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International Litigation

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This Article reviews some of the most significant developments made in international litigation in 2019.

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. ATTACHMENT/EXECUTION EXCEPTIONS

Recent decisions of the U.S. Courts of Appeals for the Second and Third Circuits addressed when a judgment creditor may attach assets of the sovereign's instrumentality by applying the U.S. Supreme Court's alter ego analysis in *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*.²

* This article summarizes developments in international litigation during 2019. 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 Katie Gonzalez, Leila Mgaloblishvili, Canem Ozyildirim, Abigail Gotter, and Paul Kleist, associates at the same firm. Theodore J. Folkman, a partner at Pierce Bainbridge Beck Price & Hecht LLP in Boston 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 Caroline C. Stewart, an associate at the same firm. Matthew D. Slater, a partner at Cleary Gottlieb in Washington, D.C., authored Section IV, with assistance from Sameer Jaywant, an associate at the same firm. Howard S. Zelbo, a partner at Cleary Gottlieb in New York, authored Section V, with assistance from Ms. Gonzalez and Mr. Kleist. (Note: Cleary Gottlieb represented Molson Coors Brewing Company, BNP Paribas, and Petrobras in the cases discussed in Sections IV and V.) Igor V. Timofeyev, Charles A. Patrizia, and Joseph R. Profaizer, partners at Paul Hastings LLP in Washington, D.C., authored Sections VI and IX.

1. 28 U.S.C. §§ 1602 (2020).

2. *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 623 (1983).

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In *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, the Third Circuit found that an independent jurisdictional basis was not required for enforcement actions against an alter ego, and confirmed that enforcement proceedings should apply the *Bancec* test to determine when the “presumption of independent status” afforded to state-owned instrumentalities is overcome.³ While most courts applying *Bancec* have focused on whether maintaining separateness “would work fraud or injustice,” the Third Circuit relied solely on an “extensive control” analysis.⁴ Applying five non-exhaustive factors the Supreme Court recently identified in *Rubin v. Islamic Republic of Iran*,⁵ the Third Circuit found that Venezuela so extensively controlled its wholly-owned oil company as to render it Venezuela’s alter ego for enforcement purposes.⁶

In *Kirschenbaum v. Assa Corporation*, the Second Circuit affirmed that an entity incorporated in New York whose shares were wholly owned by and deemed “interchangeable with” a state-controlled entity was Iran’s alter ego under the “extensive control” analysis.⁷ *Kirschenbaum* thus extended the *Bancec* alter ego analysis to entities not covered by the FSIA, because an “agency or instrumentality” under the FSIA must be formed under foreign state laws and cannot be incorporated in the United States.⁸

B. SERVICE OF PROCESS

In *Republic of Sudan v. Harrison*, the Supreme Court reviewed one of the four methods of service of process upon a foreign state—service by mail with signed return receipt—and held that “the most natural reading” of Section 1608(a)(3) requires a plaintiff to mail service “directly to the foreign minister’s office in the minister’s home country.”⁹ Consequently, plaintiffs’ mailing to the Sudanese embassy in Washington, D.C. did not constitute proper service.¹⁰

C. JURISDICTION OVER CRIMINAL CASES

As discussed in last year’s issue, in *In re Grand Jury Subpoena*, the U.S. Court of Appeals for the D.C. Circuit departed from the understanding that the FSIA applies only to civil litigation and held that foreign states or state-

3. *Crystallex Int’l Corp. v. Bolivarian Republic of Venez.*, 932 F.3d 126, 136-40 (3d Cir. 2019).

4. *Id.* at 140–41.

5. 138 S.Ct. 816, 823 (2018).

6. *Crystallex*, 932 F.3d at 140–152.

7. 934 F.3d 191, 197-98 (2d Cir. 2019).

