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International Litigation

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I. Foreign Sovereign Immunities Act

Foreign states are presumptively immune from suit, and their property presumptively immune from attachment and execution, unless an exception in the Foreign Sovereign Immunities Act (FSIA) applies.[1]

A. JURISDICTIONAL EXCEPTIONS

In *OBB Personenverkehr AG v. Sachs*, the United States Supreme Court reaffirmed that in order for a suit to proceed under the § 1605(a)(2) exception for conduct "*based upon* a commercial activity in the United States," the conduct must serve as the "gravamen" of the suit.[2] The Court rejected the Ninth Circuit's analysis of the "based upon" requirement that instead asked whether the conduct was "an element" of each asserted claim.[3] The Court noted that such a test would "necessarily require[ ] a court to identify

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1. *See* 28 U.S.C. §§ 1602 *et seq.*
2. OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390, 395 (2015).
3. *Id.* at 395-96.

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all the elements of each claim" after conducting a "choice-of-law" analysis," and "would allow plaintiffs to evade the [FSIA's] restrictions through artful pleading."[4]

In *Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela*, the D.C. Circuit held, in a 2-1 decision, that the takings exception in § 1605(a)(3) applied when a Venezuelan subsidiary corporation alleged that Venezuela had "unreasonably discriminated against it on the basis of [the] nationality" of its American parent.[5] The majority noted that the alleged discrimination excepted the case from the "domestic takings rule," which generally bars a foreign corporation from "seek[ing] redress in an American court for wrongs suffered in its home country."[6] The court further held that, notwithstanding that corporate law typically prohibits shareholders from enforcing a corporation's rights, the parent had standing because § 1605(a)(3) requires only that "rights in property . . . are in issue" and, under circuit precedent, shareholders may have rights in corporate property.[7]

B. Attachment or Execution Exceptions

In *Wyatt v. Syrian Arab Republic*, the United States Court of Appeals for the Seventh Circuit held that creditors who obtain default judgments against states designated as terrorism sponsors need not serve those states with the judgments under § 1608(e) prior to executing on their property.[8] The court reasoned that while § 1610(c) explicitly mandates § 1608(e) notice prior to execution against the property of states and their instrumentalities under §§ 1610(a) and (b), it does not expressly require the same for execution against the property of terrorism sponsors under § 1610(g).[9] The U.S. District Court for the District of Columbia subsequently rejected this holding in *Owens v. Republic of Sudan*, where the court held that § 1610(g) is not a "freestanding immunity exception" and that § 1610(c) does apply to terrorism-sponsor cases.[10]

C. Alter Ego

In *EM Ltd. v. Banco Central de La República Argentina*, the Second Circuit rejected an attempt to have the Central Bank of Argentina declared Argentina's alter ego and liable for all its debts.[11] Applying the United States Supreme Court's test from *First National City Bank v. Banco Para El Comercio Exterior de Cuba*,[12] the Second Circuit stated that as an "instrumentality" under the FSIA, the Central Bank was jurisdictionally immune and

4. *Id.* at 396.

5. Helmerich & Payne Int'l Drilling Co. v. Venezuela, 784 F.3d 804, 812 (D.C. Cir. 2015), *petition for cert. filed*, No. 15-698 (U.S. Nov. 27, 2015).

6. *Id.* at 812-14.

7. *Id.* at 814-16.

8. Wyatt v. Syrian Arab Republic, 800 F.3d 331, 342-43 (7th Cir. 2015), *petition for cert. filed*, No. 15-1095 (U.S., Aug. 31, 2015).

9. *Id.*

10. Owens v. Republic of Sudan, Civ. Action No. 01-2244 (JDB), 2015 WL 6530582, at *3-4 (D.D.C. Oct. 28, 2015).

11. EM Ltd. v. Banco Central de la República Argentina, 800 F.3d 78, 89-96 (2d Cir. 2015), *petition for cert. filed* No. 15-872 (U.S. Jan. 7, 2016).

12. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba (*Banec*), 462 U.S. 611, 629-30 (1983).

separate from Argentina unless the plaintiffs showed that Argentina exercised "day-to-day" control over its operations, or that recognizing its separateness would work a "fraud or injustice."[13] The court found plaintiffs' allegations insufficient to satisfy either prong, emphasizing that close interaction concerning monetary policy is not enough for control and that plaintiffs had not claimed that the Central Bank was used to frustrate collection efforts or treated as a "sham" to hide assets.[14]

D. Service of Process

The FSIA also governs service of process upon foreign states. In *Barot v. Embassy of the Republic of Zambia*, the D.C. Circuit reversed a dismissal for failure to effect service after the plaintiff's numerous unsuccessful attempts to comply with the requirements of § 1608(a).[15] The court acknowledged that "strict adherence to 1608(a)" is necessary, but noted that unlike the federal rules, the FSIA has no deadline to effect service, meaning that there was still "a reasonable prospect that service [could] be maintained" and that dismissal was inappropriate.[16] In *Harrison v. Republic of Sudan*, examined in the following section, the Second Circuit for the first time held that papers addressed to a minister of foreign affairs but sent to a state's embassy in Washington, D.C., constitutes service under § 1608(a)(3).[17]

II. International Service of Process

International service of process is governed by Rule 4(f) of the Federal Rules of Civil Procedure. Rule 4(f) requires that the means of international service of process comport with due process and not be prohibited by an international agreement.[18]

In *Harrison v. Republic of Sudan*, sailors injured during al Queda's bombing of the U.S.S. Cole and their spouses sued Sudan, alleging that it provided material support for the attack.[19] When Sudan failed to appear, the plaintiffs obtained a default judgment and were awarded over $300 million, but when the plaintiffs sought to enforce the judgment against funds held by New York banks, Sudan opposed by arguing that plaintiffs' service of process was flawed and therefore the default judgment lacked jurisdiction.[20]

As noted in the previous section, a foreign state can only be served with process in accordance with the § 1608(a) of the FSIA.[21] The FSIA lists four methods of service in preferential order, including "any special arrangement for service between the plaintiff and the foreign state";[22] any applicable international agreement or convention;[23] mailing

