

# International Litigation

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## I. Foreign Sovereign Immunities Act\*

### A. FSIA CASES BEFORE THE SUPREME COURT

The Foreign Sovereign Immunities Act (FSIA) provides the sole basis for subject matter jurisdiction in any action against a foreign state.<sup>1</sup> In 2007, the Supreme Court of the United States decided two FSIA-related cases.

In *Permanent Mission of India to the United Nations v. City of New York*, the Supreme Court considered whether India and Mongolia enjoyed immunity from declaratory judgment actions initiated by New York City to determine the validity of municipal tax liens on property owned by the foreign sovereigns and used in part as residences for diplomatic employees and their families.<sup>2</sup> The Supreme Court held that India and Mongolia were not immune from suit because the “immovable property” exception under Section

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1. See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004).

2. *Permanent Mission of India to the U.N. v. City of New York*, 127 S. Ct. 2352 (2007).

1605(a)(4) of the FSIA applied.<sup>3</sup> The Court rejected the foreign states' contention that the "immovable property" exception was limited to cases contesting title, ownership, or possession, and emphasized the plain language of the provision, which refers to cases in which "rights in" immovable property are "in issue."<sup>4</sup> This broad language, the Court held, encompasses tax liens because a lien is a non-possessory interest in property that places "rights in" property "in issue" by inhibiting the right to convey.<sup>5</sup>

In *Powerex Corp. v. Reliant Energy Services, Inc.*, the Court held that the appellate jurisdictional bar of 28 U.S.C. Section 1447(d) precluded the Ninth Circuit from reviewing an order of remand to state court that was based on a finding that the defendant was not a "foreign state" under Section 1603 of the FSIA.<sup>6</sup> Emphasizing the clear language of the statute, the Court rejected Powerex's argument that Section 1447(d) was inapplicable to suits removed under the FSIA.<sup>7</sup> Writing for the majority, Justice Scalia acknowledged the possibility that an erroneous remand could deprive a foreign state of a federal forum but concluded that the issue raised a policy debate not appropriate for consideration by the Court: "As far as the Third Branch is concerned, what the text of § 1447(d) indisputably does prevail over what it ought to have done."<sup>8</sup>

## B. FSIA EXCEPTIONS TO SOVEREIGN IMMUNITY FROM JURISDICTION

### 1. *The Waiver Exception*

The waiver exception to jurisdictional immunity under the FSIA, Section 1605(a)(1), provides that a foreign state is not immune from suit where it has "waived its immunity either explicitly or by implication."<sup>9</sup> In *Autotech Technologies LP v. Integral Research & Development Corp.*, the Seventh Circuit found an implied waiver of immunity by Integral, a corporation wholly owned by Belarus.<sup>10</sup> After the parties had settled the original lawsuit, the district court retained jurisdiction to enforce the settlement and subsequently imposed monetary contempt sanctions on Integral for noncompliance. Ten years later, the district court reduced the unpaid sanctions to a money judgment without addressing whether Integral had waived sovereign immunity.<sup>11</sup> On appeal, the Seventh Circuit found that Integral had implicitly waived immunity, both by agreeing to arbitrate in the United States under a contract governed by Illinois law and by not raising the immunity defense at the commencement of proceedings.<sup>12</sup>

The Fifth Circuit applied the same principles in *Af-Cap, Inc. v. Republic of Congo*, but found no implied waiver of jurisdictional immunity by the Republic of Congo.<sup>13</sup> There,

3. *Id.* at 2358.

4. *Id.* at 2356.

5. *Id.*

6. *Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2417 (2007). Section 1447(d) of title 28, United States Code provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

7. *Powerex*, 127 S. Ct. at 2419-20.

8. *Id.* at 2420.

9. 28 U.S.C. §1605(a)(1).

10. *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 743-44 (7th Cir. 2007).

11. *Id.* at 742.

12. *Id.* at 743-44.

13. *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 426-27 (5th Cir. 2006).

the underlying contract did not provide for arbitration but for jurisdiction of courts in London and New York (not Texas where the district court was located). The contract was governed by English (and not U.S.) law. Furthermore, the previous proceedings in *Af-Cap*, where the waiver exception to immunity from *execution* had been found to apply, had concerned garnishment of Congo's intangible property allegedly located in Texas but had not implicated Congo *in personam*, and therefore could not affect Congo's jurisdictional immunity from *in personam* orders.<sup>14</sup>

## 2. *The Commercial Activity Exception*

### a. "Commercial Activity" by a Foreign State

In *El-Hadad v. United Arab Emirates*, the D.C. Circuit considered an accountant's wrongful termination suit against his employer, the Embassy of the United Arab Emirates, and held that the employment relationship constituted a commercial activity.<sup>15</sup> Guided by the FSIA's legislative history, the court concluded that, while the commercial activity exception may not be invoked by civil servants or other state employees performing a "quintessentially governmental" function, El-Hadad was an accountant engaged in regular commercial employment.<sup>16</sup> Therefore, his employment action was within the commercial activity exception.<sup>17</sup>

In *Anglo-Iberia Underwriting Management. Co. v. Lodderhose*, the Second Circuit addressed whether "negligent supervision" of an employee could be deemed a "commercial activity."<sup>18</sup> The suit was based on a fraud scheme perpetrated by an employee of Jamsostek, an insurance company owned by the Republic of Indonesia. The Second Circuit's summary order affirmed the dismissal of the breach of contract claims against Jamsostek and Indonesia because the implicated employee lacked apparent or actual authority, and his actions therefore could not be imputed to his employers.<sup>19</sup> But the court remanded for further consideration of the plaintiffs' "negligent supervision" claim, which was not based on agency principles.<sup>20</sup> If negligent supervision of the employee occurred "in connection with a commercial activity" of Indonesia and caused a "direct effect" in the United States, the action would be within the purview of the commercial activity exception.<sup>21</sup>

### b. The "Based Upon" Requirement

The commercial activity exception requires that the plaintiff's action be "based upon" a foreign state's "commercial activity" or an act in connection with such activity causing a

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14. *Id.* See *infra* note 46 for further discussion of both *Autotech* and *Af-Cap* in relation to execution immunity.

15. *El-Hadad v. United Arab Emirates*, 496 F.3d 658, 663-68 (D.C. Cir. 2007).

16. *Id.* at 664.

17. *Id.* at 668.

18. *Anglo-Iberia Underwriting Mgmt. Co. v. Lodderhose*, 235 Fed. App'x 776, 781-82 (2d Cir. 2007).

19. *Id.* at 780.

20. *Id.* at 781-82.

21. *Id.* at 780.

“direct effect” in the United States.<sup>22</sup> In other words, the plaintiff must show a “significant nexus” between its cause of action and the foreign state’s commercial conduct.<sup>23</sup>

In *Kensington International Ltd. v. Itoua*, the Second Circuit found that such a nexus was lacking in a civil RICO action by Kensington, a creditor of the Republic of Congo, against Congo’s national oil company *Société Nationale des Pétroles du Congo* (SNPC), its former president, Itoua, and the French bank *BNP Paribas* (BNP).<sup>24</sup> Kensington alleged that oil trading transactions and related financial arrangements by these defendants prevented Kensington from attaching Congolese oil in satisfaction of its judgments against Congo. The Second Circuit held that Kensington’s RICO action was not “based upon” any conduct by the defendants that either took place in the United States or caused a direct effect in the United States. “The gravamen of Kensington’s complaint” was the oil prepayment agreements between SNPC and BNP, which occurred in Europe or in Africa.<sup>25</sup> The occasional shipments of oil to the United States by BNP or third parties and occasional payments wired through the New York branch of BNP did not “form the basis of [Kensington’s] action” because the oil trading structure “would have the same alleged effect on Kensington’s ability to collect on its debt even if” these events occurred entirely outside the United States.<sup>26</sup> Likewise, Kensington’s inability to collect on its U.S. judgment did not constitute a “direct effect” in the United States because a contrary rule would allow plaintiffs “to abrogate sovereign immunity regardless of how insubstantial the connection was between the acts underlying that judgment and the United States.”<sup>27</sup>

On the other hand, in *Boeing Co. v. EgyptAir*, the Second Circuit found the “significant nexus” requirement satisfied.<sup>28</sup> Boeing, a named assured under EgyptAir’s insurance policy, sought a declaratory judgment that Misr, an insurance company wholly owned by Egypt, could not recover from Boeing for damages it had paid in connection with an EgyptAir plane crash. In a summary order, the Second Circuit held that naming Boeing as an additional assured was an “act” in connection with Misr’s commercial activity outside the United States that had a “direct effect” in the United States by allowing EgyptAir to fly in and out of this country.<sup>29</sup> Since Boeing’s claim for declaratory relief was “based upon” that same act, which precluded Misr from recovering against Boeing, the court found it to be well within the commercial activity exception.<sup>30</sup>

In *Orient Mineral Co. v. Bank of China*, the Tenth Circuit also addressed the nexus requirement.<sup>31</sup> The plaintiff, Orient Mineral Company (Orient), had formed a joint venture with an individual who opened an account at the Bank of China (Bank) on Orient’s behalf,

22. 28 U.S.C. § 1605(a)(2).

23. See *Reiss v. Société Centrale du Groupe des Assurances Nationales*, 235 F.3d 738, 747 (2d Cir. 2000); see also *Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006) (“As a threshold step in assessing plaintiffs’ reliance on the ‘commercial activity’ exception, we must identify the act of the foreign sovereign State that serves as the basis for plaintiffs’ claims.”).

24. *Kensington Int’l Ltd. v. Itoua*, 505 F.3d 147, 156 (2d Cir. Oct. 18, 2007).

25. *Id.*

26. *Id.* at 156-57.

27. *Id.* at 159.

28. *The Boeing Co. v. EgyptAir*, No. 05-5986-CV, 2007 U.S. App. LEXIS 10801, at \*4 (2d Cir. May 7, 2007).

29. *Id.*

30. *Id.*

31. *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 993-1000 (10th Cir. Oct. 24, 2007).

and who later allegedly embezzled money from the account, including a sum wired to his wife's account in Utah. Orient sued the Bank on the theory that it had breached the duty to safeguard Orient's funds, arguing that the claims were "based upon" the Bank's commercial conduct with a nexus to the United States. The court held that there was no jurisdiction over most of Orient's claims because the "ongoing business relationship" between Orient and the Bank was in China, and those claims had no connection to the Bank's unrelated commercial presence in the United States.<sup>32</sup> Nevertheless, with respect to the wire transfer to the account in Utah, the court held that the Bank had engaged in commercial activity that caused a "direct effect" in the United States.<sup>33</sup>

c. "Direct Effect in the United States"

In *American Telecom Co., L.L.C. v. Republic of Lebanon*, the Sixth Circuit held that a foreign state's act of excluding a U.S. company from bidding on a contract did not constitute a "direct effect" in the United States.<sup>34</sup> American Telecom paid for the right to bid on a contract in Lebanon but was subsequently disqualified because it had submitted an e-mail copy of its tender bond and not the original document. On appeal from the dismissal of American Telecom's suit on sovereign immunity grounds, the Sixth Circuit applied the principle that an "effect is direct if it follows as an immediate consequence of the defendant's activity" and held that the only immediate consequence of Lebanon's act was to disqualify American Telecom from the bidding in Lebanon.<sup>35</sup> American Telecom's payment for the right to enter the bidding (drawn from a U.S. bank account) was voluntary and not an "effect" of Lebanon's conduct. Accordingly, the alleged breaches by Lebanon did not "cause a direct effect in the United States," and Lebanon was entitled to immunity.<sup>36</sup>

3. *The Expropriation Exception*

In *Nemariam v. Federal Democratic Republic of Ethiopia*, the D.C. Circuit addressed claims against Ethiopia and its Central Bank (CBE) for allegedly unlawful takings of bank accounts.<sup>37</sup> The court held that, although "rights in property" under Section 1605(a)(3) included intangible property, the expropriation exception was inapplicable because the bank accounts at issue were not owned or operated by CBE.<sup>38</sup> The court reasoned that the property right at issue was the plaintiff's "contractual right to receive payment," and that CBE had not taken possession of that right—"instead it declined to perform its own contractual obligations."<sup>39</sup>

32. *Id.* at 993-96.

33. *Id.* at 996.

34. *American Telecom Co., L.L.C., v. Republic of Lebanon*, 501 F.3d 534, 541 (6th Cir. 2007).

35. *Id.* at 540 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992)) (internal quotations omitted).

36. *Id.* at 541.

37. *Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470 (D.C. Cir. 2007).

38. *Id.* at 481.

39. *Id.*

## C. FSIA EXCEPTIONS TO SOVEREIGN IMMUNITY FROM EXECUTION

1. *Scope and Effect of a Waiver of Immunity from Execution*

In *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, the Ninth Circuit considered whether the Republic of Congo's contractual waiver of immunity from execution allowed Congo's judgment creditor to attach various obligations owed to Congo by ChevronTexaco in connection with petroleum operations in Congolese territory.<sup>40</sup> The Court of Appeals held that, even with the waiver, the only property of Congo amenable to execution would be its property both "in the United States" and "used for commercial activity in the United States."<sup>41</sup> Finding that ChevronTexaco's obligations to Congo were not used for a commercial activity in the United States, the court dissolved the garnishments and liens.<sup>42</sup>

In holding that no waiver can dispense with the statutory limitations imposed by the FSIA, the Ninth Circuit joined other circuit courts that have likewise interpreted Section 1610(a)(1) of the FSIA according to its plain meaning.<sup>43</sup> In *Autotech*, the Seventh Circuit also concluded that, even if the defendant's jurisdictional waiver encompassed execution immunity, the scope of property amenable to execution was still limited by the language of the statute.<sup>44</sup> *Autotech's* writ of execution was unenforceable under Section 1610 because the writ did not identify any specific property, making it impossible to ascertain whether the property subject to execution would be "in the United States" and "used for commercial activity in the United States."<sup>45</sup> In the words of the Seventh Circuit, "[a] court cannot give a party a blank check when a foreign sovereign is involved."<sup>46</sup>

2. *Property of a Foreign State v. Property of an Agency or Instrumentality of a Foreign State*

Although an "agency or instrumentality of a foreign state" is included within the definition of a "foreign state" under Section 1603 of the FSIA, a foreign state itself and its agencies or instrumentalities are treated very differently for execution purposes.<sup>47</sup> In *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, the Ninth Circuit addressed whether the Ministry of Defense of Iran (MOD), for purposes of execution immunity, was an agency or instrumentality of Iran, or

40. *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080 (9th Cir. 2007).