8. *See* 28 U.S.C. § 1603(b)(3). In related proceedings, the Second Circuit held that the jurisdictional and attachment/execution protections in Sections 1604 and 1609 did not apply to a foreign state’s property in *in rem* civil forfeiture proceedings, because the defendant in a civil forfeiture case is the property itself and not the sovereign or its instrumentality. *United States v. Assa Corp.*, 934 F.3d 185, 188–91 (2d Cir. 2019).

9. 139 S.Ct. 1048, 1053, 1056–57 (2019).

10. *Id.* at 1062.

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owned entities are subject to criminal jurisdiction.¹¹ The D.C. Circuit thereafter issued an opinion providing additional insight into its reasoning following its earlier decision on this subject.¹² The court explained that there was jurisdiction over the enforcement of a grand jury investigation-issued subpoena pursuant to 18 U.S.C. § 3231, which provides district courts with jurisdiction over “all offenses against the laws of the United States,” and that the FSIA does not strip courts of criminal jurisdiction.¹³ The Supreme Court then vacated a temporary stay of enforcement against the subpoena and denied certiorari.¹⁴ While these decisions may expand criminal liability to sovereigns and sovereign-owned entities so long as an FSIA exception applies, it does not appear that courts have since applied the FSIA in the criminal context.

D. IMMUNITY OF INTERNATIONAL ORGANIZATIONS

In *Budba Ismail Jam, et al. v. International Finance Corporation*, the Supreme Court held that international organizations are not entitled to virtually absolute immunity under the International Organizations Immunities Act (IOIA), as the D.C. Circuit had previously held.¹⁵ The Court determined that the immunity of international organizations and sovereigns are “continuously equivalent” and, therefore, international organizations are subject to the same limited immunity as foreign states under the FSIA.¹⁶ This holding will likely result in an increased number of suits against international organizations in U.S. courts, in which courts may apply FSIA jurisprudence to questions of international organization immunity.

II. International Service of Process

Since 2011, many federal district courts have held that the Hague Service Convention¹⁷ permits a plaintiff to serve process by email, even in foreign states that have objected to service by the alternate methods permitted by Article 10 of the Convention. Some of these cases appear to be judicial reactions to foreign state intransigence—for example, a state’s inappropriate invocation of the Article 13 right to refuse to comply with the Convention “where compliance would infringe [the state’s] sovereignty or security,”¹⁸ or

11. 749 F. App’x 1 (D.C. Cir. 2018).

12. *In re Grand Jury Subpoena*, 912 F.3d 623, 626 (D.C. Cir. 2019).

13. *Id.* at 627–31.

14. *See In re Grand Jury Subpoena*, 139 S.Ct. 914 (2019); *In re Grand Jury Subpoena*, 139 S.Ct. 1378 (2019).

15. *Jam v. Int’l Fin. Corp.*, 139 S.Ct. 759, 771–72 (2019).

16. *Id.* at 768.

17. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Art. 10, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 165.

18. *See, e.g., Gurung v. Malhotra*, 279 F.R.D. 215 (S.D.N.Y. 2011) (Indian government cited Article 13 in refusing to execute request for service on a consular official who had been sued by a former domestic employee for violation of state and federal labor and human rights laws); *In re Takata Airbag Prods. Liab. Litig.*, 2017 WL 8809362 (S.D. Fla. Mar. 24, 2017) (German

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a state's refusal to execute requests emanating from the United States altogether.¹⁹ The reasoning of these decisions was always in tension with existing authority on the operation of the Convention, which is exclusive and requires a plaintiff to use one of the specified methods whenever the Convention applies.²⁰ Nonetheless, over time, many district court decisions allowed email service as a matter of precedent, even where the exceptional circumstances which motivated the original decisions were not present and even though no appellate court had squarely addressed the question.

