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Forum Shopping and Other Reflections on Litigation Involving U.S. and European Businesses

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FORUM SHOPPING AND OTHER REFLECTIONS ON LITIGATION INVOLVING U.S. AND EUROPEAN BUSINESSES†

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I. INTRODUCTION: INTERNATIONAL LITIGATION AND INTERNATIONAL BUSINESS TRANSACTIONS

When U.S. lawyers say they practice "international law," they usually mean "international transactional law." These lawyers help set up international deals. But just as domestic business deals give rise to disputes that wind up in litigation, international business deals which go sour often find their way into tribunals such as courts and the arbitration process. A key part of international law practice is resolving international disputes.

U.S. lawyers, more so than their European counterparts, draw a sharp distinction between transactional and litigation practice. However, an understanding of international business dispute resolution is essential for structuring successful international deals. You cannot set up a deal properly if you do not plan for what will happen if the deal goes bad.

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In fact, dispute issues are sometimes central elements to an international deal. I recently worked with a U.S.-based company which had developed a cutting-edge technology unavailable outside the U.S. The client, which did not have a European presence, negotiated with an Italian counterpart which enjoyed a major European market share. The Italian counterpart wanted to license the innovative U.S. technology and distribute the resulting products throughout Europe. The relationship had the makings of a classic "win-win" scenario: each party had something the other wanted. The sticking point was enforcement, how to avoid disputes over compliance. The U.S. company had difficulty proposing a workable royalty licensing arrangement, because all the sales information would be in the hands of the Italian company, an arms-length competitor on the other side of the Atlantic. The Americans were reluctant to disclose valuable trade secrets to a foreign competitor which would be in a position to exploit the information for its own gain. While the deal initially appeared simple, it ended up being virtually unworkable because the specter of disputes loomed too large. The deal's weakness was the unavailability of a viable dispute resolution mechanism.

This illustrates why transactional lawyers representing U.S. companies with international business interests need to be able to spot and address international dispute resolution issues. This paper will examine those issues, raising them in their broadest possible context and illustrating them with examples from and reflections on my own experience. This is a practice-oriented discussion which has as its goal the examination of the link between dispute resolution procedures and U.S. businesses' transactions with Europe.[1]

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[1] This paper offers a "hypothesis-forming," as opposed to "hypothesis-testing," treatment of international litigation issues. *See* WALTER O. WEYRAUCH, THE PERSONALITY OF LAWYERS 4-5 (1964); *see generally* Donald C. Dowling, Jr., *General Propositions and Concrete Cases: The Search for a Standard in the Conflict Between Individual Property Rights and the Social Interest*, 1 J. LAND USE & ENVIRONMENTAL LAW 353, 357 n. 30 (1985). Only a book-length treatment could possibly flesh out the legal principles behind all the international litigation issues discussed here. Currently, the two leading treatises attempting to do this by addressing the law of international litigation in U.S. courts are GARY B. BORN & DAVID WESTIN, INTERNATIONAL LITIGATION IN UNITED STATES COURTS, COMMENTARY AND MATERIALS (2d ed. 1992) and DAVID EPSTEIN & JEFFREY L. SNYDER, IN-

II. INITIAL CONSIDERATIONS: FORUM SELECTION, ARBITRATION CLAUSES, AND THE DIFFERENCES BETWEEN U.S. AND EUROPEAN COURT PROCEDURES

When businesses in two different countries have a dispute which leads to litigation, the first and probably most important issue is forum selection, or "forum shopping."[2] Because international business disputes often center on contracts, the primary issue governing international forum selection is the text of the parties' contract. The secondary issue is the geographic location of the party which files the litigation, and the location of its law firm.

A. *Contractual Forum Selection Provisions*

Working a forum selection clause into an international contract is perhaps the most important example of how international litigation issues fit into international transactional practice. The transaction lawyer who negotiated an original contract and its forum selection clause often has a greater impact on the outcome of an after-arising dispute than does the litigation attorney who ends up handling the case.[3]

The drafter of a forum selection clause must distinguish choice of law from choice of forum location, and must distinguish both of these from choice of forum type. Choice of law is simply the choice of which legal system will govern the contract. Usually this is the legal system of one of the parties's home countries,[4] but the parties can also designate a third countries'

TERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE AND STRATEGY (1993).

[2] "Forum selection" and "forum shopping" address the same thing; the difference is who is speaking. The party choosing the forum is engaged in "forum selection," while the party dragged into a forum against its will accuses its adversary of "forum shopping."

[3] *See, e.g.*, Interamerican Trade Corp. v. Companhia Fabricadora de Pecas, 973 F.2d 487 (6th Cir. 1992) (enforcing contractual selection of Brazilian forum); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir. 1992) (enforcing contractual selection of British forum), *cert. denied* 113 S. Ct. 658 (1992). *See generally* Michael F. Solimine, *Forum Selection Clauses and the Privatization of Procedure,"* 25 CORNELL INT'L L.J. 51 (1992). *See also generally* discussion *infra* at part V.