41. *Id.* at 1087.

42. See discussion *infra* Part I.C.2.

43. See, e.g., *Kensington Int'l Ltd. v. Republic of Congo*, 461 F.3d 238, 243 (2d Cir. 2006) ("even with a waiver, the district court's authority is still limited" by the language of subsections 1610(a)(1) and 1610(d)(1) of the FSIA); *FG Hemisphere Assocs. v. Republique du Congo*, 455 F.3d 575, 588-590 (5th Cir. 2006) (courts must determine whether a foreign state's property is "in the United States" and "used for commercial activity in the United States" every time execution on foreign state property is sought).

44. *Autotech*, 499 F.3d at 749-51, discussed *supra* Part I.B.1.

45. *Id.* at 750.

46. *Id.* The Seventh Circuit, however, opined that the FSIA does not categorically prohibit the imposition of monetary contempt sanctions against a foreign state, attempting to distinguish, without significant analysis, the Fifth Circuit's recent holding that the FSIA bars such sanctions because they are not contemplated by §§ 1610-11. Compare *Autotech*, 499 F.3d at 745 (7th Cir.), with *Af-Cap*, 462 F.3d at 428-29 (5th Cir.).

47. Compare 28 U.S.C. § 1610(a) with § 1610(b).

a part of the state itself.<sup>48</sup> Plaintiff Elahi, in order to satisfy a wrongful death judgment against Iran resulting from a terrorist act, sought to attach an arbitral award owed to MOD by Cubic Defense Systems. His ability to do so turned on whether MOD was “a separate legal person” within the meaning of Section 1603(b) because, if it were, its property would be subject to the broader set of exceptions to immunity from execution that apply to agencies and instrumentalities under Section 1610(b).<sup>49</sup> The Ninth Circuit adopted a “‘core functions’ test, asking whether the defendant is ‘an integral part of a foreign state’s political structure’ or, by contrast, ‘an entity whose structure and function is predominantly commercial.’”<sup>50</sup> While declining to state a categorical rule on the subject, the court subscribed to “a strong presumption that the armed forces constitute a part of the foreign state itself” and, because that “presumption has not been rebutted here,” the court concluded that MOD was a part of the state.<sup>51</sup>

### 3. Property “Used for a Commercial Activity in the United States”

In *EM Ltd. v. Republic of Argentina*, the Second Circuit addressed the attempt by plaintiffs, holders of Argentine-issued debt, to attach an account of Argentina’s central bank at the Federal Reserve Bank of New York (FRBNY).<sup>52</sup> The district court rejected the argument that the Republic had obtained an attachable interest in the funds based upon two decrees issued by the Argentine President in late 2005, which authorized the central bank to use its reserves to repay the Republic’s debts to the International Monetary Fund (IMF) without specifically designating the FRBNY funds for that use.<sup>53</sup>

In affirming the vacatur of the attachment, the Second Circuit held that, even if the decrees had converted the FRBNY funds into property of the Republic, repaying the IMF is not a “commercial activity,” and that, in any event, plaintiffs had failed to show that any of the FRBNY funds were to be “used for” making such payments.<sup>54</sup> The Second Circuit observed that the Republic’s relationship with the IMF was pursuant to powers “peculiar to sovereigns” because only sovereign nation states can become members and borrowers of the IMF, and the IMF program is part of an enterprise intended to promote stability in the international monetary system and foster orderly economic growth.<sup>55</sup>

48. Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys. Inc., 495 F.3d 1024, 1034-37 (9th Cir. 2007).

49. *Id.* at 1034; 28 U.S.C. § 1603(b). The Ninth Circuit held that Elahi could attach the *Cubic* award under the Terrorism Risk Insurance Act (TRIA) and reached the question of MOD’s status under the FSIA only to the extent that its analysis of TRIA might be incorrect.

50. *Cubic*, 495 F.3d at 1034 (quoting *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994)).

51. *Id.* at 1035, 1036-37. See discussion *infra* Part I.C.3.

52. *EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2d Cir. 2007).

53. *Id.* at 470.

54. *Id.* at 484. The Republic’s ability to exert some control over its central bank, as reflected in the decrees, did not mean that the ownership of the FRBNY funds had changed hands to the Republic. “To conclude otherwise would be to allow creditors of a foreign state to attach all of the assets of the state’s central bank any time the foreign state issues directives affecting the central bank’s reserves.” *Id.* at 475. The Second Circuit further noted that, even if the Republic had an attachable interest in the FRBNY account, the funds would likely be immune from attachment by the separate protection given to central bank assets under § 1611 of the FSIA, which immunizes property of a foreign central bank “held for its own account.” *Id.* at 485; 28 U.S.C. § 1611(b)(1).

55. *EM*, 473 F.3d at 482-83.

In both *Af-Cap* and *Cubic*, the Ninth Circuit also considered the question of whether property was “used for a commercial activity in the United States,” as required by Section 1610(a).<sup>56</sup> In *Af-Cap*, the plaintiff urged the court to adopt a broad reading of “used for” that would encompass the “entire underlying activity that generated the property in question.”<sup>57</sup> The Ninth Circuit disagreed, holding that “property is ‘used for a commercial activity in the United States’ when the property in question is put into action, put into service, availed or employed *for* a commercial activity” as opposed to “*in connection* with a commercial activity or *in relation* to a commercial activity.”<sup>58</sup> Under this interpretation, the Ninth Circuit held that none of the obligations owed to Congo was “used for commercial activity in the United States.”<sup>59</sup> Similarly, in *Cubic*, the Ninth Circuit held that the arbitral award that MOD intended to send to Iran for “repatriation into a ministry’s budget” was not being “used for a commercial activity in the United States.”<sup>60</sup>

## II. Service of Process Abroad\*

### A. INTRODUCTION

Service of process upon an individual in a foreign country in civil actions brought in U.S. federal courts is governed by Rule 4(f) of the Federal Rules of Civil Procedure. The Supreme Court has 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 in Civil or Commercial Matters (Hague Convention), Rule 4(f) requires that the Hague Convention’s provisions are the exclusive means to effect service of process.<sup>61</sup> Additionally, Rule 4(f)(3) allows for service “by other means not prohibited by international agreement, as the court orders.”<sup>62</sup> In 2007, the language of Rule 4 was amended for stylistic purposes only<sup>63</sup> and the federal courts wrestled with the question of whether the Hague Convention authorizes service of process through registered international mail and what possible alternate means of service of process are allowable under Rule 4(f)(3).

### B. DEVELOPMENTS UNDER THE HAGUE CONVENTION

Although the Hague Convention outlines several possible methods in which service of process can be performed (for example, through a foreign country’s central authority), the

56. *Af-Cap*, 475 F.3d 1080; *Cubic*, 495 F.3d 1024 (discussed *supra* Parts I.C.1 and I.C.2 respectively).

57. *Af-Cap*, 475 F.3d at 1087.

58. *Id.* at 1091 (emphasis in original) (citing *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240 (5th Cir. 2002)).

59. *Id.* at 1092-96.

60. *Cubic*, 495 F.3d at 1037 (discussed *supra* Part I.C.2).

\* Contributed by William Lawrence, partner at Frommer Lawrence & Haug, L.L.P. in New York, New York. Special thanks to Rami Bardenstein, an associate with Frommer Lawrence & Haug, L.L.P., for his research assistance.

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

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

63. Amendments to Rule 4 became effective on December 1, 2007. A Committee note on the approved changes recognized that the language of Rule 4 was amended as a part of the general restyling of the Civil Rules and was done to make the rules more easily understood.

Hague Convention's Article 10(a) has generated some recent federal court discussion. Article 10(a) states that as long as the foreign state "does not object, the present Convention shall not interfere with (a) the freedom to send judicial documents, by postal channels, directly to persons abroad."<sup>64</sup> Controversy continues to surround the term "send." Federal courts have split on the whether the term "send" means "serve" and therefore allows for service of process via certified mail.<sup>65</sup>

In 2007, one district court in the Sixth Circuit adopted the Fifth and Eight Circuits' interpretations of Article 10(a) as not permitting service via registered mail.<sup>66</sup> The Eastern District of Tennessee in *Haun v. HTC, Inc.* concluded that service via registered mail to a Swedish defendant was improper because "'send' in Article 10(a) is not equivalent to 'service of process.'"<sup>67</sup> The *Haun* court relied on prior district court decisions from the Sixth Circuit in support of its holding.<sup>68</sup> Although the *Haun* decision does not contain any reasoned analysis of Article 10(a), when read in context with other 2007 federal district court decisions, this case highlights the division amongst courts on the broad issue of whether Article 10(a) permits service via registered mail or not.

In *Barnhill v. Teva Pharmaceuticals USA, Inc.*, the Southern District of Alabama also dealt with the issue of whether to interpret "send" in Article 10(a) as permitting service via certified mail and reached the opposite conclusion.<sup>69</sup> In *Barnhill*, the plaintiff notified Teva, an Israeli defendant, of the action by mailing a copy of the summons and complaint by international certified mail to Israel, a signatory of the Hague Convention without objection to Article 10(a). In reaching its decision, the *Barnhill* court found the Second and Ninth Circuits' reasoning in interpreting the term "send" in Article 10(a) more persuasive than that of the Fifth and Eight Circuits. This broader interpretation, according to the court, was more aligned with the Hague Convention's purpose, which facilitates service of process.<sup>70</sup> Recognizing that the Second and Ninth Circuit's interpretation "was also the understanding of parties [to the Hague Convention] . . . and the view of the United States State Department," the district court held that Article 10(a) permits service by mail.<sup>71</sup> As a result, the *Barnhill* court held that the plaintiff's service of process was sufficient.<sup>72</sup>

The Eastern District of Wisconsin in *Koss Corp. v. Pilot Air Freight Corp.*, provided a more nuanced interpretation of whether Article 10(a) permits service of process abroad by

64. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters art. 10(a), Nov. 15, 1965, T.I.A.S. No. 6638, 4 I.L.M. 341.

65. See, e.g., *Mitchell v. Theriault*, 516 F. Supp. 2d 450, 453 (E.D. PA. Oct. 12, 2007); *Koss Corp. v. Pilot Air Freight Corp.*, 242 F.R.D. 514, 516 (E.D. Wis. 2007); *Barnhill v. Teva Pharmaceuticals USA, Inc.*, No. 06-0282-CB-M, 2007 U.S. Dist. LEXIS 44771, \*15 (S.D. Ala. Apr. 24, 2007).

66. *Haun v. HTC, Inc.*, No. 3:07 Civ. 180, 2007 U.S. Dist. LEXIS 69495 (E.D. Tenn. Sept. 19, 2007). Also upholding service of process via registered mail under Article 10(a) was the district court in *Guy Carpenter & Co., LLC v. Samengo-Turner*, No. 07 Civ. 3580, 2007 U.S. Dist. LEXIS 42730 at \*7 (S.D.N.Y. June 14, 2007) (finding service effective because the United Kingdom (where the defendants resided) has not objected to Article 10(a), and registered mail is an acceptable method of service of process).

67. *Id.* at \*4.

68. *Id.*

69. See, *Barnhill*, No. 06-0282-CB-M, 2007 U.S. Dist. LEXIS 44771 (S.D. Ala. April 24, 2007).

70. *Id.* at \*15.

71. *Id.*

72. *Id.*

registered mail.<sup>73</sup> In *Koss*, the defendant, Pilot Air Freight, attempted to effect service of process on Posten, a third-party Swedish company, via international registered mail in Sweden. In concluding that the Hague Convention does not prevent service via international mail, the *Koss* court relied on two principal findings similar to those in *Barnhill*. First, the court found that the Hague Convention “is dedicated solely to service of process,” and therefore “it would be incongruous for a subsection of Article 10(a) to refer to something other than service of process.”<sup>74</sup> This conclusion is bolstered by the view of practically all member countries to the Convention that the term “send” in Article 10(a) includes serve.<sup>75</sup> Second, the court recognized that the United States State Department “specifically disapproved the Eight[sic] Circuit’s” view that “send” does not mean “serve.”<sup>76</sup>

Unlike the *Barnhill* court, however, the *Koss* court did not find that Article 10(a) expressly authorizes service of process via registered mail but merely does not interfere with service of process via international mail. The *Koss* court found that Rule 4(f)(3) of the Federal Rules of Civil Procedure authorizes service by international mail, but that such service must be specifically directed by the district court.<sup>77</sup> Ultimately, while service in *Barnhill* was proper without court authorization, in *Koss* the defendants were not authorized to serve the third-party via international mail. Since Pilot Air Freight was not given express authorization by the district court for such service, Pilot Air Freight’s service was not valid.<sup>78</sup> Under the circumstances, the district court authorized such service and gave Pilot Air Freight 120 days to properly effect service.<sup>79</sup>

Further highlighting the confusion surrounding Article 10(a)’s contours is *Mitchell v. Theriault*.<sup>80</sup> *Mitchell* dealt with two Canadian defendants, residents of Quebec, who were accused of negligently injuring the plaintiffs in an automobile accident. One defendant was an individual while the other defendant was a corporation. Recognizing the split among federal circuits, and even within its own circuit, the district court held that Article 10(a) permits service via registered mail.<sup>81</sup>

Similar to the *Koss* court, however, the *Mitchell* court found that Article 10(a) permits but does not expressly authorize service through registered mail.<sup>82</sup> The *Mitchell* court noted that authorization was possible under three other provisions: Rule 4(f)(2)(c)(ii), Rule 4(f)(3), or Rule 4(f)(2)(A). Rule 4(f)(2)(c)(ii) authorizes service by mail if “mailed by the clerk of the federal district court in which the suit is filed.”<sup>83</sup> Since the *Mitchell* plaintiffs mailed the summons and complaint, and not the district court clerk, Rule 4(f)(2)(c)(ii) was clearly not applicable.<sup>84</sup> As was the case in *Koss*, Rule 4(f)(3) was not applicable because it

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73. *Koss*, 242 F.R.D. 514.

74. *Id.* at 516-517.

75. *Id.* at 517.

76. *Id.* Note that *Koss*, like *Haun* (discussed above), involved a Swedish defendant. The only distinction determining whether or not service was proper was the location of the U.S. forum in which the suit was filed.

77. *Id.* at 518.

78. *Id.*

79. *Id.*

80. *Mitchell*, No. 3:07-cv-1241, 2007 U.S. Dist. LEXIS 76684 (E.D. PA. Oct. 12, 2007).

81. *Id.* at \*11.

82. *See id.* at \*11-\*12.

83. *Id.* at \*13.

