# THE TRANSNATIONAL CASE IN CONFLICT OF LAWS: TWO SUGGESTIONS FOR THE NEW RESTATEMENT THIRD OF CONFLICT OF LAWS—JUDICIAL JURISDICTION OVER FOREIGN DEFENDANTS AND PARTY AUTONOMY IN INTERNATIONAL CONTRACTS

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## INTRODUCTION

In the context of the project of the American Law Institute ("ALI") to draft a new *Restatement of the Law Third, Conflict of Laws*, Professor Ralf Michaels has raised the question whether conflict of laws rules—broadly defined—should be shaped any differently for cross-border (transnational) cases. When the issue was first raised, Professor Silberman's initial instinct was that the principles would not likely look any different in the two situations, except perhaps for a few very specific areas, such as the recognition of foreign country judgments, regulatory legislation such as antitrust and securities,[1] possibly intellectual property, and areas governed by treaties, such as family law. On further reflection, however, she began to think that there might be other issues that were more nuanced, bringing to mind an early piece that she wrote on judicial jurisdiction shortly after the *Asahi* case, where she suggested that a somewhat different standard for judicial jurisdiction may have emerged in cases involving foreign defendants.

For this essay, we (Professor Silberman and her co-author and research assistant Nathan Yaffe) have selected two areas where the "transnational" case may deserve special consideration and where a particular conflicts rule might distinguish between the domestic and the transnational case. One of these areas—party autonomy in the international case—may be more apparent than the second—the assertion of judicial jurisdiction over foreign defendants under the due process clause—but we hope to make the case for both. We note that Preliminary Draft No. 2 of the *Restatement of the Law Third, Conflict of Laws* acknowledges the possibility for some difference in the application of conflicts principles to international cases.[2] Section 1.04, entitled "Interstate and International Conflict of Laws," states that rules in the Restatement that are not limited to States of the United States or to Nations will be generally applicable to both, but adds, "although it remains possible that factors in a particular international case will call for a result different from that which would be reached in a interstate case."

At the outset, we understand and respect the basic proposition that the purpose of a Restatement is to "restate" the law and not "make it up" in order to develop rules that one considers desirable as a matter of policy. At the same time, the tradition of Restatements in the past has been to reflect trends

1. The topics of recognition and enforcement of foreign country judgments and the territorial reach of legislative jurisdiction are addressed in the ongoing revision of the Restatement of the Foreign Relations Law of the United States. *See generally* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION (AM. LAW INST., Council Draft No. 3, Dec. 6, 2016).

2. RESTATEMENT (THIRD) OF CONFLICT OF LAWS (AM. LAW INST., Council Draft No. 3, Nov. 11, 2016) [hereinafter CONFLICTS RESTATEMENT DRAFT].

in the law and perhaps adopt principles that, as was suggested at another recent meeting for a different Restatement project, give a "progressive nudge."

## I. REASONABLENESS IN JUDICIAL JURISDICTION CASES—IS THERE A DIFFERENCE BETWEEN DOMESTIC AND FOREIGN DEFENDANT CASES?

It is certainly true that in the almost thirty years since the decision in *Asahi Metal Industry Co. v. Superior Court*,[3] the lower courts have ostensibly defined the due process standard for *specific* jurisdiction in the same fashion for both domestic and foreign defendants. Whether the defendant is domestic or foreign, the courts first look to determine whether minimum contacts are satisfied and then turn to the "reasonableness" of exercising specific jurisdiction. However, courts' analyses vary dramatically from that point on, depending on whether the party resisting the exercise of jurisdiction is domestic or foreign.

Eight years after the *Asahi* decision, Professor Silberman observed that although the lower federal and state courts had interpreted *Asahi* as "creat[ing] a formal two-step level of analysis, where contacts are an end in themselves to be overlaid with a more general inquiry about 'fairness,'" the "few cases . . . to reject jurisdiction after finding requisite contacts . . . fit the comity concerns of *Asahi* regarding foreign defendants."[4] That instinct—with only impressionistic results rather than systematic empirical research to support the thesis—was that the due process judicial jurisdictional standard with respect to foreign defendants was somewhat different from the standard for domestic defendants in interstate cases. Specifically, the view was that the *Asahi* decision's multi-factor "reasonableness" prong was directed primarily to transnational cases involving foreign defendants.[5] Consistent with this view is the Introductory Note and Comment to Section 421

3. Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cty., 480 U.S. 102 (1987).

4. Linda J. Silberman, *"Two Cheers" for* International Shoe *(and None for* Asahi*): An Essay on the Fiftieth Anniversary of* International Shoe, 28 U.C. DAVIS L. REV. 755, 760 (1995). *See also* Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 509 (1993) (discussing *Asahi*'s "formal two-tier analysis").

5. Silberman, *supra* note 4, at 511–12 (discussing Lichon v. Aceto Chem. Co., 538 N.E.2d 613, 623 (Ill. App. Ct. 1989), which found sufficient minimum contacts where an English manufacturer shipped hazardous chemical into United States, but held that "*in personam* jurisdiction over [defendant] would not comport with traditional notions of fair play and substantial justice"). For an example of this transnational focus, see Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1490 (9th Cir. 1993) (finding minimum contacts for foreign doctors, who published allegedly false and defamatory articles about California plaintiff's product in professional journal distributed world-wide, but holding jurisdiction over foreign individuals in suit on behalf of international corporation would nonetheless be "unreasonable").

("Jurisdiction to Adjudicate") of the *Restatement Third of The Foreign Relations Law of the United States* (finalized after the Supreme Court's decision in *Asahi*). The Introductory Note states, "[t]his Restatement sets forth some international rules and guidelines for the exercise of jurisdiction to adjudicate in cases having international implications, applicable to courts both in the United States and in other states."[6] Comment a to Section 421 (entitled "Jurisdiction to adjudicate and jurisdiction to prescribe") states that "[t]his section applies the principle of reasonableness to limit the exercise of jurisdiction to adjudicate, as [section] 403 does with respect to jurisdiction to prescribe."[7]

Although it is fair to say that courts at least pay lip service to the contacts/reasonableness approach regardless of whether the defendant is domestic or foreign, it is worth considering specific data to determine if there are differences between the two types of cases. The ALI is now engaged in a revision of both the Conflict of Laws (Second) Restatement and the Foreign Relations Law (Third) Restatement, and if the case law supports a distinction in the jurisdictional reach over domestic defendants as compared to foreign defendants, that reality should be reflected in the ongoing Restatement revision efforts. To that end, we surveyed over 400 judicial jurisdiction cases since the year 2000 with the goal of capturing the state of the law by identifying differences in reasoning and result in domestic versus foreign defendant cases.[8]

Our sample suggests that courts in practice only dismiss on reasonableness grounds where the defendant is foreign, whereas they effectively never dismiss domestic defendants on grounds of reasonableness. That is not to say that most foreign defendants in specific jurisdiction cases are dismissed on reasonableness grounds. Indeed, in those cases not disposed

6. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 introductory note (AM. LAW INST. 1987).

7. *Id.* § 421 cmt. a.

8. To conduct this survey, we proceeded as follows. On Westlaw, the advanced search tool was used with the following parameters: "reasonabl! /3 jurisdiction /p asahi", with date range limited to "Cases after 12/31/1999" and "cases before 11/15/2016." This produced 425 results. We then filtered out several types of results: duplicative results; cases in which the lower court opinion returned in the results included a reasonableness finding that was abrogated on appeal or reconsideration; cases in which the court decided on other grounds (e.g. a forum selection clause designating an alternative forum) but subsequently invoked reasonableness unnecessarily; and cases that did not make a specific jurisdiction determination. When a result did not include a final determination, for example because it permitted additional jurisdictional discovery, the "History" tab was used to investigate if the subsequent case history included a relevant jurisdictional determination; where it did, that was included as well. Ultimately, this left us with 403 cases. To ensure exhaustiveness, we would have needed to use a broader set of search parameters. However, for illustrative purposes, more than 400 results from a 16-year period is sufficient. For the final results, see *infra* Annex. We emphasize that our data represents only a "sample" and not an exhaustive survey of all cases.

of entirely on minimum contacts grounds, only about one-quarter find that the exercise of jurisdiction would be unreasonable.[9] However, it is only in the foreign defendant cases where the "reasonableness" prong of the inquiry decides the outcome. Table 1 provides a summary of our results.[10]

| | **Foreign Defendant** *Sample Size: 143 Cases* | | | **Domestic Defendant** *Sample Size: 260 Cases* | | |
|---|---|---|---|---|---|---|
| *Outcome* | Dismiss on Reasonableness | Other Dismissal | No Dismissal | Dismiss on Reasonableness | Other Dismissal | No Dismissal |
| *Number of Cases* | 27 | 28 | 88 | 4 | 94 | 162 |
| *Percent of Total for Cases of that Type* | 18.9% | 19.6% | 61.5% | 1.5% | 36.2% | 62.3% |

*Table 1. Summary of results by case type and outcome.*

Three caveats about the results set forth above are in order. First, there is a special category of domestic cases in which the defendant is an officer, agency, or instrumentality of a sister state. Our survey included four such cases, which did find that exercising jurisdiction would be unreasonable.[11] However, we believe these cases effectively serve as the "exception that proves the rule." The relationship between sister states is one of co-equal sovereigns; as such, cases involving a lawsuit in the court of one state against an officer, agency, or instrumentality of another state implicate comity concerns that are unique among cases against domestic defendant cases.[12]

9. Out of the 403 cases in our sample, 143 involved a foreign defendant. Of those, 28 were dismissed on minimum contacts grounds alone. In the remaining 115, exercising jurisdiction was found to be unreasonable in 27.

10. For the complete results, see Annex.

11. Stroman Realty, Inc. v. Wercinski, 513 F.3d 476, 488 (5th Cir. 2008); Adams v. Georgia Div. of Child Support Servs., No. 2:13–CV–10, 2015 WL 475521, at *5 (D. Vt. Aug. 11, 2015); Adams v. Horton, No. 2:13–CV–10, 2015 WL 1015339, at *7 (D. Vt. Mar. 6, 2015); Thyssen Stearns, Inc. v. Huntsville Madison Cty. Airport Auth., No. 4:01-CV-0601-A, 2001 WL 1041821, at *3 (N.D. Tex. Aug. 30, 2001).