[4] On occasion, resolving international disputes pursuant to an arbitration clause can involve applying the law of more than one legal system. *Cf.* Comment, *The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depeçage*, 12 Nw. J. INT'L L. & BUS. 163 (1991).

legal system, or even a private legal structure which is not tied to any one government.[5]

Surprisingly, contract drafters often inadvertently truncate the choice of forum location and choice of law issues designating one without mentioning the other. Analytically, choice of forum location is an issue entirely separate from choice of law . Often as a means of compromise, parties which distinguish these issues will stipulate that one party's national law applies to a contract, while the other party's national courts will serve as the site for litigation arising out of the deal.[6]

The third issue related to choice of law and choice of forum location is choice of forum type. At its most basic, this is the question of "to arbitrate or to litigate?"[7] Deciding between arbitration and litigation depends on many factors: a party's assessment at the transaction stage[8] of who is most likely to initiate proceedings in the event of a dispute; how trustworthy are the courts in the respective parties' jurisdictions; and how enforceable a court award would be against the other side.

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[5] For example, parties from countries not signatory to the U.N. Convention on Contracts for the International Sale of Goods might nevertheless incorporate the Convention as a term in their contracts. U.N. Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, U.N. Doc. A/Conf. 97/18, 19 I.L.M. 668, 671 (1980) (available in foreign law volume of Martindale-Hubbell). This Convention is a treaty which has 34 signatory countries (including the U.S. and European Union member states Denmark, France, Germany, Italy, the Netherlands, and Spain), but parties in non-signatory states can invoke the Convention by incorporation as a term in a contract.

[6] Courts around the world generally respect contracting parties' right to stipulate that the law of a non-forum country will apply to a dispute within the forum. *See, e.g.*, citations *supra* at note 5. Usually courts require only that the country chosen for its governing law have some rational connection to the deal. Thus, if a U.S. company and a Spanish company enter a joint venture to be performed in Germany, the parties' contract could safely designate the laws of the U.S., Spain, or Germany. If, however, the parties decided to invoke Nigerian law, their selection likely would not stand up if challenged later in a court with a more logical connection to the deal.

[7] Actually this is an oversimplification, because alternative dispute resolution clauses often contain other options, including forms of mediation. Usually, however, the final dispute resolution step will be arbitration. *Cf.* Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L LAW. 187 (1989) (article discussing international dispute resolution "alternatives" devotes 11 pages [193-203] to arbitration and less than 3 pages [204-06] to all other "alternatives").

[8] Theoretically, after a dispute arises the parties can jointly opt for arbitration, even if no arbitration clause had been worked into the contract at the transaction stage. In practice, however, this almost never happens.

Common justifications for arbitration such as speed and cost-savings are largely illusory in today's environment. The reality of scheduling international arbitrations, especially those with panels of three arbitrators, can lead to delays similar to those inherent in court proceedings. Also, complex business arbitrations involving U.S. parties can be as expensive as court proceedings. I was recently involved in an international business arbitration in which the hearing ended up lasting more than a month, and in which the pre-hearing discovery proceedings had been more elaborate than those in most international-context court lawsuits. One of my partners spent two weeks flying all over the Far East taking depositions in a trip that ended up covering more ground than Marco Polo's.

Yet international arbitration has two important advantages which keep it at the forefront of dispute resolution options in international deals. First is neutrality. Arbitration is a natural middle ground: A foreign adversary's local courts usually appear biased, and your country's courts usually appear just as biased to your adversary. International arbitration associations especially those not based in either party's country, generally do not play favorites. Parties to a deal can also select both a site and a language for an arbitration proceeding which favors neither side.

Perhaps most important, arbitrations are, believe it or not, more readily enforceable abroad than court awards.[9] As a practical matter, a U.S. party which gets a judgment in a U.S. court against a European defendant which does not have sufficient assets in the U.S. will end up re-litigating in a European court, in order to get the Europeans to enforce the judgment against the defendants' European assets. Enforcing an arbitration

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[9] 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6999, 330 U.N.T.S. 38, 9 U.S.C. § 201 (available in foreign law volume of Martindale Hubbell) (the 83 signatory countries include the U.S. and all European Union [EU] states except Portugal); David Rivkin, *"International Arbitration," chapter 9 in* COMMERCIAL ARBITRATION FOR THE 1990's 123, 124 (1991) ("international arbitration awards are easier to enforce than foreign court judgments"); *cf.* Ramona Martinez, *"Recognition and Enforcement of International Arbitral Awards Under the U.N. Convention of 1958: The 'Refusal' Provisions,"* 24 INT'L LAW. 487 (1990).

award within a New York Convention country, on the other hand, is much simpler.[10]

B. *Location of Party Bringing Dispute to the Forum, and of its Law Firm*

If no underlying contract unequivocally designates the forum before which the international dispute must be brought, the most important factor governing choice of forum becomes the geographic location of the party filing the action and the location of its law firm. This issue can start a "race to the courthouse" in those disputes where each party can articulate some claim against the other.