Appellate courts have still not addressed the question, but district courts may have begun to reverse course. In *Luxottica Group S.p.A. v. Partnerships and Unincorporated Associations Identified on Schedule "A"*,²¹ Luxottica, the owner of the Ray-Ban and Oakley trademarks, brought a trademark infringement action against the owners of online marketplaces hosted on sites including eBay and Alibaba.²² The claim was that the defendants were selling counterfeit products.²³ The defendants were in China.²⁴ The court granted an *ex parte* motion for leave to serve process by email.²⁵ The defendants, then appeared and moved to dismiss, arguing that they had not been validly served with process because China has objected to service of process by mail under Article 10.²⁶

While acknowledging that the Convention does not "explicitly prohibit email service," the court framed the question as "whether the Convention's textual silence on a method of service leaves this court free to authorize service by that method."²⁷ The court concluded that it does not in light of *Volkswagenwerk AG v. Schlunk*,²⁸ under which the Convention "pre-empts inconsistent methods of service . . . [wherever] it applies."²⁹ Luxottica pointed to Article 10(a) of the Convention, which permits service through the postal channel unless the foreign state has objected, and it noted that

government cited Article 13 in refusing to execute request for service in a case that sought punitive damages).

19. See, e.g., *The NOCO Co. v. Khaustov*, No. 1:19 CV 196, 2019 WL 4218637 (N.D. Ohio Sept. 5, 2019) (Russia unilaterally suspended cooperation with the United States under the Convention in light of dispute about fees for executing requests for service); *Epic Games, Inc. v. Mendes*, No. 17-CV-06223-LB, 2018 WL 582411 (N.D. Cal. Jan. 29, 2018) (same); *SEC v. Dubovoy*, No. CV156076MCAMAH, 2016 WL 7217607, at *1 (D.N.J. Dec. 13, 2016) (same).
20. *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694, 698–99 (1988); *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1507 (2017); see also Permanent Bureau of the Hague Conference on Private International Law, PRACTICAL HANDBOOK ON THE OPERATION OF THE SERVICE CONVENTION ¶¶ 51 & n.92 (4th ed. 2016) (collecting cases).

21. *Luxottica Group S.p.A. v. P'ships & Unincorporated Ass'n Identified on Schedule "A"*, 391 F. Supp. 3d 816 (N.D. Ill. 2019).

22. *Id.* at 819.

23. *Id.*

24. *Id.*

25. *Id.* at 820.

26. *Id.* at 819–20.

27. *Id.* at 825.

28. 486 U.S. 694 (1988).

29. *Luxottica*, 391 F. Supp. 3d at 825 (quoting *Schlunk*, 486 U.S. at 699).

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China had not specifically objected to service by email. But the court reasoned that “[i]f Article 10(a) uses language broad enough to reach email, it is difficult to see why an objection using Article 10(a)’s language should be given equal breadth.”³⁰

It remains unclear whether the courts will continue to liberally allow email service based on unreviewed district court precedent, or whether *Luxottica* represents a turning of the tide.³¹ The question is one of many in a lively ongoing discussion about electronic methods of service under the Convention.³²

III. Personal Jurisdiction

In *Bristol-Myers Squibb Co. v. Superior Court of California*,³³ the U.S. Supreme Court held that a state lacks personal jurisdiction over an out-of-state defendant that conducts business within the state if the defendant’s in-state activities are not related to the plaintiff’s claims.³⁴ The Court expressly reserved the issue of whether this holding extended to class actions, leading to a split of authority among the lower courts in the immediate wake of the decision.³⁵ At first it appeared that federal courts would “generally align” with the approach of extending *Bristol-Myers* to class actions.³⁶ But over the course of 2019, a contrary majority position emerged.

The chief reason for the present majority position that *Bristol-Myers* does not apply to class actions arises from key procedural differences between “class” and “mass” actions.³⁷ In a mass tort action such as *Bristol-Myers*, each plaintiff is a real party in interest.³⁸ Each party, therefore, must establish personal jurisdiction over the defendant.³⁹ In a class action, however, only the class representative is named on the complaint, and court have held that the specific jurisdiction analysis is not impacted by claims of unnamed class members.⁴⁰ Additionally, due process concerns are significantly reduced in a class action context compared to a mass tort context because Federal Rule of Civil Procedure 23, applicable to class actions only, imposes due process

30. *Id.* at 827.