12. For example, in *Adams v. Horton*, the court noted "concerns of federalism and comity between the states" and found it "unreasonable for a state to exercise jurisdiction over officials or agencies of another state based on actions they have taken to enforce a valid state court order." *Horton*, 2015 WL 1015339, at *7. In *Stroman Realty*, the court was even more explicit in its reasoning:

Second, notwithstanding the fact that cases in our sample asserting specific jurisdiction[13] over domestic defendants (aside from those just mentioned above) effectively never dismiss on reasonableness grounds, a minority of courts proceed to consider reasonableness even when they find there are insufficient contacts. These courts necessarily conclude that asserting jurisdiction on the basis of insufficient contacts is unreasonable. Many of these cases merely recite the *Asahi* factors before stating summarily that exercising jurisdiction would be unreasonable in light of these factors.[14] However, an even smaller minority of cases feature in-depth discussion of the *Asahi* reasonableness factors, which suggests that, in an extraordinary case a court faced with a purely domestic fact pattern might dismiss on reasonableness grounds. Of those that engage in a full-blown reasonableness

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> Important questions of federalism are present here, and thus . . . "the shared interest of the several states" is the most significant reasonableness consideration . . . . Federalism and state sovereignty are an essential part of the constraints that due process imposes upon personal jurisdiction. Those constraints . . . "ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." (citation omitted) . . . Accordingly, "the reasonableness of asserting jurisdiction over [a] defendant must be assessed in the context of our federal system of government." (citation omitted) . . . The effect of holding that a federal district court in the Southern District of Texas had personal jurisdiction over a nonresident state official would create an avenue for challenging the validity of one state's laws in courts located in another state. This practice would greatly diminish the independence of the states. *Stroman Realty*, 513 F.3d at 488 (internal citations omitted).

The other cases are to the same effect. Discussions of sovereignty, comity, and respect for the other state's policies are features of the discussion in *foreign* defendant cases, which also appear in this category of domestic defendant cases because of the unique attribute of the defendant being an agent or organ of the state. By contrast, where the defendant is merely a citizen of a sister state, and is sued in their private capacity, issues of comity or sovereignty do not arise. *See, e.g.*, Barranco v. 3D Sys. Corp., 6 F.Supp.3d 1068, 1083 (D. Haw. 2014) ("[T]he sovereignty of a defendant's state is not a significant consideration in actions between citizens of the United States.").

13. Prior to *Daimler*, some cases used "reasonableness" to dismiss a defendant when general jurisdiction had been asserted. *See, e.g.*, Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 573 (2d Cir. 1996) ("[E]very circuit that has considered the question has held, implicitly or explicitly, that the reasonableness inquiry is applicable to *all* questions of personal jurisdiction, general or specific."). However, the Supreme Court's decision in *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014), appears to have jettisoned that approach with respect to both foreign and domestic defendants: "When a corporation is genuinely at home in the forum State, however, any second-step [reasonableness] inquiry would be superfluous." *Id.* at 762 n.20.

14. *See, e.g.*, Allied Pilots Ass'n v. Bensel, No. 402CV0149A, 2002 WL 1286157, at *3 (N.D. Tex. June 6, 2002) (listing the factors and then simply asserting that, "[a]pplying these factors, the court concludes that exercise of jurisdiction over Bensel would not be constitutionally permissible"); Valdez v. Kreso, Inc., 157 F.Supp.2d 722, 726 (N.D. Tex. 2001), *aff'd*, 31 F.App'x 836 (Table) (5th Cir. 2002) (same). It should be noted that an even greater percentage of the domestic defendant cases that *do not dismiss* also feature a similarly perfunctory discussion of reasonableness. *See, e.g.*, Broad. Mktg. Int'l, Ltd. v. Prosource Sales & Mktg., Inc., 345 F.Supp.2d 1053, 1063 (D. Conn. 2004) (reciting factors and then determining jurisdiction to be reasonable); Mfg. Tech., Inc. v. Kroger Co., No. 06 Civ. 3010(JSR), 2006 WL 3714445, at *4 (S.D.N.Y. Dec. 13, 2006) (same); Mosca v. Valenty, No. CIV –08–578–F, 2008 WL 4722985, at *7 (W.D. Okla. Oct. 23, 2008) (same); Pearson Educ., Inc. v. Shi, 525 F.Supp.2d 551, 558 (S.D.N.Y. 2007) (same).

analysis after finding insufficient contacts, it often appears to be based on dicta from *Burger King v. Rudzewicz*[15] that is taken to indicate a court may exercise jurisdiction *despite* not having the otherwise required minimum contacts, *because* the reasonableness factors weigh heavily in favor of jurisdiction in the forum.[16]

A reading of *Burger King* that suggests insufficient contacts may be cured by a strong showing on the reasonableness prong finds no support in the Supreme Court's subsequent opinions, and should not be taken as representative of the current state of the law.[17] The minimum contacts/reasonableness inquiry is strictly sequenced, with the result that the modern reasonableness inquiry is designed to effectuate a one-way ratchet towards declining jurisdiction. As a result, the appropriate approach—as recognized by several Federal Courts of Appeals and state supreme courts[18]—is that once minimum contacts are found to be lacking, the inquiry ends. Nonetheless, it bears noting that some courts seem to believe a case featuring insufficient contacts can be salvaged by a strong showing in favor

15. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

16. Gordon v. Greenview Hosp., Inc., 300 S.W.3d 635, 654 (Tenn. 2009) ("The United States Supreme Court has stated that considerations of fairness may sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.") (internal quotations omitted); Old United Cas. Co. v. Flowers Boatworks, No. 2:15-CV-43-DBH, 2016 WL 1948873, at *8 (D. Me. May 3, 2016) ("When a plaintiff's evidence concerning relatedness and purposeful availment is fairly weak, the less a defendant need show in terms of unreasonableness to defeat jurisdiction. However, the reverse is equally true: a strong showing of reasonableness may serve to fortify a more marginal showing of relatedness and purposefulness.") (internal quotations and citations omitted).

17. For example, given that J. McIntyre Mach. Ltd. v. Nicastro, 564 U.S. 873 (2011), involved an injured U.S. worker suing a foreign corporation, there is a strong argument that the chosen forum of New Jersey (or some other geographically proximate U.S. forum) would have been the only "reasonable" forum. Yet the Court did not even discuss the reasonableness prong as a potential cure for the insufficient contacts. Instead, a colloquy between Justice Ginsburg and counsel for McIntyre left serious doubt as to whether a viable theory existed for exercising jurisdiction in the only other possible forum in the United States. *See* Transcript of Oral Argument at 7–12, J. McIntyre Mach. Ltd. v. Nicastro, 564 U.S. 873 (2011) (No. 09-1343). *Cf.* Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 552 (2012) ("The Court adopted a rigid, defendant-centric, two-step model in which the issue of contact between the defendant and the forum is primary. Only if a defendant-initiated contact is established will a court consider the fairness and reasonableness of jurisdiction.").

18. Porina v. Marward Shipping Co., 521 F.3d 122, 129 (2d Cir. 2008) ("We conclude that [defendant's] contacts with the United States do not satisfy . . . minimum contacts . . . As a result, we need not consider whether personal jurisdiction would be 'reasonable' in the particular circumstances of the case."); Doe v. Unocal Corp., 248 F.3d 915, 925 (9th Cir. 2001) ("Plaintiff's evidence is insufficient to establish either purposeful availment or a but-for relationship between [the forum contacts] and plaintiffs' claims. Plaintiffs therefore fail to establish specific jurisdiction, and the Court need not reach the [reasonableness] prong of the specific jurisdiction test."); LinkAmerica Corp. v. Cox, 857 N.E.2d 961, 970 (Ind. 2006) ("Because LinkAmerica does not have sufficient 'minimum contacts' with the state, it is unnecessary to engage in a 'reasonableness' analysis.").

of the reasonableness of exercising jurisdiction—despite the fact that none of the cases in our sample do so. It is not surprising that in a case where the contacts are close to sufficient, a court hopes to buttress its conclusion to dismiss by underscoring that the case would reach the same result using a "reasonableness" inquiry—a pattern observed in several of the transnational cases in our sample.[19] However, when that approach is taken where the contacts are effectively non-existent, the result is a conflation of the contacts and reasonableness prongs of the analysis. A representative case in the domestic context is *Oxford Commercial Funding v. SDI Le Grand Pub.*, where the court first found minimum contacts to be entirely lacking, yet proceeded to evaluate reasonableness anyway in the following, duplicative terms:

> Defendant brings up numerous points in its argument that granting jurisdiction in Illinois is unreasonable. Defendant is a Florida corporation that has its principal place of business in Florida. All communications and transactions . . . concerning the receivables at issue occurred in Florida . . . . Further, Defendant argues that Oxford should have expected to litigate in Florida since it reached out to Florida to purchase the receivables . . . On the other hand, Defendant notes its tenuous connection to Illinois, consisting of obligatory responses to unsolicited communications. Defendant had established the receivables with another Florida company, and did not expect or intend to become involved with an out of state organization.[20]

Perhaps this type of decision contributes to the dynamic observed by a few courts, in which defendants contesting "reasonableness" merely reiterate factors argued in connection with "minimum contacts."[21] Thus, in our view, the better approach—reflected in the *Doe*, *Porina,* and *LinkAmerica* cases referenced in note 18—is to recognize that a discussion of "reasonableness" is not necessary where contacts are clearly lacking. Fortunately, the majority of courts either explicitly take this approach (or recite the reasonableness factors perfunctorily before concluding that asserting jurisdiction would be

19. *See, e.g.*, One True Vine, LLC v. Liquid Brands LLC, No. C 10–04102 SBA, 2011 WL 2148933, at *8 (N.D. Cal. May 31, 2011) (discussing, *as part of reasonableness inquiry* and after finding that contacts were insufficient to support the exercise of jurisdiction, "[d]efendant's contacts with California are virtually nil. To hale Defendant into a forum where [Defendant] has virtually no connection would constitute a denial of due process").

20. Oxford Commercial Funding, L.L.C. v. SDI Le Grand Pub., Inc., No. 02 C 0556, 2002 WL 1611576, at *6 (N.D. Ill. July 19, 2002).

21. *See, e.g.*, OneBeacon Ins. Grp. v. Tylo AB, 731 F.Supp.2d 250, 262 (D. Conn. 2010) (noting that in connection with reasonableness, "the parties essentially reiterate the arguments they made with respect to the 'purposeful availment' prong discussed above, and do not identify any independent substantive social policies that would be furthered or undermined by permitting this case to go forward in Connecticut").

unreasonable) when contacts are lacking.[22]

The third caveat is that the same phenomenon occurs in transnational cases involving foreign defendants, where courts resort to reasonableness despite finding contacts to be insufficient. However, these cases are different from the domestic defendant cases in several respects. Rather than "merely reciting" the reasonableness factors[23] or "rehashing contacts"[24] as part of the reasonableness inquiry that is common in cases with domestic defendants, the cases involving foreign defendants typically feature genuine, probing reasonableness analyses.[25] When a court engages in such an analysis and the analysis seemed at all significant to the outcome, the case was included in the "dismiss on reasonableness" category—regardless of whether the court had found the contacts prong to be just over, or just under, the threshold to satisfy "minimum contacts." Although such an approach arguably creates asymmetry between the classification of foreign defendant and domestic defendant cases, there are multiple reasons to adopt it. Unlike the domestic defendant cases discussed above, the foreign defendant cases represent attempts to define what a reasonableness standard entails. As such, they contribute to the development of the common law and are cited by subsequent opinions—a phenomenon borne out by our sample. Moreover, the nature of the analysis in the foreign defendant cases looks similar regardless of whether the minimum contacts prong was satisfied or not (in contrast to domestic defendant cases, where failing on contacts often led to the problematic patterns of analysis discussed above). Perhaps most crucially, unlike in the domestic defendant cases, the foreign defendant cases include numerous examples in which jurisdiction was declined on the ground of reasonableness alone.

