LEK/RFT), 2008 WL 3884374 at *5 (N.D.N.Y. Aug. 18, 2008).

153. See *In re Air Crash Near Peixoto de Azeveda, Braz.*, on Sept. 29, 2006, 574 F. Supp. 2d 272, 278, 286 (E.D.N.Y. 2008).

154. *Windt v. Qwest Commc'ns Int'l, Inc.*, 544 F. Supp. 2d 409, 433 (D.N.J. 2008), *aff'd*, 529 F.3d 183 (3d Cir. 2008).

the Czech Republic, among other powers.¹⁵⁵ In another case, the same court confirmed that discovery under section 1782(a) is governed by the Federal Rules of Civil Procedure, regardless of whether the discovery is for use in a foreign criminal proceeding.¹⁵⁶

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

In 2008, U.S. courts continued to develop jurisprudence concerning the discretionary factors weighed in granting requests for discovery from a foreign party for use in proceedings in the United States by means other than the Hague Convention.¹⁵⁷ In one case, the District Court for the Southern District of Florida declined to require the plaintiff to ask for evidence via the Hague Convention “because the Convention will not facilitate the gathering of evidence more effectively than the procedures already in place through the Federal Rules.”¹⁵⁸ In another case, the District Court for the Eastern District of Pennsylvania ordered foreign discovery via the Federal Rules rather than via the Hague Convention because “the interest of the U.S. in enforcing its antitrust laws and managing litigation in the federal courts weighs against the use of the Hague Convention.”¹⁵⁹

In weighing whether to proceed with discovery under the Federal Rules, rather than under the Hague Convention or foreign law, the “balance of national interests” was named by one court as the most important factor.¹⁶⁰ The court must “determine whether disclosure would affect important substantive policies or interests of either the United States or [the foreign country].”¹⁶¹

155. See *In re Czech Rep.*, No. 3:08-mc-001-J-33TEM, 2008 WL 179263, at *2-3 (M.D. Fla. Jan. 17, 2008); see also *In re Czech Rep.*, No. 3:07-mc-47-J-32TEM, 2007 WL 4049949 (M.D. Fla. Nov. 15, 2007) (allowing Czech Republic’s request for legal assistance and appointing Commissioner).

156. See *In re Weber*, No. 3:07-mc-27-J-32MCR, 2007 WL 4285362, at *6-7 (M.D. Fla. Nov. 30, 2007).

157. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 539 (1987) (holding that the Hague Convention is not the exclusive means for obtaining evidence located abroad); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (setting out five factors: “[1]) the importance to the . . . litigation of the documents or other information requested; [(2)] the degree of specificity of the request; [(3)] whether the information originated in the United States; [(4)] the availability of alternative means of securing the information; and [(5)] the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine the important interest of the state where the information is located”). Courts in the Second Circuit also consider “the hardship of compliance on the party or witness from whom discovery is sought [and] the good faith of the party resisting discovery.” *Minpeco v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 523 (S.D.N.Y. 1987).

158. *Calixto v. Watson Bowman Acme Corp.*, No. 07-60077-CIV, 2008 WL 4487679, at *4 (S.D. Fla. Sept. 29, 2008). See also *Emerson Elec. Co. v. Le Carbone Lorraine*, No. 05-6042 (JBS), 2008 WL 4126602, at *8 (D.N.J. Aug. 27, 2008) (“[W]hile resort to the Hague Convention procedures may be equally effective, . . . that would be a lengthier process. That delay [is] unnecessary as the . . . sovereign interests and the ‘facts’ that is the specific discovery sought[,] weigh against requiring Plaintiffs to go through the Hague to obtain these documents.”).

159. *In re Aspartame Antitrust Litig.*, No. 2:06-CV-1732-LDD, 2008 WL 2275531, at *4 (E.D. Pa. May 13, 2008).

160. *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. De Equip. Medico*, No. 07-CV-309-L(AJB), 2008 WL 81111, at *6 (S.D. Cal. Jan. 8, 2008).

161. *Id.* (internal quotation marks and citation omitted); see also *Strauss v. Credit Lyonnais*, 249 F.R.D. 429, 443, 447-49 (E.D.N.Y. 2008) (finding that the balance of interests weighed in favor of discovery under the Federal Rules, instead of under the Hague Convention, in light of the United States’ strong interest in combating terrorism and where the court opined that France had submitted only general objections to the use of the Federal Rules, civil or criminal penalties under bank secrecy laws in France were unlikely, and France had

VI. Extraterritorial Application of United States Law*

A. INTRODUCTION

Courts look to the *Restatement (Third) of Foreign Relations* when determining whether to apply U.S. law extraterritorially. The Restatement provides that a State may exercise prescriptive jurisdiction where the conduct in question “has or is intended to have a substantial effect within its territory.”¹⁶² Courts must consider the following factors in determining whether extraterritorial jurisdiction is reasonable: (1) the extent of the domestic effect of the conduct; (2) the connections between the United States and the persons engaging in the conduct in question; (3) the character of the conduct and the extent to which it is regulated elsewhere; (4) whether justified expectations exist and are protected; (5) the importance of the regulation internationally; (6) consistency with international custom; (7) the interests of other States in regulating the conduct; and (8) whether the regulation would create a conflict with the laws of a foreign jurisdiction.¹⁶³

In the past year, U.S. courts have applied these principles in a variety of fields, considering extraterritoriality in disputes involving constitutional claims, labor disputes, and criminal statutes.

B. FEDERAL HABEAS CLAIMS

In last year’s review, we considered federal habeas corpus claims brought by the detainees held in Guantanamo Bay, Cuba.¹⁶⁴ In particular, we reviewed the D.C. Circuit’s decision in *Boumediene v. Bush*,¹⁶⁵ which the Supreme Court then examined in 2008.¹⁶⁶ The Supreme Court overturned the D.C. Circuit, finding that the Military Commissions Act of 2006 (MCA) violated the Suspension Clause of the Constitution by stripping federal courts of jurisdiction over habeas petitions filed by foreign citizens detained at Guantanamo Bay, Cuba. Specifically, the Court stated that the process provided by the Detainee Treatment Act of 2005 did not serve as an adequate substitute for habeas corpus because detainees were not given an opportunity to present relevant exculpatory evidence not made part of the record in earlier proceedings.¹⁶⁷ The Court rejected the government’s argument that the constitutional protections had no effect in Guantanamo, where the United States maintains only plenary control rather than formal sovereignty, and stated that the “Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.”¹⁶⁸ Moreover, the Court emphasized that “[e]ven when the United States acts outside its border, its powers are not ‘absolute and unlimited’ but are subject ‘to such restrictions as are ex-

previously signed international agreements evidencing its similar interest in combating terrorism). The authors’ firm represented Credit Lyonnais in this action.

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

162. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(1)(c) (1987).

163. *Id.* § 403(2).

164. See Jonathan I. Blackman et al., *International Litigation*, 42 INT’L LAW. 415, 440 (2008).

165. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. denied*, 127 S. Ct. 1478 (2007); *vacated*, 127 S. Ct. 3078 (2007).

166. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

167. See *id.* at 2271-74.

168. *Id.* at 2259.

pressed in the Constitution.”¹⁶⁹ The *Boumediene* decision marked the turning point in the numerous cases involving detainees at Guantanamo Bay, with the Supreme Court overturning last year’s precedent and holding that the federal courts have jurisdiction to hear the detainees’ habeas corpus claims. Although the Court granted the detainees’ access to federal courts, it did not fashion a clear procedural remedy for the detainees, and we anticipate that significant litigation in 2009 will involve the implementation of the *Boumediene* decision.

C. CRIMINAL STATUTES

In *United States v. Vilches-Navarrette*, the First Circuit held that the Fourth Amendment did not apply to a non-resident of the United States while in international waters, despite his extraterritorial arrest under the Maritime Drug Law Enforcement Act (MDLEA).¹⁷⁰ Vilches-Navarrette was apprehended by the United States Coast Guard in international waters west of Grenada for possession with intent to distribute five kilograms of cocaine.¹⁷¹ Although Vilches-Navarrette did not raise the claim in the district court, he challenged the constitutionality of the jurisdictional element of the MDLEA on appeal. The majority rejected the challenge for lack of plain error, noting that under the MDLEA, jurisdiction is not an element of the crime.¹⁷² In a concurring opinion, Circuit Judges Lynch and Howard further endorsed the constitutionality of the MDLEA’s jurisdiction by stating that the statute does not require a jurisdictional statement because its application is “consistent with the protective principle of international law” and within Congressional regulatory power for purposes of national security.¹⁷³

In *United States v. Reumayr*, the District Court of New Mexico held that Congress intended the statutes prohibiting the attempt to destroy property by means of an explosive, and possessing a firearm in furtherance of a crime of violence, as well as prohibiting the attempt to destroy an energy facility, to apply extraterritorially.¹⁷⁴ Reumayr was charged with attempting to destroy the Trans-Alaska Pipeline and an adjacent energy facility by means of an explosive. Reumayr argued that the criminal statutes under which he was charged should not apply extraterritorially if the attempted crime would have affected private rather than government property.¹⁷⁵ The Court disagreed, finding that Congress has a security interest in private property and showing the Congressional intent of extraterritorial application of each statute under which Reumayr was charged. Reumayr also argued that his Fifth Amendment due process rights were violated by extraterritorial application of Congressional statutes.¹⁷⁶ The Court held that because Reumayr’s purpose in his attempted attack was to “violently disrupt the United States petroleum and financial markets,” his prosecution was consistent with due process because of a sufficient nexus

169. *Id.* (citing *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)).

170. *See United States v. Vilches-Navarrette*, 523 F.3d 1 (1st Cir. 2008).

171. *See id.* at 4-5.

172. *See id.* at 9-10.

173. *See id.* at 22.

174. *See United States v. Reumayr*, 530 F. Supp. 2d 1210 (N.M. 2008).

175. *See id.* at 1215.

176. *See id.* at 1222.

between the defendant and the United States.¹⁷⁷ For this reason, the Court determined that the extraterritorial application of the statutes was appropriate.¹⁷⁸

Similarly, in *State v. Flores*, the Court of Appeals of Arizona applied Arizona's human smuggling statute extraterritorially and held Flores, a Mexican citizen, guilty of soliciting another person to smuggle him illegally into the United States.¹⁷⁹ The Court focused on "Flores' illegal presence and transportation within Arizona as the intended result of his crime of solicitation to commit human smuggling[.]" and found that the result of the crime would have a substantial effect in Arizona.¹⁸⁰ For this reason, the Court determined that the human smuggling statute could be applied extraterritorially.¹⁸¹

D. LABOR DISPUTES

In *Veiga v. World Meteorological Organization*, "Veiga, a citizen of Portugal and Italy," filed a wrongful termination suit against "the World Meteorological Organization (WMO), an international organization based in Switzerland."¹⁸² The WMO claimed immunity under the International Organizations Immunity Act (IOIA). Veiga challenged the constitutionality of the IOIA, claiming that WMO's immunity from process would deprive her of all rights of action and remedies.¹⁸³ The Court held that because Veiga failed to show any relevant conduct or material effect from the underlying claim that occurred in the United States, the Constitution did not afford her rights and protections as a non-resident alien located abroad.¹⁸⁴ Moreover, the Court held that Veiga did not have standing to invoke the subject matter jurisdiction of the federal courts and could not demand access to U.S. courts.¹⁸⁵

VII. Enforcement of Foreign Arbitral Awards and Judgments*

A. INTRODUCTION

The 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention or Convention) governs the recognition and enforcement of most foreign arbitral awards in U.S. courts.¹⁸⁶ The New York Convention applies to awards "made in the territory of a State other than the State where the recognition and

177. *Id.* at 1223.

178. *See id.*

179. *See State v. Flores*, 188 P.3d 706 (Ariz. Ct. App. 2008).

180. *See id.* at 715.

181. *See id.*

182. *See Veiga v. World Meteorological Org.*, 568 F. Supp. 2d 367, 369 (S.D.N.Y. 2008).

183. *See id.* at 370-71.

184. *See id.* at 372.

185. *See id.* at 375-76.

* Contributed by Cameron Holland, Attorney-Adviser, Officer of the Legal Adviser, United States Department of State. The views expressed are those of the author and not necessarily those of the Department of State or the United States Government.

186. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention or Convention] (entered into force in the United States on Dec. 29, 1970, subject to declarations). The New York Convention is enforced in U.S. courts in accordance with Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208 (2008).

enforcement of such awards are sought” and to awards not considered to be domestic in the enforcing State.¹⁸⁷

State law, on the other hand, governs the recognition and enforcement of foreign money judgments. Most states have enacted legislation adopting the exact or similar text of the Uniform Foreign Money-Judgments Recognition Act (the Uniform Act). Where such legislation is not in force, courts generally apply the principles articulated in the early Supreme Court decision, *Hilton v. Guyot*.¹⁸⁸

B. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

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

On March 25, 2008, the United States Supreme Court issued its decision in *Hall Street Associates, L.L.C. v. Mattel*,¹⁸⁹ a case arising out of a motion for vacatur of a domestic arbitration award that will have an important impact on the vacatur and modification of international arbitration awards. In *Hall Street*, the Court addressed whether private parties can contract around the statutory grounds for vacatur and modification of arbitration awards articulated in section 10 of the Federal Arbitration Act (FAA) in U.S. courts. Under the New York Convention, national courts may refuse to recognize an arbitral award that has been vacated “by a competent authority of the country in which . . . that award was made.”¹⁹⁰ Courts are divided as to whether awards governed by the New York Convention with venue in the United States are subject to an action to vacate under section 10 of the FAA, including on grounds for vacatur not available under the Convention itself. To the extent that a court applies section 10 to a motion to vacate a “non-domestic” Convention award in U.S. courts, the *Hall Street* decision opens the argument that the motion cannot rest on grounds for vacatur determined by contract between the parties that are outside the grounds articulated in the FAA. The ability of a party seeking to avoid enforcement of a non-domestic award in U.S. courts on contractual vacatur grounds thus becomes much more difficult.

Hall Street Associates, L.L.C. (Hall Street) filed suit in federal district court after Mattel, Inc. (Mattel) gave notice of intent to terminate a lease between the two parties. Following a bench trial, Mattel won on the termination issue, and the two parties drew up an agreement to submit a remaining indemnification issue to arbitration. The agreement allowed a U.S. district court to “vacate, modify or correct any award: (i) where the arbitrator’s findings of fact are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.”¹⁹¹ After Mattel won in arbitration, Hall Street filed suit in the District Court for the District of Oregon to vacate the award on grounds of legal error, the standard of review chosen by the parties in the arbitration agreement. The court vacated and remanded based on legal error, and the arbitrator accordingly amended its decision to favor Hall Street. Both parties appealed the decision, and again the district court reviewed and corrected the arbitration award based on legal error. Mat-

187. *Id.* at art. I(1).