When the claimant bringing the dispute is based in the U.S. and has U.S. counsel, that party almost always favors U.S. courts. The chief reason is the fabled "home court advantage."[11] Although statistics are hard to come by, experience, both personal and by reading enough reported case decisions, shows that judges in every country do indeed tend to favor local parties over foreigners. "Home court advantage" is a legitimate factor to consider when selecting a forum.

However, this factor should not overwhelm the other issues in play, especially when a U.S.-based company has a substantial presence in the adversary's forum, and is to that extent effectively local. There is a huge Toyota plant in the small Kentucky town of Georgetown. Procter & Gamble has extensive operations near Brussels, Belgium. Neither Toyota of Japan nor U.S. Procter & Gamble would have to worry about getting "home-towned" in, respectively, Kentucky or Belgian courts. Additionally, a neutral court forum is available whenever parties from two countries are doing business in a third country.

A key choice of law factor is the applicable legal systems' substantive laws governing the actual dispute. Too often U.S. parties and their lawyers reflexively decide that U.S. law is in-

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[10] In fact, New York Convention arbitrations circumvent most of the problems discussed in the rest of this paper.

[11] Another important reason U.S. claimants favor U.S. courts is the higher amount of damages frequently available. However, this is not as significant a factor in breach of contract litigation (as are so many business disputes), because U.S. courts more strictly limit breach of contract damages than damages under other legal theories.

herently better for U.S. clients. But conceptually, every time U.S. law differs from a foreign doctrine, there is a 50% chance that the foreign rule will be better for the U.S. client.[12] An informed choice of law decision is therefore impossible before researching both legal systems' applicable rules. A knee-jerk preference for U.S. law can be a real disservice to clients.[13]

Additionally, having the "home court advantage" and even winning a judgment are meaningless, if the judgment will not be enforceable against the defendant's assets. Too often, U.S. parties and their lawyers maneuver for a U.S. court forum, even when a U.S. judgment will ultimately prove worthless. I know a U.S. born and trained lawyer acting as a legal consultant in Salzburg, Austria, who limits his consulting practice to helping enforce U.S. judgments throughout Europe. This consultant laments that he has seen too many cases where U.S. clients' lawyers have treated cases in U.S. courts against solvent European defendants just like domestic cases. They focused on proving liability and damages, but effectively ignored the international litigation issues of transnational service of process, personal jurisdiction, and enforcement of judgments abroad, until it was too late. U.S. parties and their lawyers too often expend substantial time and resources, — and sometimes even win multimillion dollar verdicts — but end up recovering nothing, because the defendant's foreign assets prove unreachable. The

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[12] Legal rules almost always exist in isolation from party nationality.

[13] U.S. businesses' (and lawyers') knee-jerk preference for a U.S. forum can lead to illogical results. I once saw a draft of a form employment contract between a U.S. based company with a U.K. office and its U.K. citizen employees working in the U.K. The draft, which contained non-compete provisions, called for U.S. law and courts to adjudicate all disputes. But U.K. employment law (like that of most countries, including the U.S.) cannot be opted out of; this contract was therefore unenforceable, because key terms of the parties' relationship, such as minimum wage, workplace safety, collective bargaining, sick leave, maternity pay, and severance pay, were necessarily governed by U.K. law. Further, designating a U.S. forum often makes little sense when the other party has no ties to, assets in, nor reason to travel to the U.S. The employer in this scenario might have rather easily convinced a U.S. court to award a default judgment after a litigated dispute arose, such as for breach of the non-competition clause, and after the employee failed to show up in the stateside court. But getting a U.K. court to enforce the default judgment would be another matter entirely. And a non-competition or non-solicitation injunction from a U.S. court would be toothless if an ex-employee were competing overseas. Also, if a U.K. ex-employee sued simultaneously on an employment theory in a U.K. tribunal, the British forum would almost certainly retain jurisdiction, notwithstanding the choice-of-U.S.-forum clause.

lesson is that while having the "home court advantage" can indeed be important, a lawyer should not let that advantage lure the client away from its real, ultimate goal: collecting a judgment.

C. *Discovery Is a Critical Difference Between U.S. and Foreign Procedure*

A vast gulf separates U.S. pretrial procedures from those of the rest of the world. Ironically, while U.S. business people often complain about the expense of domestic U.S. litigation, once an international dispute actually arises, these same American executives often feel more comfortable in U.S. courts precisely because they offer more elaborate pre-trial discovery procedures.[14] Yet the very availability of broad U.S. discovery gives rise to European businesses' healthy aversion to U.S. courts.