Thus, notwithstanding these three caveats, the data from our survey support a core observation: although as an abstract principle courts clearly include the concept of reasonableness in the due process analysis for both domestic and foreign defendant cases, "reasonableness" as a separate inquiry only really matters in the foreign defendant cases. In the pages that follow, we argue that the reasonableness inquiry is in fact uniquely appropriate for cases against foreign defendants, such that in interstate cases it should be

22. *See, e.g.*, Williams v. eAdGear Holdings USA, Inc., Civ. No. SA-13-CA-125-OLG, 2014 WL 12561661, at *8 (W.D. Tex. Jan. 7, 2014) ("Because the Court believes that plaintiff has failed to meet his burden of showing that the defendants had sufficient minimum contacts so as to satisfy due process, the Court need not address whether the 'fairness' prong of the jurisdictional inquiry has been satisfied.").

23. *See supra* note 14 and accompanying text.

24. *See supra* note 18 and accompanying text.

25. The content of these analyses are discussed at greater length *infra* Sections II–III.

recognized that reasonableness analysis has a diminished and perhaps different role.

## II. ANALYZING THE CASES WHERE COURTS DISMISS ON REASONABLENESS GROUNDS

To understand the role of reasonableness in the cases involving foreign defendants, one begins with *Asahi*;[26] a case with unusual facts that produced a fractured opinion. The U.S. plaintiff had settled the main product liability claim with the Taiwanese defendant manufacturer, and it was only jurisdiction over the Japanese component manufacturer on the third-party indemnification claim that was at issue. Because of a 4-4-1 split on whether the Japanese component manufacturer had minimum contacts with California based on having placed its products into the stream of commerce, eight of the Justices went on to address the "reasonableness" of asserting jurisdiction, concluding that the assertion of jurisdiction would be unreasonable in this situation. Among the factors considered, the Justices noted the distance between Japan and California and the burdens of a defendant submitting to a foreign legal system.[27] They also observed that given that the claim was between two foreign manufacturers and likely to be decided under foreign law, California had a diminished interest in hearing the case. The Court expressly mentioned the need to consider the interests of other nations when a U.S. court asserts jurisdiction over a foreign defendant—as well as the U.S. government's interest in its foreign relations policies.[28] The Court summarized its view by stating, "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[29]

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26. Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cty., 480 U.S. 102 (1987).

27. *Id.* at 115.

28. *Id.*

29. *Id.* Despite the fact that comity clearly underpins the Court's analysis in *Asahi*, lower courts faced with wholly domestic cases often reference *Asahi* as the source for the classic five-factored test that harkens back to the "fair play and substantial justice" days, which does not have obvious comity implications. *See, e.g.*, Valdez v. Kreso, Inc., 157 F. Supp .2d 722, 726 (N.D. Tex. 2001), *aff'd*, 31 F.App'x 836 (Table) (5th Cir. 2002). Yet as the analysis from *Asahi* shows, more is at stake in the foreign defendant case than just these basic fairness considerations. Thus, in foreign defendant cases, some courts have recognized that additional factors must be accounted for to reflect the comity concerns underlying *Asahi*. *See* Weiss v. Nat'l Westminster Bank PLC, 176 F. Supp. 3d 264, 288–89 (E.D.N.Y. 2016) (listing the five factors then stating, "[i]n addition, when the entity that may be subject to personal jurisdiction is a foreign one, courts consider the *international* judicial system's interest in efficiency and the shared interests of the *nations* in advancing substantive policies") (emphasis in original) (internal quotation and citation omitted). It is these additional factors—which are triggered where another nation has a greater regulatory interest, especially if the conduct and actors are concentrated in the foreign jurisdiction; where there are parallel proceedings; or where the underlying facts implicate national interests—that makes the reasonableness inquiry uniquely salient in foreign defendant cases.

As stated previously, our survey indicates that the reasonableness inquiry essentially leads to dismissal only when there is a foreign defendant.[30] But even that claim must be qualified. Consistent with the fact that *Asahi*'s "reasonableness" test accounts for the interests of the forum state and of the plaintiff in obtaining relief, courts do not dismiss on reasonableness grounds where the case involves a personal injury claim against a foreign manufacturer whose products injure U.S. consumers or employees and minimum contacts are found.[31] Thus, although twenty-two of the foreign defendant cases in our sample involved personal injury claims by consumers or employees,[32] only one was dismissed on reasonableness grounds where the defendant arguably had the requisite contacts—and this case was like *Asahi* in that the plaintiff had already dropped out of the proceeding as a result of settlement.[33]

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30. *See supra* Table I.

31. One might have thought that J. McIntyre Mach. Ltd. v. Nicastro, 131 S.Ct. 2780 (2011) would curtail those tort cases that would satisfy the "minimum contacts" prong of the due process analysis, but most lower courts, both state and federal, have distinguished *McIntyre* as a case in which the record revealed that only a single product had reached the forum state. *See, e.g.*, Sieg v. Sears Roebuck & Co., 855 F. Supp. 2d 320, 327 (M.D.Pa. 2012) (adhering to Third Circuit precedent, because the majority in McIntyre failed "to adopt clearly one of the two Asahi standards"). *But see* State v. NV Sumatra Tobacco Trading Co., 403 S.W.3d 726, 762 (Tenn. 2013) (dismissing in light of *McIntyre* where defendant had sent 11.5 million cigarettes into the forum).

32. Gourdine v. Karl Storz Endoscopy-Am., Inc., Civil Action No. 2:14-4839-RMG, 2016 WL 5219636, at *1 (D.S.C. May 2, 2016); Merced v. Gemstar Grp., Inc., Civil Action No. 10-3054, 2015 WL 1182860, at *1 (E.D. Pa. Mar. 13, 2015); Book v. Doublestar Dongfeng Tyre Co., Ltd., 860 N.W.2d 576, 579 (Iowa 2015); *In re* Chinese-Manufactured Drywall Prods. Liab. Litig., 742 F.3d 576, 581–82 (5th Cir. 2014); Russell v. SNFA, 987 N.E.2d 778, 780–84 (Ill. 2013); King v. Gen. Motors Corp., Civil Action No. 5:11–cv–2269–AKK, 2012 WL 1340066, at *1 (N.D. Ala. Apr. 18, 2012); Willemsen v. Invacare Corp., 282 P.3d 867, 870–71 (Or. 2012); Read v. Moe, 899 F. Supp. 2d 1024, 1026 (W.D. Wash. 2012); Merced v. Gemstar Grp., Inc., Civil Action No. 10-3054, 2011 WL 5865964, at *1 (E.D. Pa. Nov. 22, 2011); Hoffman v. Empire Mach. & Tools Ltd., No. 4:10–CV–00832–NKL, 2011 WL 1769769, at *1 (W.D. Mo. May 9, 2011); OneBeacon Ins. Grp. v. Tylo AB, 731 F.Supp.2d 250, 253 (D. Conn. 2010); *Ex parte* DBI, Inc., 23 So.3d 635, 637 (Ala. 2009); Pope v. Elabo GmbH, 588 F. Supp. 2d 1008, 1010–11 (D. Minn. 2008); Dorel Indus., Inc. v. Sup. Ct., 134 Cal.App.4th 1267, 1269 (Cal. Ct. App. 2005); Chea v. Fette, No. Civ.A 02-8667, 2004 WL 220866, at *1 (E.D. Pa. Jan. 7, 2004); Tungate v. Bridgestone Corp., Cause No. IP 02–151–CH/K, 2002 WL 31741484, at * 1 (S.D. Ind. Nov. 1, 2002); Bridgestone Corp. v. Sup. Ct., 99 Cal.App.4th 767, 771 (Cal. Ct. App. 2002); Dorfman v. Marriott Int'l Hotels, Inc., No. 99 CIV 10496(CSH), 2002 WL 14363, at *1 (S.D.N.Y. Jan. 3, 2002); Spomer v. Aggressor Int'l, Inc., 807 So.2d 267, 269–70 (La. Ct. App. 2001); Kopke v. A. Hartrodt S.R.L., 629 N.W.2d 662, 666–67 (Wis. 2001).

33. Juelich v. Yamazaki Mazak Optonics Corp., 682 N.W.2d 565, 575 (Minn. 2004). The court is somewhat unclear in certain aspects of its reasoning, but ultimately it seems like the court did not view the contacts prong as creating a true due process obstacle to asserting jurisdiction *independent of* its unreasonableness determination. The court used the prior *International Shoe* balancing approach, describing an "interplay" between the contacts and reasonableness prongs such that they operate on a "sliding scale." *Id.* at 570–71. As to the three factors related to contacts, the court concluded they did not weigh "significantly" (quantity of contacts), "strongly" (quality of contacts), or "materially" (connection between contacts and cause of action) in favor of jurisdiction. Although subsequent dicta may suggest it

That case is *Juelich v. Yamazaki Mazak Optonics Corp.*, in which a Minnesota worker was injured by an industrial product and sued the Japanese manufacturers of the laser-cutting system as well as the component scissor-lift table. The component manufacturer moved to dismiss the suit by the worker and the cross-claims asserted by the system manufacturer. By the time the case reached the Minnesota Supreme Court, the plaintiff had settled the case with the system manufacturer, and the indemnification claim against the component manufacturer was the only remaining claim. Although splitting over whether there were sufficient contacts to support personal jurisdiction, all participating justices agreed that the assertion of jurisdiction would be unreasonable and made clear that they viewed this transnational dispute as perfectly analogous to *Asahi*.[34]

However, these types of comity considerations[35] in injured worker/consumer cases appropriately give way to the forum's interest in providing recovery for injured residents in the more common situation where

found the contacts insufficient, it seems clear from the court's actual reasoning that it would have upheld jurisdiction had the reasonableness factors strongly favored the exercise of jurisdiction. The court concluded, "[w]hen considering [the reasonableness factors] together, we are left with the same conclusion as the one reached by the majority in *Asahi*—exercise of jurisdiction over [the] foreign national defendant, 'would offend traditional notions of fair play and substantial justice.'" *Id.* at 576 (internal citations omitted). By contrast, it did not similarly "conclude" anything based on the contacts analysis. Moreover, the court's reference to *Asahi* is illuminating: the court had previously underscored that the *Asahi* court was split on the issue of contacts but overwhelmingly agreed that asserting jurisdiction would offend "fair play and substantial justice." Thus, it seems clear that had the court in *Juelich* found that the reasonableness factors strongly favored jurisdiction, that finding would have compensated for the borderline contacts such that it could exercise jurisdiction. Arguably, *Sutherland v. Robby Thruston Carpentry, Inc.* is another exception because the court finds that jurisdiction over the manufacturer named in the complaint would be unreasonable. 68 Va. Cir. 43, 2005 WL 545543, at *5 (Va. Cir. Ct. 2005). However, *Sutherland* is different for two reasons. First, the court more explicitly found minimum contacts to be lacking, as well. Second, the court noted that the actual manufacturer of the product in question was likely not the one named in the complaint, and further that the plaintiff had named the undisputed distributor of the product. *Id.* at *4.