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

189. *Hall Street Assocs. v. Mattel*, 128 S. Ct. 1396 (2008).

190. New York Convention, Article V(1)(e).

191. *Hall Street*, 128 S. Ct. at 1400-01.

tel then appealed to the Ninth Circuit, arguing that the arbitration agreement's provision for judicial review of legal error was unenforceable. The Ninth Circuit agreed, and Hall Street petitioned for certiorari to the U.S. Supreme Court.

The Supreme Court granted certiorari to decide whether the grounds for vacatur and modification provided by Sections 10 and 11 of the FAA are exclusive. Hall Street made two arguments for non-exclusivity: (1) that the Court has accepted expanded non-statutory grounds for vacatur since *Wilko v. Swan*¹⁹² and (2) that the nature of arbitration and the policy behind the FAA support the capacity of private parties to expand judicial review of arbitration agreements. The Court held that *Wilko* neither grants private parties the authority to expand review by contract—which was not at issue in that case—nor does it clearly grant judicial expansion of review beyond the grounds set forth in section 10 of the FAA, as some Circuits, including the First, Second, Fifth, and Eleventh, have held it to do.¹⁹³ On the issue of contractual freedom, the Court reasoned first that general policy supporting the enforcement of arbitration agreements is insufficient where “textual elements” in the FAA support the argument for exclusively statutory grounds for judicial review of awards. Further, the Court noted that “[a]ny other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process and bring arbitration theory to grief in post-arbitration process.”¹⁹⁴ The Court thus held that “§§ 10 and 11 provide exclusive regimes for review provided by the [FAA]” but also left open the implication of the decision for vacatur and modification of non-domestic arbitral awards governed by the New York Convention in U.S. courts.¹⁹⁵

2. Stay of Enforcement Pending Completion of Other Arbitral Claims

In *Wartsila Finland OY v. Duke Capital L.L.C.*, the Fifth Circuit rejected a request for a stay of enforcement of an arbitral award until newly filed arbitration claims involving the same parties were resolved.¹⁹⁶ In 2005, an International Chamber of Commerce (ICC) arbitration tribunal awarded Wartsila Finland OY and Wartsila Guatemala, SA, (collectively Wartsila) €11.3 million against Duke Energy International (DEI) arising from breach of a construction contract. Prior to the issuance of the €11.3 million award, the ICC tribunal permitted DEI to withdraw certain claims and reserve them for presentation at a later arbitration proceeding. Upon the issuance of the award, DEI refused payment to

192. *Wilko v. Swan*, 346 U.S. 427 (1953).

193. See *Hall Street*, 128 S. Ct. at 1403-04.

194. *Id.* at 1405 (internal quotations and citations omitted).

195. *Id.* at 1407. The New York Convention applies only to awards “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought” and to awards not considered to be domestic in the enforcing State. New York Convention Art. I(1). Section 202 of the FAA states that an agreement or award . . . which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relationship with one or more foreign states.” 9 U.S.C. § 202.

For further reading on the significance of the *Hall Street* decision for international commercial arbitrations venue in the United States, see Charles H. Brower, *Hall Street Assocs. v. Mattel, Inc.: Supreme Court Denies Enforcement of Agreement to Expand the Grounds for Vacatur Under the Federal Arbitration Act*, ASIL INSIGHTS, VOL. 12, ISSUE 11 (2008), available at <http://www.asil.org/insights080527.cfm>.

196. See *Wartsila Finland OY v. Duke Capital L.L.C.*, 518 F.3d 287 (5th Cir. 2008).

Wartsila, arguing that it could set off amounts that would later be sought in the withdrawn claims. Shortly after DEI filed a request for arbitration of the withdrawn claims with the ICC, Wartsila filed a motion in federal court to confirm and enforce the award under the New York Convention. DEI filed for a stay of enforcement pending resolution of the newly filed arbitration claims. The district court denied DEI the stay, and DEI appealed.

On appeal before the Fifth Circuit, DEI advanced two arguments in support of a stay: (1) that a proper interpretation of the award required the court issue a stay and (2) that the court should exercise discretion to stay enforcement of the award. The Fifth Circuit first noted that a district court “should enforce an arbitration award as written—to do anything more or less would usurp the tribunal’s power to finally resolve disputes and undermine the pro-enforcement policies of the New York Convention.”¹⁹⁷ Because the final award plainly stated “Duke must pay Wartsila” and because none of DEI’s contextual arguments were compelling, the Court found the refusal to grant a stay in conformity with the award.¹⁹⁸

With regard to DEI’s request for a discretionary stay, the Court of Appeals reviewed the district court’s decision using an abuse of discretion standard. The Court found that the district court did not abuse its discretion in refusing to grant the stay of enforcement on the grounds set forth in *Hewlett-Packard Co. Inc. v. Berg*,¹⁹⁹ where the First Circuit awarded a stay because the defendant had become insolvent, leaving the plaintiff with no ability to enforce any award rendered in a pending arbitration. The Court noted that, unlike the plaintiff in *Berg*, DEI had “presented no evidence of Wartsila’s insolvency or that DEI will have trouble recovering on its claims.”²⁰⁰ Without deciding whether the Fifth Circuit recognized the inherent authority of the district court to issue a stay, the Court found that at a minimum such a stay would only be available in very limited circumstances, and there was no abuse of discretion by the district court in this case.²⁰¹

C. RECOGNITION AND ENFORCEMENT OF FOREIGN COURT JUDGMENTS

1. *Recognition of Foreign Bankruptcy Proceedings*

In *In re Board of Directors of Telecom Argentina, S.A.*, the Second Circuit addressed the question of whether the debt restructuring of an Argentine company approved by a majority of its creditors and by an Argentine court could be implemented in a U.S. court under former Section 304 of the U.S. Bankruptcy Code²⁰² with respect to a U.S. creditor who

197. *Id.* at 292.

198. *Id.* at 294.

199. *Hewlett-Packard Co. Inc. v. Berg*, 61 F.3d 101, 105 (1st Cir. 1995).

200. *Wartsila Finland OY*, 518 F.3d at 295.

201. *See id.*

202. Section 304 of the Bankruptcy Code governed the recognition of ancillary bankruptcy proceedings by U.S. bankruptcy courts until it was repealed and replaced in 2005 by a new Chapter 15 incorporating the Model Law on Cross-Border Insolvency that was drafted by the United Nations Commission on International Trade Law (UNCITRAL). The court applied section 304 to this dispute because Telecom Argentina, S.A. filed its petition in bankruptcy court shortly prior to the effective date of the repeal. This decision remains relevant to the recognition of foreign bankruptcy proceedings in two ways. First, section 1506 of the new Chapter 15 creates an exception permitting courts to refuse to take an action governed by the chapter “if the action would be manifestly contrary to the public policy of the United States.” 11 U.S.C. § 1506 (2009). Thus, the comity language of *Telecom* remains relevant to the interpretation of that provision of the current

had not participated in the restructuring.²⁰³ As a result of the 2001 Argentina economic crisis, Telecom Argentina, S.A., (Telecom) received court approval for a privately negotiated, majority-approved restructuring plan that would be binding on all creditors of its outstanding debt. The Argo Fund Ltd. (Argo), a creditor of Telecom, did not participate in voting for the plan and instructed its U.S. bank not to cancel or transfer any of Argo's notes in accordance with Telecom's restructuring. Telecom responded by filing a petition in U.S. bankruptcy court seeking a judgment declaring the Argentine approval order and restructuring recognizable in U.S. courts, binding on all U.S. creditors, and resulting in cancellation of the debt to Argo. The bankruptcy court concluded that the restructuring proceeding qualified as a "foreign proceeding" and that the restructuring plan was worthy of recognition under section 304 of the Bankruptcy Code. The district court affirmed on appeal and Argo appealed to the Second Circuit.

