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**International Litigation**

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International Litigation

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International Litigation


I. Foreign Sovereign Immunities Act

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

A. Jurisdictional Exceptions

In Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela, the U.S. Court of Appeals for the D.C. Circuit, on remand from the U.S. Supreme Court, applied the heightened standard previously announced for establishing jurisdiction over a sovereign under the FSIA's expropriation exception.² Following the Supreme Court's determination that a plaintiff must make more than a non-frivolous showing that the

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¹ This article summarizes developments in international litigation during 2018. The article was edited by Aaron Marr Page, managing attorney at Forum Nobis PLLC in Washington, D.C. Jonathan I. Blackman, a partner at Cleary Gottlieb Steen & Hamilton LLP in New York and London, and Carmine D. Boccuzzi, a Cleary Gottlieb partner in New York, authored Sections I and VII, with assistance from Paul Kleist and Katie Gonzalez, associates, and Hyungwoo Lee and Canem Ozyildirim, law clerks, at the same firm. Theodore J. Folkman, a shareholder at Murphy & King in Boston and author of Letters Blogatory: The Blog of International Judicial Assistance, authored Section II. Phillip B. Dye, Jr., a partner at Vinson & Elkins L.L.P. in Houston, Texas, authored Sections III and VIII, with assistance from Anna Rose Johnson and Jessica M. Pagano, associates at the same firm. Matthew D. Slater, a partner at Cleary Gottlieb in Washington, D.C., authored Section IV, with assistance from Caroline Stanton, associate, and Sameer Jaywant, law clerk, at the same firm. (Note: The firm represented Anheuser-Busch and BNP Paribas in the cases described in Section IV.) Howard S. Zelbo, a partner at Cleary Gottlieb in New York, authored Section V, with assistance from Paul Kleist and Katie Gonzalez. Igor V. Timofeyev, Charles A. Patrizia, and Joseph R. Profaizer, partners at Paul Hastings LLP in Washington, D.C., authored Section VI and IX, with assistance from Katherine Johnson, Noah N. Simmons, and Jay Tymkovich, associates at the same firm.

expropriation exception applies, the court held that a U.S. parent company, but not its Venezuelan subsidiary, had sufficiently alleged a violation of international law when Venezuela assumed control of its Venezuelan subsidiary. But the Venezuelan subsidiary was barred from suit by the “domestic takings rule,” which precludes nationals from seeking redress for property seized by their home country.

In Comparelli v. Republica Bolivariana De Venezuela, the U.S. Court of Appeals for the Eleventh Circuit applied Helmerich to revive claims against Venezuela, which had been dismissed by the district court. The court held that the expropriation exception’s “nexus requirement”—providing a requisite connection to the United States sufficient to allow extraterritorial application”—would be sufficient to rebut the presumption against extraterritoriality. The court remanded to the lower court to determine whether Plaintiffs met the nexus requirement.

In Schubarth v. Federal Republic of Germany, the D.C. Circuit affirmed in part and reversed in part the dismissal of a suit, claiming that Germany and its agency or instrumentality unlawfully seized Plaintiff’s property in Germany. The court followed its previous decision in De Csepel v. Republic of Hungary to determine that the expropriation exception applies differently to an agency or instrumentality of a foreign state than it does to the state itself. The court explained that although Germany was immune from suit under the expropriation exception because the property was not located in the United States, there is no such restriction to claims against an agency or instrumentality of a foreign state for property located abroad.

As to the FSIA’s waiver exception, in BAE Systems v. Korea’s Defense Acquisition Program Administration, the U.S. Court of Appeals for the Fourth Circuit found that Korea implicitly waived its immunity because it failed to assert sovereign immunity in either its motion to dismiss or its first responsive pleading. The court thus joined the Second and Seventh Circuits in holding that a foreign state waives its sovereign immunity defense by failing to raise it in its initial pleading.

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5. Id. at 447–48, 453.
7. Id. at 1324–25.
8. Id. at 1326.
11. Schubarth, 891 F.3d at 401.
12. Id. at 399–401.
B. Execution Exceptions

In Rubin v. Islamic Republic of Iran, the U.S. Supreme Court resolved a circuit split regarding execution under the FSIA’s “terrorism” exception in § 1610(g).\textsuperscript{15} In an 8–0 decision, the Supreme Court held that § 1610(g), which provides for automatic veil-piercing to enforce judgments against state sponsors of terrorism under § 1605A’s terrorism exception to jurisdictional immunity, does not provide a “freestanding” exception to execution immunity because the property at issue must be otherwise not immune under a separate provision of § 1610.\textsuperscript{16} The Court rejected Petitioners’ argument that § 1610(g) provided an independent basis for execution immunity because doing so would render the remaining § 1610 provisions “superfluous” and is at odds with “historical practice.”\textsuperscript{17} Therefore, the judgment holders who sought to execute against artifacts owned by Iran and located in the United States could not do so because they had not “identifie[d] a basis under one of § 1610’s express immunity-abrogating provisions to attach and execute against a relevant property.”\textsuperscript{18}