34. *Juelich*, 682 N.W.2d at 576, 576, 578.

35. In a wide-ranging assessment of the doctrine of comity in American law, William S. Dodge defines comity as "deference to foreign government actors that is not required by international law but is incorporated in domestic law." William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2079 (2015). Dodge does not discuss the "reasonableness" prong of the jurisdictional analysis in depth, although he does include it, along with *forum non conveniens*, as an aspect of adjudicative comity. *Id.* tbl.1.

Two considerations have particular salience for the analysis of reasonableness in cases in our sample. First, as *Asahi* instructed, comity requires "consider[ing] the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction." *Asahi*, 480 U.S. at 115. Second, our sample shows that courts assessing the reasonableness of exercising jurisdiction often discuss which nation has a greater interest in regulating the *conduct* and/or *actors* at issue in the case. These two factors—procedural and substantive policies, and regulatory interest in the conduct and actors at issue—constitute the core of the notion of "comity" invoked here.

the U.S. plaintiff is still party to the case.[36] Indeed, one recent opinion in our sample explicitly recognized that the reasonableness inquiry could effectively never result in dismissal in such a scenario.[37]

However, outside of the tort cases in our sample, the presence of a foreign defendant, even in a suit brought by a U.S. plaintiff, often does result in a dismissal on reasonableness grounds depending on other factors. To give just one example, consider *Benton v. Cameco*,[38] where a breach of contract suit was brought in Colorado by a Colorado plaintiff involving a failed joint venture between the parties. Activities relating to the negotiation of the contract had taken place in California, and sufficient minimum contacts were found. Nonetheless, the Tenth Circuit held that asserting jurisdiction was unreasonable, noting both that the defendant was a Canadian corporation and the international nature of the case, as well as the fact that Canadian law would govern the dispute.

*Benton* is representative both with respect to the reasoning and to the type of fact pattern—a transnational business dispute—that has led courts in our sample to find the exercise of jurisdiction unreasonable. Another case, *Rippey v. Smith*,[39] used a reasonableness inquiry to dismiss a fraud claim by a U.S. plaintiff against an English law firm. The Court of Appeals for the Ninth Circuit held that the firm's communications with, and solicitations of, the plaintiff in California constituted the requisite purposeful availment of the forum to establish "minimum contacts," but then dismissed on reasonableness grounds. The court observed that the English firm did not have a U.S. office and its representation of California clients had been limited to foreign proceedings—echoing a concern about unfamiliarity with the U.S. legal system. Moreover, the dispute centered on actions of British parties and decision undertaken in Britain and therefore created the potential for conflict with British sovereignty.

The discussion about factors such as the actors whose conduct is most central to the issue of liability as well as the location of evidence and

36. *See, e.g.*, Book v. Doublestar Dongfeng Tyre Co., 860 N.W.2d 576, 579 (Iowa 2015); *In re* Chinese-Manufactured Drywall Prods. Liab. Litig., 742 F.3d 576, 581 (5th Cir. 2014); Russell v. SNFA, 987 N.E.2d 778, 798–99 (Ill. 2013).

37. Gourdine v. Karl Storz Endoscopy-Am., Inc., Civil Action No. 2:14-4839-RMG, 2016 WL 5219636, at *13 (D.S.C. May 2, 2016) ("[P]laintiffs allegedly injured within the United States by defective or misrepresented medical products sold within the United States cannot reasonably be expected to litigate in the foreign place of manufacture."); *see also* Chea v. Fette, No. Civ.A. 02-8667, 2004 WL 220866, at *1 (E.D. Pa. Jan. 7, 2004) ("As the injury to plaintiff, a citizen of Pennsylvania, took place in Pennsylvania, while plaintiff was under the employ of a company operating under the laws of Pennsylvania, this forum clearly has a very strong interest in the case.").

38. Benton v. Cameco Corp., 375 F.3d 1070 (10th Cir. 2004).

39. Rippey v. Smith, 16 F.App'x 596, 599 (9th Cir. 2001).

witnesses and is not *solely* (or even *primarily*) directed to considerations of litigation convenience, but rather to elements of comity (often described as "sovereignty" in the cases).[40] As reflections of comity, these concerns are unique to foreign defendant cases.

Comity concerns are at a peak where the foreign nation has a substantial relationship with the party resisting jurisdiction or the underlying facts, or where related litigation is proceeding in the foreign jurisdiction. For example, in *M-I Drilling Fluids*, the foreign defendant, Dynamic Air Ltd. ("DAL"), was the Brazilian subsidiary of a Minnesota corporation.[41] Brazilian state-owned oil company Petrobras had solicited bids for a company to install a system for transporting the "drill cuttings" produced when oil rigs engage in drilling.[42] DAL won the bid and thereafter "designed, sold, and operated" several of these systems for Petrobras on ships flying under the flags of several countries, including the United Kingdom.[43] M-I Drilling Fluids ("M-I")—a UK-based firm—held five patents for the type of "pneumatic conveyance system" DAL had installed pursuant to the contract with Petrobras.[44] According to M-I, DAL only learned about the technology underlying these systems by competing against M-I in competitive bidding processes, and through hiring away a number of employees previously working for M-I in Brazil.[45] M-I filed suit against DAL and its Minnesota-based parent. In analyzing the reasonableness of exercising jurisdiction with respect to defendant DAL, the court emphasized that Brazil's interests were significantly implicated because "Petrobras hired DAL to install the accused systems, [and] the outcome of this case will directly impact Petrobras' operations."[46] It also noted that related litigation was already underway in

40. *See supra* note 35. In the cases in our sample, courts repeatedly looked for conflicts with the defendant nation's sovereignty. *See*, *e.g.*, S.H. Silver Co., Inc. v. David Morris Int'l, No. C 08–03550 CRB, 2008 WL 4058364, at *6 (N.D. Cal. Aug. 28, 2008) ("[W]here, as here, the defendant is from a foreign nation rather than another state, the sovereignty barrier is high and undermines the reasonableness of personal jurisdiction.") (quoting Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc., 1 F.3d 848, 852 (9th Cir. 1993)); TH Agric. & Nutrition, LLC v. Ace Eur. Grp. Ltd., 488 F.3d 1282, 1297 (10th Cir. 2007) (finding that where most defendants are Dutch residents and Dutch law will apply, exercising jurisdiction would tread on "the country's sovereign interest in interpreting its laws and resolving disputes involving its citizens") (quoting OMI Holdings, Inc. v. Royal Ins. Co. of Can., 149 F.3d 1086, 1098 (10th Cir. 1998)); Groupion, LLC v. Groupon, Inc., No. C 11–00870 JSW, 2012 WL 2054993, at *7 (N.D. Cal. June 5, 2012) (noting in its reasonableness analysis that defendant "has not identified any conflict with the sovereignty of Germany").

41. M-I Drilling Fluids UK Ltd. v. Dynamic Air Ltda., Civil No. 13-2385 ADM/HB, 2016 WL 829900, at *1 (D. Minn. Mar. 1, 2016), *appeal filed*, No. 16-1772 (Fed. Cir. 2016).

42. *Id*.

43. *Id.*

44. *Id.* at *2.

45. *Id.*

46. *Id.* at *7.

Brazil. Finally, it reached the determination that "the Court cannot conclude that exercise of personal jurisdiction here would not hinder foreign relations with Brazil."[47] Showing sensitivity to the existence of formal ties such as state ownership,[48] the existence of parallel litigation in the foreign state in question,[49] and the reality that U.S. litigation can pose a foreign relations problem is all consonant with the comity considerations originally articulated in *Asahi*.

## III. FOREIGN DEFENDANT CASES THAT DO NOT DISMISS ALSO HAVE DIFFERENT REASONING FROM DOMESTIC CASES

Even in those cases involving foreign defendants that do not result in a finding of unreasonableness, courts discuss a variety of factors that are not discussed in interstate cases, including familiarity with the legal system,[50] linguistic capability,[51] and especially ability to retain local counsel.[52] Nonetheless, when these factors are raised, there is still more likely than not to be a *refusal to dismiss*.

A consistent theme underpinning these cases is an effort by courts to ascertain that the transnational backdrop of the case is not arbitrarily dictating the result. One concern is whether the foreign defendants have been able to obtain effective representation. Another factor is whether the legal or policy principles of the defendant's home state are inconsistent with the law that will be applied by the U.S. court.

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47. *Id.*

48. *See also* Costa v. Keppel Singmarine Dockyard PTE, Ltd., No. CV 01-11015MMM, 2003 WL 24242419, at *23 (C.D. Cal. Apr. 24, 2003) (expressing concern about taking jurisdiction where the government of Singapore has even an indirect, 32% ownership stake in the defendant).

49. *See, e.g.*, Ideal Instruments, Inc. v. Rivard Instruments, Inc., 434 F. Supp. 2d 598 (N.D. Iowa 2006), *on reconsideration*, 434 F. Supp. 2d 640, 649 (N.D. Iowa 2006) (declining to dismiss on reasonableness in light of parallel litigation in Canada but staying its own action until the parallel litigation concluded); Ajuba Int'l, L.L.C. v. Saharia, 871 F. Supp. 2d 671, 684 (E.D. Mich. 2012) (in refusing to dismiss on reasonableness grounds, adverting to the relevance of parallel litigation but finding "[a]lthough Ajuba India has filed suit in India, Ajuba International and MiraMed are not Plaintiffs in that case and their claims will not be resolved in that litigation").

50. Fortis Corp. Ins. v. Viken Ship Mgmt., 450 F.3d 214, 223 (6th Cir. 2006) ("The parties have already demonstrated an ability to conduct discovery with little difficulty across borders . . . .").

51. *Id.* ("[M]ost (if not all) of the relevant witnesses speak English.").

52. *See, e.g.*, CFA Inst. v. Inst. of Chartered Fin. Analysts of India, 551 F.3d 285, 296 (4th Cir. 2009) (Defendant "has been able to secure counsel to represent its interests, and its litigation burden is thus no more substantial than that encountered by other entities that choose to transact business in Virginia."); *In re* Chinese-Manufactured Drywall Prods. Liab. Litig., 742 F.3d 576, 592 (5th Cir. 2014) (citing *CFA*'s discussion on the subject of retaining local counsel); Xcentric Ventures, LLC v. Arden, No. C 10–80058(SI), 2010 WL 2560484, at *6 (N.D. Cal. June 22, 2010) ("Defendant's capacity to hire foreign counsel and litigate in the present forum, moreover, casts doubt on the severity of defendant's litigation burden . . . ."); Dorel Indus., Inc. v. Supr. Ct., 36 Cal.Rptr.3d 742, 754 (Cal. Ct. App. 2005) (also discussing ability to retain local counsel).