In evaluating a petition under section 304, courts "shall be guided by what will best assure an economical and expeditious administration of [the debtor's] estate," consistent with a case-by-case balancing of six statutory factors relating to the foreign bankruptcy proceeding, including just treatment of all claimholders and principles of international comity.²⁰⁴ Argo contended first that the debt restructuring process "does not provide for just treatment of creditors because it allows for 'only limited objections and limited recourse against a majority-approved [plan]'" and second that the restructuring proceeding did not comport with public policy of the United States and was not entitled to considerations of comity.²⁰⁵ With regard to Argo's first contention, the Second Circuit noted that the just treatment factor is satisfied upon a showing that the applicable law "provides for a comprehensive procedure for the orderly and equitable distribution of [the debtor's] assets among all of its creditors."²⁰⁶ Because Argo had notice of the restructuring proceedings throughout the process and had opportunities to object to, and to vote on, the terms of the proposed plan, and because an Argentine court had ruled that the plan was not "abusive, fraudulent or discriminatory," the Court held that the bankruptcy court had not abused discretion in finding the plan provided just treatment of creditors.²⁰⁷

With regard to Argo's second contention, the Court noted that "[c]omity is generally appropriate where the foreign 'proceedings do not violate the laws or public policy of the United States and if the foreign court abides by fundamental standards of procedural fairness.'"²⁰⁸ In analyzing Argo's arguments that the restructuring proceeding was inconsistent with provisions of the U.S. bankruptcy code, the Court emphasized that "[s]ection 304 was adopted to recognize and enforce foreign proceedings where appropriate, not to require adoption of U.S. law."²⁰⁹ The Court refused to endorse an interpretation of the bankruptcy code that would "exalt bondholders' individual rights over recognition of for-

Bankruptcy Code. Second, petitions for recognition of foreign bankruptcy petitions that were filed prior to the repeal date of section 304 remain in U.S. courts and may be effected by the *Telecom* decision.

203. See *In re Bd. of Dirs. of Telecom Argentina, S.A.*, 528 F.3d 162 (2d Cir. 2008).

204. Section 304 only applies to petitions filed in Bankruptcy Court prior to its October 17, 2005, effective date of repeal. Chapter 15 does not require that courts evaluate the six factors listed in § 304(c). See *In re Bd. of Dirs. of Telecom Argentina, S.A.*, 528 F.3d 162, 169-70 (2d Cir. 2008).

205. *Id.* at 170.

206. *Id.* (internal quotations and citation omitted).

207. *Id.* at 171.

208. *Id.* at 171-72 (internal quotations and citation omitted).

209. *Id.* at 172, n.12 (internal quotations and citation omitted).

eign insolvency proceedings,” that would require U.S. creditors to receive the same in foreign bankruptcy proceedings as they would in U.S. proceedings, or that would find bad faith where a foreign company restructured prior to actual insolvency.²¹⁰ The court also reiterated that “foreign courts have an interest in conducting insolvency proceedings concerning their own domestic business entities” and that foreign creditors may be required to submit to foreign bankruptcy proceedings to resolve their claims.²¹¹ The court thus concluded that Argo’s refusal to participate in the Argentine proceedings did not grant an entitlement to protection from the restructuring plan under principles of comity.²¹²

2. *Applicability of Last-in-Time Rule to Conflicting Foreign Court Judgments*

In *Byblos Bank Europe, S.A., v. Sekerbank Turk Anonym Syrketi*, the New York Court of Appeals addressed the question of how to rule on a motion to enforce a foreign court judgment when two conflicting foreign judgments existed regarding the same dispute.²¹³ After Sekerbank Turk Anonym Syrketi (Sekerbank) defaulted on two \$2.5 million loans made by Byblos Bank Europe, S.A., (Byblos), Byblos began separate proceedings in Belgium, Turkey, and Germany for breach of contract. The Turkish courts ruled in favor of Sekerbank, dismissing Byblos’ claims. Sekerbank sought recognition of the Turkish judgment in the Belgian and German courts where litigation was pending. Whereas the German court recognized the judgment, the Belgian court ruled in favor of Byblos on the merits.

Byblos sought enforcement of the Belgian judgment in New York Supreme Court, arguing that the Belgian judgment was entitled to recognition under the “last-in-time” rule pursuant to Rule 53 of the New York Civil Practice Law and Rules (CPLR), under which the last judgment among conflicting sister state judgments generally prevails. Sekerbank cross-moved to vacate the judgment, arguing that (1) the court should exercise its power under CPLR 5304 to deny recognition of the Belgian judgment due to the conflicting Turkish judgment, and (2) the last in time rule did not apply to foreign court judgments. The court agreed with Sekerbank as did the Appellate Division, which concluded that the “last-in-time rule lacks any justification where, as here, the foreign country that rendered the last judgment [did] not give any party against whom enforcement is sought any kind of opportunity to argue the binding effect of the earlier judgment.”²¹⁴ The Appellate Division further noted that the Belgian judgment was based on a law permitting review of the merits that was directly in contravention of principles of comity and that had been since repealed.

The Court of Appeals affirmed. The Court noted that under CPLR 5304(b)(5), courts may exercise discretion to refuse to enforce a foreign court judgment that is in conflict with “another final and conclusive judgment,” although the New York statute does not specify which judgment takes precedence.²¹⁵ Instead, the Court held that the last-in-time rule applicable to sister state judgments need not apply automatically to foreign court

210. *Id.* at 172-74.

211. *Id.* at 175.

212. *See id.* at 174.

213. *See Byblos Bank Eur., S.A., v. Sekerbank Turk Anonym Syrketi*, 885 N.E.2d 191, 192 (N.Y. 2008).

214. *Byblos Bank Eur., S.A., v. Sekerbank Turk Anonym Syrketi*, 837 N.Y.S.2d. 54, 56 (N.Y. App. Div. 2007).

