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International Litigation

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I. Foreign Sovereign Immunities Act

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

A. GENERAL EXCEPTIONS

In *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, the United States Court of Appeals for the Second Circuit affirmed the denial of a Kazakhstan sovereign wealth fund's motion to dismiss on sovereign immunity grounds.² The court held that the FSIA does not immunize an instrumentality of a foreign sovereign against claims that it violated federal securities laws by making misrepresentations outside the United States concerning the value of securities purchased by investors within the United States. The court found that the "direct-effect clause" of the commercial activity exception to immunity, Section 1605(a)(2) of the Foreign Sovereign Immunities Act, was satisfied where the effect of the securities fraud—plaintiff's loss—occurred in the United States, at least

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1. See 28 U.S.C. § 1602 (1976).

2. *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98 (2d Cir. 2016).

where the securities were marketed in the United States and “the defendant contemplated and acted to encourage investment by United States persons.”³

In *Arch Trading Corporation v. Republic of Ecuador*, the United States Court of Appeals for the Second Circuit affirmed the dismissal of a suit brought by several entities claiming that the Republic of Ecuador and two of its instrumentalities unlawfully seized their property in Ecuador. The entities claimed that this conduct fell within the FSIA’s “expropriation” exception in Section 1605(a)(3).⁴ The court held that the exception did not apply where plaintiffs alleged only that entities affiliated with government instrumentalities engaged in commercial activity in the United States. Plaintiffs’ allegations did not overcome the presumption of separateness laid out in *Bancec*⁵ because they did not allege that the instrumentalities themselves exercised significant and repeated control over the day-to-day operations of the distinct, non-governmental entities.⁶ As a result, the commercial activity of the non-governmental entities could not be imputed to the instrumentalities and did not destroy the immunity afforded to Ecuador and its instrumentalities.

B. EXECUTION EXCEPTIONS

The United States Court of Appeals for the Seventh and Ninth Circuits have split in two decisions analyzing the scope of FSIA’s “terrorism” exception in Section 1610(g). In *Rubin v. Islamic Republic of Iran*, victims of terrorism sought to satisfy their multi-million dollar default judgment against Iran by executing on several collections of ancient Persian artifacts located in the United States.⁷ The Seventh Circuit rejected plaintiffs’ argument that Section 1610(g), added in 2008 to ease “the collection process for victims of state-sponsored terrorism by eliminating the *Bancec* rule that foreign sovereigns and their instrumentalities are treated separately for execution purposes,” is itself a “freestanding exception to execution immunity.”⁸ Thus, a plaintiff that seeks to execute on property pursuant to Section 1610(g) must still satisfy a Section 1610 exception to execution immunity, *e.g.*, the commercial activity exception. But in *Bennett v. Islamic Republic of Iran*, the Ninth Circuit disagreed, holding that subsection (g) does contain “a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities,” and that once plaintiffs had satisfied Section 1610(g), they were free to execute on the judgment debtors’ United States property.⁹

3. *Id.* at 110–11.

4. *Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193 (2d Cir. 2016).

5. *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

6. *Arch Trading*, 839 F.3d at 201–207.

7. *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 473 (7th Cir. 2016).

8. *Id.* at 481.

9. *Bennett v. Islamic Republic of Iran*, 825 F.3d 949, 959 (9th Cir. 2016).

In *Kirschenbaum v. 650 Fifth Avenue and Related Properties*, the United States Court of Appeals for the Second Circuit reversed a lower court grant of summary judgment on terrorism victims' turnover actions, by which the victims had sought to satisfy their judgments by seizing properties held by companies allegedly linked to Iran.¹⁰ The court found that the company from which turnover was sought did not bear the attributes of statehood and therefore could not be equated with Iran.¹¹ Additionally, they were not agencies or instrumentalities of Iran because the New York-based entities were United States "citizens" under § 1603(b)(3).¹² And there was no evidence that Iran exercised day-to-day control over the companies as would be required to treat them as alter egos of Iran.¹³ The court allowed that on remand, the plaintiffs could seek to establish facts proving that the companies were agencies or instrumentalities of Iran under the separate definition in the Terrorism Risk Insurance Act and that the properties were "blocked assets" subject to execution under that Act.¹⁴

II. International Service of Process

International service of process is governed by Rule 4(f) of the Federal Rules of Civil Procedure, which allows for service (A) "by internationally agreed means," such as the Hague Service Convention; or (B) "by a method that is reasonably calculated to give notice;" or (C) "by other means not prohibited by international agreement, as the court orders."¹⁵

In 2016, several courts grappled with Russia's refusal to execute requests for service of process under The Hague Service Convention¹⁶ and its objections under Article 10 of the Convention to the use of alternate means such as postal service. In *Delex Inc. v. Sukhoi Civil Aircraft Co.*, the plaintiff, Delex, served process on a Russian defendant, Sukhoi, by registered mail and by personal delivery to the head of its foreign activity legal support department. Both methods were authorized by the state of Washington's corollary to Rule 4.¹⁷ The Washington Court of Appeals held that the service was valid despite Russia's position on postal service, finding that

10. *Kirschenbaum v. 650 Fifth Ave. & Related Properties*, 830 F.3d 107 (2d Cir. 2016).

11. *Id.* at 124–25.

12. Notably, the court indicated that a U.S.-based *partnership* could still qualify as an agency or instrumentality because "Congress has 'never expanded [its] grant of citizenship to include artificial entities other than corporations.'" *Id.* at 125–28. But this analysis did not affect the partnership at issue in the case because the argument was not pursued on appeal. *Id.*

13. *Id.* at 128–30.