When facing a forum selection decision, particularly one in which you feel tempted to undo a European claimant's choice of a European forum, try the exercise of looking at the litigation process from the European viewpoint. According to one French lawyer who is also admitted to practice in the U.S.:

> U.S.-style procedural rules, the absence of which U.S. litigants tend to criticize in European courts, are precisely those considered to be the most outrageous by European litigants in U.S. courts.
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> . . .
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> Europeans are wary of U.S. jury trials because of the wide discrepancies in awards between [European] Community and U.S. jurisdictions. In civil law countries, juries do not participate in civil or commercial matters.[15]

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[14] A vivid example of this thinking (albeit from a U.S. Judge, not an executive) is the surprising 1993 ruling from highly-respected U.S. Seventh Circuit Court of Appeals judge Richard Posner in Allendale Mut. Ins. v. Bull Data Systems, 10 F.3d 425, 430 (7th Cir. 1993), *later proc.* 32 F.3d 1175 (1994). This opinion allows litigation over a French warehouse fire to proceed in a U.S. court, notwithstanding the intrinsically French nature of the dispute, because "[it does not] appear that the Commercial Court of Lille [France] is equipped to resolve a massive document case."

[15] Patrick Thieffry, *"European Integration in Transnational Litigation,"* 13 B.C. INT'L & COMP. L. REV. 339, 356-57 (1990). The point here is that a U.S. defendant to European court litigation should think hard before urging to a European tribunal that U.S. courts are more appropriate. This is particularly true

III. INTERNATIONAL LITIGATION IN U.S. COURTS, FROM SERVICE OF PROCESS THROUGH ENFORCEMENT OF JUDGMENT

Notwithstanding all the foregoing, quite often U.S. parties to international deals end up litigating international disputes in U.S. courts. While many aspects of these cases are identical to domestic business litigation, certain key procedural issues take on special importance in the international context, particularly service of process, personal jurisdiction, discovery, and enforcement of foreign judgments.

A. *Service of Process*

Domestically, service of process is usually a relatively simple issue which paralegals and court personnel handle without the need for much attention from lawyers. However, in international-context litigation, service of process is far more complex, because service on a foreign defendant involves sovereignty and international diplomacy. By effecting service abroad, the forum country performs an act with legal effect inside the recipient country's national borders. Service of U.S. process on European parties requires special attention.

I recently worked on a case in which our client was an English defendant sued in a Tennessee federal court. A solid argument existed that the service of process was technically improper, so we challenged it. But our Tennessee local counsel asked us several times why we were expending so much legal time, effort, and expense on a service of process issue likely to be resolved against us. Indeed, because domestic service of process deficiencies are usually curable, domestic service technicalities often are not worth expensive collateral litigation. However, the analysis is quite different in the foreign context. Many U.S. judgments against foreign defendants have been rendered unenforceable due to service of process defects established in foreign courts at the enforcement stage. Defendants who neglect to preserve their service challenges at the outset can later be held to have waived these potentially-dispositive defenses.

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when the claimant's ties to the particular European forum at issue are not substantially stronger than the U.S. defendant's.

The first question regarding how to perfect service of process abroad is whether the defendant's country is one of the 30 signatories to the Hague Service Convention.[16] Each Hague Service Convention country designates a "Central Authority," through which a party from abroad seeking service must transmit judicial documents. The country's Central Authority itself takes care of service. This circumvents the diplomatic breach-of-sovereignty concern. Under the Hague Service Convention, the defendant's countries' own officials serve process, after finding out what a foreign lawsuit is all about.[17]

However, while the Convention is theoretically "mandatory" in signatory countries,[18] there exist certain procedures which effectively streamline the Convention and allow a few simplified service routes entirely short-circuiting the Central Authority.[19]

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[16] The Convention on Service of Process of Judicial and Extrajudicial Documents in Civil and Commercial Matters, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 (available in foreign law volume of Martindale-Hubbell). The U.S. and all European Union member states except Ireland are signatories. As to foreign service of U.S. process, *see* Fed. R. Civ. P. 4(f). *See generally* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS (1992); Kenneth Reisenfeld, *"Service of U.S. Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure,"* 24 INT'L LAW. 55 (1990).

[17] A country's authorities can and sometimes do reject service of a foreign complaint which violates internal public policy. In the context of Western Europe, this is especially a concern with Switzerland, which, due to differences between Swiss and U.S. policy, with some regularity rejects U.S. court pleadings. *See, e.g.*, U.S. Department of State, *"Judicial Assistance in Switzerland"* (unpublished paper available from Department of State at (202) 647-6445).

[18] Volkswagenwerk A.G. v. Schlunk, 486 U.S. 694, 699 (1988).