C. Jurisdiction over Criminal Cases

In In re Grand Jury Subpoena, the U.S. Court of Appeals for the D.C. Circuit rejected a foreign state-owned corporation’s argument that it had sovereign immunity against enforcement of a subpoena issued in a grand jury investigation (reportedly the investigation led by Special Counsel Robert S. Mueller III into Russian interference in the 2016 presidential election).\textsuperscript{19} Assuming that sovereign immunity “extends to the criminal context,”\textsuperscript{20} the court held that foreign state-owned corporations are subject to criminal jurisdiction in the U.S. and that the FSIA’s immunity exceptions apply to criminal as well as civil cases.\textsuperscript{21} The court then went on to find that the commercial activity exception covered the subpoena.\textsuperscript{22} This decision departs from the normal understanding that the FSIA by its terms applies only to civil litigation, and it will be interesting to see whether it is followed in other cases.

\textsuperscript{15} Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 827 (2018). See Rubin v. Islamic Republic of Iran, 830 F.3d 470, 487 (7th Cir. 2016); Bennett v. Islamic Republic of Iran, 825 F.3d 949, 959 (9th Cir. 2016).
\textsuperscript{16} Id. at 827.
\textsuperscript{17} Id. at 825.
\textsuperscript{18} Id. at 824.
\textsuperscript{19} See In re Grand Jury Subpoena, No. 18 Civ. 3071 (D.C. Cir. Dec. 18, 2018), ECF No. 1764819. The court indicated that a fuller opinion will follow.
\textsuperscript{20} Id. at 1.
\textsuperscript{21} Id. at 2–3.
\textsuperscript{22} Id. at 3.
II. International Service of Process

As noted in last year’s Year in Review, the U.S. Supreme Court recently resolved a key interpretative question under the Hague Service Convention by holding that Article 10(a) permits service of process by postal channels in the absence of objection from the state of destination. In 2018, U.S. courts turned their attention to another longstanding interpretative question: to what extent can parties contract around the Convention?

In Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., the parties’ arbitration agreement included a provision accepting service of process by FedEx or a similar courier in the event of later proceedings. When Rockefeller sought to confirm an arbitral award in the Los Angeles County Superior Court and served process on SinoType by FedEx, SinoType defaulted and then moved to set aside the judgment as void on the grounds of insufficient service of process because China had objected to service by postal channels under Article 10(a). The lower court denied the motion, but on appeal, the court reversed.

The holding is consistent with the baseline understanding of the Convention as “exclusive,” but not “mandatory,” in the words of the Hague Conference on Private International Law. The Convention’s exclusive character means that when it applies, parties must use one of the methods of service it authorizes or permits. The Convention’s non-mandatory character means that the law of the forum, not the Convention itself, determines when there is “occasion to transmit a judicial document for service abroad.” This already difficult distinction has become even more complicated by the unfortunate substitution of the word “mandatory” for the word “exclusive” in some U.S. cases, including the leading case of Volkswagenwerk AG v. Schlunk.

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26. Rockefeller, 233 Cal. Rptr. 3d at 818.
27. Id. at 819; see also Declarations of People’s Republic of China, HCCH, https://www.hcch.net/en/instruments/conventions/status-table/notifications/?cid=393&disp=resdn (last visited Apr. 10, 2019) (related to Special Administrative Region of Hong Kong Convention).
28. Rockefeller, 233 Cal. Rptr. 3d at 823.
30. Convention, supra note 19, art. 1.
Convention was “mandatory” when it applied, but that because state law authorized service on a German defendant by delivering the summons and complaint to its US subsidiary, the Convention did not apply—or in the Hague Conference’s preferred language, that the Convention is exclusive but non-mandatory.32

In Rockefeller, the parties not only agreed to a particular method of service, but also implicitly agreed that it was necessary to transmit the summons and complaint to China. Thus, the Convention applied, and the parties’ agreement was an agreement contrary to the exclusive character of the Convention. The Rockefeller court correctly recognized that more than the parties’ private interests are involved. China itself has an interest. The Convention gives “each contracting state—not the citizens of those states”—the power to decide whether alternate methods of service are permissible.33 In particular, Article 10 gives the “state of destination” the power to object,34 which China has done. Chinese internal law also makes it clear that service of process in China is impermissible without the consent of the relevant Chinese authorities.35 The Chinese approach is consistent with the view of many civil law states, which regard the service of process on their territory as a sovereign act that must be performed by state officials.

The court rejected what it took to be the holding of the New York case, Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L.,36 namely, that parties could waive the application of the Convention. While the Mann court indeed stated, without support or citation, that it saw “no reason why the requirements of the Convention may not be waived by contract,”37 this conclusion was not necessary because the party challenging proper service in Mann had more broadly “waived [his] right to service of process of any summons or complaint.”38 Thus, the conflict between the New York and California cases may be less stark than it appears.