215. *Byblos Bank Europe*, 885 N.E.2d at 193-94.

judgments, and “[s]pecifically, the last-in-time rule should not be applied where, as here, the last-in-time court departed from normal *res judicata* principles by permitting a party to relitigate the merits of an earlier judgment.”²¹⁶

VIII. Forum Non Conveniens*

A. INTRODUCTION

The doctrine of *forum non conveniens* “authorizes a court with venue to decline to exercise its jurisdiction when the parties’ and the court’s own convenience, as well as the relevant public and private interests, indicate that the action should be tried elsewhere.”²¹⁷ Under the federal law standard, “[a] defendant seeking dismissal for *forum non conveniens* bears the burden of demonstrating (i) that an adequate alternative forum is available, (ii) that relevant public and private interests weigh in favor of dismissal, and (iii) that the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice.”²¹⁸

Only when a district court has taken into account and weighed all of the relevant factors may it grant a *forum non conveniens* dismissal.²¹⁹ A district court need not conclusively establish its own jurisdiction before dismissing a suit for *forum non conveniens*.²²⁰

B. FINDINGS OF “OPPRESSIVENESS AND VEXATION” IN FORUM NON CONVENIENS DETERMINATIONS

Recent federal circuit court decisions indicate a continuing split on whether a district court considering a motion for *forum non conveniens* dismissal must affirmatively find that the plaintiff’s choice of forum results in “oppressiveness and vexation” to the defendant as articulated by the Supreme Court in *Koster v. (American) Lumbermens Mutual Casu-*

216. *Id.* at 194.

* Contributed by Phillip B. Dye, Jr., partner, and Justin R. Marles, associate, at Vinson & Elkins LLP in Houston, Texas.

217. *Liquidation Comm’n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1356 (11th Cir. 2008).

218. *Id.* The Supreme Court, in the seminal case of *Gulf Oil Corp. v. Gilbert*, held that the private interest factors include:

the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining the attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

330 U.S. 501, 508 (1947).

A recent restatement of the public interest factors under *Gilbert*, has noted that they involve the consideration of:

the administrative difficulties stemming from court congestion; the local interest in having localized disputes decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflicts of laws or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Clerides v. Boeing Co., 534 F.3d 623, 628 (7th Cir. 2008) (citing *Gilbert*, 330 U.S. at 508-09).

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

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

*alty Co.*²²¹ The Sixth Circuit held twice in 2008 that a district court need not make a specific finding on the question of “oppressiveness and vexation” for the defendant in granting or denying forum non conveniens dismissal.²²² First, in *Estate of Thomson* the Sixth Circuit opined that “we have stated that a district court need not make a ‘finding’ that trial in the United States forum would be ‘oppressive’ or ‘vexatious’ to the defendants.”²²³ One month later, in *Barak v. Zeff*, the Sixth Circuit again held that “‘oppressiveness and vexation’ . . . are no longer absolute prerequisites for dismissal on the ground of forum non conveniens.”²²⁴ There, although the plaintiff had brought suit in his home forum of Michigan, the District Court nevertheless dismissed in favor of a foreign forum. The Court of Appeals affirmed the dismissal, noting that while the District Court was obliged to afford a high degree of deference to the plaintiff’s choice of his home forum, it was not necessary for the defendant in moving to dismiss on forum non conveniens ground to show that the plaintiff had “intended to oppress or vex” by suing there.²²⁵

On the other hand, the Third Circuit in *Windt v. Qwest Communications International, Inc.* held that a specific showing by the defendant of “oppressiveness or vexation” was necessary for forum non conveniens dismissal.²²⁶ The *Windt* case involved claims by bankruptcy trustees for KPNQwest N.V. against Qwest Communications International for allegedly deceiving KPNQwest’s Supervisory Board about the financial solvency of KPNQwest.²²⁷ The trustees filed suit in the District of New Jersey, which granted the defendant’s motion for forum non conveniens dismissal.²²⁸ In doing so, the district court determined that “under the holding of *Piper [Aircraft Co. v. Reyno]*, the defendant has to make an ‘oppressive or vexatious’ showing *only in case if the plaintiff is suing in plaintiff’s home forum.*”²²⁹ The Third Circuit upheld the grant of forum non conveniens dismissal by the district court while addressing the district court’s misunderstanding of the Third Circuit’s “oppressiveness and vexation” standard, stating:

Piper Aircraft Co. does not excuse a defendant from showing that litigating in the chosen forum would be oppressive or vexatious when the plaintiff is not suing in the

221. While there is ordinarily a strong presumption in favor of the plaintiff’s choice of forum in conducting an analysis of the private interest factors (see *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)), according to the Supreme Court in *Koster*:

[The plaintiff] should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff’s convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court’s own administrative and legal problems.

Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524, (1947). See also *Sinochem Int’l Co.*, 127 S. Ct. at 1190.

222. *Barak v. Zeff*, 289 Fed. Appx. 907, 911 (6th Cir. 2008); *Estate of Thomson v. Toyota Motor Corp. World-Wide*, 454 F.3d 357, 365 (6th Cir. 2008).

223. *Estate of Thomson*, 545 F.3d at 365.

224. *Barak*, 289 Fed. Appx. at 912.

225. *Id.* (citing *Duha v. Agrium, Inc.*, 448 F.3d 867, 875 (6th Cir. 2006)).

226. *Windt*, 529 F.3d at 195-96.

227. *Id.* at 187.

228. See *Windt*, 544 F. Supp. 2d at 434.

229. *Id.* at 428 (emphasis in original).

plaintiff's home forum. See *Piper Aircraft Co.*, 454 U.S. at 241^[230]. A defendant must show that litigation in the chosen forum is oppressive or vexatious regardless of whether the plaintiff brings suit in his home forum.²³¹

Overall, the decisions of the Sixth Circuit in *Barack* and the Third Circuit in *Windt* indicate an important and ongoing divide between the courts on the role of the concept of "oppressiveness and vexation" in the forum non conveniens analysis.

C. FORUM NON CONVENIENS DISMISSAL TO IRAQ

One of the key prongs of the forum non conveniens inquiry is the identification of an adequate alternative forum.²³² Courts have determined in several instances that the proposed alternative forum is not sufficient because litigation there would present a security risk to the parties.²³³ The issue of the safety of the litigating parties in the proposed alternative forum took an interesting twist in the case of *Galustian v. Peter*.²³⁴ The plaintiff in this case, Galustian, filed suit in the Eastern District of Virginia against the director of the Private Security Company Association of Iraq (PSCAI), Peter.²³⁵ Galustian's complaint alleged defamation by Peter based on an e-mail supposedly sent by the defendant to various members of the PSCAI circulating an arrest warrant for the plaintiff of questionable origin (plaintiff claimed the warrant was forged by a company with whom plaintiff was entangled in a separate business dispute).²³⁶

Peter requested forum non conveniens dismissal of the case for litigation in Iraq.²³⁷ In response to Peter's arguments, Galustian submitted an affidavit from the managing director of a security contractor in Baghdad stating that Iraq was not an "adequate alternative legal forum" for the dispute due to continuing instability in that country.²³⁸ The Eastern District of Virginia refused to entertain the plaintiff's security arguments as part of its consideration of the "adequate alternative forum" prong, instead holding that "the facts offered by [plaintiff's expert] with respect to the current conditions in Iraq, as well as the challenges Westerners face there, are germane to the court's analysis of the private interest factors presented in this dispute."²³⁹ Upon turning to the private interest factors, the

230. *Piper Aircraft Co.*, 454 U.S. at 241 (quoting *Koster*, 330 U.S. at 524).

231. *Windt*, 529 F.3d at 195-96.