One example of the latter consideration is the court's opinion in *Gourdine v. Karl Storz Endoscopy-America*.[53] In that case, an American patient, after undergoing surgery sued a German manufacturer of a medical device that allegedly resulted in the dissemination of cancerous cells through the patient's body as a result of the manufacturer's device (called a "morcellator"). In assessing whether the exercise of jurisdiction over "KST" (the German manufacturer) was reasonable, the court wrote the following:

> [I]f German procedural law applied to the jurisdictional question, KST would be subject to personal jurisdiction in the United States. *See* Zivilprozessordnung [ZPO] [Code of Civil Procedure Code], §§ 21, 23 . . . . As discussed above, German choice-of-law rules would apply California's substantive agency law to the relationship between [the American subsidiary] and KST even if the agency *locus contractus* were in Germany. German law obviously does not control the jurisdiction of U.S. courts, but it is a strong indication of German procedural policy interests. Here, German law disclaims a procedural policy interest. A German company should hardly be surprised if haled into court in a venue in which it would be subject to personal jurisdiction under German law.[54]

Comity, of course, does not require U.S. courts to seek to bring about harmonization. Yet courts at times seem to take the reasonableness inquiry as an opportunity to consider what is systemically desirable, rather than merely what is desirable from the standpoint of a U.S. court. Thinking along these lines may result in consideration of the procedural code of another country,[55] or the invocation of broader transnational policy interests. For example, in *In re Chinese-Manufactured Drywall* the Court of Appeals for the Fifth Circuit observed: "China may not favor personal jurisdiction over its manufacturers, [but] . . . given the global nature of the economy, it is in everyone's interest to discourage the manufacture and distribution of defective products."[56] These observations reflect a view that where the legal or policy priorities of the foreign state mirror those of the United States, the argument that exercising jurisdiction undermines the policies of another state becomes much weaker.[57]

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53. Gourdine v Karl Storz Endoscopy-America, Inc., Civil Action No. 2:14-4839 RMG, 2016 WL 5219636 (D.S.C. May 2, 2016).

54. *Id.* at *13.

55. *See, e.g.*, Simon v. Philip Morris, Inc., 86 F.Supp.2d 95, 136 (E.D.N.Y. 2000) ("England's civil procedure rules provide for jurisdiction in connection with tort claims if 'the damage was sustained, or resulted from an act committed, within the jurisdiction.' . . . To the extent that this provision would subject an American company to suit in England on the basis of injuries suffered there, reciprocal jurisdiction over [the defendant] would seem to be reasonable.") (internal citation omitted).

56. In re *Chinese-Manufactured Drywall Prods. Liab. Litig.*,, 742 F.3d at 592 (internal quotation marks omitted).

57. However, it should be reiterated that finding another country's laws will apply to the dispute is often an argument *against* the reasonableness of exercising jurisdiction.

Another unique feature of these foreign defendant cases is that the prospect of dismissing on reasonableness grounds raises particularly strong concerns about hardships on U.S. plaintiffs. As noted above, these concerns are especially strong in the context of personal injury, but they are not necessarily so limited. Courts have generally shown an awareness that U.S. plaintiffs in some circumstances would face the hardship of traveling to a foreign country and conducting litigation in a language and legal system with which they are not familiar.[58] And although the starting point is that both plaintiff and defendant are presumed to have analogous interests in litigating at home,[59] where the U.S. plaintiff is the proverbial "little guy," courts are much more reluctant to dismiss on reasonableness grounds if so doing would force the plaintiff to litigate abroad.[60]

As a final characteristic of the reasoning in foreign defendant cases that distinguishes them from domestic cases, many courts recognize that the particular interest in the application of certain federal laws, such as securities or antitrust, weighs against dismissal on reasonableness grounds.[61] Interestingly, such recognition is not limited to cases involving traditional public law regulatory schemes; instead, it can extend to reach fields as disparate as patent law and even the regulation of lawyers.[62] At times, noting the strong federal interest in application of U.S. law can result in a court nearly foregoing the reasonableness inquiry altogether.[63]

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58. Pro Axess, Inc. v. Orlux Distrib., Inc., 428 F.3d 1270, 1281 (10th Cir. 2005) ("Because common law governs this suit, litigating the case in France, a civil law country, would be difficult. Moreover, Pro Axess's management would face the hardship of traveling to France and conducting litigation in a language with which it is not readily apparent that they are familiar.").

59. Cascade Fund, LLP v. Absolute Capital Mgmt. Holdings Ltd., 707 F.Supp.2d 1130, 1141 (D. Colo. 2010) ("Cascade's interests in litigating the case in the United States rather than the Cayman Islands are the reverse image of ACM's interests in not being hauled into court in the United States.").

60. Pope v. Elabo GmbH, 588 F.Supp.2d 1008, 1021 (D. Minn. 2008) ("Pope obviously has an interest in litigating in his home state, and as an individual, he would be more seriously inconvenienced by litigating in Germany than Elabo (a company with international reach) is by litigating in Minnesota.").

61. Zurich Capital Mkts., Inc. v. Coglianese, 388 F.Supp.2d 847, 859 (N.D. Ill. 2004) ("The United States has a substantial interest in the enforcement of its securities laws and the protection of investors in the United States securities markets."); *see also In re* Bernard L. Madoff Inv. Sec. LLC, 440 B.R. 274, 281 (Bankr. S.D.N.Y. 2010) ("The United States has a strong interest in applying the provisions of its Bankruptcy Code."); ReedHycalog UK, Ltd. v. United Diamond Drilling Servs., Inc., No. 6:07 CV 251, 2009 WL 2834274, at *4 (E.D. Tex. Aug. 31, 2009) ("In addition, the State of Texas has a significant interest in preventing patent infringement within its borders and in protecting the patent rights of its citizens."); A.V. Imps., Inc. v. Col de Fratta, S.p.A., 171 F.Supp.2d 369, 376 (D.N.J. 2001) (noting the forum state of Pennsylvania's "strong interest" in keeping the litigation in Pennsylvania, the site of the alleged unfair competition).

62. Lans v. Adduci Mastriani & Schaumberg L.L.P., 786 F.Supp.2d 240, 288 (D.D.C. 2011) ("[T]he District of Columbia has a significant interest in regulating attorneys who engage in legal activity within its borders . . . .").

63. *See, e.g.*, Digitech Image Techs., LLC v. Mamiya Dig. Imaging Co., Ltd., No. 8:12–cv–1675–

The factors discussed in this section—access factors such as language abilities and ability to retain local counsel, consideration of "mirror image" cases and policies, the unique hardship on some U.S. plaintiffs facing reasonableness dismissal, and the unique regulatory interest in the enforcement of certain federal laws—are exclusively the province of transnational cases involving foreign defendants. These factors all raise issues related to comity, as well as a form of interest balancing between the United States and other jurisdictions. For the most part, they reflect the type of comity concerns that *Asahi* adverted to as underlying the reasonableness inquiry—in stark contrast to the domestic cases described *supra*.

## IV. A WORD ON GENERAL JURISDICTION

Our survey was designed to focus on specific jurisdiction. But in light of the Supreme Court's recent decision in *Daimler AG v. Bauman*[64] and its potential impact on specific jurisdiction, a word on general jurisdiction is in order. In dramatically changing the jurisdictional rules on general jurisdiction to require that the defendant be "at home"—and effectively limiting "at home" to the corporation's place of incorporation and principal place of business—Justice Ginsburg's opinion in *Daimler* rejected as unnecessary any role for "reasonableness" in general jurisdiction.[65] *Daimler* was a case involving a foreign defendant engaged in foreign activity that gave rise to the claim. Justice Ginsburg's opinion called attention to the transnational context of the case, suggesting that international comity and the avoidance of international friction were elements of the due process analysis.

It is always possible—though we think unlikely—that lower courts will limit *Daimler* to a case involving a foreign defendant where the conduct occurred abroad. One state supreme court has already done so,[66] and the U.S. Supreme Court has granted a petition for certiorari filed by the domestic defendant who was not "at home" in Montana.[67] But for the most part,

ODW(MRWx), 2013 WL 1415121, at *5 (C.D. Cal. Apr. 8, 2013) ("The other *Asahi* factors establish a compelling case *for* the exercise of personal jurisdiction. The federal-court system has a strong interest in resolving Digitech's myriad cases in one unified forum-California. Digitech is also a "citizen" of California in that it is formed under California law and has its principal place of business here. Digitech also has a strong interest in litigating in its home state, further undergirding the conclusion that this Court may reasonably exercise specific jurisdiction over Leaf.").

64. Daimler AG v. Bauman, 134 S.Ct. 746 (2014).

65. *See supra* note 13.

66. Tyrrell v. BNSF Ry. Co., 373 P.3d 1, 6 (Mont. 2016) (explaining that "*Daimler* addressed the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States.") (internal citations and quotations omitted).

67. Petition for Writ of Certiorari Granted, BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 810 (2017).

*Daimler* has been understood to apply the same rule in the interstate situation; that is, a U.S. defendant is subject to general jurisdiction only in its state of incorporation or principal place of business. And indeed, the Supreme Court in *Daimler* made explicit reference to "sister-state" as well as "foreign-country" corporations in its opinion.[68] At the same time, the role for "reasonableness" in specific jurisdiction cases with foreign defendants may increase as courts faced with limited prospects of obtaining general jurisdiction over such defendants begin to adjust their notion of what constitutes specific jurisdiction.[69]

## V. FINAL COMMENTS ON JUDICIAL JURISDICTION AND REASONABLENESS

So what relevance do our findings on specific jurisdiction and reasonableness have for the *Restatement of the Law Third, Conflict of Laws* and the *Restatement of the Law Fourth, The Foreign Relations Law of the United States*? There is already a Council Draft of a provision on jurisdiction in the *Restatement of the Law Fourth, The Foreign Relations Law of the United States*,[70] but we consider it too general and thus inadequate. Neither the black letter nor the Comments highlight the special role of "reasonableness" in transnational cases involving foreign defendants, and the black letter fails to provide any guidance as to what the standards are generally. Professor Silberman—who is an Adviser to that project—has already provided comments to the Foreign Relations Reporters to that effect. As for the *Restatement of the Law Third, Conflict of Laws*, the earlier *Restatement (Second) of Conflicts* contains over fifty sections (§§ 24–77) relating to what might be called adjudicatory jurisdiction. (There are

68. *Daimler*, 134 S.Ct. at 754.

69. *See* Weiss v. Nat'l Westminster Bank PLC, 176 F.Supp.3d 264, 278, 289 (E.D.N.Y. 2016) (exercising specific jurisdiction over banks that transferred funds allegedly used by terrorist organizations and finding the contacts satisfied both contacts and reasonableness). *But see* Rushaid v. Pictet & Cie, 28 N.Y.3d 316, 319 (Ct. App. N.Y. 2016) (exercising specific jurisdiction in an action brought by Saudia Arabian company against Swiss defendant private bank parties where fraud occurred in Saudi Arabia but defendant used correspondent bank account in New York). The court in *Rushaid* discussed some of the reasonableness factors, such as the burden on the defendant and the shared interests of states in furthering substantive policies, but did so in the context of the traditional "minimum contacts/fair play and substantial justice" test from *International Shoe*. *Id.* at 331–32. *See also* Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 684 (2015) (discussing the potential for *Daimler* to create pressure to expand specific jurisdiction); Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments: What Hath* Daimler *Wrought?*, 91 N.Y.U. L. Rev. 344, 364–86 (2016) (discussing alternative bases of jurisdiction that may be "pressed into service" in light of *Daimler*, especially in the context of recognition and enforcement actions and proceedings involving third-party banks).

70. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 302 (AM. LAW INST. Council Draft No. 3 Dec. 6, 2016).

additional sections on limitations on the exercise of jurisdiction that include *forum non conveniens*). We doubt these provisions are relied upon or cited much anymore because they are outdated and the jurisprudence has moved on since 1971. In addition to the necessary updates, we believe it would be prudent to draft provisions that call attention to the special role of the foreign defendant in the application of the due process test—particularly the "reasonableness" inquiry. Moreover, these findings should be even more salient for articulating provisions about judicial jurisdiction in the *Restatement of the Law Fourth, The Foreign Relations Law of the United States*, and we urge that the Reporters on the Foreign Relations Restatement to include such provisions in their final Draft.

## VI. PARTY AUTONOMY IN INTERNATIONAL CONTRACTS

### A. Introduction

A second issue on which there may be more of a consensus that a distinction between interstate and international cases is called for relates to rules on party autonomy in international contracts. Although we do not suggest that the new Restatement should embrace the recently promulgated *Hague Principles on Choice of Law in International Contracts*,[71] there are certain aspects of the Principles—such as the fact that they cover only *international* contracts—that are worth consideration and could be addressed in a revision to what is presently section 187 of the *Restatement (Second) of Conflicts of Laws*.[72]

Although the case law generally on party autonomy in the United States has not formally distinguished between domestic interstate cases and international cases, support can be found in Supreme Court decisions for permitting broader autonomy when parties include a choice of law clause in an international contract. The Supreme Court decisions on choice-of-forum clauses do not directly address choice of law, but language in *M/S Bremen v. Zapata Off-Shore Co*.[73] states a policy of "eliminat[ing] all uncertainty as to the nature, location, and outlook of the forum," and "as to the applicable substantive law."[74] Other Supreme Court decisions on forum-selection

71. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS (2015) [hereinafter HAGUE PRINCIPLES ON CHOICE OF LAW]. For commentary on the HAGUE PRINCIPLES ON CHOICE OF LAW, *see generally* Marta Pertegás & Brooke Adele Marshall, *Party Autonomy and its Limits: Convergence Through the New Hague Principles on Choice of Law in International Commercial Contracts*, 39 BROOK J. INT'L L. 975 (2014).

72. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1971), discussed *infra* Section VI.B.

73. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

74. *Id.* at 13 n. 15.

clauses, such as *Scherk v. Alberto-Culver Co.*[75] and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[76] underscore the emphasis on party autonomy in the international arena. Of course, all of these cases were brought in federal court and reflect a federal standard, and the traditional view is that states are free to fashion their own standards on party autonomy, whether by legislation or judicial interpretation of both choice-of-forum and choice-of-law clauses. But the federal cases have been influential for state courts and the development of state law; indeed it could be argued that with respect to international commercial contracts, the appropriate standard—including the role for party autonomy—should be a federal one.[77] But the resistance to federal common law generally and the strong tradition of state choice of law on these issues makes such a solution unlikely.

B. Suggestions for the Restatement (Third)

A more appropriate way to reflect modern attitudes about party autonomy in international cases would be to address the issue in the revision of the *Restatement of the Law Third, Conflict of Laws*. As noted earlier, section 1.04 in Council Draft Number 1 acknowledges that factors in an international case may call for a different result than for a domestic case. The same principle was found in section 10 of the *Restatement (Second)*,[78] and could have been understood there as open to a more liberal standard for party autonomy in an international case. However, the Reporters' Note to section 10 went in a diametrically opposite direction, stating that a U.S. court might "be more reluctant to apply the local law of a foreign nation with standards and ideals different from ours than it would be to apply to local law of a sister State."[79] Such a parochial attitude—at least in the context of international commercial contracts—does not reflect existing state or federal law, and a more liberal approach to the application of foreign law in this area is called-for. Fortunately, section 1.04 of the Council Draft of the *Restatement (Third)* contains no similar parochial commentary, although it does note, "there may

75. Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

76. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

77. The role for federal common law in a number of areas of transnational litigation has been suggested by various commentators. *See, e.g.*, Silberman, *Developments*, *supra* note 4, at 517–18 (*forum non conveniens*); Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1571–87 (1992) (recognition and enforcement of judgments in international cases).

78. Section 10 states that rules of the Restatement "are generally applicable to cases with elements in one or more foreign nations," but in a particular case there may be reason to reach "a result different from that which would be reached in an interstate case." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 10 (AM. LAW INST. 1971).

79. *Id.* § 10 reporter's note.

be significantly sharper policy clashes in the international context."[80] The foreign law bans enacted in some states underscore the point that application of foreign law from certain legal systems may present difficulties, but many of those foreign law bans include an express exception for corporations or other legal entities, attempting to exempt international commercial transactions from the ban.[81] As the Reporters turn to this section in the new *Restatement of the Law Third, Conflict of Laws*, they would do well to highlight these points in the Reporters' Notes.

1. Eliminating the Requirement of a "Substantial Relationship"

We turn now to our suggestions for specific revisions of the provisions relating to party autonomy in international contracts, presently falling within section 187 of the *Restatement (Second) of Conflicts*. Whether the contract is an international or interstate one, section 187 requires a "substantial relationship" between the "chosen state" and "the parties or the transaction" or some other "reasonable basis for the parties" choice. By comparison, the Hague Principles covering *international* contracts do not require any such geographical connection. Even under the existing section 187, it might be argued that when the transaction is an *international* one, there is a "reasonable basis" for the parties' choice of law even if unconnected to the parties or the transaction. With such an understanding in the background, a revision to section 187 might appropriately dispense with the requirement of a connection to the parties or the transaction in an international case, or make clear that when the case involves an international commercial contract that fact itself provides a reasonable basis for the parties to choose a law unconnected to the parties or the transaction. It should be noted that two states of the United States that have codified choice of law—Louisiana and Oregon—have abandoned the requirement of a "substantial relationship" in both interstate and international cases.[82] Limitations on party choice in those statutes are left to important and fundamental policy tensions with the law that would otherwise apply in the absence of an effective choice by the

80. RESTATEMENT (THIRD) OF CONFLICT OF LAWS, Council Draft No. 1, *supra* note 2, at § 1.04 cmt. d.

81. FAIZA PATEL, MATTHEW DUSS, & AMOS TOH, CTR. FOR AM. PROGRESS, FOREIGN LAW BANS: LEGAL UNCERTAINTIES AND PRACTICAL PROBLEMS 28 (2013) ("The five states that have passed foreign law bans so far have added exceptions for companies to alleviate the restrictions that the laws would place on international business transactions.").

82. LA. CIV. CODE ANN. art. 3515 (2016); OR. REV. STAT. § 81.100–81.135 (2002) (current version at OR. REV. STAT. § 15.300–15.380 (2011). *See* Symeon C. Symeonides, *Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis*, 44 WILLAMETTE L. REV. 205, 230 (2007) ("Indeed, unlike the corresponding provisions of other codifications and the Restatement (Second) but consistently with new trends, section 81.120 of the Oregon Act does not require that the state of the chosen law have any particular factual or legal connection to the transaction or the parties.").

parties. If the abandonment of all connecting requirements seems to go too far, the revised Conflicts Restatement might adopt a compromise, similar to the provision in Article 3(3) of the Rome I Regulation, which limits the choice of another law when all of the elements are connected to a single state.[83] In the international context, such a limitation would mean that in a case involving all English parties and an English transaction, the parties could not choose California or French law. Nor could parties in a case with all Ohio facts choose German law. Of course, these types of facts might mean that the contract would not qualify as an "international" contract at all.

2. Distinguishing Types of Contracts

Even in the context of an "international" contract, a revised Conflicts Restatement should distinguish *international commercial* contracts from other types of contracts. The Hague Principles adopt this approach,[84] as does the Rome I Regulation, which provides for different rules with respect to passengers, consumers, employees, and insurance policy holders.[85] Generally, legislatures and courts in the United States do not single out weaker parties for protection. An attempt to draw such a distinction in a proposed 2001 revision of the Uniform Commercial Code failed, [86] but another look at case law in various jurisdictions may still support a revised structure of this type for the *Restatement of the Law Third, Conflict of Laws*.

3. Other Limitations on Party Autonomy

Section 187 of the *Restatement (Second) of Conflicts* presently provides for an additional limit on the parties' choice, regardless of whether the case is international or interstate. It states that the parties' choice will not be given effect if, with respect to the particular issue, the chosen law would be "contrary to a fundamental policy of a state which has a materially greater interest than the chosen state," and which would otherwise "be the state of the applicable law." A distinction might be drawn between interstate and

83. Regulation 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6, art. 3(3) [hereinafter Rome I].

84. *See* HAGUE PRINCIPLES ON CHOICE OF LAW, *supra* note 71, at art. 1 ("These Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts.").

85. *See* Rome I, *supra* note 83, at arts. 5–8 (governing contracts of carriage, consumer contracts, insurance contracts and individual employment contracts, respectively).

86. *See* U.C.C. § 1–301(c)(2) (AM. LAW INST. & NAT. CONF. OF COMM'RS ON UNIF. STATE LAWS, Draft of the Revision of Uniform Commercial Code Article 1-General Provisions, 2001). For an account of the proposed reforms, see Patricia A. Tauchert, *A Survey of Part 5 of Revised Article 2*, 54 SMU L. REV. 971, 978 (2001) (observing that the drafters of the July 2000 Draft "again distinguish between consumer and commercial transactions") and for a retrospective, see Fred H. Miller, *What Can We Learn from the Failed 2003-2005 Amendments to UCC Article 2?*, 52 S. TEX. L. REV. 471 (2011).

international contracts in two respects: (a) whether there is a "materially greater interest," and (b) whether there is a "fundamental policy" that overrides the applicable choice of law by the parties.

On the question of what is meant by a "materially greater interest," guidance may be taken from a concurring opinion in an *en banc* decision California Supreme Court, *Nedlloyd Lines B.V. v. Superior Court*.[87] Writing separately from his colleagues, Justice Kennard emphasized the nature of international commercial contracts in the context of evaluating the interest and policy of California law allegedly in tension with the chosen law of Hong Kong.[88] The justice argued that California's interest was not only that of its substantive contract rule but also one of giving respect to and promoting party autonomy as it affects the interpretation and enforcement of contracts;[89] an interest heightened even more when the contract is an international commercial contract. Thus, without reaching the question of whether the chosen Hong Kong law violated the fundamental policy of California, Justice Kennard opined that California did not have a materially greater interest than Hong Kong in the application of its law to the contract. The other justices also upheld the choice of Hong Kong law, determining that there was no fundamental policy of California that was offended by that choice.[90]

Regardless of whether another state has a "materially greater interest" or when a fundamental policy of the otherwise applicable law should override the parties' choice, the role of international commerce and international commercial transactions is a factor that should be taken into account in determining the validity of a choice of law by the parties. Such a result might be achieved in the *Restatement of the Law Third, Conflict of Law*s by providing concrete illustrations of "fundamental policy," but also calling particular attention to the international context in evaluating whether a state has a "greater interest" in the application of its law.