Read together, the cases appear to reflect that, because the Convention is non-mandatory, parties wishing to avoid the burdens of service under the Convention may agree ex ante to appointment an agent for service of process in the United States or may agree to waive the requirement of service of process altogether. Such agreements would raise no problems under the Convention (though they might raise other concerns under the Due Process Clause if there were an issue about actual notice) because they avoid the need to transmit papers to China at all and thus render the Convention inapplicable. It is also noteworthy that a failure to raise the service issue in an answer will waive the issue, regardless of the Convention issues

32. Id. at 705, 707–08.
33. Rockefeller, 233 Cal. Rptr. 3d at 826.
34. Convention, supra note 19, art. 10.
35. Rockefeller, 233 Cal. Rptr. 3d at 826 (citing Civil Procedure Law of the PRC, art. 261).
37. Id. at 421.
38. Id. at 420.
involved. Thus, in the wake of 

Rockefeller, contracting parties may wish to consider careful drafting to avoid the issue raised by the case.

III. Personal Jurisdiction

A. Specific Jurisdiction

In Walden v. Fiore, analyzed in the 2014 volume of the Year in Review, the U.S. Supreme Court “le[ft] . . . for another day” questions concerning how defendants’ virtual presence and conduct may translate into contacts with a state that are sufficient to provide for personal jurisdiction—or more simply, the question of when a website can constitute purposeful availment for personal jurisdiction purposes.40 In 2018, the U.S. Court of Appeals for the First Circuit took up these questions in Plixer Int’l, Inc. v. Scrutinizer GmbH.41 The court found specific personal jurisdiction over a German corporation with no ties to the United States, except modest web-based sales.42

In the case, Scrutinizer operated an English software development website, while Plixer, “a Maine corporation,” owned the U.S. registered trademark “Scrutinizer.”43 Plixar sued Scrutinizer for trademark infringement, asserting personal jurisdiction over Scrutinizer under FRCP 4(k)(2), which broadly grants personal jurisdiction where the exercise does not violate due process and certain other requirements are met.44 To satisfy due process requirements, Plixer needed to show that Scrutinizer’s forum contacts represented purposeful availment of the forum.

Scrutinizer responded with three arguments. First, Scrutinizer argued that it “did no more than enter its products into the stream of commerce.”45 The court disagreed, noting that stream-of-commerce analysis applies in cases where entities cannot “predict or control” where their products will land, whereas Scrutinizer had the ability to predict and control where its website was accessible.46 Second, Scrutinizer argued that its contacts with the United States were the result of U.S. customers’ “unilateral actions,” not Scrutinizer’s.47 The court also found this unpersuasive, asserting that Scrutinizer could not claim its contacts with the United States were involuntary after knowingly serving U.S. customers for over three years with no attempts to limit its website’s accessibility to those customers.48 Third,

42. Id. at 4.
43. Id. at 4–5.
44. Id. at 5. Scrutinizer conceded that the claim arose from their forum activities. Id. at 7.
45. Id. at 8.
46. Id. For example, Scrutinizer could have included a disclaimer on its website that it was not intended for U.S. customers, or blocked U.S. users from accessing the website in the first place.
47. Id.
48. Id. at 9.
Scrutinizer argued that it “did not specifically target the United States,”49 relying on the Supreme Court case of J. McIntyre Mach., Ltd. v. Nicastro, where a plurality opinion held that personal jurisdiction was permitted “only where the defendant can be said to have targeted the forum.”50 The First Circuit declined to adopt this rule.51 Instead, the court followed Justice Breyer’s concurrence, which the court viewed as the narrowest holding from Nicastro, as it required nothing more than following then-existing Supreme Court precedent.52 This approach meant analyzing the case under Asahi Metal Indus. Co. v. Superior Court of California, Solano Cty.53 and Keeton v. Hustler Magazine.54 Under this analysis, the First Circuit concluded that Scrutinizer’s “regular flow or regular course of sales” in the U.S. demonstrated its purposeful availment of the U.S. forum.55 Further, the court found that Scrutinizer’s “voluntary service” of U.S. customers indicated that it could anticipate U.S. litigation.56 But the First Circuit emphasized that its ruling was highly fact-specific and expressly declined to create any general guidelines for how online activities should factor into minimum contacts analysis.57

B. GENERAL JURISDICTION

There is still a divide between states that do and do not extend personal jurisdiction based on corporate registration statutes. In Webb-Benjamin, LLC v. Int’l Rug Grp., LLC, the Superior Court of Pennsylvania held that Pennsylvania courts not only have jurisdiction over registered corporations, but that such jurisdiction also extends to cases arising from events that occurred prior to a corporation’s in-state registration.58 In Waite v. All Acquisition Corp., however, the U.S. Court of Appeals for the Eleventh Circuit ruled that a registered corporation in Florida was not automatically subject to general personal jurisdiction.59 The Montana Supreme Court in DeLeon v. BNSF Ry. Co. also rejected the notion that registration automatically provided for personal jurisdiction and found, on