232. See, e.g., *Liquidation Comm'n of Banco Intercontinental*, 530 F.3d at 1356.

233. See, e.g., *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 29 (D.D.C. 2005) (refusing defendant's request of dismissal for litigation in Indonesia due to the "genuine risk of reprisals if [plaintiffs] publicly identify themselves by attempting to litigate in Indonesia."); *Rasoulzadeh v. Assoc. Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983) (refusing defendant's forum non conveniens request when litigation of plaintiffs' claims in Iran presented a significant risk to plaintiff's safety), *aff'd without op.* 767 F.2d 908 (2nd Cir. 1985). *But see Paolicelli v. Ford Motor Co.*, 289 Fed. Appx. 387, 390 (11th Cir. 2008) (rejecting plaintiff's argument that Columbia was inadequate alternative forum due to "political instability" that posed "safety risks for the parties" absent evidence the political unrest has affected the Columbian judicial system or would affect litigation of the case.).

234. See *Galustian v. Peter*, 561 F. Supp. 2d 559 (E.D. Va. 2008), *order clarified at* 570 F. Supp. 2d 836 (E.D. Va. 2008).

235. See *id.* at 561.

236. See *id.*

237. See *id.* at 562-63.

238. *Id.* at 563 n.5.

239. *Id.*

court explained it was “cognizant of the ongoing instability and dangers present in Iraq.”²⁴⁰ The court considered this a unique set of circumstances, however, because the matter “arises from a dispute involving various individuals who were *already* living and working in Iraq as part of the rebuilding effort at the time the complained-of conduct occurred.”²⁴¹ In granting a conditional forum non conveniens dismissal, the district court explained that “litigation of the matter in Iraq is actually the more prudent method of resolving this dispute” as litigation in the United States “would necessitate travel to Iraq by United States-based attorneys involved in this dispute[,]” and “[u]nlike the plaintiff, the defendant, and the various witnesses involved in this lawsuit, these individuals did not elect to relocate to Iraq[.]”²⁴² The Eastern District of Virginia’s decision marks an important precedent with respect to future litigation tied to Iraq.

D. RELATIONSHIP BETWEEN STANDARDS FOR TRANSFER OF VENUE AND FORUM NON CONVENIENS DISMISSAL

The federal venue transfer provision 28 U.S.C. § 1404(a), which allows a district court to transfer a civil action brought in one district to any other district or division where it might have been brought “[f]or the convenience of parties and witnesses,” borrows a great deal from the test for forum non conveniens dismissal. Yet, “[a]lthough most federal courts properly distinguish between a forum non conveniens dismissal and a Section 1404(a) transfer, some recent district court opinions reveal an unfortunate erroneous conflation of the common law dismissal doctrine and the federal transfer statute.”²⁴³ This year, the Fifth Circuit Court of Appeals confronted the parallels and fleshed out some key differences between the forum non conveniens doctrine and the venue transfer statute in the case of *In re Volkswagen of America, Inc.*²⁴⁴

Plaintiffs in *In re Volkswagen*, the survivors of an automobile accident in Dallas, Texas, filed suit against Volkswagen in the Marshall Division of the Eastern District of Texas alleging that design defects in the Volkswagen Golf automobile caused injuries to one of the passengers in the accident and lead to the death of another.²⁴⁵ Defendant Volkswagen filed a motion to transfer venue to the Dallas Division of the Northern District of Texas under § 1404(a), which was subsequently denied by the Eastern District court.²⁴⁶ Volkswagen then filed a motion for reconsideration, “arguing that the district court gave inordinate weight to the plaintiffs’ choice of forum and that the district court failed properly to weight the venue transfer factors.”²⁴⁷

240. *Id.* at 564 n.6.

241. *Id.*

242. *Id.*

243. WRIGHT & MILLER, 14D FEDERAL PRACTICE AND PROCEDURE § 3828 (Thomson West 2007) (citing, e.g., *Uszynski v. Butterfield*, No. 06-CV-13216, 2006 WL 2865220 (Oct. 5, 2006 E.D. Mich.); *Karykous v. Sbarro, Inc.*, No. 06-2452 (AET), 2006 WL 2690287 (Sept. 19, 2006 D.N.J.)).

244. See *In re Volkswagen of America*, 506 F.3d 376, 381 (5th Cir. 2007), *granting petition for rehearing*, 517 F.3d 785, *rehearing opinion* at 545 F.3d 304 (5th Cir. 2008) (en banc).

245. See *In re Volkswagen*, 506 F.3d at 378.

246. See *id.* at 379.

247. *Id.*

After the district court denied Volkswagen's motion for reconsideration, Volkswagen requested a writ of mandamus from the Fifth Circuit Court of Appeals.²⁴⁸ In its petition, Volkswagen claimed that the district court had "abused its discretion by applying the wrong legal standard when, giving plaintiffs' choice of forum an elevated status, it stated that the moving party must show that the balance of convenience and justice *substantially* weighs in favor of transfer."²⁴⁹ Volkswagen claimed that the district court's decision reflected the "much stricter forum non conveniens dismissal standard" rather than the more permissive standard that applies to transfers of venue under § 1404(a).²⁵⁰ The Fifth Circuit panel agreed with Volkswagen, holding that "the district court erred in requiring Volkswagen to show that the balance of convenience and justice substantially weighs in favor of transfer[.]" and that for a transfer of venue under section 1404(a), a party need only "show good cause."²⁵¹ The Court rejected its earlier decision of *Marbury-Pattillo Construction Co. v. Bayside Warehouse Co.*, in which the Fifth Circuit relied on *Gulf Oil Corp. v. Gilbert* for the proposition that venue transfer would not be granted unless the factors justifying a § 1404(a) change of venue (which themselves closely resemble the forum non conveniens criteria²⁵²) were "strongly in favor of the defendant."²⁵³ Although the Fifth Circuit panel determined that the district court had "erroneously applied the stricter forum non conveniens dismissal standard," it did not explain whether this error by itself warranted mandamus relief, instead holding that mandamus was proper because the district court had improperly applied the public and private interest criteria from *Gilbert* in rejecting Volkswagen's requested venue transfer.²⁵⁴

In spite of the initial grant of mandamus by the Fifth Circuit panel, plaintiffs requested an en banc rehearing of the case by the full Fifth Circuit.²⁵⁵ The Fifth Circuit granted the plaintiffs' en banc request and re-examined the arguments of the plaintiffs and Volkswagen on the venue transfer issue.²⁵⁶ The court's final en banc opinion on the question of which standard should be applied in evaluating a request to transfer venue mirrored its earlier decision in the case, with the court holding that "a plaintiff's choice of forum under the *forum non conveniens* doctrine is weightier than a plaintiff's choice of venue under § 1404(a) because the former involves the outright dismissal of a case, and the latter involves only a transfer of venue within the same federal forum."²⁵⁷ Yet, the Fifth Circuit in its new opinion carefully noted, "[t]hat § 1404(a) venue transfers may be granted 'upon a lesser showing of inconvenience' than *forum non conveniens* dismissal, however, [this] does not imply 'that the relevant factors [from the forum non conveniens context] have changed or

248. See *id.* at 379.

249. *Id.* at 380 (emphasis in original).

250. *Id.*

251. *Id.* at 384.

252. The Fifth Circuit in its later *en banc* opinion explained that "we have adopted the private and public interest factors first enunciated in *Gulf Oil Corp. v. Gilbert*, [. . .] a *forum non conveniens* case, as appropriate for the determination of whether a § 1404(a) venue transfer is for the convenience of parties and witnesses and in the interest of justice." *In re Volkswagen*, 545 F.3d 304 at 315. But "[a]lthough the *Gilbert* factors are appropriate for most transfer cases, they are not necessarily exhaustive or exclusive." *Id.*

253. See *In re Volkswagen*, 506 F.3d at 383 (citing *Marbury-Pattillo Constr. Co v. Bayside Warehouse Co.*, 490 F.2d 155, 158 (5th Cir. 1974)).