14. *See id.* at 131.

15. *See Fed. R. Civ. P.* 4(f).

16. The ostensible reason for Russia's refusal is a dispute about whether the U.S. practice of charging a flat fee for the central authority's private contractor is consistent with Article 12. *See Hague Service Convention*, arts. 10, 12, Nov. 15, 1965, U.S.T. 361. The Special Commission of the Hague Conference on Private International Law has rejected Russia's position several times, most recently in 2014, but the dispute remains unresolved. *Id.*

17. *Delex Inc. v. Sukhoi Civil Aircraft Co.*, 372 P.3d 797, *review denied*, 385 P.3d 114 (2016).

because Russia's refusal to execute requests "renders service under the Hague Convention impossible. . . [Delex] must be allowed to serve [Sukhoi] through alternative means."¹⁸ By contrast, in *Fisher v. Petr Konchalovsky Foundation*, the court rejected a motion under Federal Rule of Civil Procedure 4(f)(3) for leave to serve by mail based on Russia's objection to postal service.¹⁹ The *Fisher* court took the position that the Convention—and Russia's objections to it—remains effective notwithstanding Russia's intransigence regarding execution of service requests. But the court went on to authorize service by email, relying on questionable precedents holding that the Convention does not forbid service by email. Nevertheless, *Fisher* and *Delex* are plainly at odds about the effect of the Russian position on the Convention.

A background issue left open in both cases is the customary international law governing the effect of breaches of a multilateral treaty. The *Delex* court held that the Convention was ineffective *vis a vis* Russia without a formal U.S. withdrawal because there was no mechanism for the United States to "abrogate the [Convention] with respect to Russia but leave it in force with the [over sixty] other signatories."²⁰ But under customary international law, "[a] material breach of a multilateral agreement" generally entitles "a party specially affected" to suspend the operation of the agreement with respect to the "defaulting state."²¹ On the other hand, to suspend the operation of a treaty, the United States would have to take some formal action of notification,²² which the United States has not done.

United States courts also continued to be divided about the permissibility of postal service under Article 10 generally. A minority of courts, which focus on Article 10(a)'s use of the word "send" rather than "serve," continue to hold that service of process by mail is not authorized by the Convention. For example, the Texas Court of Appeals rejected the validity of postal service in *Menon v. Water Splash, Inc.*,²³ perhaps following the lead of the United States Court of Appeals for the Fifth Circuit.²⁴ But in *Mutual Benefits Offshore Fund v. Zeltser*, a New York intermediate court of appeals overruled its own precedent to allow for postal service, the position likewise supported by the United States Department of State, the Special Commission of The Hague Conference, and all other State Parties to the Convention.²⁵ A petition for certiorari has been filed in *Menon*, and in

18. *Id.* at 802.

19. *Fisher v. Petr Konchalovsky Found.*, No. 15-CV-9831, 2016 WL 1047394 (S.D.N.Y. Mar. 10, 2016).

20. *Delex*, 193 Wash. App. at 372.

21. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 335(2)(b) (1987).

22. *See id.* § 337(1).

23. *See Menon v. Water Splash, Inc.*, 472 S.W.3d 28 (Tex. App.—Houston [14th Dist.] 2015, pet. filed).

24. *See Nuovo Pignone, S.p.A v. Storman Asia M/V*, 310 F.3d 374 (5th Cir. 2002).

25. *Mut. Benefits Offshore Fund v. Zeltser*, 140 A.D.3d 444, 37 N.Y.S.3d 1 (N.Y. App. Div. 2016).

September 2016 the Supreme Court of the United States called for a response to the petition.²⁶ So, 2017 may be the year when the long-standing split in authority on this issue is resolved.

III. Personal Jurisdiction

A. GENERAL JURISDICTION

In 2016, lower courts continued to apply the Supreme Court of the United States' 2014 decision, *Daimler AG v. Baumann*, which states that general jurisdiction over a foreign corporation is proper only when a corporation's affiliations with the forum state are so "continuous and systematic" as to render it "essentially at home" in the forum state.²⁷ Courts consistently declined to exercise general jurisdiction outside of *Daimler's* paradigmatic forums: the defendant's place of incorporation and principal place of business.²⁸

But courts remain split on whether a defendant who is not "at home" in a forum state may nonetheless consent to a general jurisdiction by complying with that forum state's business registration statute. In *Brown v. Lockheed Martin Corporation*, the United States Court of Appeals for the Second Circuit held that a defendant's business registration in the forum state did not constitute consent to jurisdiction because the statute did not "contain express language alerting the potential registrant that . . . it would be agreeing to submit to the general jurisdiction of the state courts."²⁹ The Second Circuit also reasoned that *Daimler* "suggest[ed] that federal due process rights likely constrain an interpretation that transforms a run-of-the-mill registration and appointment statute into a corporate 'consent'—perhaps unwitting—to the exercise of general jurisdiction by state courts."³⁰ Other courts have decided similarly, based both on *Daimler* and on the language of the particular registration statute.³¹ But in *Bors v. Johnson & Johnson*, the United States District Court for the Eastern District of Pennsylvania held that consent to personal jurisdiction under the

26. *Menon*, 472 S.W.3d 28.

27. *Daimler AG v. Bauman*, 571 U.S. 746, 763 (2014).

28. See *Chavez v. Dole Food Co., Inc.*, 836 F.3d 205, 223 (3d Cir. 2016); *Best Odds Corp. v. iBus Media Ltd.*, No. 14-16235, 2016 WL 3924386, at *1 (9th Cir. 2016); *Patterson v. Aker Sols. Inc.*, 826 F.3d 231, 234 (5th Cir. 2016).

29. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 630 (2d Cir. 2016).

30. *Id.*

31. See *Display Works, LLC v. Bartley*, No. CV 16-583, 2016 WL 1644451, at *7 (D.N.J. Apr. 25, 2016) (holding that business registration did not constitute consent and that older cases reaching the opposite conclusion "cannot be squared with . . . *Daimler*"); *In re Zofran (Ondansetron) Prod. Liab. Litig.*, No. 1:15-CV-13760-FDS, 2016 WL 2349105, at *4 (D. Mass. May 4, 2016) (finding no consent to jurisdiction, reasoning that "[a]s with the Connecticut statute at issue in *Brown*, the Missouri statute does not mention consent to personal jurisdiction"); and *Aclin v. PD-RX Pharm. Inc.*, No. 5:15-CV-00561-R, 2016 WL 3093246, at *8 (W.D. Okla. June 1, 2016) (declining to exercise general jurisdiction on the basis of registration).

Pennsylvania registration statute remained valid after *Daimler* because “Pennsylvania’s statute specifically advises the registrant of the jurisdictional effect of registering to do business.”³² Similarly, in *In re Syngenta AG MIR 162 Corn Litigation*, the United States District Court for the District of Kansas found that the defendant had consented to jurisdiction by registering to do business because the “Kansas Supreme Court has already interpreted the statute to require consent to general jurisdiction, . . . making it no different than if the Court were faced with a statute that explicitly requires consent.”³³

Until recently, this split in authority was nowhere more pronounced than in Delaware, where different courts considering the same registration statute reached different conclusions. Last year, the United States District Court for the District of Delaware issued two conflicting opinions on the issue.³⁴ This year, when the Federal Circuit had the opportunity to address the conflict, it declined to do so, instead basing its opinion on specific jurisdiction grounds.³⁵ But in 2016, the Supreme Court of Delaware decided *Genuine Parts Company v. Cepec*, concluding that “[i]n light of the U.S. Supreme Court’s clarification of the due-process limits on general jurisdiction in *Goodyear* and *Daimler*,” Delaware’s registration statute provided a means for service of process but not for consent to general jurisdiction.³⁶

More broadly, until the issue is decided by the United States Supreme Court, lower courts and state courts will continue to variably interpret the provisions of the states’ different business registration statutes in light of or perhaps in spite of *Daimler*.

IV. The Act of State Doctrine

The Act of State Doctrine is a prudential limitation on the exercise of judicial review requiring United States courts to decline to pass judgment on the validity of official acts of a foreign state performed in its own territory.³⁷

32. *Bors v. Johnson & Johnson*, No. CV 16-2866, 2016 WL 5172816 at 4* (E.D. Pa. Sept. 20, 2016).

33. *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591-JWL, 2016 WL 2866166, at *1 (D. Kan. May 17, 2016).

34. See *AstraZeneca AB v. Mylan Pharm., LLC*, 72 F. Supp. 3d 549, 555–56 (D. Del. 2014); *Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 78 F. Supp. 3d 572, 588–91 (D. Del. 2015).

35. *Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d 755 (Fed. Cir. 2016).

36. *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 148 (Del. 2016).

37. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *Credit Suisse v. U.S. Dist. Ct. For the Cent. Dist. of Cal.*, 130 F.3d 1342, 1346 (9th Cir. 1997); *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int’l.*, 493 U.S. 400, 409 (1990) (doctrine “requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid”); *Salem Fin., Inc. v. United States*, 786 F.3d 932, 955 (Fed. Cir. 2015) (doctrine does not apply when court need not adjudicate validity of foreign state’s act).

A. INTERSECTION WITH COMITY

In *In re Vitamin C Antitrust Litigation*, Chinese vitamin C suppliers sought dismissal of an antitrust suit brought by United States purchasers on the basis of an alleged conflict between Chinese law, which required defendants to set prices and reduce quantities of vitamin C sold abroad, and United States law, which prohibits such agreements between competitors.³⁸ Plaintiffs argued that there was no true conflict because defendants had petitioned the Chinese government to adopt the laws at issue.³⁹ The United States Court of Appeals for the Second Circuit held that once Chinese law was established through evidence provided by the Chinese government, the act of state doctrine barred plaintiffs' efforts to impugn the law by inquiring into "the underlying reasons and motivations for the actions of the foreign government."⁴⁰ The court went on to hold that principles of international comity required dismissal on jurisdictional grounds.⁴¹

B. EXTRATERRITORIAL RECOGNITION

The act of state doctrine does not always require that a United States court give effect to a foreign government's sovereign acts when those acts purport to have effect outside the foreign sovereign's territory. In *Villoldo v. Castro Ruz*, the United States Court of Appeals for the First Circuit refused to allow judgment creditors of Cuba to execute on property in the United States that Cuban law purported to expropriate.⁴² The court declined to depart from the extraterritoriality exception where allowing plaintiffs to execute on the property would be contrary to the express wishes of the executive branch, hamper United States foreign policy by preventing the United States government from using the assets in ongoing negotiations with Cuba, and frustrate Congressional sanctions by permitting a flow of currency from the United States to Cuba.⁴³

Conversely, in *Federal Treasury Enterprise Sojuzplodoimport v. Spirits International B.V.*, the United States Court of Appeals for the Second Circuit gave effect to a foreign government's decree assigning all of its interests in a United States trademark. Because it "was a wholly intragovernmental transfer of rights" that did not purport to alter anyone else's rights or interests, and addressed "a question of Russian law decided within Russia's borders, rather than a matter of United States law with a situs in the United

38. *In re Vitamin C Antitrust Litig.*, 837 F.3d 175 (2d Cir. 2016).