49. Id. at 8.
52. Id. The court clarified that it did not intend to follow the New Jersey test described in Nicastro, which would confer jurisdiction on foreign defendants who know their products are distributed through a “system that might lead to those products being sold” anywhere.
56. Id. at 10.
57. Id. at 7–8.
59. Waite v. All Acquisition Corp., 901 F.3d 1307, 1321–22 (11th Cir. 2018).
the facts of the case, that registration, even combined with some business in the state, was insufficient for personal jurisdiction.60

IV. The Act of State Doctrine

The act of state doctrine is a prudential limitation on the exercise of judicial review, requiring U.S. courts to deem acts of foreign sovereigns taken within their own jurisdictions as valid.61

A. Antitrust Claims

In *Sea Breeze Salt, Inc. v. Mitsubishi Corp.*,62 the U.S. Court of Appeals for the Ninth Circuit rejected antitrust claims against the Mexican salt production corporation, ESSA, 51% owned by the Mexican government, and Mitsubishi Corporation, which owned the remaining 49%, arising out of ESSA’s refusal to honor plaintiffs’ purchase orders on account of an exclusivity deal with Mitsubishi.63 The Ninth Circuit applied the act of state doctrine on the basis that ESSA was the instrument through which Mexico determined how to exploit its natural resources and that the plaintiffs’ claim would require the court to adjudicate those determinations.64 The court held that “an official act for purposes of the act of state doctrine may be performed by an instrumentality of a foreign sovereign, such as a government-owned corporation.”65

In *Mountain Crest SRL, LLC v. Anheuser-Busch InBev SA/NV*,66 a Wisconsin district court similarly rejected antitrust claims against U.S. breweries on act of state grounds because the claims would have required the court to adjudicate the validity of distribution policies agreed to by Ontario state instrumentalities and later ratified by Ontario legislation.67 The Court found influential, but not controlling, the fact that an Ontario court rejected similar antitrust claims against the Ontario government instrumentality and the defendants’ Canadian subsidiaries on the basis that the conduct at issue was authorized by valid Ontario government policy.68

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63. Id. at 1067.
64. Id. at 1069.
65. Id. The Court applied its own and Fifth Circuit precedent rejecting antitrust claims against OPEC states on similar grounds. See id. at 1070; Spectrum Stores, Inc. v. Citgo Petroleum Corp., 632 F.3d 938, 944 (5th Cir. 2011).
67. Id. at *6–7.
68. Id. at *8.
B. Second Hickenlooper Amendment

Enacted after *Sabbatino*, the Second Hickenlooper Amendment restricts application of the act of state doctrine with respect to a “confiscation or other taking after January 1, 1959” that “violates principles of international law.” In *Von Saher v. Norton Simon Museum of Art at Pasadena*, the U.S. Court of Appeals for the Ninth Circuit rejected a quiet title action to recover paintings taken by the Nazis. The paintings had been claimed by another party in Dutch post-war restitution proceedings, which the Dutch government settled by agreeing to sell the paintings to the other party, who in turn conveyed them to a U.S. museum. The Court held that the act of state doctrine barred the claim and rejected the argument that the claim fell within the Second Hickenlooper Amendment’s exception because the Dutch government’s acts did not violate international legal principles by which it was bound at the time of its acts, but rather were acts done in accordance with a restitution scheme that aligned with those established by the United States and other Allied powers after World War II.

C. Indirect Claims

In *Kasbej v. BNP Paribas SA*, the U.S. Court of Appeals for the Second Circuit rejected claims of a putative class of Sudanese nationals against BNP Paribas for allegedly conspiring with and aiding and abetting the Sudanese government’s human rights abuses by financing the government. Plaintiffs argued that the act of state doctrine did not bar their claims because they were seeking not to invalidate the acts of the Sudanese government, but rather to “obtain damages” from a private party. The Court rejected this argument, holding that Plaintiffs’ secondary liability claims could only be sustained by assessing whether “the actions of the Government of Sudan, occurring within the then-existing territorial borders of Sudan, against the people of Sudan, amounted to state law violations . . . .”