13. *See EM Ltd.* 800 F.3d at 91, 94-95.
14. *Id.* at 94, 96.
15. Barot v. Embassy of the Republic of Zambia, 785 F.3d 26, 28-30 (D.C. Cir. 2015).
16. *Id.* at 27, 29-30.
17. Harrison v. Republic of Sudan, 802 F.3d 399, 403-07 (2d Cir. 2015).
18. *See* Fed. R. Civ. P. 4(f)(1) (an individual may be served outside of the United States "by any internationally agreed means of service that is reasonably calculated to give notice"); Fed. R. Civ. P. 4(f)(3) (allowing service "by other means not prohibited by international agreement").
19. *Harrison*, 802 F.3d at 400.
20. *Id.* at 401–02.
21. *See supra* Section I.D.
22. § 1608(a)(1).

of the complaint and summons, along with a translation in the foreign state's official language, to the "head of the ministry of foreign affairs of the foreign state";[24] and, if none of the other methods are available, then mailing of the complaint and summons to the Director of Special Consular Services for transmission of the papers through diplomatic channels.[25]

In *Harrison*, the plaintiffs argued that they successfully served process by mailing the required documents, with the appropriate translations, to the Minister of Foreign Affairs via the Embassy of Sudan in Washington, D.C., while Sudan argued that the FSIA required the plaintiffs to mail the documents to the Minister of Foreign Affairs in Khartoum.[26] The court rejected Sudan's argument, noting that the FSIA "is silent as to a specific location where the mailing is to be addressed."[27] After examining the legislative history of the FSIA and the few district court opinions addressing this issue, the Second Circuit concluded that the FSIA did not require mailing to the foreign state.[28] The court also rejected Sudan's position as "mak[ing] little sense from a reliability perspective and as a matter of policy," because "[w]hile direct mailing relies on the capacity of the foreign postal service or a commercial carrier, mail addressed to an embassy—as an extension of the foreign state—can be forwarded to the minister by diplomatic pouch."[29] The court acknowledged that the Vienna Convention on Diplomatic Relations prohibits service of process on an embassy or a diplomatic agent, but held that "[i]n a case where the suit is not against the embassy or diplomatic agent, but against the foreign state with service on the foreign minister *via* the embassy address, we do not see how principles of mission inviolability and diplomatic immunity are implicated."[30]

III. Personal Jurisdiction

A. General Jurisdiction

In 2015, the federal courts of appeal consistently applied the Supreme Court's landmark 2014 decision in *Daimler AG v. Bauman*, which held that general jurisdiction over a foreign corporation is proper only when the corporation's affiliations with the forum state are so "continuous and systematic" as to render it "essentially at home" in that state.[31] Under *Daimler*, aside from the "exceptional" case, the paradigm forum for general jurisdiction over a corporation is the defendant's place of incorporation and principal place of business.[32] No federal appellate courts to consider the issue have elaborated on

23. § 1608(a)(2).
24. § 1608(a)(3).
25. § 1608(a)(4).
26. *Harrison*, 802 F.3d at 403-04.
27. *Id.* at 404.
28. *Id.* at 406.
29. *Id.*
30. *Id.* at 405 (referring to Vienna Convention on Diplomatic Relations, arts. 22(1), 31(1), Apr. 18, 1961, 500 U.N.T.S. 95).
31. Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014).
32. *Id.* at 760-61, 761 n. 19.

what would constitute an "exceptional case"; rather they have uniformly declined to exercise general jurisdiction over defendants outside of *Daimler*'s paradigmatic forums.[33]

Federal district courts in 2015 applied *Daimler* with less consistency. District courts remain split on whether a defendant who is not "at home" in a forum state may nonetheless consent to general jurisdiction under state long-arm provisions by complying with the forum state's business registration statute. In *AstraZeneca AB v. Mylan Pharmaceuticals, LLC*, the U.S. District Court for the District of Delaware wrote that, "[i]n light of the holding in *Daimler*, [the defendant's] compliance with Delaware's registration statutes—mandatory for doing business within the state—cannot constitute consent to jurisdiction."[34] But in *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc.*, a different judge on the same court held the opposite.[35] Similarly, in *Otsuka Pharmaceutical Co., Ltd. v. Mylan Inc.*, the U.S. District Court for the District of New Jersey found that a defendant had consented to personal jurisdiction by registering to do business in New Jersey.[36] Five months later, in *McCourt v. A.O. Smith Water Products Co.*, another judge on that same court held the opposite.[37]

B. Specific Jurisdiction

With regard to specific personal jurisdiction, courts continue to grapple with the split in authority on the necessary casual nexus between a plaintiff's cause of action and a defendant's forum contacts required to support a finding of personal jurisdiction. In *Beydoun v. Wataniya Restaurants Holding, Q.S.C.*, a former employee alleged that the defendant, his former employer, had recruited employees in, made business trips to, and purchased equipment from the forum state of Michigan.[38] The Sixth Circuit held that although the employer's contacts with Michigan were sufficient to satisfy the long-arm statute, the plaintiff's causes of action—for false imprisonment, abuse of process, and malicious prosecution—did not proximately result from those contacts.[39] The *Beydoun* court held that "more than mere but-for causation is required to support a finding of personal jurisdiction."[40] Conversely, in *Cossart v. United Excel Corp.*, the First Circuit expressly held that "in deciding [personal jurisdiction under the Massachusetts long-arm statute] whether a claim 'arises from' a defendant's 'transacting business,' [a court] look[s]

33. *See* First Metro. Church of Hous. v. Genesis Grp., 616 F.App'x 148, 148-49 (5th Cir. 2015) (noting the "difficult[y] . . . [of] establish[ing] general jurisdiction in a forum other than the place of incorporation or principal place of business"); Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 135 (2d Cir. 2014) (holding that bank was "incorporated and headquartered elsewhere, [and] this [was] clearly not an exceptional case"); Carmouche v. Tamborlee Mgmt., Inc., 789 F.3d 1201, 1204-05 (11th Cir. 2015); Kipp v. Ski Enter. Corp. of Wis., Inc., 783 F.3d 695, 697-98 (7th Cir. 2015).