39. *Id.* at 191–92.

40. *Id.* at 191 (quoting *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 452 (2d Cir. 1987)).

41. *Id.* at 194–95.

42. *Villoldo v. Castro Ruz*, 821 F.3d 196, 206 (1st Cir. 2016).

43. *Id.* at 203.

States,” the decree was a sovereign—and not commercial—act whose validity cannot be questioned in a United States court.⁴⁴

And in two other cases, district courts accepted that they could not inquire into the validity of a foreign expropriation, yet found they could adjudicate related acts taken in the United States: a foreign state’s compliance with the by-laws of the company whose shares it had expropriated,⁴⁵ in one; and in the other, allegations of fraudulent conveyance in the United States to avoid the consequences of an international arbitration concerning the alleged expropriation.⁴⁶

C. FOREIGN CRIMINAL ALLEGATIONS

In *Ates v. Gulen*, plaintiffs alleged that certain Turkish officials conspired to persecute them by planting evidence, fabricating search warrants, securing illegal wiretaps, and arresting and detaining them without lawful basis.⁴⁷ The district court dismissed in part on act of state grounds, finding that adjudicating the claims risked inquiry into the legal validity of the alleged conspirators’ conduct as well as of the subsequent actions of the Turkish government to indict them.⁴⁸

V. International Discovery

A. OBTAINING UNITED STATES DISCOVERY FOR USE IN FOREIGN PROCEEDINGS

In 2016, several United States courts considered whether to order discovery for use in proceedings before foreign or international tribunals, pursuant to 28 U.S.C. § 1782(a) and *Intel Corp. v. Advanced Micro Devices, Inc.*⁴⁹ While many courts granted discovery requests,⁵⁰ a similar number rejected them, citing, among other factors, the burdensome nature of the request,⁵¹ the foreign tribunal’s opposition to U.S. judicial assistance,⁵² and

44. Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int’l B.V., 809 F.3d 737, 744 (2d Cir. 2016).

45. Petersen Energia Inversora, S.A.U. v. Argentine Republic, 2016 WL 4735367, at *7–8 (S.D.N.Y. Sept. 9, 2016).

46. Crystallex International Corp. v. Petróleo de Venezuela, S.A., 2016 WL 5724777, at *9–10 (D. Del. Sept. 30, 2016).

47. *Ates v. Gulen*, No. 3:15-CV-2354, 2016 WL 3568190, at *1 (M.D. Pa. June 29, 2016).

48. *Id.* at *16.

49. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256–66 (2004).

50. See, e.g., *In re Michael Kors, LLC*, No. 2:15-cv-1978 (CCC) (JBC), 2016 WL 4472950 (D.N.J. Aug. 23, 2016); *In re Porsche Automobil Holding SE*, No. 15-mc-417 (LAK), 2016 WL 702327 (S.D.N.Y. Feb. 18, 2016).

51. *Andover Healthcare, Inc. v. 3M Co.*, 817 F.3d 621, 623–24 (8th Cir. 2016); *In re Global Energy Horizons Corp.*, 647 F. App’x 83, 86–87 (3d Cir. 2016).

52. *In re Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1040, 42 (N.D. Cal. 2016).

the requesting party's failure to exhaust discovery-related remedies in the foreign tribunal.⁵³

In a 2016 decision notable for its expansive view of the geographic scope of § 1782(a), the Eleventh Circuit, in *Sergeeva v. Tripleton International Limited*, upheld an order requiring an Atlanta-based company to produce documents maintained by its Bahamian affiliate.⁵⁴ In so holding, the Eleventh Circuit rejected the company's argument that it should not be required to produce documents located outside of the United States; in the court's view, based on the plain language of § 1782(a) and the significant discretion afforded district courts thereunder, the "location of responsive documents and electronically stored information . . . does not establish a *per se* bar to discovery."⁵⁵

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

In 2016, several United States courts also considered whether to order the production of discovery abroad for use in United States proceedings. Among them was the District Court for the Northern District of Illinois, which declined to require two foreign, non-party banks with small branch offices in Chicago to search for and produce information from their overseas entities, reasoning based on *Daimler AG v. Bauman*,⁵⁶ that it lacked personal jurisdiction over the banks, and that comity concerns militated against requiring them to comply with the plaintiff's "broad discovery requests."⁵⁷ Wielding its judicial power less reservedly, the United States District Court for the Southern District of New York, in a case arising out of the alleged

53. *In re Elvis Presley Enters. LLC*, No. 15mc386 (DLC), 2016 WL 843380, at *3 (S.D.N.Y. Mar. 1, 2016).

54. *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194 (11th Cir. 2016).