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70. 22 U.S.C. § 2370(e)(2).
72. Id. at 1143.
73. Id.
74. Id. at 1153–55. In *Comparelli v. Venezuela*, the Court remanded for further assessment whether the expropriation exception to sovereign immunity and the Hickenlooper exception applied. 891 F.3d 1311, 1328 (11th Cir. 2018).
76. Id. at 777.
77. Id.
D. Appealability

In Petersen Energía Inversora S.A.U. v. Argentine Republic and YPF S.A., the Second Circuit held that rejection of an act of state defense is not immediately appealable by a foreign sovereign.78

V. International Discovery

A. Obtaining U.S. Discovery for Use in Foreign Proceedings

Among the statutory requirements for obtaining United States discovery for use in foreign proceedings under 28 U.S.C. § 1782 is that the discovery target “reside[ ]” or be “found” in the judicial district in which the application is filed.79 Following a recent trend, two U.S. district courts in the Southern District of New York denied § 1782 applications for discovery from foreign banks, holding that the due process requirements of Daimler AG v. Bauman apply in the § 1782 context.80 The courts held that the mere presence of a branch office, accompanied by limited commercial activity, does not render a bank “essentially at home” in New York such that the Daimler test, and thus § 1782, is satisfied. Similarly, but without deciding conclusively whether the Daimler test or some lesser standard applies, a D.C. federal district court held that two U.S. banks were neither “at home” in D.C. nor “found” there for purposes of § 1782, although both banks maintained branches and ATMs in D.C., and one sponsored the Washington Redskins football team.81 While the law in this area remains unsettled,82 these decisions suggest that a party seeking § 1782 discovery should carefully consider the target’s contacts with the judicial district in which the application is to be filed, as a § 1782 application could be denied if the target has minimal local ties (including because it is headquartered abroad and conducts most of its operations outside of the United States).

In another notable 2018 case, Kiobel v. Cravath, Swaine & Moore LLP, the U.S. Court of Appeals for the Second Circuit held that it would be an abuse of discretion to permit § 1782 discovery of information held by U.S. counsel related to a foreign party that was in counsel’s possession solely because of

82. Some courts, including another S.D.N.Y. court just this year, have held that a § 1782 discovery target is “found” within a judicial district if it maintains an office in the district, without any further examination under Daimler. See Ayyash v. Crowe Horwath LLP, No. 17- mc-482 (AJN), 2018 WL 1871087, at *2 (S.D.N.Y. 2018); see also In re Qualcomm Inc., 162 F. Supp. 3d 1029, 1036–38 (N.D. Cal. 2016).
the firm’s representation of that party in earlier U.S. litigation. The *Kiobel* decision suggests that courts may be reluctant to grant § 1782 requests aimed at U.S. counsel, particularly where, as in *Kiobel*, the material sought is undiscoverable abroad because doing so might chill attorney-client relations and damage the international standing of U.S. law firms. And in *In re Postalis*, a S.D.N.Y. district court enforced the statute’s “for use” requirement, concluding on the basis of a § 1782 applicant’s public statements that it was seeking impermissible pre-action discovery in contemplation of a lawsuit in the United States against the Section 1782 target rather than information “for use” in a foreign proceeding.

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

U.S. courts, in considering whether to order the production of discovery abroad for use in U.S. proceedings, sometimes hesitate to do so on the basis of foreign blocking statutes. This was the case in *Salt River Project Agricultural Improvement & Power District v. Trench France SAS*, where the court deferred to a French blocking statute. The more common practice, however, is to compel production despite such statutes.

The European Union’s General Data Protection Regulation (“GDPR”) became effective on May 25, 2018. It remains to be seen whether it will be accorded the same treatment as blocking statutes. The GDPR significantly restricts the disclosure of personal data—a broadly defined term likely to encompass a vast amount of otherwise discoverable material—and unlike some blocking statutes, contemplates harsh penalties, including steep fines and potential criminal liability. Although no U.S. court appears to have yet considered whether the GDPR impedes granting overseas discovery, the U.S. Supreme Court suggested in dicta in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa* that to the

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84. See id.
89. Id.
extent a foreign rule of law is “substantive,” it is entitled to greater deference than a mere blocking statute.90

VI. Extraterritorial Application of United States Law

A. Stored Communications Act

As noted in last year’s Year in Review, the U.S. Supreme Court granted certiorari in October 2017 to decide whether the warrant provisions of the Stored Communications Act (“SCA”)91 apply extraterritorially to data stored at Microsoft’s datacenter in Ireland.92 The U.S. Court of Appeals for the Second Circuit had decided in 2016 that the presumption against extraterritoriality barred application of the SCA to data stored abroad even if controlled by a U.S. entity.93 On March 23, 2018, Congress amended the SCA through the Clarifying Lawful Overseas Use of Data Act (“CLOUD Act”), which requires a data service provider to produce electronic records within its possession regardless of whether they are located inside or outside the United States.94 The U.S. government subsequently obtained a warrant pursuant to the CLOUD Act for the information it had sought under the SCA.95 Accordingly, the Supreme Court vacated the Second Circuit’s judgment and remanded with instructions to dismiss the case as moot.96

B. Intellectual Property

In WesternGeco LLC v. ION Geophysical Corporation, the U.S. Supreme Court held that a patent owner may recover lost foreign profits from an infringer who exports components of a patented invention from the United States when those components are assembled into the infringing invention abroad.97 WesternGeco owns patents to a system for surveying the ocean floor.98 ION Geophysical began selling a competing system with components that were manufactured in the United States and then shipped to companies abroad for assembly and usage.99 WesternGeco sued for patent infringement under 35 U.S.C. § 271(f)(2), which prohibits “suppling” components of a patented invention “in or from the United States” with the intent that they “will be combined outside of the United States in a manner that would infringe the patent if such combination