[19] One such shortcut is international service of process by mail. Some Hague countries (for example Canada and Pakistan) expressly allow international mail service, via statements in their accessions to the convention itself. Others (for example Germany and the Czech Republic) expressly forbid it. An argument exists that the Convention's § 10(a) authorizes mail service in the rest of the signatory countries. *Cf.* Note, *"International Service of Process by Mail Under the Hague Service Convention,"* 13 MICH. J. INT'L L. 698 (1992). Other such shortcuts exist due to various Hague signatories' pronouncements allowing service which does not conform to the letter of the Convention. For example, although the texts of the Convention and its accession statements do not say so, the United Kingdom allows "any person in another Contracting State [to effect] service 'directly' [in the U.K.] through a competent person other than a judicial officer or official, e.g. a solicitor." Letter from W. Jones (U.K. Nationality and Treaty Dep't) to J.H.A. van Loon (Permanent Bureau, Hague Conference on Private International Law) (Sept. 11, 1980).

Service of process in countries which have not ratified the Hague Service Convention requires research into these countries' specific national laws. The usual procedure is to serve "letters rogatory," which in this context means a formal request for service to the proper foreign official. This procedure, which must be followed in Switzerland, can take a lot of time and be quite frustrating, as when foreign functionaries reject pleadings due to technical or de minimus violations. The U.S. Department of State is helpful in researching foreign service matters and it publishes detailed papers on specific topics like "Judicial Assistance in Switzerland."[20]

B. *Personal Jurisdiction*

Personal jurisdiction in international-context litigation, like service of process, usually requires more attention than it does in domestic lawsuits. Traditionally, under U.S. law the legal analysis was effectively the same in both types of cases. In order for a U.S. court to be able to exercise jurisdiction over a defendant, the defendant had to have sufficient "minimum contacts" with the forum U.S. state to be consistent with the state's "long-arm" statute and with the "due process" clause of the U.S. Constitution. U.S. federal courts adopt the service of process law of the state in which they sit. Therefore, in U.S. federal court lawsuits the issue traditionally came down to assessing a foreign defendants' contacts with the particular U.S. forum state.[21]

To illustrate, if a U.S.-based plaintiff sued a French defendant in either Oklahoma federal or state court, the traditional U.S. personal jurisdiction analysis would focus on whether the French entity had sufficient "minimum contacts" with Oklahoma. The French defendant's contacts with all the other U.S. states and territories would, for the most part, be irrelevant. Frustrations would arise when a foreign defendant had substantial contacts with the U.S. as a whole, but these con-

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[20] The State Department will assist researchers over the telephone at (202) 647-3445, and will provide copies of these unpublished papers on request. On letters rogatory generally, *see* 28 U.S.C. § 1781 (1994).

[21] An exception to this has always been those few federal statutes which have national service of process provisions, and therefore apply a "national minimum contacts" test to overseas defendants.

tacts were sufficiently spread out so that no one state or territory had enough "minimum contacts" to assert personal jurisdiction under the Constitution or under any applicable "long arm" statute.

Some argued that a "U.S. national contacts" analysis should apply against foreign parties, at least in federal court proceedings. But the authoritative case law never went this far. In fact, the U.S. Supreme Court has implied that when a defendant is foreign, U.S. plaintiffs should have to prove greater "minimum contacts" with the forum state than in a domestic proceeding.[22]

This "traditional" analysis still applies in state court cases and in federal court diversity lawsuits. But very recently, effective since December 1, 1993, the Federal Rules of Civil Procedure have allowed that, as to "claims arising under federal law," personal jurisdiction exists over any foreign defendant who is properly served, as long as "the exercise of jurisdiction is consistent with the Constitution and laws of the United States."[23] This essentially creates a "U.S. national contacts" test in federal question cases extending personal jurisdiction as far as the Constitution allows.

C. *Discovery*

Once a plaintiff establishes service of process and personal jurisdiction in a U.S. court, the focus turns to discovery, the process by which each side has to show its opponent most of the cards in its hand. The U.S. practice of broad pre-trial discovery including depositions, physical examinations, site inspections, document production, and interrogatories[24] is virtually unknown in the rest of the world. Even in common-law England, pre-trial discovery is extremely limited and depositions are rare. In fact, there are only a handful of court reporters based

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[22] Asahi Metal Ind. v. Sup. Ct. Calif., 480 U.S. 102, 114 (1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of [U.S.] personal jurisdiction over national borders. . . ."). *But cf.* S&S Screw Mach. Co. v. Cosa Corp., 647 F. Supp. 600 (M.D. Tenn. 1986); McCombs v. Cerco Rentals, 622 S.W.2d 822 (Tenn. Ct. App. 1981).

[23] FED. R. CIV. P. 4(k)(2). Service must be consistent with the qualifications set out in FED. R. CIV. P. 4(k)(1).

[24] *See* FED. R. CIV. P. 27-36.

in London, and these stenographers subsist chiefly on work for U.S. lawyers deposing British witnesses for U.S. lawsuits.

In civil law countries, including those of Continental Europe, discovery is far more limited than in the U.S.. Rather than take each others' depositions, in Continental Europe parties submit briefs explaining their cases and attaching all of the key documents. In Europe, judges, not lawyers, are fact-finders. Documents are more important in trial than is oral testimony.