55. *Id.* at 1200. Three federal appellate courts, in cases pre-dating *Sergeeva*, suggested in dicta that § 1782 does *not* permit the production of documents located abroad. See *Kestrel Coal Pty. Ltd. v. Joy Global, Inc.*, 362 F.3d 401, 404 (7th Cir. 2004) (quoting commentary from one of the principal drafters of the statute that § 1782 "was not intended to enable litigants to obtain in Spain evidence located in Spain that could not be obtained through proceedings in Spain"); *Four Pillars Enters. Co. v. Avery Dennison Corp.*, 308 F.3d 1075, 1079-80 (9th Cir. 2002) (stating there is "some support" for the view that § 1782 does not "encompass[] the discovery of material located in foreign countries" and affirming the denial of discovery of overseas materials); *In re Sarrio, S.A.*, 119 F.3d 143, 147 (2d Cir. 1997) (observing that while § 1782 does not, "[o]n its face . . . limit its discovery power to documents located in the United States," the legislative history suggests that "Congress intended to reach only evidence located" here). Most district courts have adopted this view. See *In re Certain Funds, Accounts, and/or Inv. Vehicles Managed by Affiliates of Fortress Inv. Grp. LLC*, No. 14 Civ. 1801 (NRB), 2014 WL 3404955, at *4 (S.D.N.Y. July 9, 2014) ("In examining a party's request to conduct discovery for use in a foreign proceeding, courts have read into § 1782 a threshold requirement that the material sought be located in the United States."); but see *In re Gemeinschaftspraxis*, No. M19-88 (BSJ), 2006 WL 3844464, at *5 (S.D.N.Y. Dec. 29, 2006) (declining to impose such a requirement).

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

57. *Leibovitch v. Iran*, No. 08 C 1939, 2016 WL 2977273, at *6-17 (N.D. Ill. May 19, 2016).

manipulation of London interbank offer rates for yen, ordered multiple bank defendants to produce documents received from and delivered to UK regulators, notwithstanding a regulator's objection and the fact that disclosure would risk violating the UK data privacy law.⁵⁸

VI. Extraterritorial Application of United States Law

A. RICO

In *RJR Nabisco, Inc. v. European Community*, the Supreme Court of the United States held that the substantive prohibitions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(b)-(c), apply extraterritorially, but only if foreign conduct violates a predicate offense that itself is intended to apply extraterritorially.⁵⁹ Applying the framework of *Morrison v. National Australia Bank, Ltd.*⁶⁰ and *Kiobel v. Royal Dutch Petroleum Co.*,⁶¹ the Court found “a clear indication” that RICO applies extraterritorially, thereby rebutting the extraterritoriality presumption. Even though RICO does not contain “an express statement of extraterritoriality,” Congress “has defined ‘racketeering activity’ . . . to encompass violations of predicate statutes that *do* expressly apply extraterritoriality,” making RICO “the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality.”⁶²

The Supreme Court, however, reversed the Second Circuit's holding that 18 U.S.C. § 1964(c), RICO's private right of action, permits suits premised on injuries that occurred abroad.⁶³ The Court held that the extraterritoriality presumption must be applied separately to RICO's private right of action, and concluded that section 1964(c) lacked “a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States.”⁶⁴ Thus, a private RICO plaintiff “must allege and prove a *domestic* injury to its business or property.”⁶⁵

Justice Ginsburg, joined by Justices Breyer and Kagan, dissented in part, and would have held that RICO's private right of action does not contain a domestic injury requirement.⁶⁶ Justice Breyer also wrote separately, arguing against deference to the United States Government's view that allowing civil RICO actions for foreign injuries may cause international friction.⁶⁷

58. *Laydon v. Mizuho Bank, Ltd.*, No. 12 Civ. 3419 (GBD) (HBP), 2016 WL 1718387, at *2–15 & n.17 (S.D.N.Y. Apr. 29, 2016).

59. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101–02 (2016).

60. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010).

61. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

62. *RJR Nabisco*, 136 S. Ct. at 2102–03.

63. *Id.* at 2106. Last year's Year in Review discussed the Second Circuit's decision.

64. *Id.* at 2106–11.

65. *RJR Nabisco*, 136 S. Ct. at 2106.

66. *Id.* at 2112–13 (Ginsburg, J., concurring in part and dissenting in part).

67. *Id.* at 2116–17 (Breyer, J., concurring in part and dissenting in part).

B. FOURTH AND FIFTH AMENDMENTS

The United States Supreme Court granted certiorari in *Hernandez v. Mesa*, a case where a Mexican teenager, standing on the Mexican side of the United States-Mexico border, was shot and killed by a United States Border Patrol agent standing on the United States side.⁶⁸ In the *en banc* decision below, the United States Court of Appeals for the Fifth Circuit held that the plaintiff could not assert a claim under the Fourth Amendment and the agent was entitled to qualified immunity.⁶⁹ The Court added a question to the grant of certiorari—likely inspired by the United States government’s amicus brief—requiring the parties to brief whether *Bivens v. Six Unknown Federal Narcotics Agents*⁷⁰ would even permit the claim at issue.⁷¹

C. STORED COMMUNICATIONS ACT

Applying *RJR Nabisco*, the United States Court of Appeals for the Second Circuit held that Congress did not intend the warrant provisions of the Stored Communications Act (SCA), 18 U.S.C. § 2701 et seq., to apply extraterritorially, thus quashing a government warrant seeking customer e-mail content stored at Microsoft’s datacenter in Ireland.⁷² The court relied heavily on the fact that the SCA’s focus was on protecting a user’s privacy in stored communications.⁷³

D. ANTITRUST

As noted above, in *In re Vitamin C Antitrust Litigation*, the United States Court of Appeals for the Second Circuit dismissed an antitrust suit against Chinese manufacturers and California-based sellers alleging a price and supply-fixing conspiracy where the Chinese Government filed an amicus brief asserting that Chinese law compelled the defendants’ actions.⁷⁴ The Second Circuit held that it should defer to the foreign government’s representation concerning “the construction and effect of its laws and regulations,” and that principles of international comity justified abstention from exercising jurisdiction.⁷⁵

68. *Hernandez v. Mesa*, 137 S. Ct. 291 (2016).