92. Id.
93. Microsoft Corp. v. United States, 829 F.3d 197, 221 (2d Cir. 2016).
95. Id. at 1187.
96. Id. at 1188.
98. Id. at 2135.
99. Id.
occurred within the United States." After reaffirming the presumption against extraterritoriality, the Court held that the “focus” of § 271(f)(2) was on domestic conduct: the manufacture and export of components. Accordingly, the lost-profits award against ION was not an impermissible extraterritorial application of U.S. law, even though those profits were earned abroad.

C. ANTITRUST

In Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., the U.S. Supreme Court held that federal courts must consider, but are not bound by, a foreign government’s official statement regarding the meaning and interpretation of its laws. Petitioners, U.S.-based purchasers of vitamin C, alleged a price-fixing conspiracy by manufacturers and exporters of vitamin C in the People’s Republic of China (“PRC”). The PRC companies countered that the alleged price fixing was mandated by their government. The PRC Ministry of Commerce filed an amicus brief supporting the companies, stating that the price controls were “a regulatory pricing regime mandated by the government of China.” The Second Circuit held that conclusive weight must be given to the PRC government’s interpretation of Chinese law, and dismissed the suit. The Supreme Court reversed, criticizing that standard as too “deferential,” and held that a federal court should accord “respectful consideration”—but not “conclusive effect”—to a “foreign government’s statements.”

D. CONTINUING CRIMINAL ENTERPRISE

In United States v. Vasquez, the U.S. Court of Appeals for the Fifth Circuit held that 21 U.S.C. § 848(e)(1)(A), which criminalizes the killing of an individual while engaging in a continuing criminal enterprise, applies extraterritorially. The defendant was convicted of killing while engaged in a drug trafficking operation, with the murders occurring in Mexico. The Fifth Circuit found clear Congressional intent that § 848(e) should apply extraterritorially (overcoming the presumption against extraterritoriality) because the predicate statutory offenses—operating drug trafficking cartels—plainly applied to at least some foreign conduct.

100. Id. at 2138.
101. Id. at 2138.
102. Id.
104. Id. at 1870.
105. Id.
106. Id.
107. Id. at 1872.
108. Id. at 1874.
110. Id. at 368–370.
111. Id. at 377.
E. Bivens

In Hernandez v. Mesa, the Fifth Circuit, sitting en banc, refused to extend the Bivens damages remedy extraterritorially. In Mesa (analyzed in the 2015, 2016, and 2017 volumes of Year in Review), a Border Patrol agent fired across the border, fatally wounding a Mexican teenager. The teenager’s family sued for unjustified use of deadly force in violation of the Fourth and Fifth Amendments. The Fifth Circuit declined to extend a cause of action to a foreign citizen, injured on foreign soil, partly out of concern that such suits against a federal employee would interfere with delicate matters of international relations.

By contrast, a divided Ninth Circuit panel in Rodriguez v. Swartz extended Bivens in an analogous cross-border shooting by a Border Patrol agent in Arizona, finding that the presumption against extraterritoriality was overcome. The Ninth Circuit acknowledged that its decision created a split with the Fifth Circuit, and the Supreme Court called for the views of the Solicitor General in both cases as it considers granting certiorari.

VII. Recognition and Enforcement of Foreign Judgments

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

A. FOREIGN ARBITRAL AWARDS

Article V of the New York Convention outlines the limited circumstances under which a court may refuse to recognize and enforce a foreign arbitral award, including because “[t]he award has not yet become binding on the parties.” The U.S. Court of Appeals for the D.C. Circuit relied on this

113. Id. at 814.
114. Id. at 815.
115. Id. at 822–23.
117. Id. at 731; see also id. at 751–52 (M. Smith, J., dissenting).
119. 21 U.S.T. 2517. The Convention is implemented in U.S. law through Chapter 2 of the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 201-08 (2013). The Inter-American Convention on International Commercial Arbitration 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.
120. 21 U.S.T. 2517., Art. V(1)(e).
provision in *Diag Human S.E. v. Czech Republic Ministry of Health*, 121 to find that an award in a Czech-seated arbitration was not binding on the Czech Republic, and therefore unenforceable, because it had been nullified by a “Resolution” issued by a “second arbitral panel” sitting in review of the original arbitral panel’s decision.122 The court explained, with reference to a Czech legal treatise and expert testimony, that this two-tier review process, although rarely used in practice, was a particular feature of Czech arbitration law.123 The Court found that the second arbitral panel both intended to nullify the award, and that it had the power to do so.124 The Court also emphasized that the parties had provided for two-tier review, “mirroring” applicable Czech law, in their own arbitration agreement.125