34. AstraZeneca AB v. Mylan Pharm., 72 F. Supp. 3d 549, 555-56 (D. Del. 2014) (emphasis omitted) (Sleet, J.).

35. *See* Acorda Therapeutics, Inc. v. Mylan Pharm., 78 F. Supp. 3d 572, 588-91 (D. Del. 2015) (Stark, J.).

36. Otsuka Pharm. Co., Ltd. v. Mylan Inc., 106 F.Supp.3d 456, 470-71 (D.N.J. 2015).

37. *See* McCourt v. A.O. Smith Water Prods. Co., Civ. Action No. 14-221, 2015 WL 4997403 (D.N.J. Aug. 20, 2015).

38. Beydoun v. Wataniya Rests. Holding, Q.S.C., 768 F.3d 499, 507-08 (6th Cir. 2014).

39. *Id.*

40. *Id.* at 507.

to see whether the transacted business was a 'but for' cause of the harm alleged in the claim."[41]

Some circuits remain undecided. In *Benson v. Rosenthal*, a district court within the Eastern District of Louisiana recognized that "[w]hile many circuits have expressly adopted some variation of the [causal nexus] tests [for specific jurisdiction], the Fifth Circuit has not."[42]

C. Imputed Jurisdiction

Courts this year also worked to define the contours of imputed personal jurisdiction. In *Ranza v. Nike, Inc.*, the Ninth Circuit recognized a non-traditional approach to alter ego jurisdiction.[43] In *Ranza*, a United States citizen residing abroad brought an employment action against her former employer, the Dutch subsidiary of an Oregon parent corporation.[44] Rather than seeking to impute a subsidiary's local contacts to a foreign parent, "which is the traditional application of the alter ego test," the plaintiff in *Ranza* sought to impute the local parent's contacts to the foreign subsidiary.[45] Although the court eventually found that the affiliated parties were not alter egos, it recognized the viability of a reverse-piercing alter ego theory to extend personal jurisdiction to a foreign subsidiary.[46]

IV. The Act of State Doctrine

The act of state doctrine is a prudential limitation on the exercise of judicial review.[47] The doctrine requires that "the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid,"[48] but does not apply when a court need not adjudicate validity of foreign state's act.[49]

A. Defining Foreign State

In *Ministry of Oil of Republic of Iraq v. 1,032,212 Barrels of Crude Oil Aboard United Kalavrvta*, Kurdistan sought dismissal under the act of state doctrine after Iraq's oil ministry sued for alleged illegal seizure and conversion of Iraqi crude oil.[50] The U.S. District Court for the Southern District of Texas found that although Kurdistan, as a political subdivision of the Republic of Iraq, was a state within the meaning of the FSIA, it

41. Cossart v. United Excel Corp., 804 F.3d 13, 18 (1st Cir. 2015).
42. Benson v. Rosenthal, 116 F. Supp. 3d 702, 711 (E.D. La. 2015).
43. *See* Ranza v. Nike, Inc., 793 F.3d 1059 (9th Cir. 2015), *cert. denied*, 136 S.Ct. 915 (2016).
44. *Id.*, 793 F.3d at 1066-67.
45. *Id.* at 1071.
46. *Id.* at 1071-73.
47. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964); Credit Suisse v. U.S. Dist. Court for Cent. Dist. of Cal., 130 F.3d 1342, 1346 (9th Cir. 1997).
48. W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l., 493 U.S. 400, 409 (1990).
49. *See, e.g.*, Salem Fin., Inc. v. United States, 786 F.3d 932, 955 (Fed. Cir. 2015), *cert. denied*, No. 15-380, 2016 WL 854219 (U.S. Mar. 7, 2016).
50. Ministry of Oil of the Republic of Iraq v. 1,032,212 Barrels of Crude Oil Aboard the United Kalavrvta, Civ. Action No. G-14-249, 2015 WL 93900, at *12 (S.D. Tex. Jan. 7, 2015), *appeal dismissed as moot*, No. 15-40062 (5th Cir. Sept. 21, 2015).

did not have the characteristics of a foreign state necessary to invoke the doctrine—most importantly the capacity to conduct foreign relations.[51] The court also found that policy reasons underlying the doctrine did not support dismissal, noting in particular the lack of any separation of powers concern and the fact that "'the current government of Iraq itself has sought out United States courts,' a factor that 'tilt[s] against the doctrine's application.'"[52]

B. Defining Foreign Territory

In *AdvanFort Co. v. International Registries, Inc.*, a United States federal district court found that the act of state doctrine may bar claims based on acts occurring outside the boundaries of the sovereign if they have effect solely within the state's sovereign territory.[53] The case concerned a claim against a Virginia company that administers the maritime services of the Republic of the Marshall Islands (RMI), based on the company's emails implementing an RMI official's suspension order.[54] Because "the public act at issue . . . was directed at and only had effect on RMI flagged ships, which are clearly within RMI's territory," it met the threshold for act of state protection.[55]

Similarly, in *Hourani v. Mirtchev*, the D.C. Circuit held that claims of defamation based on statements made on the website of the Kazakh embassy in Washington, D.C. with the active support of the Kazakh ambassador were subject to the act of state doctrine, stating that an ambassador's statement on traditional subjects of sovereign and diplomatic communication must be treated as being "formulated and dictated from within its own territory."[56]

C. Extraterritorial Recognition

The court in *Mezerhane v. República Bolivariana de Venezuela*[57] from the Eleventh Circuit, and *Yale University v. Konowaloff*[58] from the Second Circuit, reaffirmed that the doctrine precludes adjudicating the validity of a foreign state's confiscation of its citizens' property within its own borders.

Two district courts reached different results on the question of recognizing Cuban expropriation decrees regarding property in the United States so as to allow judgment creditors of Cuba to execute on the property. In *Villoldo v. Ruz*, the court declined to allow execution because taking the property from the rightful, but unknown, owners would not be "consistent with the policy and law of the United States,"[59] whereas in

51. *Id.* at *12-13.