When a party to a U.S. lawsuit must take evidence abroad, an initial inquiry is whether the foreign country is a signatory to the Hague Evidence Convention.[25] More than 20 countries (including the U.S.) have signed on to the Hague Evidence Convention, but three European Union member states — Belgium, Ireland, and Greece — have not. The Hague Evidence Convention, like the Hague Service Convention, funnels requests for judicial assistance through a national "Central Authority" which each signatory country has designated.[26]

For obtaining discovery in non-Hague Evidence Convention Countries, research into local law is especially important.[27] In some countries, including Switzerland, taking a deposition is a criminal act, because it threatens national sovereignty by forcing a domestic citizen to appear and testify on penalty of a foreign country's perjury laws. There are stories of lawyers who,

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[25] Convention on Taking Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (available in foreign law volume of Martindale-Hubbell). For comment on this Convention, *see, e.g.*, Darrell Prescott & Edwin Alley, *"Effective Evidence-Taking Under the Hague Convention,"* 22 INT'L LAW. 939 (1988).

[26] However, the Hague Evidence Convention is not mandatory, so parties can take discovery through other routes. *See* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522 (1987); Gary Born & Scott Hoing, *Comity and the Lower Courts: Post-Aérospatiale* Applications of the Hague Evidence Convention, 24 INT'L LAW. 393 (1990); Joseph Griffin & Mark Bravin, *"Beyond Aérospatile:* A Commentary on Foreign Discovery Provisions of the Restatement (Third) and the Proposed Amendments to the Federal Rules of Civil Procedure," 25 INT'L LAW. 331 (1991). *See generally* FED. R. CIV. P. 28(b) (depositions in foreign countries); 28 U.S.C. § 1781 (1994) (letters rogatory); 28 U.S.C. § 1783 (1994) (subpoena of person in foreign country).

[27] Here again the U.S. State Department can be an invaluable research source, via its series of relevant papers, including "Obtaining Evidence Abroad," "Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters," and country-specific reports such as "Judicial Assistance in Switzerland," and through its telephone assistance. *See supra* notes 19, 22.

ignorant of this, found themselves led out of deposition conference rooms in handcuffs![28]

The reciprocal issue, getting discovery in the U.S. for European court proceedings, is seldom problematic. A U.S. statute offers broad assistance.[29] Since U.S. discovery is broader than is discovery in Europe, U.S. courts rarely find their foreign counterparts' information requests unreasonable.

D. *Recognition and Enforcement of Foreign Judgments*

Before suing a party who resides abroad, a claimant must consider the location of the defendants' assets and craft an appropriate strategy. Many foreign-based corporations have sufficient assets in the U.S. to render collection abroad a non-issue. But when investigation reveals a defendants' assets are or can quickly be moved abroad, the plaintiffs' litigation strategy from the outset must account for the inevitability of having to enforce any successful U.S. judgment abroad.[30] When arbitration is not an option, often the enforcement factor will militate strongly toward suing abroad, on the defendant's home turf. The benefits of "home court advantage" and enhanced remedies available in U.S. litigation, such as treble and punitive damages, are illusory if the defendants' jurisdiction will not enforce U.S. judgments which include these types of damages.[31]

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[28] *See supra* text at part III(A). Note that because discovery is so radically different in foreign countries, even when a party to a U.S. lawsuit is entitled to take evidence abroad (through the Hague Evidence Convention or through letters rogatory), the foreign authorities may well impose conditions which are, by U.S. standards, bizarre. For example, a foreign magistrate, not a U.S. lawyer, may do the questioning, and the magistrate may summarize testimony in a report, rather than allow a verbatim transcript.

[29] 28 U.S.C. § 1782 (1994).

[30] *See generally* Werner Ebke & Mary Parker, *"Foreign Country Money-Judgments and Arbitral Awards and the Restatement (Third) of Foreign Relations Law of the U.S.: A Conventional Approach,"* 24 INT'L LAW. 21 (1990).

[31] For example this is the case in Switzerland and, often, Germany. *See* Martin Bernet & Nicholas Ulmer, *"Recognition and Enforcement of Foreign Civil Judgments in Switzerland,"* 27 INT'L LAW. 317, 326-29 (1993); Hartwin Bungert, *"Enforcing U.S. Excessive and Punitive Damages Awards in Germany,"* 27 INT'L LAW. 1075 (1993). For a collection of sources on the recognition and enforcement of U.S. judgments outside the U.S., see Robert Lutz, *"Enforcement of Foreign Judgments, Part II: A Selected Bibliography on Enforcement of U.S. Judgments in Foreign Countries,"* 27 INT'L LAW. 1029 (1993). *See generally* INTERNATIONAL EXECUTION AGAINST JUDGMENT DEBTORS (Dennis Campbell ed., 1994); INTERNA-