84. *Id.*

requires prior authorization from the district court, which the plaintiffs did not receive prior to service.<sup>85</sup> Thus, the court turned to Rule 4(f)(2)(A), which authorizes service “in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction.”<sup>86</sup> After analyzing Canada’s law on service, the court concluded that service via mail was authorized for individuals but not corporations in Quebec.<sup>87</sup> And as the *Koss* court did, the *Mitchell* court simply quashed service and allowed the plaintiffs 120 days to effect proper service.<sup>88</sup>

The *Koss* and *Mitchell* decisions are of interest for two reasons. First, both courts seemingly agreed with *Barnhill* that Article 10(a) permits service via registered mail yet found no express authorization. Second, and more importantly, *Mitchell* delved much deeper into Rule 4(f) to find authorization than *Koss* did.

The decisions of 2007 regarding Article 10(a) demonstrate there are at least four possible outcomes when a plaintiff attempts to effect service of process via registered mail abroad, depending on the particular U.S. forum. Courts can find Article 10(a) does not permit such service (*Haun*); expressly authorizes service (*Barnhill*); does not expressly authorize service but requires a court directive to authorize service (*Koss*, *Mitchell*); or requires the law of the forum to authorize such service (*Mitchell*).

### C. DEVELOPMENTS UNDER RULE 4 OF THE FEDERAL RULES OF CIVIL PROCEDURE

A corollary to the Hague Convention is Rule 4(f)(3) of the Federal Rules of Civil Procedure, which provides for service “by other means not prohibited by international agreement as the court orders.”<sup>89</sup> As discussed in the *Koss* case above, means of service under Rule 4(f)(3) must be authorized by a district court before such service can be valid. Two recent cases highlight the types of alternate means district courts approved in 2007.

In *Williams-Sonoma, Inc. v. Friendfinder, Inc.*, a Northern District of California court approved Williams-Sonoma’s request for service via electronic mail on the defendant in a trademark infringement suit.<sup>90</sup> Williams-Sonoma asserted that it could not effect service by traditional means because the physical addresses of the named defendants, residents of various countries such as the Philippines, India, England, and Israel, were incorrect or because the defendants refused service.<sup>91</sup> Relying on a previous Ninth Circuit holding that service via electronic mail is permitted so long as it was the most likely means of reaching the defendant, and on evidence that email accounts were an effective means of communication between Williams-Sonoma and the defendants, the *Williams-Sonoma* court authorized service of process via electronic mail.<sup>92</sup>

Similarly, in *Philip Morris USA, Inc. v. Veles Ltd.*, the Southern District of New York authorized service of process in a trademark case via electronic mail and facsimile pursuant

85. *See id.*

86. *Id.* at \*14.

87. *Id.* at \*16-17.

88. *See id.* at \*21.

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

90. *Williams-Sonoma Inc. v. FriendFinder Inc.*, No. C 06-06572 JSW, 2007 U.S. Dist. LEXIS 31299 (N.D. Cal. Apr. 17, 2007).

91. *Id.* at \*2.

92. *Id.* at \*6.

to Rule 4(f)(3).<sup>93</sup> In *Philip Morris*, the plaintiff alleged that the defendants violated plaintiff's trademarks by advertising and selling cigarettes bearing the plaintiff's trademarks through online cigarette stores. Philip Morris sought approval under Rule 4(f)(3) to effect service of process via electronic mail and facsimile because the defendants were foreign corporations of unknown citizenship, and no physical addresses were posted on the websites.<sup>94</sup> Nor was Philip Morris able to locate any physical addresses valid for completing service of process.<sup>95</sup> The *Philip Morris* court noted that, although Rule 4(f) permits a wide range of alternate means, the "court must determine whether the alternate method is reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."<sup>96</sup> The court recognized that "[f]ederal courts have traditionally incorporated advances in telecommunications technology to methods of notice giving."<sup>97</sup> Finding that the plaintiff adequately demonstrated service could not be completed by traditional methods, and that email and fax would likely reach the defendants, the district court authorized service via email and fax.

### III. Personal Jurisdiction\*

#### A. INTRODUCTION

The federal courts continue to reach different results in applying existing precedent when determining if a federal court may exercise personal jurisdiction over a foreign national defendant.<sup>98</sup> As discussed *infra* in Part VIII(B), however, a unanimous Supreme Court resolved a circuit split over "whether a federal court could dismiss under the forum non conveniens doctrine before definitively ascertaining its own jurisdiction," holding that a district court may dismiss a case for forum non conveniens before resolving questions of subject-matter and personal jurisdiction "when considerations of convenience, fairness, and judicial economy so warrant."<sup>99</sup> Yet, because jurisdiction is a threshold consideration, district courts must continue to dismiss for lack of jurisdiction, not for forum non conveniens, if the lack of jurisdiction is obvious.<sup>100</sup>

Concerning the lower courts, there was little breakthrough or pronouncement of clear precedent that might benefit practitioners. This compilation highlights cases decided in 2007 concerning the reach of personal jurisdiction to foreign national defendants, focusing on three areas: (1) specific personal jurisdiction, (2) foreign products placed into the

93. *Philip Morris USA Inc. v. Veles Ltd.*, No. 06 CV 2988 (GBD), 2007 U.S. Dist. LEXIS 19780 (S.D.N.Y. March 12, 2007).

94. *Id.* at \*2.

95. *Id.*

96. *Id.* at \*8-\*9.

97. *Id.* at \*8.

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

98. See, e.g., *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 318-24 (3d Cir. 2007) (discussing the three competing approaches federal and state courts have used to explain the "arise out of or relate to" standard from *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984), and adopting an amalgamated standard for the Third Circuit).

99. *Sinochem Int'l Co. Ltd., v. Malay. Int'l Shipping Corp.*, 127 S. Ct. 1184, 1192-93 (2007).  
100. *Id.* at 1194.

United States's stream of commerce, and (3) enforceability of foreign judgments against U.S. residents.

## B. SPECIFIC JURISDICTION

Two circuit decisions illustrate recent applications of specific jurisdiction. In *Sloss Industries Corp., v. Eurisol*, the Eleventh Circuit concluded that a French company's sales relationship with an Alabama plaintiff constituted sufficient contacts to allow the court to exercise personal jurisdiction.<sup>101</sup> In mid-2004, Eurisol, a French corporation, began purchasing slag wool from Sloss Industries Corporation, an Alabama company.<sup>102</sup> Sloss filed suit against Eurisol after Eurisol failed to pay for some shipments; Eurisol did not enter an appearance, and the district court entered a default judgment for Sloss.<sup>103</sup> After a jury awarded Sloss damages, Eurisol moved to set aside the judgment for lack of personal jurisdiction, which was denied, and Eurisol appealed.<sup>104</sup>

On appeal the Eleventh Circuit agreed that Eurisol was subject to specific jurisdiction in Alabama as a result of the sales contracts between the two companies. These contacts included extensive involvement by Eurisol in and with Sloss in Alabama:

(1) initiating contact with Sloss, (2) having its representatives visit Sloss'[s] manufacturing facilities in Alabama to discuss the production of the slag wool, (3) proposing an exclusive supplier arrangement, and (4) sending shipping containers to Sloss in Alabama for use in shipping the slag wool to France.<sup>105</sup>

The court distinguished these contacts from prior non-resident-transaction cases by noting this case involved ten orders over several months, and Eurisol was extensively involved in the transactions by visiting the plant,<sup>106</sup> assisting with shipping, and proposing exclusive supplier arrangements.<sup>107</sup> The court found that, constitutionally, Eurisol "was more than a mere passive purchaser" and "purposefully availed itself of the privilege of

101. *Sloss Indus. Corp., v. Eurisol*, 488 F.3d 922 (11th Cir. 2007).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 929.

106. *But see* *Moncrief Oil Int'l, Inc. v. OAO Gazprom*, 481 F.3d 309, 313-14 (5th Cir. 2007) (characterizing a single visit by defendant to the forum as "fortuitous" because any related business discussions between the parties were "purely incidental" to the defendant's visit).

107. *Sloss Indus. Corp.*, 488 F.3d at 931, *distinguishing* *Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc.*, 786 F.2d 1055 (11th Cir. 1986) (holding no personal jurisdiction over out-of-state purchaser when purchase involved only one transaction), *and* *Banton Indus., Inc. v. Dimatic Die & Tool Co.*, 801 F.2d 1283 (11th Cir. 1986) (finding no personal jurisdiction over ongoing business relationship with out-of-state purchaser because the purchase at issue was unsolicited from Alabama, the products were delivered outside of Alabama, and the purchaser never sent representatives to Alabama). The court's distinction of *Banton* was limited only to the fact that, unlike in *Barton*, Eurisol was involved in the shipping process. *Sloss Indus. Corp.*, 488 F.3d at 932. Instead, the court looked to older precedent that emphasized the out-of-state purchaser's involvement in the Alabama company's business. *Id.*, *comparing to* *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 155-56 (5th Cir. 1974) (noting the "affirmative, purposeful decision to enter [forum] and conduct business there."), *and* *Sw. Offset, Inc. v. Hudco Publ'g Co.*, 622 F.2d 149 (5th Cir. 1980) (holding proper the exercise of personal jurisdiction because most orders were unsolicited, the products were made in the forum, the forum's law governed the contracts, and payment was received in the forum). The Eleventh Circuit emphasized that Eurisol's contacts with Alabama "went beyond those" in *Hudco Publ'g*. *See Sloss Indus. Corp.*, 488 F.3d at 932.

conducting activities in Alabama.”<sup>108</sup> Finding that the exercise of specific personal jurisdiction over Eurisol comported with constitutional requirements, the court declined to set aside the judgment.<sup>109</sup>

The Third Circuit extended personal jurisdiction in a tort action to a Barbados hotel that had taken overt actions to solicit and to maintain a business relationship with the plaintiffs in Pennsylvania, including mailing the plaintiffs newsletters and brochures advertising spa treatments and engaging with the plaintiffs in numerous phone calls.<sup>110</sup> One of the plaintiffs was injured following a spa treatment, and the plaintiffs sued the hotel for negligence. The district court dismissed their case for lack of personal jurisdiction.<sup>111</sup>

On appeal, the Third Circuit found that the hotel “purposefully availed itself of the privilege of conducting activities” within Pennsylvania by “deliberately reach[ing] into Pennsylvania” through the mailing of newsletters to the O’Connors, the mailing of a spa brochure after they scheduled their vacation, and the contracting for spa services over the telephone.<sup>112</sup> Turning to the *Helicopteros* criterion of whether the claims arose out of at least one of these contacts,<sup>113</sup> the court considered three standards—(1) the “proximate cause” or “substantive relevance” test,<sup>114</sup> (2) the “but-for causation” test,<sup>115</sup> and (3) the “substantial connection” or “discernable relationship” test<sup>116</sup>—and continued its practice of declining to adopt a clear standard.<sup>117</sup>

Instead, the court held that “specific jurisdiction requires a closer and more direct casual connection than that provided by the but-for test.”<sup>118</sup> The “casual connection,” the court reasoned, “must be intimate enough to keep the quid pro quo [of specific jurisdiction]

108. *Sloss Indus. Corp.*, 488 F.3d at 933.

109. *Id.* at 935 (affirming the lower court).

110. *Sandy Lane Hotel Co.*, 496 F.3d at 315-16.

111. *Id.*; see also *O’Connor v. Sandy Lane Hotel Co.*, No. Civ.A.04-2436, 2005 WL 1463250 (E.D. Pa. June 20, 2005) (reconsideration memorandum & order) (reconsidering and re-granting defendant’s motion to transfer to the U.S. District Court for the Southern District of New York for lack of personal jurisdiction in Pennsylvania); *O’Connor v. Sandy Lane Hotel Co.*, No. Civ.A.04-2436, 2005 WL 994617 (E.D. Pa. Apr. 28, 2005) (original memorandum & order).

112. *Sandy Lane Hotel Co.*, 496 F.3d at 317-18 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

113. See *Helicopteros*, 466 U.S. at 414.

114. *Sandy Lane Hotel Co.*, 496 F.3d at 319 (“[T]his test examines whether any of the defendant’s contacts with the forum are relevant to the merits of the plaintiff’s claim.”) (citing as an example *Mass Sch. of Law at Andover, Inc. v. Am. Bar Ass’n*, 142 F.3d 26, 35 (1st Cir. 1998)).

115. *Id.* at 319. (“[T]his standard is satisfied when the plaintiff’s claim would not have arisen in the absence of the defendant’s contacts.”) (citing as an example *Schute v. Carnival Cruise Lines*, 897 F.2d 377, 385-86 (9th Cir. 1990)).

116. *Id.* at 319-20 (“The critical question is whether the tie between the defendant’s contacts and the plaintiff’s claim is close enough to make jurisdiction fair and reasonable.”) (citing as examples *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 335-36 (D.C. 2000), and *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998)).

117. *Id.* at 320-21 (“[W]e think it appropriate to continue this Court’s established practice and refrain from adopting a bright-line test. That is not to say, however, that our relatedness inquiry should be completely devoid of standards.”) (internal citation omitted).

118. *Id.* at 323. (“[T]he analysis should hew closely to the reciprocity principle upon which specific jurisdiction rests. . . . The relatedness requirement’s function is to maintain balance in this reciprocal exchange. In order to do so, it must keep the jurisdictional exposure that results from a contact closely tailored to that contact’s accompanying substantive obligations.”) Ironically, the court added that, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), the Supreme Court advised that the “Due Process Clause is supposed to bring ‘a degree of predictability to the legal system.’” *Id.* (internal citations omitted).

proportional and . . . reasonably foreseeable.”<sup>119</sup> This meant that the plaintiff would not have been injured if the hotel had not mailed him a brochure about the spa, which led him to schedule treatment and ultimately injure himself.<sup>120</sup> It was significant in this case that the plaintiffs formed a service contract with the hotel through the back and forth telephone conversations between Barbados and Pennsylvania, thereby demonstrating that this negligence claim arose out of the hotel’s contacts with Pennsylvania.<sup>121</sup> The district court’s judgment was reversed and remanded for further proceedings.<sup>122</sup>

### C. STREAM OF COMMERCE

Courts continue to differ on whether the mere placement or advertising of a product on the Internet by a defendant is enough to confer personal jurisdiction in the forum where the defendant’s website is viewed. The Ninth Circuit, in *Holland America Line, Inc. v. Wartsila North America, Inc.*, declined to exercise jurisdiction over a Finnish holding company that maintained a website accessible in Washington.<sup>123</sup> Holland America alleged that some combination of the companies owned by Wartsila—Wartsila Finland and Wartsila North America—designed, manufactured, or sold a faulty engine part that contributed to an engine fire, which destroyed one of Holland America’s passenger ships.<sup>124</sup> The Ninth Circuit declined to extend general personal jurisdiction based solely on Wartsila and Wartsila Finland’s sale and advertising of products on the Internet, finding that “the placement of a product into the stream of commerce, without more, is not an act purposefully directed toward a forum state.”<sup>125</sup> Significantly, Wartsila’s “passive website and Wartsila’s advertisements in various marine publications” alone, were insufficient to extend personal jurisdiction when it was clear that Wartsila had never directly, or through a distributor, “put any products into the stream of commerce that might have ended up” in Washington.<sup>126</sup> As to Wartsila Finland, there was a “paucity of contacts” with Washing-

119. *Id.* at 323.