52. *Id.* at *13 (quoting Republic of Iraq v. ABB AG, 920 F. Supp. 2d 517, 534 (S.D.N.Y. 2013)).

53. AdvanFort Co. v. Int'l Registries, Inc., Civ. Action No. 1:15-CV-220, 2015 WL 4254988, at *7 (E.D. Va. July 13, 2015).

54. *Id.* at *1-2.

55. *Id.* at *7. The court reserved decision on whether to dismiss pursuant to the doctrine until it could potentially seek the views of the U.S. Department of State. *Id.* at *8.

56. Hourani v. Mirtchev, 796 F.3d 1, 11-12, 14 (D.C. Cir. 2015).

57. Mezerhane v. República Bolivariana de Venezuela, 785 F.3d 545, 552 (11th Cir. 2015), *cert. denied* 136 S.Ct. 800 (2016).

58. Yale Univ. v. Konowaloff, 620 Fed. Appx. 60, 61(2d Cir. 2015).

59. Villoldo v. Ruz, 113 F. Supp. 3d 435, 439, 442-43 (D. Mass. 2015), *appeal docketed*, No. 15-1808, No. 15-2080 (1st Cir. Sept. 24, 2015).

Hausler v. JP Morgan Chase Bank, N.A., the court found execution to be consistent with United States policy because it would result in compensation of terror victims and the property would otherwise likely escheat to the State of New York.[60]

Finally, in *Federal Treasury Enterprise Sojuzplodoimport v. Spirits International B.V.*, the Second Circuit held that because a foreign governmental decree assigning all interests in a U.S. trademark "was a wholly intragovernmental transfer of rights" that did not purport to alter anyone else's rights or interests, and addressed "a question of Russian law decided within Russia's borders, rather than a matter of U.S. law with a situs in the United States," the decree was a sovereign (and not commercial) act whose validity cannot be questioned in a U.S. court.[61]

V. International Discovery

A. Obtaining United States Discovery for Use in Foreign Proceedings

In 2015, United States courts addressed the requirements for obtaining discovery for use in proceedings before foreign or international tribunals, pursuant to 28 U.S.C. § 1782(a)[62] and under the factors set out in *Intel Corp. v. Advanced Micro Devices, Inc.*[63]

Several courts interpreted the statutory requirement that the discovery be "for use" in a foreign proceeding. In *Mees v. Buiter*, the Second Circuit held that the requested discovery need not be "necessary" for success in the foreign proceeding, so long as it would provide "some advantage."[64] But in *Certain Funds, Accounts and/or Inv. Vehicles v. KPMG*, the Second Circuit found that where the requesting party has no "role in the proceeding" beyond a mere "ability to pass on information," it cannot satisfy this "for use" requirement.[65]

Two courts addressed the scope of what may count as a "proceeding before a foreign tribunal."[66] In *Akebia Therapeutics v. Fibrogen*, the Ninth Circuit concluded that the European and Japanese Patent Offices were foreign "tribunals" because both offices conduct "quasi-judicial proceedings."[67] By contrast, the Southern District of New York in *Jiangsu Steamship Co. v. Success Superior Ltd.*, held that a party's claim that the discovery would be of use in "unspecified foreign attachment proceedings" was insufficient, both because the party failed to show that such proceedings were "reasonably contemplates" and because pre-judgment attachment proceedings would not be "adjudicative" in

60. Hausler v. JP Morgan Chase Bank, N.A., 127 F. Supp. 3d 17, 56-57 (S.D.N.Y. 2015).

61. Fed. Treasury Enter. Sojuzplodoimport, OAO v. Spirits Int'l B.V., 809 F.3d 737, 743 (2d Cir. 2016), *rev'g* 61 F.Supp. 3d 372 (S.D.N.Y. 2014).

62. *See* 28 U.S.C. § 1782(a) ("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.").

63. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 243 (2004). In *Intel*, the Supreme Court noted three statutory requirements for invoking § 1782(a) and articulated four discretionary factors courts should consider. *Id.* at 244-45.

64. Mees v. Buiter, 793 F.3d 291, 298 (2d Cir. 2015).

65. Certain Funds, Accounts, and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 120 (2d Cir. 2015).

66. *See* § 1782(a).

67. Akebia Therapeutics, Inc. v. Fibrogen, Inc., 793 F.3d 1108, 1111 (9th Cir. 2015).

nature.[68] The court emphasized that it would be illegitimate for a party to use § 1782 to "troll[ ] for assets in U.S. institutions in order to decide whether it is worth [its] while to commence [a foreign merits proceeding] in the first place," and a "subterfuge" to use § 1782 to obtain discovery with an eye toward eventually "initiating pre-judgment attachment proceedings in the United States, rather than a foreign tribunal."[69]

In *In re Republic of Kazakhstan*, the Southern District of New York held that a foreign sovereign could be an "interested person" for purposes of the statute, in part because the goal of the statute was to "encourage reciprocity by foreign governments."[70] The court also held that because the respondent London-based law firm "operate[d] as a single law firm" with its New York office, the firm could be "'found' [in New York] for purposes of section 1782" and the documents could be sought.[71]

B. Obtaining Discovery from Abroad for Use in United States Proceedings

In 2015, United States courts considered the discretionary factors in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa* in evaluating discovery requests for information located in foreign jurisdictions for use in U.S. proceedings.[72]

In *Motorola Credit Corp. v. Uzan*, the Southern District of New York considered requests for materials located in several different countries, and focused on the extent to which the foreign jurisdictions had historically enforced blocking statutes or secrecy laws.[73] The court found that France's blocking statute is "riddled with loopholes" and "substantially unenforceable."[74] Similarly, the court found a "total paucity of published prosecutions of banks or their officers in Jordan and the UAE."[75] By contrast, the court determined that Switzerland's secrecy regime was "seriously enforced" and refused to order discovery.[76]

Apart from national secrecy laws, European authorities can be expected to strictly enforce data protection laws, including as to United States-style discovery requests. Notably, an impending EU regulation, the General Data Protection Regulation, proposes a sharp increase in fines for violations of data protection laws, while the Court of Justice of

68. Jiangsu Steamship Co. v. Success Superior Ltd., No. 14 Civ. 9997 (CM), 2015 WL 3439220 (S.D.N.Y. Feb. 5, 2015). *See also Certain Funds*, 798 F.3d at 123 (affirming that the foreign proceedings "must be within *reasonable* contemplation") (emphasis original).