69. *Hernandez v. United States*, 785 F.3d 117, 119–21 (5th Cir. 2015) (analyzed in last year’s Year in Review).

70. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

71. *Mesa*, 137 S. Ct. 291.

72. *In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, 829 F.3d 197, 211–21 (2d Cir. 2016).

73. *Id.* at 216–20, 231–33 (Lynch, J., concurring in the judgment). In a separate concurrence, Judge Lynch called on Congress to update the SCA.

74. *In re Vitamin C Antitrust Litig.*, 837 F.3d 175 (2d Cir. 2016).

75. *Id.* at 188–94.

E. TRADEMARK

Addressing the reach of the Lanham Act, the United States Court of Appeals for the Ninth Circuit reaffirmed that *Morrison* extraterritoriality is a merits question, not a question of federal courts' subject-matter jurisdiction.⁷⁶ The court of appeals then applied *RJR Nabisco* and its own precedent of *Timberlane Lumber Co. v. Bank of American National Trust & Savings Association*⁷⁷ to hold that the Lanham Act applied extraterritorially where a Canadian retailer was purchasing United States trademarked grocery products and reselling them without authorization in Canada, potentially causing reputational harm.⁷⁸

VII. Recognition and Enforcement of Foreign Judgments

In United States courts, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards, otherwise known as the “New York Convention,” governs the recognition and enforcement of most foreign arbitral awards.⁷⁹ State law, however, governs the recognition and enforcement of foreign court judgments.

A. FOREIGN ARBITRAL AWARDS

In *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, the United States Court of Appeals for the Second Circuit held that a district court did not abuse its discretion by confirming an arbitral award nullified by a foreign judgment at the seat of the arbitration where that foreign judgment was found to be contrary to United States public policy.⁸⁰ During an arbitration between the petitioner COMMISA and PEP, an instrumentality of the Mexican government, the Mexican Congress enacted a statute making clear that Mexican law did not permit arbitration for the types of administrative claims brought by COMMISA.⁸¹ After the arbitral tribunal issued an award in COMMISA's favor, the Mexican analog of the D.C. Court of Appeals held that PEP's actions were not subject to arbitration and therefore annulled the award.⁸²

76. *Trader Joe's Co. v. Hallatt*, 835 F.3d 960, 966–69 (9th Cir. 2016).

77. *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976).

78. *Trader Joe's Co. v. Hallatt*, 835 F.3d 960, 969–75 (9th Cir. 2016).

79. The Convention is implemented in U.S. law through Chapter 2 of the Federal Arbitration Act (“FAA”). See United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards, Art. 21, June 10, 1958, U.S.T. 2517; 9 U.S.C. § 201–08 (2013). The Inter-American Convention on International Commercial Arbitration governs the recognition and enforcement of awards if a majority of the parties to an arbitration agreement are citizens of states that have ratified it. The Inter-American Convention is implemented in Chapter 3 of the FAA. See 9 U.S.C. § 301–307 (2013).

80. *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 97 (2d Cir. 2016).

81. *Id.* at 99, 108–09.

82. *Id.*

The district court refused to grant comity to the Mexican judgment and the Second Circuit affirmed, ruling that the Mexican judgment “violated basic notions of justice” by, in the United States court’s eyes, retroactively disrupting contractual expectations in favor of a state enterprise and leaving COMMISA without a remedy, although the Mexican court, as a matter of Mexican law, had found no retroactivity.⁸³

In *GSS Group Ltd. v. National Port Authority of Liberia*, the United States Court of Appeals for the D.C. Circuit held that subject matter jurisdiction could not be exercised over Liberia to confirm an arbitral award under an agency theory in which Liberia ordered its Port Authority to cancel a construction contract.⁸⁴ Although the wholly state-owned corporation had no discretion to ignore Liberia’s order, the court found that Liberia was exercising its authority as a regulator, rather than a shareholder, as the Port Authority had entered into the contract without the competitive bidding required by state contract procurement procedures.⁸⁵

In *Human v. Czech Republic—Ministry of Health*, the United States Court of Appeals for the D.C. Circuit addressed whether subject matter jurisdiction existed to enforce an arbitral award against the Czech Republic arising from an agreement to supply medical technology and services in exchange for a share of processed blood plasma.⁸⁶ The court found the Czech Republic was not entitled to sovereign immunity under the FSIA’s arbitration exception because its relationship with the claimant was a legal, although not necessarily a contractual, relationship that “may be governed” by an international agreement, namely the New York Convention.⁸⁷ The FAA’s additional requirement that the legal relationship be “considered as commercial” for purpose of enforcement in the United States of Convention awards was satisfied because, despite the lack of monetary payment under the parties’ relationship, there was clearly an exchange of valuable commodities.⁸⁸

B. FOREIGN COURT JUDGMENTS

In *Chevron Corporation v. Donziger*, the United States Court of Appeals for the Second Circuit affirmed an order enjoining enforcement of defendants’ foreign court judgment anywhere in the United States and imposing a constructive trust on any property acquired by Donziger and two Ecuadorian defendants anywhere in the world traceable to the judgment.⁸⁹ Affirming the district court’s findings that defendants had obtained their \$8.646 billion judgment by, among other things, bribing the Ecuadorian

83. *Id.* at 100, 107–08.

84. *GSS Grp. Ltd. v. Nat’l Port Auth. of Liberia*, 822 F.3d 598, 606 (D.C. Cir. 2016).

85. *Id.*

86. *Human v. Czech Republic—Ministry of Health*, 824 F.3d 131,133–34 (D.C. Cir. 2016).

87. *Id.* at 135–36 (quoting 28 U.S.C. § 1605(a)(6)).