120. *Id.*

121. *Id.*

122. *Id.* at 325. The court further found that exercising jurisdiction over the hotel in Pennsylvania comported with “fair play and substantial justice” because the hotel had not offered a “compelling case” as to why it would be “unreasonable and unfair” to litigate this matter in Pennsylvania. *Id.* at 324-25 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)) (observing that any burden to the hotel was equally applicable to the O’Connors having to litigate this matter in Barbados). The Third Circuit declined to address the hotel’s motion to dismiss under *forum non conveniens* and remanded this issue for initial consideration by the district court. *Id.*

123. *Holland Am. Line, Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450 (9th Cir. 2007), *aff’g*, No. C04-1368RSM, 2005 WL 1172429 (W.D. Wash. May 17, 2005).

124. *Id.* at 454. The Ninth Circuit also rejected general personal jurisdiction over Wartsila based on a forum selection clause in Holland America’s purchase orders because neither Wartsila nor Wartsila Finland ever agreed to the clause. *Id.* at 458 (finding Holland America could only show that it sent the terms “via email to an unspecified email address or general web address.”) (internal citation omitted); *see also Primus Corp. v. Centreformat Ltd.*, 221 Fed. Appx. 492, 493-94 (8th Cir. 2007) (unpublished opinion) (noting that a choice of law clause could support personal jurisdiction consistent with due process but such a clause, alone, ran afoul of due process).

125. *Id.* at 459 (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987)).

126. *Id.*; *see* Wartsila, <http://www.wartsila.com>. The court noted that Wartsila’s website does not allow for direct purchases and is strictly informational. *Id.* at 460. Moreover, Wartsila’s related print advertisements lacked any evidence that they were “designed specifically for the Washington market or that advertisements are heavily or predominantly distributed in Washington.” *Id.*

ton; the company did not sell products directly within the United States, and company marketing representatives never visited Washington when promoting their products to American cruise lines.<sup>127</sup>

A Virginia district court, in *Jones v. Boto Co.*, however, exercised personal jurisdiction over a foreign corporation that had no physical presence in the jurisdiction.<sup>128</sup> A Hong Kong manufacturer of artificial Christmas trees, Boto Company Limited, exported its product into the United States via Wal-Mart Stores, Inc. and Target Corporation.<sup>129</sup> Boto's only direct connection to the United States was an informational website, but Boto did not sell its products on its website.<sup>130</sup> Following a house fire from a Boto Christmas tree, the plaintiff homeowners sought damages from Boto in a Virginia district court.<sup>131</sup> In rejecting Boto's personal jurisdiction defense, the court found that Boto negligently "plac[ed] a defective product into the stream of commerce," and therefore Virginia's long-arm statute applied to Boto.<sup>132</sup> The court applied relevant constitutional standards,<sup>133</sup> noting that "a substantial number" of Boto's products would be purchased in Virginia, most of Boto's \$1.1 billion sales were from the United States, and Boto sold its products to two of the largest retailers in the United States.<sup>134</sup> Although these facts alone were insufficient to satisfy the constitutional minimum-contacts requirement, the court found that, because Boto's website was accessible in Virginia, Boto created a "substantial connection with Virginia by actions purposefully directed toward it" even though the website did not directly target Virginia.<sup>135</sup>

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127. *Id.* at 459-60. The court also found no basis for specific personal jurisdiction as there was no relationship between the forum and the negligence claim against Wartsila and Wartsila Finland. *Id.* at 460-61. The court rejected a claim of nationwide jurisdiction under Federal Rule of Civil Procedure 4(k)(2) because neither Wartsila nor Wartsila Finland alleged they are subject to "courts of general jurisdiction in any state." *Id.* at 461 (outlining the three-part inquiry for sustaining Fed. R. Civ. P. 4(k)(2) jurisdiction and adopting the practice of the Fifth, Seventh, and D.C. Circuits that a defendant can defeat application of Rule 4(k)(2) by alleging it is subject to the general jurisdiction of any court in the country); see also *Mwani v. bin Laden*, 417 F.3d 1, 11 (D.C. Cir. 2005); *Adams v. Unione Mediterranea Di Sicurtà*, 364 F.3d 646, 651 (5th Cir. 2004); *ISI Int'l, Inc., v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001), all cited in *Holland Am. Line Inc.*, 485 F.3d at 461-62.

128. *Jones v. Boto, Co. Ltd.*, 498 F. Supp. 2d 822 (E.D. Va. 2007).

129. *Id.* at 824. Seventy-five percent of Boto was owned by an American company, but Boto did not distribute its products in the United States; rather it negotiated sales contracts with American retailers. *Id.*

130. See BOTO, <http://www.boto.com.hk>.

131. *Jones*, 498 F. Supp. 2d at 823-24.

132. *Id.* at 827.

133. *Asahi Metal Indus. Co. Ltd.*, 480 U.S. 102 (outlining constitutional requirements of "stream of commerce" analysis); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945-46 (4th Cir. 1994) (requiring that the defendant "create[] a substantial connection to the forum state by action purposefully directed toward the forum state or otherwise invoking the benefits and protections of the laws of the state.").

134. *Jones*, 498 F. Supp. 2d at 829.

135. *Id.* But see *FC Inv. Group LC v. IFX Mkts, Ltd.*, 479 F. Supp. 2d 30, 36-38 (D.D.C. 2007) (rejecting claim that a business's informational website available in the forum constituted "doing business" under the District of Columbia long-arm statute). The court further found that the exercise of personal jurisdiction over Boto would not "offend traditional notions of fair play and substantial justice", in light of the "magnitude of [Boto's] revenue stream and the substantial profits that likely accompany it." *Jones*, 498 F. Supp. 2d at 830-31 (citing *Lesnick*, 35 F.3d at 945) But see *Cai v. Daimlerchrysler AG*, 480 F. Supp. 2d, 1245, 1251 (D. Or. 2007) (rejecting personal jurisdiction claim where, among other things, parent company earned approximately \$80 billion annually from sales in the United States but was only present in Oregon through its independent subsidiary).

## D. ENFORCEABILITY OF A FOREIGN JUDGMENT

Last year a divided Ninth Circuit extended personal jurisdiction over foreign defendants and vacated a foreign judgment restricting a California corporation's ability to publish materials on its website.<sup>136</sup> The Second Circuit faced a similar issue involving a Saudi Arabian citizen obtaining a libel judgment in an English court against an American author, Rachel Ehrenfeld, for publishing a book linking him to providing financial support to terrorist operations.<sup>137</sup> After receiving notice of the default judgment from the English court, Ehrenfeld sought a declaratory judgment to render the foreign judgment unenforceable in the United States on "constitutional and public policy grounds."<sup>138</sup> The district court dismissed the case for lack of personal jurisdiction because Mahfouz's contact with New York related solely to pursuing the English case against Ehrenfeld and sending her cease and desist notices.<sup>139</sup> On appeal the Second Circuit found the application of New York's long-arm statute in this case to be an open question for the Second Circuit and New York state courts, and the court certified the question to the New York Court of Appeals,<sup>140</sup> which declined to extend jurisdiction under its long-arm statute because the defendant's New York contacts were solely related to seeking enforcement of the English judgment and thus he had never transacted business within New York.<sup>141</sup> On return to the Second Circuit, plaintiff argued that the New York long-arm statute, as defined by the New York Court of Appeals, was unconstitutional under the First Amendment.<sup>142</sup> The Second Circuit rejected this claim as waived for plaintiff's lack of prior assertion of any First Amendment jurisdictional basis during the litigation.<sup>143</sup> In light of the decision by the New York Court of Appeals, the court affirmed the lower court's dismissal for lack of personal jurisdiction.<sup>144</sup>

136. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), *rev'd*, 379 F.3d 1120 (9th Cir. 2004), *rev'd and remanded*, 433 F.3d 1199 (9th Cir. 2006) (en banc). See generally *International Legal Developments in Review 2006: International Litigation: Personal Jurisdiction*, 41 INT'L LAW. 329, 334-36 (2007).

137. *Ehrenfeld v. Mahfouz*, 489 F.3d 542 (2d Cir. 2007); see also *Sheikh It All About*, THE ECONOMIST, Nov. 8, 2007, available at [http://www.economist.com/world/international/displaystory.cfm?story\\_id=10110971](http://www.economist.com/world/international/displaystory.cfm?story_id=10110971) (last visited Nov. 15, 2007); RACHEL EHRENFELD, *FUNDING EVIL: HOW TERRORISM IS FINANCED AND HOW TO STOP IT* (2003).

138. *Ehrenfeld*, 489 F.3d at 545. The English judgment "requir[ed] Ehrenfeld to refrain from 'publishing, or causing or authori[z]ing the further publication' of the disputed statements about Mahfouz in *Funding Evil* within the English court's jurisdiction." *Id.* at 547 (internal quotations omitted) (distinguishing from dispute in *Yahoo!, Inc.* over ripeness issue).

139. *Ehrenfeld v. Bin Mahfouz*, No. 04 Civ. 9641, 2006 WL 1096816, at \*4 (S.D.N.Y. Apr. 26, 2006) (memorandum & order) (declining to apply New York's long-arm statute, N.Y. C.P.L.R. § 302(a)(1), extending personal jurisdiction over "a non-domiciliary who 'in person or through an agent . . . transacts any business within the state' so long as the cause of action arises out of defendant's New York transactions.>").

140. *Ehrenfeld*, 489 F.3d at 547-51 (certifying pursuant to N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a) and 2d Cir. R. 0.27). The court affirmed the district court's finding of no personal jurisdiction over defendant under N.Y. C.P.L.R. § 302(a)(3). *Id.* at 551.

141. *Ehrenfeld v. Mahfouz*, 9 N.Y.3d 501, 509, 881 N.E.2d 830 (2007). In answering the certified question, the court noted that effect of the practice of libel tourism was not the issue before it. *Id.* at 507, N.E.2d at 834.

142. *Ehrenfeld v. Mahfouz*, 518 F.3d 102, 105 (2d Cir. 2008).

143. *Id.*

144. *Id.* at 106.

#### IV. The Act of State Doctrine\*

##### A. INTRODUCTION

The act of state doctrine is a non-jurisdictional rule generally prohibiting U.S. domestic courts from inquiring into the validity of public acts of foreign sovereigns.<sup>145</sup> The doctrine is “grounded on judicial concern that application of customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches of the government.”<sup>146</sup> Once invoked, the doctrine requires U.S. courts to deem valid the acts of foreign sovereigns committed within those sovereigns’ own territories.<sup>147</sup> The burden of proving that the doctrine applies rests with the party attempting to invoke it as a basis for dismissing the action.<sup>148</sup> The application of the doctrine is separate from the sovereign immunity inquiry, and courts must evaluate each doctrine separately.<sup>149</sup>

In 2007, courts addressed the interplay between the act of state doctrine and exceptions to the Foreign Sovereign Immunities Act (FSIA). The significant development of note was the D.C. Circuit’s decision in *Nemariam v. Federal Democratic Republic of Ethiopia* that the Second Hickenlooper Amendment and the expropriation exception of the FSIA need not be interpreted similarly.<sup>150</sup> Courts also addressed whether specific acts by foreign countries constituted acts of state, including the grant of patents by foreign countries, the purchase of artwork, and the issuance of generalized court orders not tied to particular property.

##### B. INTERPLAY WITH THE FSIA’S EXPROPRIATION AND STATE-SPONSORED TERRORISM EXCEPTIONS

Two cases highlighted the interplay between the act of state doctrine and the FSIA’s exceptions. In *Nemariam v. Federal Democratic Republic of Ethiopia*, the D.C. Circuit rejected the view “that because the expropriation exception [of the FSIA] and the Hickenlooper Amendment serve a similar purpose, the statutes must be interpreted consistently.”<sup>151</sup> The FSIA’s expropriation exception, 28 U.S.C. § 1605(a)(3), provides subject matter jurisdiction by creating an exception to sovereign immunity for a claim involving the expropriation of “rights in property.” The Second Hickenlooper Amendment to the Foreign Assistance Act of 1961 creates an exception to the act of state doctrine for a claim involving the expropriation of a “claim of title or other right to

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\* 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. This summary was prepared as of November 15, 2007.

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

146. *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972).

147. *See W.S. Kirkpatrick & Co., Inc. v. Evtl. Tectonics Corp.*, 493 U.S. 400, 406 (1990).

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

149. *See Austria v. Altmann*, 541 U.S. 677, 701 (2004) (a “determination that the [Foreign Sovereign Immunities Act] applies . . . in no way affects any argument [the State] may have that the [act of state] doctrine shields [its] alleged wrongdoing”).

150. *Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470 (D.C. Cir. 2007). A discussion of the *Nemariam* court’s analysis of the expropriation exception to the FSIA is discussed *supra* in Part I(B)(3).