31. *See* *Elobied v. Baylock*, 299 F.R.D. 105 (E.D. Pa. 2014) (An earlier decision which might be seen as the beginning of the turning of the tide, but the decision was marred by the court’s mistaken conclusion that the Convention applied even where the defendant’s address was unknown. This is plainly incorrect under Article 1 of the Convention.).

32. *See* PRACTICAL HANDBOOK, annex 8, *supra* note 20, at ¶¶ 34–46.

33. 137 S. Ct. 1773 (2017).

34. *Id.* at 1782.

35. *Id.* at 1789, n.4.

36. Joan R. Camagong, *Applying Bristol-Myers Squibb to Class Actions*, AM. B. ASS’N (Feb. 5, 2019), <https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2019/applying-bristol-myers-squibb-to-class-actions/> (accessed November 23, 2019).

37. *See, e.g.,* *Fitzhenry-Russel v. Dr. Pepper Snapple Group, Inc.*, No. 17-cv-00564, 2017 WL 4224723 at *4 (N.D. Cal. Sept. 22, 2017).

38. *Id.* at 5.

39. *Id.*

40. *See e.g., id.*

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safeguards—such as the requirements of commonality, typicality, and predominance—that reduce the kinds of variation in plaintiffs’ claims that can raise due process concerns.⁴¹

Federal district courts have also limited the reach of *Bristol-Myers* by focusing on the fact that it was a state court case. As such, there was a federalism interest protected under the Due Process Clause: in essence, the Supreme Court had to limit the sovereignty of one state to ensure equal sovereignty for all other states.⁴² In federal court, however, these concerns are less salient, because all federal courts “represent the same federal sovereign” and cannot “reach out beyond the limits imposed on them” to encroach on the sovereignty of other states.⁴³

As of November 2019, the courts opting for the majority position include courts from California, Missouri, Nevada, Pennsylvania, Florida, West Virginia, Illinois, North Carolina, Oklahoma, Georgia, Alabama, Tennessee, Minnesota, D.C., Virginia, Louisiana, and Kentucky.⁴⁴ Most decisions holding that *Bristol-Myers* should extend to class actions have come from the U.S. District Court for the Northern District of Illinois.⁴⁵ No appellate court has yet addressed this issue.

41. *Sotomayor v. Bank of America, N.A.*, 377 F. Supp. 3d 1034, 1036–37 (C.D. Cal. 2019).

42. *Bristol-Myers*, 137 S. Ct. at 1780.

43. See *In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, No. MDL 09-2047, 2017 WL 5971622, at *20 (E.D. La. Nov. 30, 2017).

44. *Zuehlsdorf v. FCA US LLC*, No. EDCV-18-1877 JGB (KKX), 2019 WL 4422673, at *5–6 (C.D. Cal. Aug. 76, 2019); *Moore v. Compass Grp. USA, Inc.*, No. 4:18CV1962 RLW, 2019 WL 4723077, at *7–9 (E.D. Mo. Sept. 26, 2019); *Edwards v. Conn’s, Inc.*, No. 2:18-cv-01998-APG-BNW, 2019 WL 4731941, at *3, n.2 (D. Nev. Sept. 27, 2019); *Gress v. Freedom Mortgage Corp.*, 386 F. Supp. 3d 455, 462–65 (M.D. Pa. 2019); *Dolan v. JetBlue Airways Corp.*, 385 F. Supp. 3d 1338, 1355 (S.D. Fla. 2019); *Ross v. Huron Law Grp. West Virginia, PLLC*, No. 3:18-cv-0036, 2019 WL 637717, at *3 (S.D. W. Va. Feb. 14, 2019); *Curran v. Bayer Healthcare LLC*, No. 17 C 7930, 2019 WL 398685, at *3–4 (N.D. Ill. Jan. 31, 2019); *Hicks v. Houston Baptist Univ.*, No. 5:17-cv-629-FL, 2019 WL 96219, at *5–7 (E.D.N.C. Jan. 3, 2019); *Braver v. Northstar Alarm Servs., LLC*, 329 F.R.D. 320, 326–27 (W.D. Okla. 2018); *Sanchez v. Launch Tech. Workforce Sols, LLC*, No. 17-1904, 2018 WL 1875615, at *1 (N.D. Ga. Jan. 26, 2018); *Jones v. Depuy Synthes Prods., Inc.*, 330 F.R.D. 298, 312 (N.D. Ala. 2018); *Hospital Auth. of Metropolitan Government of Nashville v. Momenta Pharm., Inc.*, 353 F. Supp. 3d 678, 690 (M.D. Tenn. 2018); *Knotts v. Nissan North Am., Inc.*, 346 F. Supp. 3d 1310, 1335 (D. Minn. 2018); *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114, 126–27 (D.D.C. 2018); *Morgan v. U.S. Xpress, Inc.*, No. 3:17-cv-00085, 2018 WL 3580775, at *6 (W.D. Va. July 25, 2018); *In re Chinese-Manufactured Drywall*, 2017 WL 5971622, at *20; *Day v. Air Methods Corp.*, No. 17-183, 2017 WL 4781863, at *4 (E.D. Ky. Oct. 23, 2017).