In *Leidos, Inc. v. Hellenic Republic*, the D.C. Circuit considered whether a district court abused its discretion by granting an enforcement Petitioner’s post-judgment motion to convert its arbitral award from euros to U.S. dollars, thereby boosting the value of the award by nearly twelve million dollars.126 The Court noted that the Petitioner had previously requested judgment in euros in its complaint and in two iterations of a proposed judgment, and that a request to recover in dollars “could have—and should have—been made long before judgment was entered.”127 The Court found that it was an abuse of discretion to permit a party to use a Federal Rule of Civil Procedure 59(e) motion to alter or amend a judgment as “a vehicle to present a new legal theory that was available prior to judgment.”128 The Court further pointed out that U.S. courts are no longer reluctant to enter judgments in foreign currencies, and that the Petitioner’s delay harmed the judgment debtor, which had not hedged against the risk of currency fluctuations.129

B. FOREIGN COURT JUDGMENTS

In *AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.*, 130 the Appellate Division of the New York Supreme Court, hearing a petition to enforce a foreign judgment, addressed a judgment debtor’s motion to dismiss for lack of personal jurisdiction on account of the fact that the debtor had no physical presence in New York and the enforcement Petitioner failed to identify any property the debtor owned there.131 The Appellate Division first concluded

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122. *Id.* at 612.
123. *Id.* at 611.
124. *Id.* at 612.
125. *Id.*
127. *Id.* at 218.
128. *Id.*
129. *Id.* at 218–19.
131. *Id.* at 96–97.
that Daimler did not require dismissal, because Daimler's “restriction of general jurisdiction to states where a corporate defendant is ‘at home’” should not “be extended to proceedings to recognize or enforce foreign judgments.”132 The Court nevertheless granted the motion to dismiss, holding that no basis, “whether arising from [the debtor’s] residence, the location of [its] property or otherwise,” existed “to justify [the debtor’s] being subject to the court's power.”133 In so holding, the Court distinguished the Appellate Division precedent of Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Financial Services Co.,134 where the Court had exercised jurisdiction notwithstanding the debtor’s lack of New York contacts, by noting that the debtor in that case had chosen not to argue the statutory grounds for non-recognition of a foreign court judgment under New York law.135

VIII. Forum Non Conveniens

The doctrine of forum non conveniens presupposes at least two forums in which the defendant is amenable to process.136 Thus, at the outset of any forum non conveniens inquiry, the court must determine whether an alternative forum exists.137 The party seeking dismissal bears the burden of proving the availability of an adequate alternative forum.138 In Associacao Brasileira de Medicina de Grupo v. Stryker Corp., the U.S. Court of Appeals for the Sixth Circuit held that while in some particularly clear cases the burden of proving an available adequate forum could be satisfied by pleadings and preliminary submissions, more complex matters require expert evidence concerning a particular court’s ability to exercise jurisdiction.139

In the case, a Brazilian non-profit association of health insurance providers filed suit against Stryker Corporation, a Michigan company producing and distributing medical devices.140 The suit alleged that Stryker orchestrated an illegal scheme of improper payments to influence physicians to use Stryker products.141 Stryker moved to dismiss on forum non conveniens grounds.142 The only showing by Stryker that Brazil was an adequate alternative forum was a single line in Stryker’s reply brief claiming that

132. Id. at 103.
133. Id. at 111–12.
135. Id. at 611.
140. Id. at 618.
141. Id.
142. Id.
"Stryker consents to jurisdiction in Brazil, so Brazil is an available forum."143 This was sufficient for the federal district court for the Western District of Michigan, which dismissed on forum non conveniens grounds, but not for the Sixth Circuit, which reversed and remanded for proceedings which would require Stryker to meet its burden to show that Brazil was an available and adequate alternative forum.144 The court found that it was not obvious from the pleadings alone that a Brazilian court could exercise jurisdiction over Stryker, nor that Stryker’s purported submission to jurisdiction would be legally meaningful to a Brazilian court, even if presented in a proper evidentiary form.145

The U.S. Supreme Court has made clear in Atlantic Marine Construction Company v. United States District Court that forum non conveniens litigation is an appropriate way to enforce a forum-selection clause.146 The Court went on to say that in conducting a forum non conveniens balancing test, a valid forum selection clause should be given controlling weight in all but the most exceptional cases, but did not expand on what situations might be considered exceptional.147 In Yei A. Sun v. Advanced China Healthcare, Inc., the U.S. Court of Appeals for the Ninth Circuit framed a test for the “extraordinary circumstances” where courts may deviate from the Atlantic Marine inquiry.148

In the case, a dispute had arisen when purchasers of stock brought an action against the president of a healthcare company in Washington Federal District Court even though a forum-selection clause designated California state court as the proper forum.149 The district court dismissed the suit.150 On appeal, the court looked to the Supreme Court’s earlier decision in M/S Bremen v. Zapata Off-Shore Co.151 to determine when the extraordinary circumstances alluded to in Atlantic Marine might arise. In Bremen, the Supreme Court outlined three extraordinary circumstances that may invalidate a forum-selection clause: 1) the presence of “fraud or overreaching;” 2) when enforcement would contravene a strong public policy; or 3) when trial would be so difficult in the contractual forum that the litigant is deprived of a fair trial.152 After examining the Bremen factors, the Ninth Circuit found that there was no extraordinary circumstance to prevent the application of the forum-selection clause and it mandated the suit be tried in California.153

143. Id. at 621.
144. Id. at 622.
145. Id. at 621–22.
147. Id. at 62.
149. Id.
150. Id. at 1085–86.
153. Yei A. Sun, 901 F.3d at 1093.