151. *Id.* at 479.

property.”<sup>152</sup> This similarity had caused some courts, including the Fifth Circuit, to hold that because the FSIA’s expropriation exception and Second Hickenlooper Amendment address “parallel[ ]” issues, analysis under the two should be treated as “congruent.”<sup>153</sup>

The district court in *Nemariam*, relying upon Second Circuit case law from the act of state context holding that the Second Hickenlooper Amendment did not apply to intangible property, had held that the FSIA’s expropriation exception also did not apply to intangible property.<sup>154</sup> The D.C. Circuit rejected the lower court’s conclusion, reasoning that neither the text nor the legislative history of the expropriation exception supported the reading that the two statutes should be interpreted consistently.<sup>155</sup> Consequently, the court reasoned that it was free to interpret the FSIA’s expropriation exception independently of the interpretation under the Second Hickenlooper Amendment and concluded that the plain reading and legislative history of the FSIA’s expropriation exception do not limit its application to tangible property.<sup>156</sup>

In addition to divorcing the analysis under the Second Hickenlooper Amendment from that under the FSIA’s expropriation exception, *Nemariam* also appeared to signal the D.C. Circuit’s dissatisfaction with the limitation of the Second Hickenlooper Amendment to tangible property. Thus, the court in *Nemariam* pointed out that the district court for the Southern District of New York had expressed doubt about the distinction between tangible and intangible property and had noted that the Second Circuit, which restricts the Second Hickenlooper Amendment to tangible property, had nevertheless stated, seemingly inconsistently, that the definition of property in international law commonly includes intangible property.<sup>157</sup>

In *Beaty v. Republic of Iraq*, the district court for the District of Columbia held that the act of state doctrine did not bar adjudication of a claim against the Republic of Iraq for emotional distress suffered by the children of two men detained and allegedly held as hostages by the former Iraqi regime in the 1990s.<sup>158</sup> Subject matter jurisdiction was invoked under the FSIA’s state-sponsored terrorism exception, 28 U.S.C. § 1605(a)(7).<sup>159</sup> The court accepted that the factual predicate for application of the act of state doctrine existed in the case, given that plaintiffs’ claims centered on the propriety of the Iraqi government’s detention and imprisonment of plaintiffs’ fathers within Iraqi territory. The court nevertheless concluded that the purpose of the doctrine would not be furthered by its application in the case.<sup>160</sup> The court shared the skepticism of other district courts

152. 22 U.S.C. § 2370(e)(2) (1998).

153. *De Sanchez v. Banco Cent. de Nicaragua*, 770 F.2d 1385, 1395 (5th Cir. 1985); see also *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico, S.A.*, 528 F. Supp. 1337, 1346 (S.D.N.Y. 1982), *aff’d*, 727 F.2d 274 (2d Cir. 1984).

154. *Nemariam v. Fed. Democratic Republic of Ethiopia*, 400 F. Supp. 2d 76 (D.D.C. 2005) (holding that right to bank account was intangible property not covered by FSIA expropriation exception).

155. *Nemariam*, 491 F.3d at 479 (concluding, based on legislative history, that “instead of limiting the expropriation exception to tangible property, the Congress expressed confidence that federal courts would not apply the act of state doctrine too broadly—that is, to ‘improperly[ ] prevent adjudication on the merits after jurisdiction has been established’”) (citations omitted).

156. *Id.* at 479-480.

157. *Id.* at 478 (discussing *Zappia Middle East Constr. Co. v. Emirate of Abu Dhabi*, No. 94 CIV. 1942, 1996 U.S. Dist. LEXIS 10430, 1996 WL 413680 (S.D.N.Y. July 24, 1996)).

158. *Beaty v. Republic of Iraq*, 480 F. Supp. 2d 60, 62 (D.D.C. 2007).

159. *Id.*

160. *Id.* at 89 (citing *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 405 (1990)).

about whether the doctrine ought to be applied to suits brought under the state-sponsored terrorism exception, given that:

the political branches enacted a statute [28 U.S.C. § 1605(a)(7)] whose text and structure expressly contemplate holding a foreign state liable for terrorist acts committed years earlier, and that this statute does not come into play unless the Executive Branch had identified a nation as a sponsor of terrorism at the time of the acts at issue.<sup>161</sup>

On this basis, the court concluded, “it is difficult if not impossible to say that the judiciary would be unduly interfering with the political branches’ conduct of foreign policy, which is the principal concern underlying the act-of-state doctrine.”<sup>162</sup>

The court also held as insufficient Iraq’s arguments that the regime had changed since the acts were perpetrated and had been replaced by a new government whose stability and success were a major foreign policy goal of the United States.<sup>163</sup> Although acknowledging that a change in government is usually significant to an act-of-state analysis, the court also was not convinced that that single distinction was sufficient to interfere with the foreign policy objective of the state-sponsored terrorism exception, particularly where the lawsuit was filed before the regime changed.<sup>164</sup> The court was also swayed by the fact that “the Executive Branch, despite the President’s publicly expressed desire to shield Iraq from liability, ha[d] declined to raise the act-of-state doctrine in its Statements of Interest and ha[d] explicitly declined to support Iraq’s invocation of the doctrine.”<sup>165</sup> The court was not convinced by Iraq’s argument that dismissal was appropriate on act of state grounds despite the position of the Executive Branch, distinguishing cases cited in support as being claims that were likely to embarrass the government.<sup>166</sup>

### C. NATURE OF AN ACT OF STATE

In an unusual application of the act of state doctrine, in *Voda v. Cordis Corp.*, a U.S. patent infringement case, the Federal Circuit held that the lower court had abused its discretion in assuming supplemental subject matter jurisdiction pursuant to 28 U.S.C. § 1367 over certain foreign patents, *inter alia*, because the alleged infringer would be unable, unfairly, to challenge the validity of the foreign patents because of the act of state doctrine.<sup>167</sup> In reaching this conclusion, the court, without analysis (indeed citing contrary precedent), stated that it was not persuaded by the parties or by *amici curiae* that the grant of a patent by a sovereign is not an act of state.<sup>168</sup>

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161. *Id.* (citing *Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 26-27 (D.D.C. 2005) and *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 54-55 (D.D.C. 2000)).

162. *Id.*

163. *Id.*

164. *Id.* at 89-90.

165. *Id.* at 90.

166. *Id.*

167. *Voda v. Cordis Corp.*, 476 F.3d 887, 905 (Fed. Cir. 2007).

168. *Id.* The dissenting judge vigorously protested that “patent validity and infringement are legal and commercial issues, not acts of state,” on the basis that “[t]he fundamental criterion is whether the governmental action is a significant public act or whether it is a ministerial function.” *Id.* at 914-15 (Newman, J., dissenting). Further, the dissent continued, “No support has been offered for so creative an application of interna-

The District Court for the District of Columbia was also concerned with the nature of an “act of state” in *Malewicz v. City of Amsterdam*, where the court held that it was not barred by the act of state doctrine from considering the validity of the City of Amsterdam’s acquisition of certain paintings in Germany, which plaintiffs alleged was an unlawful taking in a suit brought while the paintings were on loan in the United States.<sup>169</sup> The court rejected the City of Amsterdam’s argument that the acquisition was an “official act” of the city and thereby an act of state.<sup>170</sup> The court reasoned that the act of state doctrine is limited to “official action by a foreign sovereign” undertaken “by right of sovereignty,” while “any private person or entity could have purchased the paintings for display in a public or private museum.”<sup>171</sup>

The court also relied upon other bases for the inapplicability of the act of state doctrine. First, the court reasoned that the fact that the paintings had been purchased in Germany both illustrated the commercial rather than sovereign nature of the act and brought the act outside the ambit of the act of state doctrine, which does not apply to extraterritorial acts.<sup>172</sup> Separately, the court also took into consideration its view that applying international law would not frustrate foreign relations and that any chilling effect on the loaning of artwork “was not a matter touching upon ‘foreign relations,’ as that phrase is used by relevant authorities.”<sup>173</sup>

Finally, in *United States v. Lazarenko*, the District Court for the Northern District of California held that the act of state doctrine did not bar criminal forfeiture of assets of a foreign bank by the United States where liquidators of the bank had been authorized by the government of Antigua to act to recover the assets of the bank.<sup>174</sup> The court reasoned that the liquidators had not identified any orders from the Antiguan courts that gave specific orders as to the assets in question that would be invalidated by the court’s actions.<sup>175</sup> The court was also persuaded that “the [U.S. g]overnment’s positions taken in this matter undercut the separation of powers concerns that motivate the act of state doctrine.”<sup>176</sup>

## V. International Discovery\*

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

During 2007, U.S. courts built on previous jurisprudence regarding the statutory and discretionary requirements for obtaining discovery in the United States for use in foreign

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tional law; this ‘doctrine’ provides no support for this court’s removal of judicial discretion of United States courts to resolve a commercial dispute between private parties involving private patent rights.” *Id.*

169. *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322 (D.D.C. 2007).

170. *Id.* at 337-339.

171. *Id.*

172. *Id.* at 339.

173. *Id.*

174. *United States v. Lazarenko*, 504 F. Supp. 2d 791, 801-02 (N.D. Cal. 2007).

175. *Id.*

176. *Id.* at 802.

\* Contributed by Jeffrey S. Robins, Trial Attorney, Department of Justice, Washington, D.C. The views expressed are those of the author and not necessarily those of the Department of Justice or the United States Government.

proceedings pursuant to 28 U.S.C. § 1782(a).<sup>177</sup> U.S. courts addressed the applicability of Section 1782(a) to: private commercial arbitral bodies; documents outside of the United States; and documents that may not be admissible in the foreign jurisdiction.<sup>178</sup> U.S. courts also further analyzed the factors to determine whether to exercise their discretion and allow discovery pursuant to Section 1782.

Previously, U.S. courts have determined that private commercial arbitral bodies are not included in the types of tribunals to which Section 1782(a) applies.<sup>179</sup> The District Court for the District of New Jersey in *In re Oxus Gold*, however, found that a private international arbitration fell within the scope of Section 1782 because the arbitration was “between two admittedly private litigants . . . within a framework defined by [a] bilateral investment treaty and is governed by . . . UNCITRAL rules.”<sup>180</sup> The court also found that Section 1782 does not contain a foreign-admissibility requirement with regard to documents that may not be admissible in a foreign jurisdiction.<sup>181</sup>

U.S. courts were split regarding the applicability of Section 1782(a) to documents outside the United States. In considering this issue, the District Court for the Southern District of New York in *In re Gemeinschaftspraxis Dr. Med. Schottdorf* found that limiting the applicability of Section 1782(a) to documents inside the United States would violate the U.S. Supreme Court’s instruction in *Intel Corp. v. Advanced Micro Devices, Inc.* that Section 1782 not be construed “to include requirements that are not plainly provided for in the text of the statute.”<sup>182</sup> Rather, the court there found that the location of documents should be a discretionary consideration at most.<sup>183</sup> The District Court for the Western District of Michigan in *In re Nokia Corp.*, however, questioned in dicta whether a U.S. court could order production of documents contained outside of the United States.<sup>184</sup>

Lastly, like courts before them, courts that considered whether to exercise their discretion to order discovery pursuant to Section 1782<sup>185</sup> continued in 2007 to look for explicit

177. See 28 U.S.C. § 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.”); see also *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (interpreting the scope of the statutory provisions and establishing factors to guide the discretionary application of the statute).

178. In addition to expanding Section 1782 jurisprudence, many courts also agreed with the reasoning of the *Intel* Court. See, e.g., *In re Clerici*, 481 F.3d 1324, 1332 (11th Cir. 2007) (finding that request of Panamanian Court for assistance to obtain sworn answers to questions regarding assets and other financial matters was proper, and the Panamanian Court’s request did not seek to enforce that Court’s judgment). The court in *In re Clerici* further held that there was no requirement that the proceeding for which discovery was sought be adjudicative in nature. *Id.* at 1333.

179. See *Nat’l Broad. Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d Cir. 1999) and *Republic of Kazakhstan v. Biederman Int’l*, 168 F.3d 880 (5th Cir. 1999) (finding that tribunals were limited to governmental bodies).

180. *In re Oxus Gold, PLC*, No. 06-82-GEB, 2007 WL 1037387, at \*5 (D. N.J. Apr. 2, 2007).

181. *Id.* at \*5.

182. *In re Gemeinschaftspraxis Dr. Med. Schottdorf*, No. Civ. M19-88 (BSJ), 2006 WL 3844464, at \*5 (S.D.N.Y. Dec. 29, 2006), citing *Intel*, 542 U.S. at 260.

183. *Id.* at \*5; see also *In re Nokia Corp.*, No. 1:07-MC-47, 2007 WL 1729664 (W.D. Mich. June 13, 2007).

184. See *In re Nokia Corp.*, No. 1:07-MC-47, 2007 WL 1729664 at \*5 n. 4.

185. The *Intel* Court established factors to guide the court’s discretionary application of the statute: (1) whether “the person from whom discovery is sought is a participant in the foreign proceeding”; (2) “the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance”; (3) whether “the

statements and authoritative proof to determine whether foreign jurisdictions are receptive to U.S. judicial assistance.<sup>186</sup> While courts continued to find that Section 1782 does not require exhaustion of other forms of discovery; courts in 2007 were united in their positive view of discovery attempts made in foreign jurisdictions when the person from whom discovery was sought was a participant in the foreign proceeding.<sup>187</sup> Courts, however, were split on whether the lack of a local discovery request can be characterized as an attempt to circumvent the foreign jurisdiction.<sup>188</sup>

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

During 2007, U.S. courts also further developed the jurisprudence regarding the discretionary factors guiding requests for discovery from abroad for use in proceedings in the United States by means other than the Hague Convention.<sup>189</sup> The U.S. Supreme Court in *Societe Nationale Industrielle Aérospatiale v. U.S. District Court for Southern District of Iowa*, did not articulate a standard with regard to the appropriate level of relevancy to apply to the discovery of foreign documents via the Federal Rules of Civil Procedure.<sup>190</sup> U.S. courts, however, have consistently applied standards aimed at balancing comity and the Federal Rules of Civil Procedure. In *Weiss v. National Westminster Bank, PLC*, the District Court for the Eastern District of New York considered whether the discovery sought was relevant and crucial.<sup>191</sup> Similarly, the District Court for the Northern District of Califor-

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request conceals an attempt to circumvent foreign proof-gathering limits or other policies of a foreign country or the United States"; and (4) whether the request is unduly intrusive or burdensome. See *Intel*, 542 U.S. at 264-65.

186. See *In re Gemeinschaftspraxis Dr. Med. Schottdorf*, 2006 WL 3844464, at \*6 (citing *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1099-1100 (2d Cir. 1995)) (finding authoritative proof lacking that would support notion that the German court was unreceptive to Section 1782 discovery and further finding that the German Court had the option of excluding the discovered material from its proceedings).

187. See *In re Digitechnic*, No. C07-414-JCC, 2007 WL 1367697 at \*4 (W.D. Wash. May 8, 2007); *In re Nokia Corp.*, 2007 WL 1729664, at \*5 n. 4.

188. Compare *In re Digitechnic*, No. C07-414-JCC, 2007 WL 1367697 at \*5 (finding that "eleventh-hour discovery application seeking discovery never sought in France certainly seems to be a circumvention attempt"), with *In re Fleischmann*, 466 F. Supp. 2d 1020, 1032 (N.D. Ill. 2006) (citing *In re Euromepa S.A.*, 51 F.3d at 1098, and *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985)) (finding that were there was no local ruling denying discovery, there could be no effort to circumvent the foreign jurisdiction).