A claimant who must enforce a judgment abroad has to win twice, once in the U.S. court and once in collateral enforcement litigation on the defendant's home turf. On occasion, a foreign defendant will even devise a strategy in U.S. litigation which relies on its winning at home at the enforcement level. In one U.S. federal court lawsuit, a Swiss company which manufactures a consumer product well-known in the U.S. found itself sued stateside by its American distributor. The Swiss lawyers determined that their company would not be held subject to U.S. jurisdiction under Swiss law principles. However, under U.S. law, a U.S. court was very likely to (and ultimately did) exercise personal jurisdiction. Because its assets were all in Europe, the Swiss company decided to challenge jurisdiction and service of process in the U.S. federal court. After losing that challenge, it planned simply to stop defending the case. The theory was that a U.S. default judgment would be worthless if the plaintiff could not get it enforced in Switzerland. The Swiss lawyers were that confident that a Swiss court would indeed reopen the jurisdiction issue (given that the company had preserved the point by challenging jurisdiction in the U.S. proceeding)[32] and would ultimately decide, under Swiss law, that no U.S. jurisdiction had existed.

The reciprocal enforcement-of-judgment issue is the question of how to enforce a European-rendered judgment in the U.S. against an American defendant whose assets are stateside. When a European court has rendered such a judgment, the applicable law governing enforcement is the law of the U.S. state in which the defendant holds assets.[33] Many U.S. states have adopted the "Uniform Foreign Money-Judgments Recognition Act."[34] This model act which seeks to bring all U.S. states' laws

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TIONAL RECOGNITION AND ENFORCEMENT OF MONEY JUDGMENTS (Gregory Paley ed., 1994).

[32] A defendant who "objects to jurisdiction" in a proceeding outside of Switzerland "will not, under Swiss principles, be deemed to have submitted to foreign jurisdiction." Bernet & Ulmer, *supra* note 31, at 323.

[33] For a collection of sources on the recognition and enforcement in the U.S. of foreign country judgments, *see* Robert E. Lutz, *"Enforcement of Foreign Judgments, Part I: A Selected Bibliography on U.S. Enforcement of Judgments Rendered Abroad,"* 27 INT'L LAW. 471 (1993).

[34] 13 U.L.A. 261 (1962), *codified at, for e.g.*, OHIO REV. CODE ANN. §§ 2329.90-.94 (1994). *See* Alan Sorkowitz, *"Enforcing Judgments Under the Uniform Foreign Money-Judgments Recognition Act,"* 37 PRAC. LAW. 57 (July 1991).

into conformity with prevailing internationally-accepted enforcement principles, contains exceptions rendering judgments unenforceable when they violate a U.S. state's public policy, and when they were obtained by fraud. Service of process is another key issue under the Uniform Act. A U.S. defendant who was not properly served in the foreign action can escape enforcement in the U.S.[35] A reciprocity provision in the Act requires that the country from which the judgment comes similarly respect U.S. judgments.

IV. FORUM SELECTION WITHIN EUROPE

When a U.S. party finds itself in a dispute with a European, the initial forum selection issue is usually "U.S. versus Europe." When U.S. courts win out, the question turns to which U.S. court to select, state or federal, and in which state. When the European forum wins out, forum analysis can turn to the issue of which European court and country to select.

Each European Union member state[36] has its own unique court system, over which exists the European Community

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[35] *See generally* Ronald Brand, *"Enforcement of Foreign Money-Judgments in the U.S.: In Search of Uniformity and International Acceptance,"* 67 NOTRE DAME L. REV. 253 (1991).

[36] The European Union (which is for most practical purposes synonymous with the older terms "European Community" and "European Common Market") is a unique, often-amended treaty which superimposes a quasi-federalist governmental structure over the legal systems of its signatory "member states." For overviews of the EU structure, *see, e.g.,* LUCIE A. CARSWELL & XAVIER DE SARRAO, LAW & BUSINESS IN THE EUROPEAN SINGLE MARKET, chaps. 1-3 (1993); DESMOND DINAN, EVER CLOSER UNION? AN INTRODUCTION TO THE EUROPEAN COMMUNITY, chaps. 7-10 (1994); EUROPEAN COMMUNITY LAW AFTER 1992: A PRACTICAL GUIDE FOR LAWYERS OUTSIDE THE COMMON MARKET, chaps. 1, 23 (Ralph Folsom et al. eds., 1993); and Jean Thieffry, Philip Van Doorn & Simon Lowe, *"The Single European Market: A Practitioner's Guide to 1992,"* 12 B.C. INT'L COMP & L. REV. 357 (1989). This author has written about other aspects of EU law in Donald C. Dowling, Jr., *"Employment Matters and the Social Charter," chapter 19 in* EUROPEAN COMMUNITY LAW AFTER 1992 (Folsom, Lake & Nanda eds., 1993); Nancy E. Honig & Donald C. Dowling, Jr., *"How to Handle Employment Issues in European Deals,"* 13 PREVENTIVE L. REP. 3 (Spring 1994); Donald C. Dowling, Jr., *"EC Employment Law After Maastricht: Continental Social Europe?,"* 27 INT'L LAW. 1 (1993) *reprinted as chapter 16.1 in* EUROPEAN ECONOMIC COMMUNITY LAW (W. Hancock ed., 1994); Donald C. Dowling, Jr., *"How Does Europe Regulate Power Within Its Corporations?,"* 12 NW. J. INT'L L. & BUS. 601 (1992) (book review); Donald C. Dowling, Jr., *"L'Europa Sociale: Il Punto di Vista delle Imprese Multinazionali USA,"* 25-26 INDUSTRIA E SINDACATO 16 (1991) (Rome); Donald C. Dowling, Jr., *"Worker Rights in the Post-1992 EC: What 'Social Europe' Means to U.S.-Based Multinational Em-*