Having called attention to certain aspects of the Hague Principles as useful for inclusion for a provision on party autonomy, we reject the approach of the Principles with respect to a number of the options they offer for limitations on party autonomy. The Principles offer possibilities for "overriding mandatory provisions of the law of the forum,"[91] as well as

87. Nedlloyd Lines B.V. v. Superior Court, 834 P.2d 1148 (Cal. 1992) (en banc) (Kennard, J., concurring).

88. *Id.* at 1166.

89. *Id.*

90. *Id.* at 1153. It should be noted that a majority of the court also determined that the choice of law clause encompassed various tort claims. On this point, there were several dissenting opinions.

91. *See* HAGUE PRINCIPLES ON CHOICE OF LAW, *supra* note 71, at art. 11(1) ("These Principles shall

"overriding mandatory principles of another law,"[92] without specifying what law.[93] The role for forum law to override the parties' choice seems unnecessary and inappropriate so long as there is an escape for rejecting the choice through the vehicle of "public policy," which is also provided for in the Principles.[94] The dual references to both forum law and that of a third state for both overriding mandatory rules and public policy appear unnecessary. Of course, the Hague Principles are drafted to accommodate different regimes, and the Rome I Regulation (in Article 9) references both the overriding mandatory provisions of the law of the forum[95] and the law of the country of performance when those overriding mandatory provisions render performance of the contract unlawful.[96] Although the Regulation limits the possibility of mandatory law to two possible laws rather than some other third state as referenced in the Hague Principles; the Principles may be trying to accommodate systems that adopt the mandatory rule provision of the earlier Rome I Convention that provides for effect to be given to the mandatory rules of "the law of another country with which the situation has a close connection."[97] And as for "public policy" under both the Rome I

not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties."). Article 9(2) of the Rome I Regulation also refers to the overriding mandatory provisions of the law of the forum: "Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum." *See* Rome I, *supra* note 83, at art. 9(2).

92. *See* HAGUE PRINCIPLES ON CHOICE OF LAW, *supra* note 71, at art. 11(2) ("The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.").

93. That question is directed to the law of the forum to determine. *Id*.

94. The Hague Principles also include provisions to exclude the application of the chosen law on public policy grounds. Art. 11(3) provides that "a court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public public (*order public*) of the forum." *Id.* at art. 11(3). Art. 11(4) provides that "the law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State the law of which would be applicable in the absence of a choice of law." *Id.* at art. 11(4).

95. Article 9(2) states that: "Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum." Rome I, *supra* note 83, at art. 9(2).

96. Article 9(3) provides: "Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful." *Id*. at art. 9(3). There are other specific limitations on party autonomy in the Rome Regulation as regards specific types of contract. Article 6 dealing with consumer contracts provides that the chosen law must not strip the consumer of the protection afford by the mandatory rules of the country of the consumer's habitual residence. *See id.* at art. 6(2). With respect to insurance contracts, per Article 7, only certain laws may even be chosen by the parties. *See id*. at art. 7. For an excellent discussion of these specialized provisions, see SYMEON C. SYMEONIDES, CONFLICT OF LAWS 413–14 (Oxford 2016).

97. Article 7 of the Rome Convention states: "When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if an in so far as, under the law of the latter country, those rules must be applied

Regulation and the Rome Convention, the only state whose public policy should be invoked is that of the forum.[98]

We believe that the present section 187 of the *Restatement (Second) of Conflicts* takes a preferable approach, looking only to the "fundamental policy" of the otherwise applicable law. The role for public policy in the *Restatement (Second)* is limited to a refusal to entertain the foreign cause of action.[99] "Fundamental policy" as understood in U.S. case law appears to permit a type of balancing of the competing laws, whereas "overriding mandatory rules" as used in the European system is regarded by some as an absolute category without much flexibility.[100] In this area, the new *Restatement of the Law Third, Conflict of Laws* would do better to continue along the path of its predecessor, which is one the most widely accepted provisions of the *Restatement (Second)*.[101]

## FINAL COMMENTS

The particular examples we have chosen to illustrate some of the differences between interstate and transnational conflicts, broadly defined, suggest that the Reporters for the *Restatement of the Law Third, Conflict of Laws* would do well to take a close look at each of the various Restatement provisions they draft to determine if differences between the interstate and cross-border context necessitate separate rules or, at a minimum, invite

whatever the law applicable to the contract." *See* Rome Convention on the Law Applicable to Contractual Obligations of 1980 (consolidated version), art. 7, 1998 O.J. (C 27) 41 [hereinafter Rome Convention].

98. Article 21 of the Regulation provides, "The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum. Rome I, *supra* note 83, at art. 21. Article 16 of the Rome Convention provides: "The application of a rule of the law of any country specified by this Convention may be refused only in such application is manifestly incompatible with the public policy ('ordre public') of the forum." Rome Convention, *supra* note 97, at art. 16.

99. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (AM. LAW INST. 1971).

100. Article 9(1) of the Rome I Regulation defines "overriding mandatory provisions" as "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation". Rome I, *supra* note 83, at art. 9(1). For a thorough discussion of the history and role for mandatory rules under the Rome I Regulation, see generally Jonathan Harris, *Mandatory Rules and Public Policy Under the Rome I Regulation, in* ROME I REGULATION: THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS IN EUROPE 259-343 (Franco Ferrari & Stefan Leible eds., 2009).

101. Although a few states have enacted statutes that relax all restrictions and limitations on the parties' choice of law in contracts, whether domestic or international, when the law chosen is their own, see, e.g., N.Y. GEN. OBLIG. L. § 5-1401, they nonetheless have adopted the provisions of the Restatement (Second) when another law has been chosen. *See* Lehman Brothers Commercial Corp. v. Minmetals Int. Non-Ferrous Metals Trading Co., 179 F. Supp. 2d 118, 144–45 (S.D.N.Y. 2000) (noting that where New York law was chosen, § 5-1401 did not require an inquiry into the competing law of another country, but simultaneously invalidating the choice of Delaware law as violating the fundamental policy of China).

additional commentary.

ANNEX

| **Transnational** | | | **Domestic** | | |
|---|---|---|---|---|---|
| Dismiss on Reason-ableness | Other Dismissal | No Dismissal | Dismiss on Reason-ableness | Other Dismissal | No Dismissal |
| Archangel Diamond Corp. Liquidating Trust v. OAO Lukoil, 75 F. Supp. 3d 1343 (D. Colo. 2014) | Anchor v. Novartis Grimsby Ltd., 2006 WL 3419846 (W.D.N.Y. Nov. 27, 2006) | A.V. Imports, Inc. v. Col De Fratta, S.p.A., 171 F. Supp. 2d 369 (D.N.J. 2001) | Adams v. Georgia Div. of Child Support Servs., 2015 WL 4755721 (D. Vt. Aug. 11, 2015) | 3 Lab, Inc. v. Kim, 2007 WL 2177513 (D.N.J. July 26, 2007) | 101 McMurray, LLC v. Porter, 2012 WL 997001 (S.D.N.Y. Mar. 26, 2012) |
| Armament Sys. & Procedures, Inc. v. Radioshack Corp. Team Prod. Int'l, 2005 WL 1876102 (E.D. Wis. Aug. 8, 2005) | Avocent Huntsville Corp. v. Aten Int'l Co., 552 F.3d 1324 (Fed. Cir. 2008) | ABI Jaoudi & Azar Trading Corp. v. Cigna Worldwide INS. Co., 2016 WL 3959078 (E.D. Pa. July 22, 2016) | Adams v. Horton, No. 2:13-CV-10, 2015 WL 1015339 (D. Vt. Mar. 6, 2015) | Abarca v. Manheim Servs. Corp., 2006 WL 850893 (N.D. Ill. Mar. 24, 2006) | 22nd Century Graphic Commc'ns, Inc. v. Silverman Bernheim & Vogel, P.C., 2001 WL 1338376 (N.D. Tex. Oct. 16, 2001) |
| Benton v. Cameco Corp., 375 F.3d 1070 (10th Cir. 2004) | Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory", 283 F.3d 208 (4th Cir. 2002) | ABN AMRO, Inc. v. Capital Int'l Ltd., 595 F. Supp. 2d 805 (N.D. Ill. 2008) | Stroman Realty, Inc. v. Wercinski, 513 F.3d 476 (5th Cir. 2008) | Allied Pilots Ass'n v. Bensel, 2002 WL 1286157 (N.D. Tex. June 6, 2002) | 888 Digital, Inc. v. Song, 2008 WL 2835487 (D.N.J. July 18, 2008) |
| Cargnani v. Pewag Austria G.m.b.H., 2007 WL 415992 (E.D. Cal. Feb. 5, 2007) | Breschia v. Paradise Vacation Club, Inc., 2003 WL 22872128 (N.D. Ill. Dec. 4, 2003) | Ajuba Int'l, L.L.C. v. Saharia, 871 F. Supp. 2d 671 (E.D. Mich. 2012) | Thyssen Stearns, Inc. v. Huntsville Madison Cty. Airport Auth., 2001 WL 1041821 (N.D. Tex. Aug. 30, 2001) | Allocca v. Wachovia, No. 05-0366(WHW), 2005 WL 2972845 (D.N.J. Nov. 4, 2005) | A & D Tech., Inc. v. C.E.E., LLC, 2009 WL 2448551 (E.D. Mich. Aug. 10, 2009) |