69. *Jiangsu Steamship Co.*, 2015 WL 3439220, at *5.

70. *In re* Republic of Kazakhstan, 110 F. Supp. 3d 512, 516 (S.D.N.Y. 2015).

71. *Id.* at 515.

72. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for So. Dist. Iowa, 482 U.S. 522, 539 (1987).

73. Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397, 403 (S.D.N.Y 2014).

74. *Id.* Similarly, in *In re Cathode Ray Tube (CRT) Antitrust Litigation*, the court found that France's blocking statute posed no "realistic risk of prosecution" and therefore ordered discovery. *In re* Cathode Ray Tube (CRT) Antitrust Litigation, Case No. C-07-5944-SC, 2014 WL 5462496, at *6 (N.D. Cal. Oct. 23, 2014).

75. *Motorola Credit Corp.*, 73 F.Supp. 3d at 405.

76. *Id.* at 404.

the EU recently emphasized the independent power of national data protection agencies to enforce European data protection laws.[77]

VI. Extraterritorial Application of United States Law

A. RICO

In a closely watched case, the United States Supreme Court is set to consider the extraterritoriality of the Racketeer Influenced and Corrupt Organizations Act (RICO). In *European Community v. RJR Nabisco, Inc.*, in which the European Community and its member states alleged violations of RICO through predicate acts of money laundering, the district court in New York first dismissed the case after finding that the Supreme Court's decision in *Morrison v. National Australia Bank*[78] precluded RICO's extraterritorial application.[79] The Second Circuit reversed, distinguishing its own precedent in *Norex Petroleum Ltd. v. Access Industries, Inc.*,[80] and held that RICO applies extraterritorially whenever the RICO claim "depends on violations of a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially."[81] The Second Circuit then refused to rehear the case *en banc*, over the dissents of five judges who argued that the panel decision was irreconcilable with both *Morrison* and *Norex*.[82] Those dissenting argued that Congress did not intend RICO to apply extraterritorially and that the panel decision would invite just the kind of extraterritorial civil litigation that the Supreme Court has foreclosed not just with *Morrison*, but also with *Kiobel v. Royal Dutch Petroleum Co.*[83]

The Supreme Court granted certiorari and its forthcoming decision can be expected to provide important clarification not just for the extraterritorial reach of RICO, if any, but also for the Court's extraterritoriality jurisprudence more broadly.[84]

B. Fourth and Fifth Amendments

In *Hernandez v. United States*, the Fifth Circuit reconsidered en banc allegations of Fourth and Fifth Amendment violations based on a shooting of a Mexican teenager located on the Mexican side of the U.S.-Mexico border by a United States Border Patrol

77. *See* Case C-362/14, Schrems v. Data Protection Comm'r, InfoCuria (Oct. 6, 2015), http://curia.europa.eu/juris/liste.jsf?num=C-362/14; Cecilia Alvarez et al., *Into The Unknown – The Proposed EU General Data Protection Regulation and Its Potential Effect on Transborder Data Flows*, Bloomberg BNA: Digital Discovery & E-Evidence (2015), http://www.promontory.com/uploadedFiles/Articles/Insights/150715_BloombergBNA_EU_GDPR.pdf.

78. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).

79. European Cmty v. RJR Nabisco, Inc., No. 02-CV-5771 (NGG)(VVP), 2011 WL 843957 (E.D.N.Y. Mar. 8, 2011).

80. Norex Petroleum Ltd. v. Access Industries, Inc., 631 F.3d 29 (2d Cir. 2010).

81. European Cmty v. RJR Nabisco, Inc., 764 F.3d 129, 136 (2d Cir. 2014) (analyzed in last year's Year in Review).

82. European Cmty v. RJR Nabisco, Inc., 783 F.3d 123, 127-137 (2d Cir. 2015) (dissents by Cabranes, Raggi, Jacobs, Livingston, and Lynch).

83. *See id.* at 129-30 (Cabranes, J. dissenting) (citing Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013); *Morrison*, 561 U.S. 247).

84. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 28 (Mem.) (2015).

agent standing on the United States side.[85] The original panel held that the teenager did not have "sufficient voluntary connections" with the United States to invoke the Fourth Amendment, but that Fifth Amendment protections did apply extraterritorially.[86] In its *en banc* decision, the Fifth Circuit reaffirmed that the Mexican teenager lacked Fourth Amendment rights, but decided against the Fifth Amendment claim by finding that the border patrol officer was entitled to qualified immunity because the asserted constitutional right was, at minimum, not clearly established.[87] "No case law in 2010, when this episode occurred, reasonably warned Agent Mesa that his conduct violated the Fifth Amendment."[88] The court concluded by noting that "[r]easonable minds can differ on whether *Boumediene* may someday be explicitly extended as the plaintiffs urge."[89]

The per curiam opinion in *Hernandez* masked deep divisions on the court, which generated five separate concurring opinions. Four judges would have squarely held that United States constitutional rights do not extend to aliens who lack connection to the United States and are injured on foreign soil.[90] Other judges criticized that analysis as contrary to precedent established by the Supreme Court.[91] As of this writing, the plaintiff has filed a petition for certiorari which has been supported by numerous groups of amici curiae, and the Supreme Court has called for the views of the Solicitor General, raising the possibility that it will hear the case and clarify the extraterritoriality analysis under *Boumediene*.[92]

VII. Recognition and Enforcement of Foreign Judgments

In United States courts, the U.N. Convention on the Recognition and Enforcement of Foreign Arbitration Awards, otherwise known as the "New York Convention," governs the recognition and enforcement of most foreign arbitral awards.[93] State law, however, governs the recognition and enforcement of foreign court judgments.