189. See *Societe Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1987); 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." *STRAUSS v. CREDIT LYONNAIS, S.A.*, 242 F.R.D. 199, 210 (E.D.N.Y. 2007) (citations omitted).

190. Because discovery pursuant to Fed. R. Civ. P. 26(b)(1) is broader than most foreign jurisdictions, the *Aérospatiale* Court cautioned the need for respecting comity in the course of such requests but failed to spell out a standard for relevance. *Aérospatiale*, 482 U.S. at 542.

191. *Weiss v. Nat'l Westminster Bank, PLC*, 242 F.R.D. 33, 44-45 (E.D.N.Y. 2007) (finding documents regarding the corporate relationship, services offered, and financials were relevant and crucial to terrorist financing case).

nia in *In re Rubber Chemicals Antitrust Litigation* considered whether the discovery sought was important and relevant.<sup>192</sup>

Courts have also continued to recognize that the use of the Hague Convention procedures may be impracticable.<sup>193</sup> In *SEC v. Sandifur*, the court favored discovery pursuant to the Federal Rules of Civil Procedure where the court found that Hague discovery could take a long time, might be fruitless if a country exercised its right to limit discovery pursuant to Article 23 of the Convention, and where the inability to obtain documents pursuant to the Hague Convention would make it impossible to resort to the federal rules as backup without severely disrupting the trial schedule.<sup>194</sup> But the District Court for the Eastern District of New York in *Metso Minerals Inc. v. Powerscreen International Distribution Ltd.*, recognized that there are circumstances where parties have no choice but to rely on discovery pursuant to the Hague Convention or non-Convention letters rogatory.<sup>195</sup> There, the court found that the Hague Convention was the only means to obtain the requested discovery where the party from whom discovery was sought was a citizen of Northern Ireland, not a party to the action, and not subject to the jurisdiction of the court.<sup>196</sup>

Finally, where U.S. courts have balanced the interests of the United States with the interests of the foreign states where information is located, U.S. courts have continued to examine whether a "foreign entity has taken a clear position and articulated reasons why it believes production of the requested documents would harm its interests. . . ."<sup>197</sup> Courts in 2007 have appeared to have applied a lower standard when faced with discovery requests in terrorist financing cases that are otherwise protected by bank secrecy statutes, as U.S. courts have consistently found that the interest of combating terrorism outweighs the interest of bank customer secrecy.<sup>198</sup> The lynchpin to these decisions was the courts' findings that the foreign governments in question had recognized the supremacy of the interest in combating terrorism through the governments' participation in financial action task forces and international conventions.<sup>199</sup>

### C. INTERNATIONAL ELECTRONIC DISCOVERY

There were no decisions in 2007 that explicitly addressed the impact of the 2006 revisions to the Federal Rules of Civil Procedure regarding electronic discovery. One growing concern, however, is whether U.S. courts will defer to the laws of other jurisdictions

192. *In re Rubber Chemicals Antitrust Litig.*, 486 F. Supp. 2d 1078, 1083 (N.D. Cal. 2007) (finding importance and relevance of documents from the European Commission regarding plaintiffs' exclusion from the U.S. market lacking where plaintiff already had documents relating to the Department of Justice anti-trust investigation).

193. See *SEC v. Sandifur*, No. C05-1631c, 2006 WL 3692611, at \*4-5 (W.D. Wash. Dec. 11, 2006); *Weiss*, 242 F.R.D. at 45.

194. See *Sandifur*, 2006 WL 3692611, at \*5.

195. *Metso Minerals Inc. v. Powerscreen Int'l Dist. Ltd.*, No. CV 06-1446 (ADS)(ETB), 2007 WL 1875560 (E.D.N.Y. June 25, 2007).

196. *Id.* at \*2-3.

197. See *In re Rubber Chemicals Antitrust Litig.*, 486 F. Supp. 2d at 1084.

198. See *Linde v. Arab Bank, PLC*, 463 F. Supp. 2d 310, 314-15 (E.D.N.Y. 2006); *Weiss*, 242 F.R.D. at 45-55; *Strauss*, 242 F.R.D. at 213-224.

199. See *Weiss*, 242 F.R.D. at 48 (discussing the "United Nations' International Convention for the Suppression of the Financing of Terrorism, which recommends that nations adopt[ ] effective measures for the prevention of the financing of terrorism. . . .").

that limit the electronic transmission of information across borders and afford greater privacy protections.<sup>200</sup> In coming years, courts will likely balance any explicit statements regarding the interests of the foreign jurisdictions with the interests at stake in the litigation.<sup>201</sup>

#### D. OTHER DEVELOPMENTS

In 2007, U.S. courts also addressed: the application of Fed. R. Civ. P. 28(b) to foreign telephone depositions;<sup>202</sup> the implications of the political question doctrine to the scope of international discovery requests;<sup>203</sup> and a witness' right to invoke the Fifth Amendment Privilege against self-incrimination pursuant to Article 11(a) of the Hague Convention.<sup>204</sup>

### 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."<sup>205</sup> A court 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.<sup>206</sup>

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

200. See Steven C. Bennett, *Facing the Challenges of International E-Discovery*, Practising L. Inst., 766 PLI 291, 298-99 (Oct.-Dec. 2007) (citing Council Directive 95/46, 1995 O.J. (L 281) 31 (EC), which requires member states to "protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data").

201. See e.g., *In re Rubber Chemicals Antitrust Litig.*, 486 F. Supp. 2d at 1084; *Linde*, 463 F. Supp. 2d at 314-15.

202. *Phye v. Thill*, No. 06-1309-MLB, 2007 WL 2681106 (D. Kan. Sept. 7, 2007) (requiring that the witness and the person administering the oath be at the same location).

203. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007). Because of Statement of Interest from Department of State implicating international relations concerns, the court included requirement for document production of documents located in Indonesia only "after any necessary authorization" from the Indonesian government. *Id.*

204. *Nursing Home Pension Fund v. Oracle Corp.*, No. C01-00988 MJJ, 2007 WL 1880381, at \*15 ("Article 11(a) of the Hague Convention provides [individuals] with a privilege against self-incrimination at least as broad as any independent right that [they] could derive directly from the United States Constitution").

\* Contributed by Karen Woody, Law Clerk to the Honorable Phyllis D. Thompson, District of Columbia Court of Appeals.

205. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1987).

206. *Id.* § 403(2).

## B. FEDERAL HABEAS CLAIMS

In previous reviews, we have considered various federal habeas corpus cases brought by detainees. 2007 is no exception, in light of the recent rulings in *Boumediene v. Bush*<sup>207</sup> and *In re Iraq and Afghanistan Detainees Litigation*.<sup>208</sup> In *Boumediene*, the detainees were captured abroad and held as enemy combatants in Guantanamo Bay, Cuba. The District of Columbia Circuit considered whether the Military Commissions Act provision barring federal court jurisdiction over the detainees' habeas petitions was an unconstitutional violation of the Suspension Clause.<sup>209</sup> The court rejected the detainees' claim, stating that Supreme Court precedent "holds that the Constitution does not confer rights on aliens without property or presence within the United States."<sup>210</sup> The *Boumediene* ruling vacated and dismissed the decision in *Khalid v. Bush*, in which detainees' habeas petitions were considered by the D.C. District Court, and stated that the amendment to the habeas corpus statute precluded federal jurisdiction over the detainees' habeas petitions pending on the date of enactment.<sup>211</sup>

In *In re Iraq and Afghanistan Detainees Litigation*, the plaintiffs claimed their Fifth and Eighth Amendment rights were violated while detained by the United States military at various locations in Iraq and Afghanistan.<sup>212</sup> The D.C. District Court, in holding that the Fifth and Eighth Amendments did not apply to plaintiffs, stated, "the Constitution's reach is not so expansive that it encompasses these nonresident aliens who were injured extraterritorially while detained by the military in foreign countries where the United States is engaged in wars."<sup>213</sup> The court also stated that even if the Eighth Amendment applied to nonresident enemy aliens, its prohibitions against cruel and unusual punishment did not apply to plaintiffs because they were never convicted of a crime of any sort.<sup>214</sup>

## C. CIVIL CONTEMPT ORDERS

In *Autotech Technologies, L.P. v. Integral Research & Development Corp.*, discussed *supra* in Parts I(B)(1) and (C)(1), plaintiffs issued a writ of execution for monies due as a result of a contempt order against a wholly-owned Belarusian government company.<sup>215</sup> In declining to authorize the execution of the contempt order against unidentified Belarusian property outside the United States, the Seventh Circuit explained that if Autotech sought assets in a

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

208. *In re Iraq & Afghanistan Detainees Litig.*, 479 F.Supp.2d 85 (D.D.C. 2007).

209. *Boumediene*, 476 F.3d at 988-94.

210. *Id.* at 991.

211. *Khalid v. Bush*, 355 F.Supp.2d 311 (D.D.C. Cir. 2005). A discussion of *Khalid v. Bush* appears in *International Legal Developments in Review 2005: International Litigation: Extraterritorial Application of U.S. Law*, 40 INT'L LAW 275, 300 (2006).

212. *In re Iraq and Afghanistan Detainees Litig.*, 479 F.Supp.2d at 91.

213. *Id.* at 95.

214. *Id.* at 103.

215. *Autotech Tech., L.P. v. Integral Research & Dev. Corp.*, 499 F.3d 737 (7th Cir. 2007). As discussed in more detail in Parts I(B)(1) and (C)(1), the Seventh Circuit held that it had jurisdiction over this matter under the FSIA but declined to allow execution against the defendant for property not in the United States or not used for commercial activities in the United States. *Id.* at 750 (the FSIA did not authorize Autotech to execute a contempt order against a foreign sovereign's property "wherever that property is located around the world.")

foreign state, it must first try to obtain recognition and enforcement of the U.S. judgment in the foreign courts.<sup>216</sup> The court added that only after successful recognition of the U.S. judgment in foreign courts would it authorize enforcement of the judgment.<sup>217</sup> Based on this rationale, the court held that the presumption against extraterritorial application was sound.<sup>218</sup>

#### D. CRIMINAL STATUTES

In *United States v. Frank*, the District Court for the Southern District of Florida held that Congress' exercise of extraterritorial jurisdiction in enacting a statute prohibiting child sex tourism, entitled "Engaging in illicit sexual conduct in foreign places,"<sup>219</sup> did not violate international law.<sup>220</sup> Frank traveled from the United States to Cambodia and engaged in sexual conduct with females under the age of 18. Frank contended that the statute violated international law because it failed to recognize that the age of consent in Cambodia is 15. The court ruled, however, that Congress had the power to control and punish the conduct of American citizens abroad.<sup>221</sup> The court also stated that extraterritorial application of the statute was appropriate because the statute was enacted in order to implement the Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, a treaty ratified by the Senate.<sup>222</sup>

Similarly, the District Court for the District of Connecticut recently held in *United States v. Ionia Management, S.A.* that the United States had jurisdiction to prosecute Ionia Management for falsifying oil record books, despite the fact that the underlying act of improper discharge of oil occurred outside the territorial waters of the United States.<sup>223</sup> Ionia Management maintained that international law principles provide that individual states may not criminally prosecute for violations of international pollution laws beyond their territorial seas.<sup>224</sup> The court explained that Ionia was not charged for violation of international law for polluting but for violation of a U.S. law related to misrepresenting oil records while in port.<sup>225</sup>

In *United States v. Lopez-Vanegas*, the Eleventh Circuit considered whether the Comprehensive Drug Abuse Prevention and Control Act of 1970 applied extraterritorially.<sup>226</sup> Defendants Lopez and Salazar were convicted in the District Court for the Southern District of Florida of conspiracy to possess with the intent to distribute cocaine. Defendants argued that although they had held meetings in Miami, the plan to ship cocaine from Co-

216. *Id.* As discussed *supra* Part I(C)(1), the writ did not identify any specific property. But the court noted that "Autotech frankly admitted that it intended to use the writ to levy against assets outside the United States." *Autotech*, 499 F.3d. at 751.

217. *Autotech*, 499 F.3d. at 751.

218. *Id.* at 750-51.

219. 18 U.S.C. § 2423(c).

220. *United States v. Frank*, 486 F.Supp.2d 1353 (S.D.Fla. 2007).

221. *Id.* at 1359-60.

222. *Id.* at 1360.

223. *United States v. Ionia Mgmt. S.A.*, 498 F.Supp. 2d 477 (D.Conn. 2007).

224. *Id.* at 487.

225. *Id.*

226. *United States v. Lopez-Vanegas*, 493 F.3d 1305 (11th Cir. 2007). Specifically, the court considered the extraterritorial application of 21 U.S.C. §§ 841(a)(1), 846.

lombia to Venezuela to Saudi Arabia to France did not violate the Act because the possession and distribution of cocaine would occur on foreign soil. Although other federal courts had applied the Act extraterritorially, even though it is silent on its extraterritorial applicability, the Eleventh Circuit stated that in each of those cases some other nexus to the United States allowed for the extraterritorial application.<sup>227</sup> The court vacated the convictions and sentences because the object of the conspiracy was to possess controlled substances outside of the United States, which is not a violation of the Act.<sup>228</sup>

## VII. Enforcement of Foreign Arbitral Awards and Judgments\*

### A. INTRODUCTION

The U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention), signed on June 10, 1958, governs the recognition and enforcement of most foreign arbitral awards in U.S. courts.<sup>229</sup> The New York Convention applies 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.<sup>230</sup>

State law governs the enforcement of foreign judgments. Most states have enacted statutes that resemble or replicate the Uniform Foreign Money-Judgments Recognition Act (Uniform Act). If a state has no such statute, courts typically apply the principles of comity as articulated in the U.S. Supreme Court’s decision in *Hilton v. Guyot*.<sup>231</sup> The analysis is similar in either case.

### B. RECOGNITION OF FOREIGN ARBITRAL AWARDS

#### 1. *Non-Enforcement Based on Set-Aside of Award in Foreign Court*

The D.C. Circuit affirmed the refusal of the district court to enforce an arbitral award that had been annulled by a Columbian court in *TermoRio S.A. E.S.P. v. Electranta S.P.*<sup>232</sup> TermoRio obtained an arbitral award of US \$60.3 million against Electranta, a Columbian-owned public utility, arising out of the breach of a power purchase agreement. The

227. *Lopez-Vanegas*, 493, F.3d at 1312-13.

228. *Id.* at 1313.

\* Contributed by Heather Van Slooten Walsh, 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.