45. See, e.g., *Practice Mgmt. Support Serv., Inc. v. Cirque du Soleil, Inc.*, 301 F. Supp. 3d 840 (N.D. Ill. 2018); *Bakov v. Consolidated World Travel, Inc.*, No. 15 C 2980, 2019 WL 1294659 (N.D. Ill. Mar. 21, 2019).

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.⁴⁶

A. CLAIMS AGAINST PRIVATE ACTORS

In *Mountain Crest SRL, LLC v. Anheuser-Busch InBev SA/NV*,⁴⁷ a Wisconsin brewer alleged that two brewing conglomerates engaged in an antitrust conspiracy that damaged its ability to export its beer to Ontario.⁴⁸ The Seventh Circuit affirmed the lower court's judgment that most of the claims were barred by the act of state doctrine because they would require the court to adjudicate the validity, and not merely the existence, of certain legal enactments and policies of an Ontario governmental body.⁴⁹ The court agreed that these policies were properly viewed as official acts of the Province of Ontario and that the doctrine applied to acts of a sub-national government.⁵⁰ But the court concluded that certain other claims, based on alleged collusion promoting adoption of the government policies, were not barred by the doctrine because they would not require a court to invalidate Ontario's "chosen regulatory scheme," although they might be precluded by other legal defenses which the district court would need to consider in the first instance on remand.⁵¹

In *Royal Wulff Ventures LLC v. Primero Mining Corp.*,⁵² the Ninth Circuit affirmed dismissal of a securities fraud action against a mining company on act of state grounds.⁵³ The allegedly fraudulent statements concerned the positive consequences for the company's finances resulting from a Mexican tax ruling.⁵⁴ The majority concluded that the doctrine barred plaintiffs' claims because they, in effect, challenged the validity of the tax ruling.⁵⁵ One judge dissented, arguing that the validity was not at issue, but rather whether the defendants misrepresented the basis and reliability of the tax decision.⁵⁶

46. See, e.g., *WS Kirkpatrick & Co. Inc. v. Envtl. Tectonics Corp. Int'l*, 493 U.S. 400, 406 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

47. 937 F.3d 1067 (7th Cir. 2019).

48. *Id.* at 1069.

49. *Id.* at 1086.

50. *Id.* at 1084–85.

51. *Id.* at 1085–86.

52. 938 F.3d 1085 (9th Cir. 2019).

53. *Id.* at 1098.

54. *Id.* at 1088–91.

55. *Id.* at 1095.

56. *Id.* at 1103–04.