| **Transnational** | | | **Domestic** | | |
|---|---|---|---|---|---|
| Dismiss on Reason-ableness | Other Dismissal | No Dismissal | Dismiss on Reason-ableness | Other Dismissal | No Dismissal |
| ChemRisk, LLC v. Chappel, 2011 WL 1807436 (N.D. Cal. May 12, 2011) | Colida v. LG Elecs., Inc., 77 F. App'x 523 (Fed. Cir. 2003) | Akbar v. Bangash, 2016 WL 4060930 (E.D. Mich. July 29, 2016) | | Am. Bus. Lending Grp., Inc. v. Shainis, 2011 WL 691580 (D.N.J. Feb. 14, 2011) | A & L Energy, Inc. v. Pegasus Grp., 791 So. 2d 1266 (La. 2001) |
| City of Monroe Employees Ret. Sys. v. Bridgestone Corp., 399 F.3d 651 (6th Cir. 2005) | Computer City, Inc. v. Pro-C Ltd., 2001 WL 406370 (N.D. Tex. Apr. 17, 2001) | Altvater Gessler-J.A. Baczewski Int'l (USA) Inc. v. Sobieski Destylarnia S.A., 2010 WL 2813617 (S.D.N.Y. July 16, 2010) | | Amsleep, Inc. v. Am. Mattress Centers, Inc., 2002 WL 1400369 (N.D. Ill. June 27, 2002) | A.O. Smith Corp. v. Am. Alternative Ins. Corp., 778 So. 2d 615 (La. App. 4 Cir. 2000) |
| Doe v. Al Maktoum, 2008 WL 4965169 (E.D. Ky. Nov. 18, 2008) | Coyle v. Mathai, 2011 WL 5828522 (D.N.J. Nov. 18, 2011) | Am. Estates Wines, Inc. v. Kreglinger Wine Estates Pty, Ltd., John Does 1-10, 2008 WL 819993 (D.N.J. Mar. 25, 2008) | | Avdeef v. Google, Inc., 2014 WL 6972961 (N.D. Tex. Dec. 8, 2014) | Aero Prod. Int'l, Inc. v. Intex Corp., No. 02 C 2590, 2002 WL 31109386 (N.D. Ill. Sept. 20, 2002) |
| Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114 (9th Cir. 2002) | CRT Investments, Ltd. v. Merkin, 918 N.Y.S.2d 397 (Sup. Ct. 2010) | Anglo Irish Bank Corp., PLC v. Superior Court, 165 Cal. App. 4th 969 (2008) | | Barton v. Sewell, 2008 WL 867936 (E.D. Wash. Mar. 28, 2008) | Aeroflex Wichita, Inc. v. Filardo, 275 P.3d 869 (2012) |
| Juelich v. Yamazaki Mazak Optonics Corp., 682 N.W.2d 565 (Minn. 2004) | Daventree Ltd. v. Republic of Azerbaijan, 349 F. Supp. 2d 736 (S.D.N.Y. 2004) | Bachmann v. Broadway Fed. Bank, F.S.B., 2013 WL 312433 (Cal. Ct. App. Jan. 28, 2013) | | Bays v. Corcell Inc., 2012 WL 1616746 (S.D.W. Va. May 8, 2012) | Aerotech Holdings, Inc. v. All. Aerospace Eng'g, LLC, 650 F. Supp. 2d 594 (N.D. Tex. 2009) |

| **Transnational** | | | **Domestic** | | |
|---|---|---|---|---|---|
| Dismiss on Reason-ableness | Other Dismissal | No Dismissal | Dismiss on Reason-ableness | Other Dismissal | No Dismissal |
| Kotera v. Daioh Int'l U.S.A. Corp., 179 Or. App. 253, 256, 40 P.3d 506 (2002) | Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001) | Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120 (2d Cir. 2002) | | Bellisio Foods, Inc. v. Prodo Pak Corp., 2008 WL 4867352 (D. Minn. Nov. 4, 2008) | Afloat in France, Inc. v. Bancroft Cruises Ltd., 2003 WL 22400213 (S.D.N.Y. Oct. 21, 2003) |
| LaSalle Bus. Credit, L.L.C. v. GCR Eurodraw S.p.A., 2004 WL 1880004 (N.D. Ill. Aug. 18, 2004) | EnLink Geoenergy Servs., Inc. v. Jackson & Sons Drilling & Pump, Inc., 2009 WL 4544694 (N.D. Cal. Nov. 30, 2009) | Book v. Doublestar Dongfeng Tyre Co., 860 N.W.2d 576 (Iowa 2015) | | Buckeye Check Cashing of Arizona, Inc. v. Lang, 2007 WL 641824 (S.D. Ohio Feb. 23, 2007) | Allard v. City of Toledo, 2011 WL 2786652 (E.D. Mich. July 15, 2011) |
| Leibovitch v. Islamic Republic of Iran, 2016 WL 2977273 (N.D. Ill. May 19, 2016) | Fisher v. Teva PFC SRL, 212 F. App'x 72 (3d Cir. 2006) | Bridgestone Corp. v. Superior Court, 99 Cal. App. 4th 767 (2002) | | Car Transp. Brokerage Co. v. Blue Bird Co., 2005 WL 3783425 (W.D. Ark. Nov. 30, 2005) | Allen ex rel. Allen v. Devine, 670 F. Supp. 2d 164 (E.D.N.Y. 2009) |
| M-I Drilling Fluids UK Ltd. v. Dynamic Air Ltda.,2016 WL 829900 (D. Minn. Mar. 1, 2016) | Gardner v. SPX Corp., 272 P.3d 175 (Utah Ct. App. 2012) | Cascade Fund, LLLP v. Absolute Capital Mgmt. Holdings Ltd., 707 F. Supp. 2d 1130 (D. Colo. 2010) | | Chanel, Inc. v. Guetae, 2009 WL 348501 (D.N.J. Feb. 11, 2009) | Amin v. Bakhaty, 812 So. 2d 12 (La. App. 1st Cir. 2001) |
| Norvel Ltd. v. Ulstein Propeller AS, 161 F. Supp. 2d 190 (S.D.N.Y. 2001) | Ibrani v. Mabetex Project Eng'g, 2002 WL 1226848 (N.D. Cal. May 31, 2002) | CFA Inst. v. Inst. of Chartered Fin. Analysts of India, 551 F.3d 285 (4th Cir. 2009) | | Chemguard Inc. v. Dynax Corp., 2010 WL 363481 (N.D. Tex. Feb. 2, 2010) | Anthem Ins. Companies, Inc. v. Tenet Healthcare Corp., 730 N.E.2d 1227 (Ind. 2000) |

| **Transnational** | | | **Domestic** | | |
|---|---|---|---|---|---|
| Dismiss on Reason-ableness | Other Dismissal | No Dismissal | Dismiss on Reason-ableness | Other Dismissal | No Dismissal |
| Phillips v. Worldwide Internet Sols., 2006 WL 1709189 (N.D. Cal. June 20, 2006) | ICT Pharm., Inc. v. Boehringer Ingelheim Pharm., Inc., 147 F. Supp. 2d 268 (D. Del. 2001) | Chea v. Fette, 2004 WL 220866 (E.D. Pa. Jan. 7, 2004) | | Cheyenne Publ'g, LLC v. Starostka, 94 P.3d 463 (Wyo. 2004) | Ashburn Family Properties, L.L.C. v. EBR Huntsville, L.L.C., 2016 WL 159324 (N.D. Ala. Jan. 14, 2016) |
| R & R Games, Inc. v. Fundex Games, Ltd., 2013 WL 784397 (M.D. Fla. Mar. 1, 2013) | In re Aluminum Warehousing Antitrust Litig., 2015 WL 6472656 (S.D.N.Y. Oct. 23, 2015) | Costa v. Keppel Singmarine Dockyard PTE, Ltd., 2003 WL 24242419 (C.D. Cal. Apr. 24, 2003) | | China Shipping (NORTH Am.) Agency Co. v. Lighthouse Trucking, Inc., 2009 WL 249221 (D.N.J. Jan. 30, 2009) | Audi AG & Volkswagon of Am., Inc. v. D'Amato, 341 F. Supp. 2d 734 (E.D. Mich. 2004) |
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| Dismiss on Reason-ableness | Other Dismissal | No Dismissal | Dismiss on Reason-ableness | Other Dismissal | No Dismissal |
| S.H. Silver Co. Inc. v. David Morris Int'l, 2008 WL 4058364 (N.D. Cal. Aug. 28, 2008) | Nabulsi v. H.H. Sheikh Issa Bin Zayed Al Nahyan, 2007 WL 2126542 (S.D. Tex. July 19, 2007) | Donnelly Corp. v. Reitter & Schefenacker GmbH & Co. KG, 189 F. Supp. 2d 696 (W.D. Mich. 2002) | | Conway v. Leonard, 2004 WL 882193 (W.D. Wis. Apr. 22, 2004) | Bank of Blue Valley v. Lasker Kim & Co. LLP, 2016 WL 3881336 (D. Kan. July 18, 2016) |
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| Dismiss on Reason-ableness | Other Dismissal | No Dismissal | Dismiss on Reason-ableness | Other Dismissal | No Dismissal |
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| | | Pro Axess, Inc. v. Orlux Distribution, Inc., 428 F.3d 1270 (10th Cir. 2005) | | Prudential Ins. Co. of Am. v. Bennett, 2009 WL 3584348 (D.N.J. Oct. 27, 2009) | Greenway Leasing, L.P. v. Star Buffet Mgmt., Inc., 57 So. 3d 397 (La. App. 2d Cir. 2011) |
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| | | S.E.C. v. Straub, 921 F. Supp. 2d 244 (S.D.N.Y. 2013) | | Richardson v. Bates Show Sales Staff, Inc., 2013 WL 865547 (Tenn. Ct. App. Mar. 6, 2013) | Hyman v. W. Coast Holdings Grp., Inc., 2012 WL 1393106 (D.N.J. Apr. 20, 2012) |
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| Dismiss on Reason-ableness | Other Dismissal | No Dismissal | Dismiss on Reason-ableness | Other Dismissal | No Dismissal |
| | | Willemsen v. Invacare Corp., 352 Or. 191 (2012) | | U.S. ex rel. Banignan v. Organon USA Inc., 2012 WL 1190826 (D. Mass. Apr. 9, 2012) | Lifestyle Lift Holding, Inc. v. Maryland Plastic Surgery Associates, LLC, 2008 WL 4826295 (E.D. Mich. Nov. 5, 2008) |
| | | Xcentric Ventures, LLC v. Arden, 2010 WL 2560484 (N.D. Cal. June 22, 2010) | | Ufheil v. Bain, 2009 WL 2252148 (D. Kan. July 28, 2009) | Lima Delta Co. v. Glob. Aerospace, Inc., 325 Ga. App. 76, (2013) |
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| | | | | Wargo v. Lavandeira, 2008 WL 4533673 (N.D. Ohio Oct. 3, 2008) | MBF Trust ex rel. Frates v. Castaway Mfg., Inc., 2010 WL 4636704 (N.D. Okla. Nov. 4, 2010) |
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| | | | | | Mosca v. Valenty, 2008 WL 4722985 (W.D. Okla. Oct. 23, 2008) |
| | | | | | MWL Brasil Rodas & Eixos LTDA v. K-IV Enterprises LLC, 661 F. Supp. 2d 419 (S.D.N.Y. 2009) |
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| | | | | | Pac. Fisheries Corp. v. Power Transmission Prod., Inc., 2000 WL 1670917 (D. Haw. Oct. 17, 2000) |
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| | | | | | Protostorm, llc v. Antonelli, 2010 WL 4052922 (E.D.N.Y. Oct. 14, 2010) |
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| | | | | | Revision Military, Inc. v. Balboa Mfg. Co., 2011 WL 3875624 (D. Vt. Aug. 31, 2011) |
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| | | | | | Vireo Sys., Inc. v. HTG Ventures, LLC, 2015 WL 1893461 (M.D. Tenn. Apr. 27, 2015) |
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| | | | | | Weyent v. Vertical Networks, Inc., 2004 WL 421745 (N.D. Ill. Feb. 3, 2004) |
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