229. 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, (“New York Convention” or “Convention”) (entered into force for the United States Dec. 29, 1970, subject to declarations implemented by 9 U.S.C. §§ 201-208 (2007)). The United States made two reservations in signing the treaty. First, awards must be made in the territory of a Convention signatory. Second, the Convention only applies to disputes arising out of commercial relationships. The latter reservation is also codified at 9 U.S.C. § 202.

230. *Id.* art. I(1).

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

232. *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007).

parties' arbitration agreement was governed by Columbian law. Columbia's highest administrative court, the Consejo de Estado, annulled the award. The Consejo de Estado found that the arbitration clause in the power purchase agreement violated Columbian law because Columbian law did not expressly allow the use of the procedural rules of the International Chamber of Commerce, for which the parties' arbitration agreement provided.

TermoRio subsequently sought confirmation and enforcement of the award before the U.S. District Court for the District of Columbia. The district court concluded that it had subject matter jurisdiction over the enforcement claim but dismissed the request because the Columbian courts had vacated the award.

The Court of Appeals affirmed. Under the New York Convention, Article V(1)(e), a court may refuse to recognize and enforce an award if "[t]he award has . . . been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."<sup>233</sup> The court concluded that, where the foreign court has such primary jurisdiction, the foreign court "will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief."<sup>234</sup> Because the Consejo de Estado was a "competent authority" and because there was no evidence that the judgment was not authentic, the court concluded that TermoRio had not stated a cause of action under the New York Convention.<sup>235</sup> The court concluded that "an arbitration award does not exist to be enforced in other Contracting States if it had been lawfully 'set aside' by a competent authority in the State in which the award was made. This principle controls the disposition of this case."<sup>236</sup>

The appeals court also rejected TermoRio's argument that U.S. courts have discretion to enforce an award notwithstanding its annulment in another country if the foreign judgment is contrary to the public policy of the United States. The court noted that the standard for finding that a judgment is repugnant to public policy "is high, and infrequently met."<sup>237</sup> It further reasoned that, because Article V(2)(b) of the Convention specifically incorporates a public policy exception and because Article V(1)(e) does not, "it would be strange indeed to recognize such an implicit limitation in Article V(1)(e) that is broader than the express limitation in Article V(2)(b)."<sup>238</sup> In any event, the court concluded, TermoRio had not alleged that the proceedings before or the judgments of the Columbian courts violated basic notions of justice, as would be required under the public policy exception.<sup>239</sup>

## 2. *Availability of Foreign Anti-Suit Injunction to Prevent Debtor from Vitiating Confirmed Arbitral Award*

The Second Circuit, in *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, held that the judgment creditor, Karaha Bodas Company,

233. New York Convention, *supra* note 229, at art. V(1)(e).

234. *TermoRio*, 487 F.3d at 935.

235. *Id.*

236. *Id.* at 936.

237. *Id.* at 938.

238. *Id.*

239. *Id.* at 939.

L.L.C. (KBC) was entitled to an injunction restraining state-owned Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) from pursuing litigation in the Cayman Islands in an attempt to annul an arbitral award that had been confirmed and enforced by federal courts in New York.<sup>240</sup>

Only two weeks prior to the deadline for making a \$261 million payment on the arbitral award rendered against it, however, Pertamina filed an action in the Cayman Islands, alleging that the original arbitral award was procured by fraud. Pertamina sought damages in the amount of the award and an injunction preventing KBC from disposing of any funds received. KBC petitioned the Southern District of New York to enjoin Pertamina from maintaining the action, and the district court granted the request. The district court found that the Cayman Island action “ha[d] the obvious purpose of nullifying the judgment[s] of the federal court in Texas . . . [and] the Southern District of New York.”<sup>241</sup>

The Second Circuit affirmed. It concluded that the requirements for issuance of an anti-foreign-suit injunction, as set forth in *China Trade & Development Corp. v. M.V. Choong Yong*,<sup>242</sup> were met. Specifically, the court found as a threshold matter that (1) the parties were the same in both matters; and (2) under the New York Convention, the resolution of the case would be dispositive of the action that was to be enjoined.<sup>243</sup> With regard to the second finding, the court rejected Pertamina’s arguments that the federal judgments could not be dispositive because the courts of the United States had only secondary jurisdiction under the New York Convention (i.e., that, as a secondary jurisdiction, U.S. courts could only confirm and enforce the award—they could not protect judgments from interference by foreign courts).<sup>244</sup> The Second Circuit concluded that, although federal courts could not protect a party from all legal hardships associated with foreign litigation, they “do have inherent power to protect their own judgments from being undermined or vitiated by vexatious litigation in other jurisdictions,” and the New York Convention does not divest them of this power.<sup>245</sup>

The appeals court also found that not enjoining the Cayman Islands action would potentially undermine the judgments and jurisdiction of the U.S. courts that had heard and decided the same issues, and that the foreign action would be vexatious to KBC.<sup>246</sup> Finally, the court concluded that although principles of comity are important to the question of whether to impose a foreign anti-suit injunction, “where one court has already reached a judgment—on the same issues, involving the same parties—considerations of comity have diminished force.”<sup>247</sup> The court affirmed the lower court’s judgment but modified the injunction to clarify that it would not affect confirmation proceedings in non-U.S. jurisdictions and to permit Pertamina to seek relief from the injunction in the

240. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111 (2d Cir. 2007).

241. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 465 F.Supp.2d 283, 292-93 (S.D.N.Y. 2006).

242. *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987).

243. *Karaha Bodas Co.*, 500 F.3d at 122-24.

244. *Id.* at 124.

245. *Id.*

246. *Id.* at 126.

247. *Id.* at 120 (internal quotations omitted).

district court if Pertamina could show that it was, in good faith, challenging the award on grounds of fraud in Switzerland.<sup>248</sup>

### C. RECOGNITION AND ENFORCEMENT OF FOREIGN COURT JUDGMENTS

#### 1. *Non-Enforcement Based on Repugnance to Public Policy*

In *Sarl Louis Feraud International v. Viewfinder, Inc.*, the Second Circuit addressed the question of whether certain French court judgments violated the public policy of New York.<sup>249</sup> Plaintiffs were French fashion designers. The defendant, Delaware corporation Viewfinder, Inc., operates a website that posts photographs from fashion shows. Plaintiffs filed suits in January 2001 against Viewfinder in the Tribunal de grande instance de Paris, alleging unauthorized use of their intellectual property and unfair competition. Viewfinder did not respond to the complaint, and the French court issued a default judgment against Viewfinder. Viewfinder appealed to the Cour d'appel de Paris in October 2003, but later withdrew its appeal. As a result, the court dismissed the appeal in February 2004.<sup>250</sup>

Plaintiffs sought to enforce the French judgments in the U.S. District Court for the Southern District of New York under New York's Uniform Foreign Money Judgment Recognition Act.<sup>251</sup> The district court granted plaintiffs' request for an order of attachment. In January 2005, Viewfinder filed a motion to dismiss and a motion to vacate the attachment order, which the district court granted, finding that the judgments were unenforceable because they were repugnant to New York's public policy. The court concluded that Viewfinder had a First Amendment right to publish the photographs, which were taken of public events.<sup>252</sup> It also found that U.S. copyright law provides for a "fair use" exception for the publication of newsworthy matters, such as fashion shows.<sup>253</sup> Therefore, the court concluded that enforcing the judgments would violate the defendant's First Amendment rights.<sup>254</sup>

The appeals court considered the Uniform Act, which states that "[a] foreign country judgment need not be recognized if . . . the cause of action on which the judgment is based is repugnant to the public policy of this state."<sup>255</sup> The court noted that the standard for finding that a judgment is repugnant to the state's public policy is a high one, and the "inquiry rarely results in refusal to enforce a judgment unless it is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."<sup>256</sup> It is not sufficient, it found, that the outcome be merely different from that which would have obtained under U.S. laws or procedures.<sup>257</sup>

248. *Id.* at 130.

249. *Sarl Louis Feraud Int'l v. Viewfinder Inc.*, 489 F.3d 474 (2d Cir. 2007).

250. *Id.* at 477.

251. N.Y. C.P.L.R. §§ 5301-09.

252. *Sarl Louis Feraud*, 489 F.3d at 477-80.

253. *Id.* at 478.

254. *Id.*

255. N.Y. C.P.L.R. § 5304(b)(4).

256. *Sarl Louis Feraud*, 489 F.3d at 479 (quoting *Sung Hwan Co. v. Rite Aid Corp.*, 7 N.Y.3d 78, 82 (2006)).

257. *Id.* at 479.

The appeals court concluded that “[f]oreign judgments that impinge on First Amendment rights will be found to be ‘repugnant’ to public policy,”<sup>258</sup> but held that the district court did not fully analyze whether the intellectual property regime on which the judgments were based impinged on rights protected by the First Amendment. It therefore vacated the judgment and remanded for further analysis by the district court.<sup>259</sup>

## 2. Recognition Based on Principles of International Comity

In deciding the international child abduction case of *Navani v. Shahani*, the Tenth Circuit found that the custody order of an English court rendered a parent’s appeal of her case moot.<sup>260</sup> Bina Shahani and John Navani shared custody of their son, who habitually resided in England. Shahani took the child to the United States in violation of the custody order. In response to Navani’s petition that the child be returned to England, the U.S. District Court for the District of New Mexico ordered the boy’s return under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention)<sup>261</sup> and the International Child Abduction Remedies Act.<sup>262</sup>

Shahani appealed. Shortly before oral arguments were heard in the appeal, the English family court issued a new custody order finding that Shahani unlawfully failed to return her son to England, granting custody to Navani, and forbidding Shahani to possess or apply for any passport or travel documents for her son.

In light of this new custody order, the Tenth Circuit dismissed Shahani’s appeal as moot, because the custody order prevented the court from ordering any effective relief to Shahani.<sup>263</sup> Additionally, the court found that general principles of comity require that a U.S. court give “considerable deference” to a foreign judgment, and that the Hague Convention requires that the courts of the country of the child’s habitual residence decide questions of custody.<sup>264</sup> Furthermore, although the court concluded that “principles of comity generally require us to examine the fairness of the foreign country’s judicial procedures,” it rejected the notion that there was any inherent unfairness in the English judicial system.<sup>265</sup>

## VIII. Forum Non Conveniens\*

### A. INTRODUCTION

Forum non conveniens is a nonmerits basis for dismissal which allows courts to dismiss a pending suit for “reasons of convenience, judicial economy, and justice.”<sup>266</sup> Generally, a

258. *Id.* at 480.

259. *Id.* at 484.

260. *Navani v. Shahani*, 496 F.3d 1121 (10th Cir. 2007).

261. Hague Convention on the Civil Aspects of International Child Abduction, T.I.A.S. No. 11,670, 1343 U.N.T.S. 49 (Oct. 25, 1980).

262. International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610 (2007).

263. *Navani*, 496 F.3d at 1127.

264. *Id.* at 1128.

265. *Id.* at 1131.

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266. *German Free State of Bavaria v. Toyobo Co., Ltd.*, 480 F. Supp. 2d 948, 951-52 (W.D. Mich. 2007).

federal forum non conveniens inquiry involves three key steps.<sup>267</sup> First, the district court must establish the existence of an adequate alternative forum. Second, the court must determine the level of deference to accord to the plaintiff's choice of forum, with increased deference given to U.S. plaintiffs over foreign plaintiffs. Third, the court must analyze the balance of private and public interests to determine which forum will be the most appropriate for the case at hand. Private interest grounds taken into consideration include: the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, the possibility of a view of the premises if needed, and any other practical problems of conducting a trial in the plaintiff's chosen forum.<sup>268</sup> Public interest factors weighed by the courts include: whether trial in the plaintiff's chosen forum imposes administrative difficulties, whether the burden of jury duty is imposed on a community with no relation to the litigation, whether the trial furthers the local interest in having localized controversies decided at home, whether a complex choice of law analysis will be necessary, and whether the case will be tried in the forum at home with the governing law.<sup>269</sup> Only when a district court has taken into account and weighed all of the relevant factors may it grant a forum non conveniens dismissal.<sup>270</sup>

#### B. SETTING THE ORDER OF BUSINESS: FORUM NON CONVENIENS AND DETERMINATIONS OF SUBJECT MATTER AND PERSONAL JURISDICTION

By far the most important case to emerge this year dealing with the doctrine of forum non conveniens is *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, decided by the U.S. Supreme Court in March 2007.<sup>271</sup> In *Sinochem*, the Supreme Court tackled an issue that had strongly divided the federal circuit courts: "[w]hether a district court must first conclusively establish its own jurisdiction before dismissing a suit on the ground of *forum non conveniens*?"<sup>272</sup> The Third Circuit in *Sinochem* had held that a federal district court may not dismiss a case based on the forum non conveniens doctrine "unless and until it determined definitively that it had both subject-matter jurisdiction over the cause and personal jurisdiction over the defendant."<sup>273</sup> But other decisions by the Second, Seventh, and D.C. Circuits took a more pragmatic and less formalistic approach, allowing for forum non conveniens dismissal before examining personal or subject matter jurisdiction.<sup>274</sup> Recognizing that the need to "resolve a conflict among the Circuits," the Supreme Court granted *certiorari*, reversed the Third Circuit's judgment, and held that

267. See *USHA (India), Ltd. v. Honeywell Int'l Inc.*, 421 F.3d 129, 134 (2d Cir. 2005); *LaSala v. UBS, AG*, 510 F. Supp. 2d 213, at 218 (S.D.N.Y. 2007).

268. See *Clough v. Perenco, L.L.C.*, No. H-05-3713, 2007 WL 2409357 at \*3 (S.D. Tex. 2007) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

269. See *id.* (citing *Gulf Oil Corp.*, 330 U.S. at 508-09).

270. See *LaSala*, 510 F. Supp. 2d at 218, 222.

271. See *Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184 (2007).

272. *Id.* at 1188.

273. *Id.* at 1189 (citing *Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co.*, 436 F.3d 349 (3rd Cir. 2006)).

274. See *Intec U.S.A., L.L.C. v. Engle*, 467 F.3d 1038 (7th Cir. 2006); *Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002); *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998).