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85. Hernandez v. United States, 757 F.3d 249 (5th Cir. 2014) *rev'd en banc*, 785 F.3d 117 (5th Cir. 2015). Last year's Year in Review discussed the original Fifth Circuit panel decision.

86. *Hernandez*, 757 F.3d at 268 (applying "objective factors and practical concerns" drawn from *Boumediene v. Bush*, 553 U.S. 723 (2008), including the extent of control exercised by the United States over the border area).

87. *Hernandez*, 785 F.3d at 119-21.

88. *Id.* at 120.

89. *Id.* at 121.

90. *See id.* at 121-22 (Jones, J., concurring).

91. *Id.* at 133-38 (Prado, J., concurring).

92. *Hernandez v. Mesa*, No. 15-118, 84 USLW 3060 (July 23, 2015); *see also Hernández v. Mesa*, SCOTUSBlog, http://www.scotusblog.com/case-files/cases/hernandez-v-mesa/ (last visted Apr. 11, 2016).

93. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention]. The Convention is implemented in U.S. law through Chapter 2 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 201-08 (2013). The Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, S. Treaty Doc. No. 97-12, O.A.S.T.S. No. 42; governs the recognition and enforcement of awards if a majority of the parties to an arbitration agreement are citizens of states that have ratified it. The Inter-American Convention is implemented in Chapter 3 of the FAA. 9 U.S.C. §§ 301-07.

A. FOREIGN ARBITRAL AWARDS

In *Chevron Corp. v. Ecuador*, the D.C. Circuit held that the deference courts must give to arbitrators regarding whether the parties agreed to arbitrate the issue at hand may not be circumvented in actions against foreign states via the FSIA's jurisdictional inquiry.[94] Ecuador had argued that the question of arbitration required de novo review because, if Ecuador had not agreed to arbitrate, the district court lacked jurisdiction over it under the FSIA.[95] The D.C. Circuit disagreed, noting that "Ecuador conflate[d] the jurisdictional standard of the FSIA with the standard of review under the New York Convention," which "affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards."[96]

In *Belize Social Development Limited v. Government of Belize*, the D.C. Circuit held that in order to satisfy the requirement of the New York Convention, an arbitral award must "arise from a commercial transaction," and the award need only have a "connection to commerce."[97] The court found that the meaning of "commercial" was to be found in both the *Restatement on International Commercial Arbitration*, as well as Supreme Court precedent interpreting the Commerce Clause, not the far narrower definition of "commercial" applied in the context of the FSIA, which distinguishes between foreign states' "sovereign" and "commercial" acts.[98] The court based its reasoning on the fact that, unlike the FSIA, the New York Convention did not codify the restrictive theory of foreign sovereign immunity.[99]

In *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, the Fifth Circuit considered a lower court order refusing to enforce an arbitral award that applied Philippine law (in accordance with the contract) to award damages of less than $2,000 to a seriously injured plaintiff, on the grounds that such enforcement would be contrary to United States public policy.[100] The court reversed, explaining that there was "no evidence that the . . . award was inadequate relative to [the plaintiff's] unmet medical needs, let alone so inadequate as to violate this nation's 'most basic notions of morality and justice,'" and that as a general matter courts "should be reluctant to conclude that lesser remedies make an award unenforceable on policy grounds."[101] The court observed that some choice of law provisions may unenforceable when they are an attempt by a party to "avoid applicable law," but in the case at hand, the provision was "mandated by a foreign sovereign rather than a party to the contract."[102]

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94. Chevron Corp. v. Ecuador, 795 F.3d 200, 204-06 (D.C. Cir 2015), *petition for cert. filed*, No. 15-1088, 84 USLW 3502 (Feb. 25, 2016).

95. *Id.* at 204.

96. *Id.* at 204, 207.

97. Belize Soc. Dev. Ltd. v. Gov't of Belize, 794 F.3d 99, 103-05 (D.C. Cir. 2015), *petition for cert. filed*, No. 15-830, 84 USLW 3361 (Dec. 22, 2015).

98. *Id.* at 103-04 (citing RESTATEMENT (THIRD) OF U.S. LAW OF COMM. ARBITRATION § 1-1 (AM. LAW INST. 2012); Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003)).

99. *Id.* at 104-05

100. Asignaciaon v. Rickmers Genoa Schiffahrtsgesellschaft MBH & CIE KG, 783 F.3d 1010, 1017-19 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 795 (2016).

101. *Id.* at 1020.

102. *Id.* at 1018-19.

B. Foreign Court Judgments

In *DeJoria v. Maghreb Petroleum Exploration, S.A.*, the Fifth Circuit reversed an order finding that, under the Texas Recognition Act, a Moroccan court judgment was unenforceable on the ground that the Moroccan judicial system does not provide due process.[103] The court acknowledged that evidence suggested that Moroccan judges lack independence from the executive monarchy, but found that the plaintiff did not meet high burden of showing that the "judicial system lacks sufficient independence such that fair litigation in Morocco is impossible."[104] The court compared the case with prior United States court decisions finding insufficient due process available in the courts of Iran and war-torn Liberia, noting that those systems were "so fundamentally flawed as to offend basic notions of fairness."[105] The court also rejected the argument that the judgment was unenforceable because the Moroccan court lacked personal jurisdiction due to the plaintiff's failure to effect service, and instead focused on the fact that the defendant had actual notice of the underlying suit.[106]

VIII. Forum Non Conveniens

A. Forum Selection Clauses

In *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, the Supreme Court held that a forum selection clause should be analyzed under the doctrine of *forum non conveniens* and described specifically how the parties' agreement should inform the traditional *forum non conveniens* analysis.[107] *Atlantic Marine* was a two-party dispute, but in a pair of decisions the Fifth Circuit analyzed how *Atlantic Marine* should apply to multiparty cases.