254. *Id.* at 384, 387.

255. See *In re Volkswagen*, 517 F.3d at 785.

256. See *id.*; see also *In re Volkswagen*, 545 F.3d at 304.

257. *Id.* at 308.

that the plaintiff's choice of [venue] is not to be considered."²⁵⁸ But "[it] does imply that the burden that a moving party must meet to justify a venue transfer is less demanding than that a moving party must meet to warrant a *forum non conveniens* dismissal."²⁵⁹

IX. Parallel Proceedings*

A. INTRODUCTION

This Section addresses efforts by U.S. courts to deal with parallel civil proceedings in foreign courts (1) by issuing an anti-suit injunction enjoining a litigant from commencing or continuing litigation in a foreign forum; or by (2) staying or dismissing the U.S. action in deference to a pending foreign action.

B. ANTI-SUIT INJUNCTIONS AGAINST FOREIGN PROCEEDINGS

There were no major changes in 2008 to the jurisprudence of anti-suit injunctions. A number of cases, following either the strict or the liberal approaches of their respective circuits or states, evaluated the appropriateness of anti-suit injunctions in specific contexts.

In *Software AG, Inc. v. Consist Software Solutions, Inc.*, the District Court for the Southern District of New York followed the factors for deciding whether to enjoin a foreign proceeding announced by the Second Circuit in *China Trade and Development Corp. v. M.V. Choong Yong*,²⁶⁰ and developed by its progeny.²⁶¹ Plaintiffs, an enterprise integration vendor and its parent corporation, brought claims against defendants, a Brazilian distributor and its president, for breach of contract, false advertising in violation of the Lanham Act,²⁶² and tortious interference with business relations. After the Southern District had held hearings, but before it issued its decision, wholly owned and controlled affiliates of defendants sought and obtained ex parte orders in Brazil requiring plaintiffs to comply with the parties' distributorship agreement and preventing plaintiffs from using trademarks associated with plaintiffs' products.

After finding that other standards for a preliminary injunction, including substantial likelihood of success on the merits, were met, the court analyzed the appropriateness of enjoining the Brazilian proceeding. First, the court found that the two threshold factors set out in *China Trade* were satisfied in that the parties to the two proceedings were the same and resolution of the New York action would be dispositive of the Brazilian action.²⁶³ Notably, the court only required that the parties be "substantially the same" and was satisfied that the complainants in the Brazilian action were the wholly owned and controlled affiliates of defendants.²⁶⁴ The court also concluded that the discretionary fac-

258. *Id.* at 314 (quoting *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955)).

259. *Id.*

* Contributed by Fahad A. Habib, associate at Jones Day, Washington, D.C. The views herein are of the author and do not necessarily reflect those of Jones Day.

260. *China Trade and Development Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987).

261. See *Software AG, Inc. v. Consist Software Solutions, Inc.*, 08 Civ. 389 (CM)(FM), 2008 U.S. Dist. LEXIS 19347 (S.D.N.Y. Feb. 21, 2008).

262. 15 U.S.C. § 1125(a) (2006).

263. See *Software*, 2008 U.S. Dist. LEXIS 19347, at *65-69.

264. *Id.* at *65-67.

tors set out in *China Trade* and its progeny, i.e., “whether the foreign action threatens the enjoining court’s jurisdiction and whether the foreign action would frustrate important policies of the enjoining forum,” were met.²⁶⁵ The court found that the Brazilian action was “a transparent attempt to deprive this Court of jurisdiction” and that defendants had acted in bad faith in seeking and receiving an adjournment of a post-hearing deadline without informing the court that the Brazilian *ex parte* applications were pending.²⁶⁶ Further, the court found that the Brazilian action threatened important policies of the forum because plaintiffs’ claims implicated a federal statute, and the parties had agreed that New York law would govern their agreement.²⁶⁷ The court also found that equitable considerations; the vexatiousness, inconvenience and expense of the Brazilian proceedings; and the risk of inconsistent rulings also counseled toward granting the injunction.²⁶⁸

In *Barnie’s Coffee & Tea Co. v. American Mattress Co.*, the District Court for the Middle District of Florida refused to issue an anti-suit injunction against a parallel action brought in Kuwait by the Kuwaiti franchisee of plaintiff *Barnie’s Coffee & Tea Co., Inc.*, holding that plaintiff held the burden of “clearly establishing the prerequisites for an anti-suit injunction” and had failed to meet that burden.²⁶⁹ The court concluded that plaintiff had not presented sufficient evidence to conclude that “resolution of the case before the enjoining court is dispositive of the action to be enjoined,” among other reasons, because neither party could “give a clear explanation of the exact claims pending before the Kuwait Court.”²⁷⁰

Following the strict approach to anti-suit injunctions, the California Court of Appeals denied an application for an anti-suit injunction in *TSMC North America v. Semiconductor Manufacturing Int’l Corp.*²⁷¹ In this trade secret dispute, the Court of Appeals held that the trial court did not abuse its discretion in denying a motion by a Taiwanese company and others for an anti-suit injunction prohibiting Chinese companies from litigating claims of defamation and unfair competition in the Beijing People’s High Court.²⁷² The California suit concerned claims by each party that the other had breached a settlement agreement.²⁷³ The Beijing complaint alleged that the Taiwanese company had disseminated false and misleading information regarding the California suit to the Chinese media and public.²⁷⁴

The court held that foreign proceedings should be enjoined only upon a showing of an “exceptional circumstance” that outweighed the threat to judicial restraint and comity principles posed by anti-suit injunctions.²⁷⁵ Notwithstanding numerous concerns raised

265. *Id.* at *69.

266. *Id.* at *70.

267. *See id.* at *71.

268. *See id.* at *72.

269. *Barnie’s Coffee & Tea Co. v. Am. Mattress Co.*, No. 6:07-cv-1664-Orl-19UAM, 2008 U.S. Dist. LEXIS 4286, *7 (M.D. Fla. Jan. 20, 2008).

270. *Id.* at *6-7.

271. *See TSMC N. Am. v. Semiconductor Mfg. Int’l Corp.*, 161 Cal. App. 4th 581 (Cal. App. 1st Dist. 2008).

272. The court declined to review the trial court’s decision *de novo*, holding that “a weighing of numerous factors based on disputed facts is a classic exercise of judicial discretion that we may overturn only based upon a showing of abuse.” *Id.* at 588 n.1.

273. *See id.* at 586.

274. *See id.* at 587.