"*forum non conveniens* may justify dismissal of an action though jurisdictional issues remain unresolved."<sup>275</sup>

The Court, quoting the Seventh Circuit in *Intec*, reasoned that determining jurisdiction "is vital only if the court proposes to issue a judgment on the merits."<sup>276</sup> Yet, looking to its earlier 1999 opinion in *Ruhrgas AG v. Marathon Oil Co.*, it established that a *forum non conveniens* dismissal is anything but a judgment on the merits.<sup>277</sup> According to the Court, "[t]he critical point here, rendering a *forum non conveniens* determination a threshold, nonmerits issue in the relevant context, is simply this: Resolving a *forum non conveniens* motion does not entail any assumption by the court of substantive 'law-declaring power'."<sup>278</sup>

Notably, the Court also distanced itself from its remark in *Gulf Oil* that "the doctrine of *forum non conveniens* can never apply if there is an absence of jurisdiction,"<sup>279</sup> commenting that the statements from *Gulf Oil* were carelessly crafted.<sup>280</sup>

Ultimately, the Supreme Court held that the unique facts of each case will determine whether *forum non conveniens* motions will be heard before jurisdictional issues.<sup>281</sup> This mandate for pragmatism has been seamlessly accepted by the federal district courts, with trial courts coming down on both sides of the question. For example, in *Vivendi, S.A. v. T-Mobile USA, Inc.*, the U.S. District Court for the Western District of Washington held that "[b]ecause it may be dispositive in this case, the court intends to address the issue of *forum non conveniens* before reaching any alternative ground for dismissal."<sup>282</sup> On the other hand, the U.S. District Court for the District of New Jersey in *First Colonial Insurance Co. v. Custom Flooring, Inc.* found that "subject matter jurisdiction [could] be readily determined" and thus declined to rule on the defendant's motion for *forum non conveniens* dismissal.<sup>283</sup>

### C. FORUM NON CONVENIENS AND DOCKET CONGESTION

In 2007, courts in the Sixth and Seventh Circuits reached substantially different decisions regarding the effect of locally congested dockets and the administrative hassles of a full-blown jury trial on *forum non conveniens* dismissal.<sup>284</sup> These considerations are hardly unknown to federal courts conducting the public interest prong of the *forum non conveniens* analysis, since the Court in *Gulf Oil Corp.* declared that "[a]dministrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin" and that "[j]ury duty is a burden that ought not to be imposed upon

275. *Sinochem*, 127 S. Ct. at 1190.

276. *Id.* at 1191-92 (quoting *Intec U.S.A., L.L.C.*, 467 F.3d at 1041).

277. *See id.* at 1192 (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999)).

278. *Id.* at 1192-93 (quoting *In re Papandreou*, 139 F.3d at 255).

279. *Id.* at 1193 (quoting *Gulf Oil Corp.*, 330 U.S. at 504).

280. *Id.* at 1193.

281. *See id.* at 1194.

282. *Vivendi, S.A. v. T-Mobile USA, Inc.*, No. C06-1524JLR, 2007 WL 1168819 at \*2 (W.D. Wash. 2007).

283. *First Colonial Ins. Co. v. Custom Flooring, Inc.*, No. Civ. A 06-3998 NLH, 2007 WL 1175759 at \*3 (D.N.J. 2007).

284. *See In re Factor VIII or IX Concentrate Blood Products Litig.*, 484 F.3d 951, 958-59 (7th Cir. 2007); *German Free State of Bavaria v. Toyobo Co., Ltd.*, 480 F. Supp. 2d 948, 955 (W.D. Mich. 2007).

the people of a community which has no relation to the litigation.”<sup>285</sup> The Seventh Circuit Court and the Western District of Michigan, however, appear to have diverged in their opinions as to whether these elements constitute separate factors from the broader public interest concern of “having localized controversies decided at home,” in addition to the overall weight to be accorded to matters of docket congestion.<sup>286</sup>

The Seventh Circuit Court of Appeals in *In re Factor VIII or IX Concentrate Blood Products Litigation* dealt with these two issues in a case involving British plaintiffs who contracted HIV through tainted blood products.<sup>287</sup> In reviewing the decision of the district court to grant forum non conveniens dismissal, the Seventh Circuit stated that the lower court “may have over-estimated the administrative difficulties in keeping the case in the United States.”<sup>288</sup> Echoing the language of the Ninth Circuit in *Gates Learjet Corp. v. Jensen*, the Seventh Circuit opined that “[t]he *forum non conveniens* doctrine should not be used as a solution to court congestion.”<sup>289</sup> Attacking the lower court’s decision to dismiss based on the plaintiff’s ability to pursue a complex and time-consuming jury trial in the United States, the court declared that “the fact that a plaintiff may exercise her constitutional right to a jury trial is not something that properly may weigh *against* keeping a case in the United States.”<sup>290</sup> Crucially, the Seventh Circuit held that “[i]n our view, the burdens of jury duty are closely linked with the local interest in the litigation; they are not a separate reason to reject a case.”<sup>291</sup>

The District Court for the Western District of Michigan in *German Free State of Bavaria v. Toyobo Co., Ltd.* reached a very different conclusion as to the importance assigned in a forum non conveniens analysis to a possible jury trial in a district with an already crowded docket.<sup>292</sup> Unlike the Seventh Circuit, the Michigan district court found that the undue burden placed on a Michigan jury to try a case with no substantial connection to Michigan constituted an independent factor militating forum non conveniens dismissal under the *Gilbert* public interest test.<sup>293</sup> Furthermore, the district court noted in granting forum non conveniens dismissal “that this District is in fact in a ‘judicial crisis’ as it has been awaiting the appointment of three federal judges for quite some time with no indication that such appointments will be made any time in the near future.”<sup>294</sup> Of course, all this is a far cry from the Seventh and Ninth Circuits’ determination that “[t]he *forum non conveniens* doctrine should not be used as a solution to court congestion.”<sup>295</sup>

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285. *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 508-09.

286. *Id.* at 509.

287. See *In re Factor VIII*, 484 F.3d at 952-54.

288. *Id.* at 953-54.

289. *Id.* at 959 (quoting *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1337 (9th Cir. 1984)).

290. *Id.* at 958.

291. *Id.* at 959.

292. See *Toyobo Co., Ltd.*, 480 F. Supp. 2d at 955.

293. See *id.* at 954-55. See also *Clough*, 2007 WL 2409537 at \*5 (listing “[w]hether the burden of jury duty is imposed on a community with no relation to the litigation” as an independent public interest factor for forum non conveniens dismissal).

294. *Toyobo Co., Ltd.*, 480 F. Supp. 2d at 955.

295. *In re Factor VIII*, 484 F.3d at 959; *Gates Learjet Corp.*, 743 F.2d at 1337.

## D. FORUM NON CONVENIENS AND ESTOPPEL

Finally, in 2007, two new cases emerged clarifying the relationship between forum non conveniens and the equitable doctrine of estoppel. In both rulings, federal courts were faced with the question of how previous forum non conveniens determinations affected pending requests for forum non conveniens dismissal. The Third Circuit Court of Appeals was the first to confront the matter in *Davis International, LLC v. New Start Group Corp.*, where the district court dismissed a complaint as directly estopped on the grounds that forum non conveniens dismissal had already been granted in an earlier related action and that “the doctrine of direct estoppel barred Appellants from relitigating the decision against them.”<sup>296</sup> Affirming the district court’s decision, the Third Circuit determined that the present complaint and the previous complaint, upon which forum non conveniens dismissal was granted, were “identical in all material respects.”<sup>297</sup> The Third Circuit, highlighting the reversal of its previous decision in *Sinochem* by the U.S. Supreme Court, additionally rejected the plaintiff-appellant’s argument that “the District Court erred in deciding the direct estoppel issue before it determined its jurisdiction.”<sup>298</sup>

The District Court for the Southern District of New York in *In re Ski Train Fire in Kaprun, Austria* on November 11, 2000<sup>299</sup> also explored the nexus between estoppel and forum non conveniens in the context of collateral, rather than direct, estoppel.<sup>300</sup> This decision, involving consolidated cases brought by plaintiffs from Germany, Austria, Japan, and Slovenia, was part of a larger series of cases filed by various U.S. and foreign decedents of those who died in a disastrous ski train fire at a holiday resort in Austria.<sup>301</sup> The plaintiffs argued that the refusal of a district court to grant forum non conveniens dismissal in a prior case originating from the ski train disaster collaterally estopped the defendants from moving for forum non conveniens dismissal in *In re Ski Train Fire*.<sup>302</sup> The trial court refused to accept the plaintiffs’ estoppel argument, explaining that “[t]he prior proceeding underpinning plaintiffs’ collateral estoppel claim is a previous decision by this Court denying a motion to dismiss the U.S. plaintiffs’ . . . cases for *forum non conveniens*.”<sup>303</sup> Because the plaintiffs in the previously decided Austrian ski fire case were American citizens, while the plaintiffs in the *In re Ski Train Fire* actions were not, the court felt that the issues before it were not “identical to those previously litigated” and thus declined to hold the forum non conveniens motion as collaterally estopped.<sup>304</sup> In particular, the decision by the district court in *In re Ski Train Fire* underlines the continuing power and vitality of the U.S. Supreme Court’s holding in *Piper Aircraft Co.* that a “distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified”

296. *Davis Int’l, LLC v. New Start Group Corp.*, 488 F.3d 597, 600 (3d Cir. 2007).

297. *Id.* at 604.

298. *Id.*

299. *See In re Ski Train Fire*, 499 F. Supp. 2d 437, 444 (S.D.N.Y. 2007).

300. Issue preclusion through collateral estoppel applies to different claims, while issue preclusion through direct estoppel applies to “successive prosecutions of the same claim.” *See* 50 C.J.S. Judgment § 781 (1997).

301. *See In re Ski Train Fire*, 499 F. Supp. 2d at 440.

302. *See id.* at 444.

303. *Id.*

304. *Id.*

and that “plaintiff’s choice of forum is entitled to greater deference when the plaintiff has chosen the home forum.”<sup>305</sup>

## IX. Choice of Law\*

### A. CHOICE OF LAW AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

In *The Travelers Property Casualty Co. v. Saint-Gobain Technical Fabrics Canada Ltd.*, the United States District Court for the District of Minnesota determined that the United Nations Convention for the International Sale of Goods (CISG) governed the formation of a contract between a Minnesota firm and a Canadian firm, even though a choice of law clause in the purchase order referred to Minnesota law.<sup>306</sup>

A liability insurer and general contractor sued Saint-Gobain, a Canadian corporation, to recover amounts paid in settlement after Saint-Gobain supplied faulty materials to the contractor for a construction project.<sup>307</sup> As an alternative ground for their motion for partial summary judgment, the plaintiffs asserted that the CISG governed formation of the contract.<sup>308</sup> The plaintiffs argued that the CISG was relevant to finding that the indemnification and express warranties of the purchase order formed part of the contract between the contractor and Saint-Gobain;<sup>309</sup> however, Saint-Gobain argued that Minnesota law governed because the purchase order referenced Minnesota law and, therefore, the Minnesota Uniform Commercial Code applied.<sup>310</sup>

Citing to *Asante Technologies, Inc. v. PMC-Sierra, Inc.*,<sup>311</sup> and Article VI of the United States Constitution, the district court determined that the CISG should govern. The court noted that states are bound by the Supremacy Clause to the treaties of the United States.<sup>312</sup> The court held that because the United States has ratified the CISG treaty, and Minnesota is a territory within the United States, the CISG applies to the contract absent an express statement in the purchase order otherwise.<sup>313</sup> Although the court determined that the CISG was applicable, it elected not to address the interpretation of the indemnification and express warranties clauses until it had more facts.<sup>314</sup>

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305. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981). See also *Sinobchem*, 127 S. Ct. at 1191 (confirming the validity of *Piper Aircraft*).

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306. *Travelers Prop. Cas. Co. v. Saint-Gobain Technical Fabrics Can. Ltd.*, 474 F. Supp 2d 1075, 1081 (D. Minn. 2007).

307. *Id.*

308. *Id.* at 1081.

309. *Id.*

310. *Id.*

311. *Asante Tech., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001)

312. *Id.*

313. *Id.*

314. *Id.*

## B. CHOICE OF LAW AND LOST OR DAMAGED FREIGHT

In *Eli Lilly Do Brasil, Ltda. v. Federal Express Corp.*, the Second Circuit determined that federal common law and not Brazilian law applied to a claim based upon the transportation of cargo.<sup>315</sup> Eli Lilly had a contract with Federal Express (FedEx) to ship pharmaceuticals from Brazil to Japan.<sup>316</sup> The waybill for shipment limited FedEx's liability for stolen goods.<sup>317</sup> Lilly had the option to secure additional coverage by declaring a higher value and paying additional fees.<sup>318</sup> Lilly, however, did not exercise its option.<sup>319</sup> The shipment was hijacked, and \$800,000 worth of cargo was stolen.<sup>320</sup>

To recover the loss, Lilly sued FedEx in the Southern District of New York.<sup>321</sup> FedEx moved to limit its liability based on federal common law, but Lilly believed that Brazilian law applied.<sup>322</sup> The court ruled that federal common law was the substantive law, not the law of Brazil. Thus, the waybill was valid.<sup>323</sup> Lilly appealed.

On appeal, the Second Circuit conducted a federal common law choice-of-law analysis to determine whether the laws of Brazil or U.S. federal common law should govern the dispute. Referring to the Restatement (Second) of Conflict of Laws, the court recognized the presumption that the law of the jurisdiction having the greatest interest in the litigation should be applied.<sup>324</sup> The court determined that, under this presumption, Brazil had a more significant relationship to the parties and the contract because the contract to ship goods from Brazil to Japan was negotiated in Brazil between a Brazilian company and a U.S. company and thus had greater contacts than the United States under Section 188 of the Restatement.<sup>325</sup>

The court did not end its inquiry there, however. The court went on to examine whether the United States nonetheless had a greater interest in the litigation. The court reasoned that the rule favoring the local law from where the goods were dispatched may not apply when the contract would be invalid under that law but valid under the law of another state with a close relationship to the parties and the contract.<sup>326</sup> Because the waybill would be valid under federal common law and not Brazilian law, the Court determined that federal common law applied.<sup>327</sup> Such a finding, the court concluded, was consistent with the reasonable expectations of the parties regarding the contract. Lilly had the option to insure the cargo for additional fees. However, Lilly elected not to pay for more insurance. Thus, according to the court, the obligations and options of the waybill contract between two sophisticated parties, was enforceable under federal common law, not Brazilian law.<sup>328</sup>

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315. *Eli Lilly Do Brasil, Ltda. v. Fed. Express Corp.*, 502 F.3d 78 (2d Cir. 2007).

316. *Id.* at 79.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at 80-81.

322. *Id.*

323. *Id.*

324. *Id.* at 81.

325. *Id.*

326. *Id.* at 82-83 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 197).

327. *Id.*

328. *Id.* at 84.