In *In re Lloyd's Register North America, Inc.*, the Fifth Circuit held that *Atlantic Marine* applies even when a non-signatory to a forum selection clause is bound to a contract under the direct-estoppel doctrine.[108] The litigation arose out of a ship that Irving Shipbuilding (Irving) was building for Pearl Seas Cruises (Pearl).[109] Lloyd's Register North America (LRNA) was responsible for certifying that the ship was built according to technical standards of construction.[110] Dissatisfied, Pearl sued Irving, pursuing years of litigation and arbitration until it eventually settled; then, Pearl sued the LRNA, arguing that the LRNA misrepresented the status of the ship to Pearl and the arbitrators.[111] LRNA moved to dismiss on *forum non conveniens* grounds because its contract with Irving and its register

103. DeJoria v. Maghreb Petroleum Expl., S.A., 804 F.3d 373, 380-83 (5th Cir. 2015), *petition for cert. filed*, No. 15-1033, 84 USLW 3451 (Feb. 16, 2016).
104. *Id.* at 380-82.
105. *Id.* at 381-83.
106. *Id.* at 386-89.
107. Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. Tex., 134 S. Ct. 568 (2013).
108. *In re* Lloyd's Register N. Am., Inc., 780 F.3d 283, 294 (5th Cir. 2015), *cert. denied sub nom.* Pearl Seas Cruises, LLC v. Lloyd's Register N. Am., Inc., 136 S. Ct. 64 (2015).
109. *Id.* at 286.
110. *Id.*
111. *Id.* at 286-87.

of rules required claims to be brought in England.[112] The district court denied the motion to dismiss without explanation.[113]

On LRNA's petition for writ of mandamus, the Fifth Circuit reversed, finding first that the district court's denial of the motion to dismiss without explanation and neglect to balance the relevant *forum non conveniens* factors constituted an abuse of discretion.[114] Second, the Fifth Circuit found that direct-benefits estoppel bound Pearl to the forum selection clause contained in the contract between LRNA and Irving, even though Pearl was not a signatory to that contract, because Pearl "knew about the contract between Irving and LRNA, acted to exploit it, and gained a benefit from it."[115] Finding that the forum selection clause applied to Pearl, the court then turned to the *Atlantic Marine* analysis.[116] Weighing the private interest factors in favor of dismissal given the forum selection clause, the Fifth Circuit held that Pearl had not proven this to be one of the unusual cases in which the public interest factors outweigh the choice of a valid forum-selection clause.[117]

In re Rolls Royce Corp. arose with the failure of an engine bearing in a helicopter owned by Petroleum Helicopters, Inc. (PHI).[118] The failed bearing caused the helicopter's pilot to make an emergency water landing, which involved inflating the pontoons.[119] Subsequently, a pontoon failed and the helicopter flipped, totaling the helicopter.[120] PHI sued three parties: Rolls Royce, which designed and manufactured the engine bearing; the designer, manufacturer, and seller of the pontoons; and the company that repaired the pontoons before the crash.[121]

The district court denied Rolls Royce's motion to sever and transfer the claims against it to the Southern District of Indiana, based on a forum selection clause in its contract with PHI.[122] On Rolls Royce's petition for writ of mandamus, the Fifth Circuit reversed holding that the district court had erred in light of *Atlantic Marine*; however, it made clear that it did not read *Atlantic Marine* to require severance and transfer in all multiparty cases where only some of the parties are subject to a forum selection clause.[123] Rather, the Fifth Circuit developed a balancing test for cases like *Rolls Royce*, wherein the court should weigh the private factors of those parties who did enter into a forum selection clause entirely in favor of severance and transfer, while considering the private factors of those parties who did not agreed to a forum selection clause under the normal severance and § 1404 transfer analysis.[124] Finally, the court should determine whether the balance of private factors is outweighed by "the judicial economy considerations of having all claims

112. *Id.* at 287.
113. *Id.*
114. *In re Lloyd's*, 780 F.3d at 290.
115. *Id.* at 291.
116. *Id.* at 293-94.
117. *Id.*
118. *In re* Rolls Royce Corp., 775 F.3d 671, 674 (5th Cir. 2014), *cert. denied sub nom.* PHI Inc. v. Rolls Royce Corp., 136 S. Ct. 45 (2015).
119. *Id.* at 674.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 677-78.
124. *In re* Rolls Royce Corp., 775 F.3d at 681.

determined in a single lawsuit."[125] Whether a forum selection clause selecting a foreign jurisdiction changes the balance of these factors, given unique challenges presented when not all parties agreed to the foreign jurisdiction, remains to be seen.

IX. Parallel Proceedings

A. International Abstention

Federal district courts entertained requests to stay United States litigation in deference to ongoing foreign litigation—an exception to the courts' otherwise "unflagging" obligation to hear and decide a case that falls within its jurisdiction.[126] In general litigation, courts applied the *Colorado River* doctrine: a "two-step analysis" looking first to "whether the two proceedings are parallel" and, second, a set of discretionary factors.[127]

Several decisions reflected recognition that "[p]arallelism is not a formulaic requirement" and "exact parallelism is not required."[128] In *Glock v. Glock*, the court stayed a RICO suit brought against Glock KG and its founder by the founder's ex-wife without engaging in much analysis of the similarity of the claims to previously-filed claims in Austria, but rather looking broadly at three discretionary factors: "(1) judicial efficiency, (2) international comity, and (3) fairness."[129] In *Detroit International Bridge Company v. Canada*, the court stayed litigation by an alleged franchisee claiming an exclusive right to build a bridge between Detroit and Windsor, Canada, finding that although the defendants in the United States action (the Government of Canada and a Canadian public authority) and parallel Canadian action (the Canadian Attorney General) were different, they were "similar" for abstention purposes.[130] The court also emphasized Canada's "paramount interest in adjudicating this dispute."[131] Regarding the timing of the suits, the court in *AT&T Management Services, L.P. v. CRI Consultants Ltd.*, stayed what it called an "anticipatory" declaratory judgment action filed after the plaintiff had received demand letters that led to a later-filed English lawsuit.[132]

In the bankruptcy context, courts seemed more resistant to abstention, despite the express discretion afforded them under 28 U.S.C. § 1334(c)(1) to abstain "in the interest of justice." Both the Fifth Circuit and the bankruptcy court for the S.D.N.Y held that this discretion was simply not available in Chapter 15 cases, *i.e.* petitions filed ancillary to a primary proceeding in another country, notwithstanding the concerns of piecemeal

125. *Id.*

126. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

127. *See, e.g.*, AEP Indus., Inc. v. UTECO N. Am., Inc., No. 1:14-CV-96-GNS, 2015 WL 1298556, at *6 (W.D. Ky. Mar. 23, 2015).