Court of Justice, based in Luxembourg, and the European Community Court of First Instance.[37] Certain other disputes also get heard by the European Community Commission, an administrative body. But these three European tribunals only adjudicate certain matters of European Union law. Much European Union law gets adjudicated in the member state courts under the "direct effect" doctrine. The vast majority of disputes between U.S. and European business never make their way before these three European Union tribunals.

A unique treaty called the Brussels Convention[38] controls questions of jurisdiction among the courts of the European Union member states. If you win a lawsuit in Denmark against a Greek defendant, it is the Brussels Convention which will allow you to execute your judgment in Greece. The *raison d'être* of the European Union is to encourage the free movement of goods, services, and capital among the member states. The idea behind the Brussels Convention is the concomitant goal of encouraging the free movement of judgments.[39]

Technically the Brussels Convention is not a European Union instrument; it is an entirely separate international treaty which exists as a parallel universe to the European Union treaties themselves. But all the European Union member states ratified the Brussels Convention, and it is adjudicated by the European Union's Court of Justice.[40]

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ployers," 11 NW. J. INT'L L. & BUS. 564 (1991), *reprinted as chapter 16 in* European Economic Community Law (W. Hancock ed., 1992).

[37] For a non-technical discussion of how the two European Union courts allocate jurisdiction between themselves and with the member states' courts, *see, e.g.*, Dinan, *supra* note 36, at 295-310.

[38] European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1969 *O.J.* (C-97) 2; J.L.M. 229 (1968) [hereinafter Brussels Convention].

[39] Because the Brussels Convention effectively allows free enforcement of judgments among member states, some U.S. litigators have considered seeking enforcement of a U.S. judgment in the friendliest possible EU member state, for example England, and then invoking the Brussels Convention to enforce that "English" judgment in a less-friendly member state where the defendant has assets, say Germany, when there is a treble or punitive damage component to the original U.S. award. *See supra* note 33 and accompanying text.

[40] A proposed parallel treaty, the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters Between the Member States of the European Communities and of the European Free Trade Association, September 16, 1988, 1988 O.J. (L-319)9, exists to address enforcement of judgments between EU and European Free Trade Agreement [EFTA] member states.

The Brussels Convention's Article 26 states "a judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required."[41] However, even inter-European Union judgments will not be respected if: they are contrary to public policy in the enforcing state; there was a service of process problem and a default judgment was entered; or the judgment is irreconcilable with a prior judgment.[42]

V. CONCLUSION: PROCEDURAL DISPUTE RESOLUTION ISSUES OFTEN HAVE CRITICAL SUBSTANTIVE EFFECT

In order effectively to represent a client in an international transaction, those who put deals together need to focus on all the dispute resolution issues which can come into play, even though the team structuring the deal hopes for future cooperation, not dissention. The best international transactions are structured so that disputes which pop up later resolve themselves. From the point of view of a transactional lawyer, this resolution should, of course, be to the client's own advantage.

Not long ago my law firm had the good fortune to be involved in such a case. Our client was a Dutch machine manufacturer which had sold a large piece of equipment to a customer in Washington state. The sale documents had contained a boilerplate clause saying that all disputes would be resolved via arbitration at the Hague, in Holland — a home court advantage for our client. At the time of the transaction, the Washington customer, focusing on getting the equipment and not on fighting over it later, said nothing about this fine-print forum selection provision. When a dispute did arise, the customer sued in Washington federal court. We immediately raised the boilerplate arbitration clause by motion, moving to dismiss on arbitrability. After a hearing on just the arbitrability issue, the court ruled it had to uphold the clause, so it dismissed the case. The U.S. plaintiff, no longer able to play on

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Id. However, the Lugano Convention has never been implemented. Now that most EFTA nations are being admitted into the EU, perhaps it never will be.

[41] Brussels Convention, *supra* note 38, at art. 26.

[42] Brussels Convention, *supra* note 38.

its home court, gave up, without filing for a Hague arbitration! Careful attention to dispute resolution up front, at the transaction stage, ended up winning a later-arising litigated dispute.