275. *Id.* at 591.

before the lower court, the court found that no such circumstance was present in the case.²⁷⁶ Further, the court declined to hold that anti-suit injunctions are warranted whenever constitutional concerns are implicated and found that, in any event, the evidence did not indicate that the Chinese action would violate the constitutional rights of the Taiwanese company.²⁷⁷ The court also held that the Beijing action did not threaten the trial court's jurisdiction.²⁷⁸ Finally, the court found that California public policies, such as the litigation privilege, which protects against tort liability for statements made in the course of litigation, were not implicated.²⁷⁹

In *Cardell Financial Corp. v. Suchodolksi Associates*, the Second Circuit, by summary order, upheld the district court's decision to issue a permanent anti-suit injunction against proceedings in Brazil.²⁸⁰ The court reviewed the decision under an abuse-of-discretion standard and concluded that appellant's arguments that the lower court misconstrued the pleadings in the Brazilian action and that the injunction was premature and broad did not provide a basis for reversal of the decision.²⁸¹

In *Allied Van Lines, Inc. v. Beaman*, the District Court for the Northern District of Illinois, after concluding that it did not have jurisdiction over the defendant, noted that a request for an anti-suit injunction against a related proceeding brought by the defendant in Canada would have failed, *inter alia*, because the party seeking the injunction was not named in the Canadian suit.²⁸²

In *Satyam Computer Services. v. Venture Global Engineering, LLC*, the District Court for the Eastern District of Michigan held that an order requiring a party to request the withdrawal of a "status quo" order obtained by the party from the Indian Supreme Court was not an anti-suit injunction because the party was not being deprived of its ability to pursue the merits of its case before the Indian court.²⁸³ Rather, the court held that the new order merely removed the party's violation of a previous order by the court that had foreclosed the request to the Indian court for a status quo order.²⁸⁴

Numerous decisions in 2008 enforced the parties' forum selection clauses to exclude parallel proceedings in foreign forums.²⁸⁵

Finally, *United States CFTC v. Lake Shore Asset Management.*, a cautionary tale of "overly aggressive advocacy," addressed whether former counsel for defendant should be sanctioned under Federal Rule of Civil Procedure 37.²⁸⁶ Among other failures by counsel, the District Court for the Northern District of Illinois noted that counsel's brief discussing

276. *See id.* at 591-602.

277. *See id.* at 592-95.

278. *See id.* at 595-97.

279. *See id.* at 598-602.

280. *See Cardell Fin. Corp. v. Suchodolksi Assocs.*, 261 Fed. Appx. 324, 324-25 (2d Cir. 2008).

281. *See id.* at 324.

282. *See Allied Van Lines, Inc. v. Beaman*, No. 07 C 2407, 2008 U.S. Dist. LEXIS 60250, at *11-12 (N.D. Ill. July 21, 2008).

283. *See Satyam Computer Servs., Ltd. v. Venture Global Eng'g, L.L.C.*, No. 07-CV-12654-DT, 2008 U.S. Dist. LEXIS 3906, at *27 (E.D. Mich. Jan. 17, 2008).

284. *See id.*

285. *See, e.g., A.P. Moller-Maersk A/S v. Ocean Express Miami*, 550 F. Supp. 2d 454, 470 (S.D.N.Y. 2008) (denying motion to dismiss complaint seeking injunction against foreign proceedings brought in forums other than that chosen in the parties' contract of carriage).

286. *U. S. CFTC v. Lake Shore Asset Mgmt.*, 540 F. Supp. 2d 994 (N.D. Ill. 2008).

anti-suit injunctions “relied exclusively on cases from Circuits following the conservative approach [when reviewing anti-suit injunctions] and did not mention the approach followed by the Seventh Circuit or indeed, that there were two approaches.”²⁸⁷ The court concluded that even “brief research” would have made counsel aware of relevant Circuit precedent.²⁸⁸

C. STAYS OF U.S. PROCEEDINGS

Cases in 2008 continued to uphold judicial authority to grant stays in favor of related proceedings abroad.²⁸⁹ Some courts continued to hew to a conservative approach on granting stays. For example, in *Heriot v. Byrne*,²⁹⁰ the court declined to abstain from exercising jurisdiction in favor of related litigation in Australia finding that the two actions were not parallel as required by *Colorado River Water Conservation District v. United States*.²⁹¹ Addressing the need for the two cases to be parallel, the court explained that “[t]he question is not whether the suits are formally symmetrical, but whether there is a substantial likelihood that the foreign litigation will dispose of all claims presented in the federal case.”²⁹² The court found that plaintiffs had not met their burden of showing the two cases were parallel, given that the U.S. action included claims for equitable accounting, U.S. copyright infringement, and unjust enrichment that were not raised in the Australian action.²⁹³

Also drawing attention in 2008 was the issue of whether proceedings that had been stayed met the standards for appeal. In *Groeneveld Transport Efficiency v. Eisses*, the Sixth Circuit declined to hear an appeal of an order staying proceedings in favor of related proceedings in Canada, reasoning that the order was not a “final decision” under 28 U.S.C. § 1291.²⁹⁴ In reaching this conclusion, the court drew a distinction between stays on the basis of the international abstention doctrine, i.e., whether “substantially the same parties are litigating substantially the same issues in the two fora,” and stays based on the Supreme Court’s decision in *Colorado River*.²⁹⁵ Under the *Colorado River* decision, a federal court may stay a federal action in favor of a concurrent state proceeding, but doing so “meant that there would be no further litigation in the federal forum; the state court’s judgment on the issue would be *res judicata*.”²⁹⁶ In such a scenario, the court reasoned, the stay would therefore be considered final and subject to appeal. In the case before it, however, the court held the issues in the U.S. forum and the Canadian forum were not identical and therefore not clearly subject to the *res judicata* or collateral estoppel doc-

287. *See id.* at 1013.

288. *Id.*

289. *See, e.g.,* *Zephyr Aviation III, L.L.C. v. Keytech Ltd.*, No.: 8:07-CV-227-T-27TGW, 2008 U.S. Dist. LEXIS 21944 (M.D. Fla. Mar. 19, 2008) (affirming thirty-day stay).

290. *Heriot v. Byrne*, No. 08 C 2272, 2008 U.S. Dist. LEXIS 60600, at *23 (N.D. Ill. July 21, 2008).

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

292. *Heriot v. Byrne*, No. 08 C 2272, 2008 U.S. Dist. LEXIS 21944, at *21 (citing *AAR Int’l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 518 (7th Cir. 2001)).

293. *See id.* at *22-23.

294. *See Groeneveld Transp. Efficiency v. Eisses*, 297 Fed. Appx. 508, 510-512 (6th Cir. 2008).

295. *Id.* at 510-512.

296. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 (1983).

trines and the court had left open the possibility that the “action [c]ould be fully restored to the active docket.”²⁹⁷

Similarly, the District Court for the District of Connecticut in *In re Complete Retreats, L.L.C.*, refused to allow an interlocutory appeal under 28 U.S.C. § 1292(b) of a bankruptcy court’s decision to stay proceedings—on the basis of international comity and judicial efficiency—in favor of related proceedings in Belize.²⁹⁸ The bankruptcy court stayed proceedings seeking to recover fraudulently transferred property and money damages pending the outcome of the Belizean litigation on the basis that any ruling by the Belizean court might be inconsistent with a ruling in the bankruptcy litigation and any award for plaintiff in that action might negate the need to continue the bankruptcy proceedings.²⁹⁹ The court concluded that the decision did not meet Section 1292(b) standards.³⁰⁰

297. *Groeneveld Transp. Efficiency*, 295 Fed. Appx., at 511-512.

298. See *In re Complete Retreats, LLC v. Gram*, No. 3:07mc152 (SRU), 2008 U.S. Dist. LEXIS 4401 (D. Conn. Jan. 23, 2008).

299. See *id.* at *2-9.

300. See *id.* at *13.