88. *Id.* (quoting 9 U.S.C. § 201).

89. *Chevron Corp. v. Donziger*, 833 F.3d 74, 80–81 (2d Cir. 2016).

judge who issued it and ghostwriting his decision, the district court exercised its equitable powers under New York common law to grant the judgment debtor relief from a judgment procured by fraud.⁹⁰ The court rejected the argument that New York's Uniform Foreign Country Money-Judgments Recognition Act, which authorizes defensive but not affirmative challenges to the validity of a foreign judgment, supplanted Chevron's common-law cause of action.⁹¹ Nor did the district court order offend international comity, as it exercised power only over individuals subject to the court's jurisdiction, was limited to the United States, and did not invalidate the foreign judgment itself, so that other judgment creditors not before the court were free to continue to seek to enforcement in other countries.⁹²

VIII. Forum Non Conveniens

A. FORUM SELECTION CLAUSES

In *Atlantic Marine Construction Company, Inc. v. United States District Court*, the United States Supreme Court held that a valid forum-selection clause mandating a foreign forum usually requires dismissal for *forum non conveniens*, except in the unusual instance when the public interest factors outweigh the forum-selection clause.⁹³ Two years later, courts continue to define the boundaries of *Atlantic Marine*. In one case, the United States Court of Appeals for the Fifth Circuit defined the standards that apply to different aspects of the *Atlantic Marine* inquiry, and in another decision, it identified, without deciding, an important conflict-of-laws issue that could impact future disputes.

In *Weber v. PACT XPP Techs., AG*, the United States Court of Appeals for the Fifth Circuit defined the different bodies of law that apply to the interpretation versus the enforceability of a forum selection clause, and also adopted a mixed standard of review for the *Atlantic Marine* analysis.⁹⁴ The case arose from an employment contract between a CEO and a German company. The contract provided that the CEO was entitled to proceeds earned in patent litigation and contained a forum selection clause electing Germany as the proper forum.⁹⁵ The dispute followed a jury verdict in favor of PACT in a patent suit, an event that might have given rise to a substantial payday for the plaintiff CEO.⁹⁶ After the verdict but before the judgment was entered, the company voted the CEO out of office.⁹⁷ The CEO sued the company for breach of contract, *quantum meruit*, and promissory

90. *Id.* at 117–19.

91. *Id.* at 140–43.

92. *Id.* at 143–45.

93. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568 (2013).

94. *Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 768 (5th Cir. 2016).

95. *Id.* at 763.

96. *Id.*

97. *Id.* at 763–764

estoppel.⁹⁸ The company moved to dismiss on *forum non conveniens* grounds, arguing that Germany was the proper forum. The district court dismissed.⁹⁹

On appeal, the Fifth Circuit identified two distinct issues related to the forum-selection clause: one issue involved the legal interpretation of the clause and the other issue involved its enforceability. The court held that while the interpretation of the clause in a diversity case is governed by the forum state's choice-of-law rules, the enforceability of the clause is governed by federal law.¹⁰⁰ The court also held that it would review both interpretation and enforceability of forum-selection clauses *de novo*, and would review the court's application of the *forum non conveniens* balancing test for abuse of discretion. It ultimately affirmed the district court's dismissal.¹⁰¹

Subsequently, in *Barnett v. DynCorp International*, the United States Court of Appeals for the Fifth Circuit affirmed a district court's dismissal for *forum non conveniens* due to a foreign forum-selection clause while leaving unresolved the issue of what law applies to determine whether a forum-selection clause is valid in the first place—that is, whether under the *Weber* framework just discussed, validity is a matter of interpretation or enforceability.¹⁰² The dispute arose from an employment agreement between an employee and a Texas-based company containing a forum-selection clause electing Kuwait as the proper forum.¹⁰³ After the company terminated the employee and promised to pay his benefits and unpaid wages, the employee sued in federal court in Texas, alleging that he never received those benefits.¹⁰⁴ The district court granted the company's motion to dismiss for *forum non conveniens* over the employee's objections that the forum-selection clause was void under Texas law and unenforceable under federal law.¹⁰⁵ On appeal, the Fifth Circuit noted that contractual validity was not at issue in *Atlantic Marine* and that neither the Fifth Circuit nor the Supreme Court had specified what source of law governs validity of a forum-selection clause.¹⁰⁶ The employee argued that validity is a matter of substantive contract law and should thus be decided under Texas law, while the company argued that validity is really a matter of enforceability, and therefore was governed by federal law.¹⁰⁷ The Fifth Circuit found support for both positions, but determined that it need not decide the issue because

98. After the CEO filed suit, PACT filed the civil law equivalent of a declaratory judgment action in Germany, requesting a declaration that the compensation agreement was invalid under German law because it had not been ratified by PACT's shareholders. *Id.* at 764.

99. *Id.* at 766.

100. *Id.* at 770.

101. *Id.* at 768, 775–76.

102. *Barnett v. DynCorp Int'l, L.L.C.*, 831 F.3d 296 (5th Cir. 2016).

103. *Id.* at 299.

104. *Id.*

105. *Id.* at 301.

106. *Id.* at 301.

107. *Id.* at 301–02.

dismissal was proper under both Texas and federal law.¹⁰⁸ The question thus continues to exist as a gap exists in post-*Atlantic Marine* jurisprudence.