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IX. Parallel Proceedings

A. International Abstention

Federal courts continue to adhere to their “virtually unflagging obligation” to exercise jurisdiction, even in the face of parallel foreign proceedings, absent “exceptional” circumstances. In *Leopard Marine & Trading, Ltd. v. Easy Street Ltd.*, the U.S. Court of Appeals for the Second Circuit reaffirmed the multi-factor test it first set out in *Royal & Sun Alliance Insurance Co. of Canada v. Century International Arms, Inc.* for deciding whether to abstain due to simultaneous foreign litigation. These factors are based in part on the U.S. Supreme Court’s decision in *Colorado River Water Conservation District v. United States* and include the similarity of issues and parties, the order in which the actions were filed, the adequacy of the alternative forum, the potential prejudice to either party, the convenience for the parties, the connection between the litigation and the United States, and the connection between the litigation and the foreign jurisdiction.

The moving party in *Leopard Marine* sought abstention in light of parallel Panamanian proceedings and invoked the doctrine of international comity. The Second Circuit, however, explained that comity was “not an imperative obligation,” but rather a flexible rule of “practice, convenience, and expediency.” Focusing on the connection between the litigation and the United States, the court concluded that the “public interest” weighed in favor of having the case heard in a forum “at home with the” law governing the case, which was U.S. law. The court also rejected the argument that Panamanian exercise of *in rem* jurisdiction over the subject of the litigation, an ocean vessel, was an exceptional circumstance necessitating abstention. The court pointed out that the American proceeding was not *in rem*, but *in personam*, and so the American court, unlike its Panamanian counterpart, did not have to keep custody over the vessel to retain jurisdiction. Accordingly, allowing the American proceedings to continue alongside the Panamanian ones would not require two different courts to keep custody over the same property.

In *Holland America Line, N.C. v. Orient Denizcilik Turizm Sanayi VE Ticaret, A.S.*, the federal district court for the Western District of Washington focused on a different *Colorado River* factor: whether the

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158. *Royal & Sun*, 466 F.3d at 94.
159. *Leopard Marine*, 896 F.3d at 190.
160. Id. at 190 (internal quotation marks and citation omitted).
161. Id. at 191 (internal quotation marks and citation omitted).
162. Id. at 193.
163. Id.
164. Id.
domestic litigation or the parallel foreign proceedings began first.165 But the
court’s analysis went beyond the fact that the parallel suits in Turkish
commercial court were filed first to consider facts relating to the timing of
demand letters, the parties’ failed arbitration attempts, and the dates of
service before ultimately concluding that the factor was “neutral” and did
not favor or weigh against abstention.166 The court’s analysis demonstrates
that this *Colorado River* factor is not a simple “first to file” rule or a race
between foreign and domestic courts.167

### B. Anti-suit Injunctions

In *BAE Systems*,168 the U.S. Court of Appeals for the Fourth Circuit joined
other circuits in cautioning district courts to grant anti-suit injunctions
“sparingly” in deference to the principle of international comity.169 In *BAE*,
an American defense contractor sought a declaratory judgment in federal
district court that it had not breached a contract with the Republic of
Korea.170 After Korea filed a parallel action in a Korean court, the district
court denied the contractor’s motion for a permanent injunction prohibiting
Korea from litigating in Korean court.171 The Fourth Circuit also noted that
“anti-suit injunctions against foreign sovereigns are so unusual” that “no
circuit precedent (and little out-of-circuit precedent) exists to guide
courts.”172 Upholding that decision, the Fourth Circuit observed that
“comity concerns are near their peak” when “an injunction would bar a
foreign sovereign,” as opposed to a private party, “from litigating a dispute
in its own courts.”173 An anti-suit injunction in such circumstances would
“impinge on” both “the sovereignty of the Korean courts (to hear the case)
and the Korean government (to litigate it).”174

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165. Holland Am. Line, N.C. v. Orient Denizcilik Turizm Sanayi VE Ticaret, A.S., No. C17-
166. Id. at *7.
167. Id. at *8.
Admin., 884 F.3d 463, 479 (4th Cir. 2018).
169. Id. at 479.
170. Id. at 467.
171. Id.
172. Id. at 480.
173. Id.
174. Id.