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In *Kashef v. BNP Paribas SA*,⁵⁷ the Second Circuit reversed the district court's application of the act of state doctrine to the claims of a putative class of Sudanese refugees against BNP Paribas for allegedly conspiring with and aiding and abetting the Sudanese government's human rights abuses.⁵⁸ The claims were based on a guilty plea in which the bank admitted to violating U.S. sanctions by providing the Sudanese government access to U.S. dollar markets.⁵⁹ The Second Circuit held that there was no "official act" whose validity could be impugned because the abuses contravened Sudanese and international law, concluding that "acts that flagrantly violate a foreign state's own laws cannot, at the same time, constitute official acts entitled to deference,"⁶⁰ and that "precedent prohibits us from deeming valid violations of non-derogable *jus cogens* norms."⁶¹

C. U.S. GOVERNMENT RECOGNITION

Two lower court opinions illustrate the potentially dispositive importance of determining whether the "official acts" at issue were those of a recognized sovereign. Both cases concern the decision by President Trump to recognize Juan Guaidó as Interim President of Venezuela and the National Assembly as Venezuela's only legitimate branch of government. In *Jiménez v. Palacios*,⁶² the issue was whether the board of directors of PDVSA, Venezuela's state-owned oil company, was properly reconstituted by Guaidó.⁶³ The Court of Chancery of Delaware held that formal recognition of the Guaidó government meant, for purposes of U.S. law, that "[t]he Guaidó government's reconstitution of the PDVSA board was the official act of a recognized sovereign taken wholly within its own territory" such that "[u]nder the act of state doctrine, this Court must accept that action as valid without further inquiry."⁶⁴ In *PDVSA U.S. Litigation Trust v. Lukoil Pan Americas LLC*,⁶⁵ a Florida federal district court similarly stated that recognition of the Guaidó government operates to retroactively validate all actions and conduct from the start of the newly recognized government's existence.⁶⁶ While this opened the possibility of invoking the act of state doctrine, the court declined to apply it because it had already held the

57. *Kashef v. BNP Paribas S.A.*, 925 F.3d 53 (2d Cir. 2019).

58. *Id.* at 62–63.

59. *Id.* at 55.

60. *Id.* at 61.

61. *Id.* at 61–62.

62. *Jimenez v. Palacios*, No. CV 2019-0490-KSJM, 2019 WL 3526479 (Del. Ch. Aug. 2, 2019).

63. *Id.* at *1.

64. *Id.* at *13.

65. *PDVSA U.S. Litig. Tr. v. Lukoil Pan Americas LLC*, 372 F. Supp. 3d 1353, 1358 (S.D. Fla. 2019), *appeal filed*, No. 19-10950 (11th Cir. March 13, 2019).

66. *Id.* at 1362.

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plaintiff lacked standing and wished to avoid addressing “the current turmoil in Venezuela.”⁶⁷

V. International Discovery

A. OBTAINING U.S. DISCOVERY FOR USE IN FOREIGN PROCEEDINGS

Recent decisions of the United States Courts of Appeals for the Sixth and Second Circuits have the potential to substantially broaden the scope of 28 U.S.C. § 1782, which permits U.S. courts to order discovery for use in foreign proceedings.

In *ALJ Transportation v. FedEx*, the Sixth Circuit held that discovery under section 1782(a) “for use in a proceeding in a foreign or international tribunal” is available when the proceeding is a private international arbitration.⁶⁸ The Sixth Circuit based its conclusion on the text of the statute and also found support in *Intel Corp. v. Advanced Micro Devices, Inc.*, in which the Supreme Court favorably cited a law review article authored by one of the drafters of section 1782’s 1964 amendments suggesting that the term “tribunal,” as used in the statute, encompasses “arbitral tribunals.”⁶⁹ *ALJ Transportation* has thus introduced a circuit split, as the Second and Fifth Circuits—in opinions the Sixth Circuit noted were decided before the Supreme Court’s decision in *Intel*⁷⁰—have held that section 1782 does not apply in arbitrations.⁷¹ For the time being, then, discovery requests in aid of arbitrations seated abroad are more likely to be considered favorably in the Sixth Circuit than in the Second and Fifth Circuits.