IX. Parallel Proceedings

A. INTERNATIONAL ABSTENTION

Federal courts continue to apply the general policy that “[a]bstention from exercise of federal jurisdiction is the exception, not the rule.”¹⁰⁹ In *Custom Polymers PET, LLC v. Gamma Meccanica SPA*, the court rejected the defendant’s motion to stay parallel court proceedings in Italy, concluding that the comity analysis favored exercising jurisdiction and proceeding with the suit.¹¹⁰ Although the defendant’s Italian lawsuit preceded the plaintiff’s suit, the other factors—such as the forum selection clause and the location of witnesses—weighed against abstention.¹¹¹

Similarly, district courts in the Second Circuit confirmed that a court should decline to exercise jurisdiction only in exceptional circumstances. In *Schenker A.G. v. Société Air France*, the district court refused to stay or dismiss a German freight forwarder’s antitrust action against several airlines despite a pending Dutch action.¹¹² The court first observed that the parties in the two actions were different, so abstention would leave claims against certain defendants unresolved for a long time.¹¹³ The court next reasoned that the general preference for deferring to the initially filed action does not apply when that action seeks declaratory relief in response to a direct threat of litigation.¹¹⁴ In *C.D.S. Inc. v. Zetler*,¹¹⁵ the district court refused to abstain in deference to a proceeding in French court where the parties were not French companies, the connection with France was weak, and French law did not govern.¹¹⁶ The court concluded it would be inappropriate for a French court to decide U.S. copyright law issues and resolve United States law violations between parties that conduct business primarily within the United States.¹¹⁷ Indeed, even where foreign law applied, as in *In re Atari, Inc.*,¹¹⁸ the bankruptcy court refused to abstain in favor of a French court because the dispute concerned the interpretation and enforcement of the bankruptcy court’s own confirmation order.¹¹⁹

108. *Id.* at 302–303.

109. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

110. *Custom Polymers PET, LLC v. Gamma Meccanica SpA*, 185 F. Supp. 3d 741, 29–30 (D.S.C. 2016), *appeal dismissed* (Sept. 22, 2016).

111. *Id.* at 756–57.

112. *Schenker A.G. v. Societe Air Fr.*, 2016 U.S. Dist. LEXIS 50422 (E.D.N.Y. Apr. 13, 2016).

113. *Id.* at *6.

114. *Id.* at *8.

115. *C.D.S. Inc. v. Zetler*, 2016 U.S. Dist. LEXIS 104318 (S.D.N.Y. Aug. 3, 2016).

116. *Id.* at *18.

117. *Id.* at *16.

118. *In re Atari, Inc.*, No. 13-10176, 2016 Bankr. LEXIS 1779 (U.S. Bankr. S.D.N.Y. Apr. 20, 2016).

119. *Id.* at *45–46.

The Seventh Circuit in *Deb v. Sirva, Inc.* distinguished the abstention doctrine from *forum non conveniens*.¹²⁰ The court of appeals noted that abstention “conserve[s] judicial resources by abstaining from accepting jurisdiction when there is a parallel proceeding elsewhere,” whereas the *forum non conveniens* determination considers “the adequacy of the forum along with a balancing of the [parties’] interests.”¹²¹

B. ANTI-SUIT INJUNCTIONS

Federal circuits remain split in their approach to enjoining foreign litigation. In *BAE Systems Technology Solution & Services v. Republic of Korea’s Defense Acquisition Program Administration*,¹²² the district court enjoined the defendants from taking any action in Korea, after analyzing both the factors governing both preliminary injunctions and anti-suit injunctions under Fourth Circuit standards,¹²³ but limited the injunction’s duration in light of jurisdictional concerns, potential comity, and national security implications, and urged the parties to agree to stay the Korean action.¹²⁴ In contrast, courts in the Ninth Circuit have followed a more liberal approach, which does not require a likelihood of success on the merits to obtain an anti-suit injunction. For example, in *Tahaya MISR Inv., Inc. v. Helwan Cement S.A.E.*, the district court enjoined an Egyptian action as a violation of the parties’ forum selection clause after considering only whether the two suits involved the same parties, the possible frustration of the forum’s policy, and the impact on comity.¹²⁵

The Second Circuit considered a request for an anti-suit injunction in a context involving novel questions of bankruptcy law, maritime law, and the federal interpleader statute. In *Hapag-Lloyd Aktiengesellschaft v. United States Oil Trading LLC*, after finding subject-matter and *in rem* jurisdiction, the United States Court of Appeals for the Second Circuit held that a district court may enter a foreign anti-suit injunction under the federal interpleader injunction statute, 28 U.S.C. § 2361.¹²⁶ The court explained that “while the statute itself has no extraterritorial reach, federal courts have long possessed the inherent power to restrain the parties before them from engaging in suits in foreign jurisdictions.”¹²⁷ The Second Circuit then

120. *Deb v. SIRVA, Inc.*, 832 F.3d 800, 814–15 (7th Cir. 2016).

121. *Id.*

122. *BAE Sys. Tech. Solution & Servs. v. Republic of Korea’s Def. Acquisition Program Admin.*, 2016 U.S. Dist. LEXIS 94028 (D. Md. July 19, 2016).

123. *Id.* at *6–9, *16, *53.

124. *Id.* at *52–53.

125. *Tahaya MISR Inv., Inc. v. Helwan Cement S.A.E.*, No. 2:16-cv-01001-CAS(AFMx), 2016 U.S. Dist. LEXIS 98888 at *7–18 (C.D. Cal. July 27, 2016).

126. *See Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC*, 814 F.3d 146, 154 (2d Cir. 2016).

127. *Id.* (citing *China Trade Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987)).

remanded the case to the district court for a proper analysis regarding the injunction's scope.¹²⁸

128. *Id.* at 155.