128. *Id.* (The district court declined to abstain because "[d]espite the common facts and causes of action in the two suits, differing plaintiffs and theories of recovery lead this Court to conclude the actions are not parallel.").

129. Glock v. Glock, Civ. Action File No. 1:14-CV-3249-TWT, 2015 WL 3843288, at *2 (N.D. Ga. June 19, 2015).

130. Detroit Int'l Bridge Co. v. Gov't of Canada, 78 F. Supp. 3d 117, 121 (D.D.C. 2015).

131. *Id.* at 122 (internal quotations omitted).

132. AT&T Mgmt. Servs., LP v. CRI Consultants Ltd., Civ. Action No. 3:15-CV-0073-B, 2015 WL 4743376, at *8 (N.D. Tex. Aug. 5, 2015).

litigation and inefficiencies put forward by the stay-seeking parties in those cases.[133] And in *In re Northshore Mainland Services, Inc.*, the federal bankruptcy court in Delaware considered a petition filed by a U.S. entity along with several Bahamian partners developing "one of the most significant single-phase resorts currently under development in the western hemisphere," that was expected to eventually "generate nearly 5,000 jobs and . . . representing 12% of the GDP of The Bahamas."[134] Simultaneous with its Delaware filing, Northshore petitioned the Bahamian Supreme Court to recognize the U.S. filing and stay all related legal proceedings in The Bahamas.[135] Bahamian authorities soon began their own insolvency proceedings and the Bahamian Supreme Court rejected the petition, stating that the "only insolvency proceedings which can give true effect to the principal of modified universality would be a unitary insolvency proceedings in The Bahamas."[136] In response, while the Delaware court "acknowledge[d] the deep and important economic interest of the Government of The Bahamas in the future of the Project," it held that that interest "is no more important than the right of a company incorporated in the United States to have recourse to relief in a United States Bankruptcy Court."[137] It thus dismissed the Bahamian partner entities—but retained the insolvency of Northshore.

B. Anti-suit Injunctions

Federal district courts also entertained numerous requests to enjoin the pursuit of foreign litigation, applying a variety of similar tests drawn from leading cases in the various circuits. Here, courts showed much more exacting demands of parallelism. While noting that "the claims at issue in the foreign and local proceedings do not have to be precisely and verbally identical," the court in *Nike, Inc. v. Cardarelli* refused to enjoin, noting that the parallel Italian action including wrongful termination claims not at issue in the Oregon stock option-based litigation, and, independently, because two of the seven years of stock option agreements at issue in the case did not have a forum selection clause in favor of Oregon, the court could not enjoin their adjudication in Italy.[138] In *Vringo, Inc. v. ZTE Corp.*, a court hearing a case alleging improper use of materials protected by a non-disclosure agreement agreed to enjoin the defendant's further use of those materials, but found it could not enjoin defendant's Chinese antitrust case against the United States plaintiff that used the materials, because resolution of the NDA claims would not actually resolve the antitrust claims.[139] But in *APR Energy, LLC v. First Investment Group Corp.*, the court, after granting the plaintiff's motion to compel arbitration, determined that a defendant's claim in a parallel Libyan proceeding was arbitrable and thus that disposition

133. *See* Firefighters' Ret. Sys. v. Citco Grp. Ltd., 796 F.3d 520, 528 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 896 (2016); *In re* Hellas Telecomms. (Lux.) II SCA, 535 B.R. 543, 587-89 (Bankr. S.D.N.Y. 2015).

134. *In re* Northshore Mainland Servs., Inc., 537 B.R. 192, 196 (Bankr. D. Del. 2015).

135. *Id.* at 197.

136. *Id.* at 198.

137. *Id.* at 205–06.

138. Nike, Inc. v. Cardarelli, No. 3:14-CV-01690-BR, 2015 WL 853008, at *4 (D. Or. Feb. 26, 2015).

139. Vringo, Inc. v. ZTE Corp., No. 14-Cv-4988 (LAK), 2015 WL 3498634, at *11 (S.D.N.Y. June 3, 2015).

in favor of arbitration would fully dispose of the Libyan proceeding even though the Libyan claim was not raised in the United States action.[140]

In an interesting case, the federal bankruptcy court in New York applied the foreign litigation antisuit analysis to enjoin a *beis din* Jewish religious court proceeding invoked by an adversary of the debtor subsequent to the debtor's Chapter 11 filing.[141] The *beis din* actually issued its own equivalent of an antisuit injunction—an *ekul*—against the debtor, threatening it with a *sirov*, or shunning by members of the religious community and potentially all Orthodox Jews, if it continued adversary proceedings in bankruptcy.[142] After finding that application of the federal bankruptcy automatic stay did not violate the Free Exercise or Establishment Clauses of the United States Constitution, the bankruptcy court not only enjoined the *beis din* but imposed coercive sanctions of $10,000 a day until the school and persons who invoked the *beis din* requested that it cease and that the *ekul* be vacated.[143]

140. APR Energy, LLC v. First Inv. Grp Corp., 88 F. Supp. 3d 1300, 1321 (M.D. Fla. 2015), *aff'g on reconsideration* 2015 WL 736236 (M.D. Fla. Feb. 20, 2015). *See also* Interdigital Tech. Corp. v. Pegatron Corp., 2015 WL 3958257 (N.D. Cal. June 29, 2015) (enjoining a subsequent action in Taiwan's Intellectual Property Court filed by Taiwanese defendant against Pennsylvania plaintiff).

141. *In re* Congregation Birchos Yosef, 535 B.R. 629, 632 (Bankr. S.D.N.Y. 2015).

142. *Id.* at 631-32.

143. *Id.* at 639.

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