In another notable decision, the Second Circuit in *In re del Valle Ruiz* found that section 1782’s “reside” or be “found” in requirement extends to the limits of personal jurisdiction consistent with due process,⁷² and ruled that a court may order discovery provided that there is a nexus between the discovery target’s contacts with the forum and the actual discovery sought.⁷³ Previously, district courts had taken differing approaches as to what personal jurisdiction standard applied for section 1782 discovery.⁷⁴ The decision also

67. *Id.*

68. *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710, 715 (6th Cir. 2019).

69. *Id.* at 723–24, 728–30 (citing *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004)).

70. *Id.* at 729.

71. *Nat’l Broad. Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 191–92 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 883 (5th Cir. 1999). *But see In re Application of the Islamic Republic of Pakistan*, No. 18-103, 2019 WL 1559433, at *7 (D.D.C. Apr. 10, 2019) (distinguishing Second and Fifth Circuit cases and permitting discovery because bilateral investment treaty arbitration was neither private nor commercial).

72. *In re del Valle Ruiz*, 939 F.3d 520, 527 (2d Cir. 2019).

73. *Id.* at 530.

74. *See In re Petrobras Securities Litig.*, 393 F. Supp. 3d 376, 381 (S.D.N.Y. 2019) (noting a lack precedent as to whether § 1782 required the court to have personal jurisdiction over the party from whom discovery was sought).

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expands the geographic reach of section 1782, as the Second Circuit, joining the Eleventh Circuit, agreed with the petitioner that there is no presumption against the extraterritorial application of the statute.⁷⁵ Consequently, litigants in foreign jurisdictions with limited access to discovery may be able to seek discovery under section 1782 for documents located abroad provided that the jurisdictional due process requirements and other requirements of section 1782 are met.

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

U.S. courts considering whether to order the production of discovery abroad for use in U.S. proceedings frequently compel production even in the presence of foreign blocking statutes in reliance on *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*, in which the Supreme Court concluded that such statutes do not deprive courts of their power to order production.⁷⁶

There has been some debate whether U.S. courts will do the same in the face of the European Union's General Data Protection Regulation (GDPR), which, unlike some blocking statutes, imposes harsh penalties for unauthorized disclosures. Given that the GDPR was enacted in May 2018, a pattern of practice has yet to emerge, but an early case considering this issue suggests that courts may not treat the GDPR any differently than blocking statutes. In *Finjan, Inc. v. ZSCALER, Inc.*, the District Court for the Northern District of California compelled the disclosure of e-mails located in the United Kingdom despite the potential applicability of the GDPR, concluding in relevant part that the opposing party had not shown that the GDPR would be violated or that penalties would be imposed.⁷⁷

VI. Extraterritorial Application of United States Law

A. COMMUNICATIONS DECECY ACT

In *Force v. Facebook, Inc.*, the U.S. Court of Appeals for the Second Circuit held that a provision of the Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1), barred a lawsuit brought by victims of Hamas terrorist attacks in Israel against Facebook for allegedly providing Hamas with a communications platform that enabled those attacks.⁷⁸ The Second Circuit rejected plaintiffs' reliance on the presumption against extraterritoriality based on the argument that Hamas posted content and conducted the attacks

75. *In re Petrobras*, 939 F.3d at 532–33 (citing *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194 (11th Cir 2016)).

76. *Societe Nationale Industrielle Aeroaspatiale v. U.S. Dist. Court for S. Dist. Of Iowa*, 482 U.S. 522, 544 (1987).

77. *Finjan, Inc. v. ZSCALER, Inc.*, No. 17-cv-06946-JST (KAW), 2019 WL 618554, at *3 (N.D. Calif. Feb. 14, 2019).

78. *Force v. Facebook, Inc.*, 934 F.3d 53, 57 (2nd Cir. 2019).

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from overseas, and that Facebook’s employees who allegedly did not take down Hamas’s content were based abroad.⁷⁹ The court noted that section 230(c)(1), as an affirmative defense to civil liability, might not be subject to the presumption.⁸⁰ The Second Circuit found it unnecessary to decide that question, however, because it concluded that the conduct regulated by section 230—the litigation of civil claims in U.S. federal courts—occurred entirely domestically.⁸¹

B. SECURITIES LAW

In *SEC v. Scoville*, the U.S. Court of Appeals for the Tenth Circuit considered the extraterritorial reach of the antifraud provisions of the federal securities laws.⁸² The Tenth Circuit noted that the U.S. Supreme Court previously held, in *Morrison v. National Australian Bank Ltd.*, that the antifraud provision at Section 10 of the Securities Exchange Act of 1934 applied only domestically.⁸³ Subsequent to *Morrison*, however, Congress amended the jurisdictional sections of the federal securities laws to indicate that the antifraud provisions applied extraterritorially when the conduct-and-effects test is met.⁸⁴ Although Congress did not revise the substantive antifraud provisions of the securities laws, the Tenth Circuit nevertheless concluded that “Congress undoubtedly intended that the substantive antifraud provisions should apply extraterritorially when the statutory conduct-and-effects test is satisfied.”⁸⁵ Applying that test, the court then concluded that the antifraud provisions applied to defendants’ sales of internet advertising services to persons located outside the United States.⁸⁶ Judge Briscoe concurred only in the judgment because he was not persuaded that the sales at issue were foreign sales outside of the United States; rather, he believed that they constituted domestic activity.⁸⁷

C. RICO

In *Bascuñán v. Elsaca*, the U.S. Court of Appeals for the Second Circuit held that a lawsuit brought under civil provisions of the Racketeer

79. *Id.* at 72–74.

80. *Id.* at 74 (citing *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018)). The Second Circuit observed that the Ninth Circuit held, albeit in a decision predating the Supreme Court’s adoption of the two-step extraterritoriality analysis framework, that the presumption against extraterritoriality was inapplicable to a liability-limiting statute. *Force*, 934 F.3d at 73–74 (discussing *Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948 (9th Cir. 2008)).

81. *Force*, 934 F.3d at 74.

82. *Sec. & Exch. Comm’n v. Scoville*, 913 F.3d 1204 (10th Cir. 2019).

83. *Id.* at 1217 (discussing *Morrison v. National Australian Bank Ltd.*, 561 U.S. 247, 255–65 (2010)).

84. *Scoville*, 913 F.3d at 1218.

85. *Id.* at 1217–18.

86. *Id.* at 1219.

87. *Id.* at 1225–27 (Briscoe, J., concurring).

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Influenced and Corrupt Organizations Act of 1970 (RICO) based on defendants' alleged participation in a network of transnational fraudulent schemes was not barred by the presumption against extraterritoriality.⁸⁸ The district court had dismissed the complaint for failure to allege a domestic injury under RICO and impermissible reliance on extraterritorial applications of RICO predicate statutes.⁸⁹ The Second Circuit reversed, holding that (with one exception) the alleged misappropriation involved a domestic injury because it occurred when the allegedly misappropriated funds were transferred out of a New York bank account.⁹⁰ The court also concluded that the civil RICO claims involved domestic applications of the predicate mail and wire fraud, money laundering, and bank fraud statutes because (1) the defendants used domestic mail or wires in furtherance of a scheme to defraud, and (2) the use of the mail or wires was a core component of that scheme.⁹¹

D. BIVENS

In *Hernandez v. Mesa* (analyzed extensively in previous volumes of *Year in Review*), the Supreme Court is reconsidering whether the *Bivens* damages remedy should apply extraterritorially. In *Mesa*, a Border Patrol agent fired across the border, fatally wounding a Mexican teenager.⁹² The teenager's family sued for unjustified use of deadly force in violation of the Fourth and Fifth Amendments.⁹³ The Fifth Circuit, sitting en banc, declined to extend a cause of action to a foreign citizen, injured on foreign soil, partly out of concern that such suits would interfere with international relations.⁹⁴ The Supreme Court granted certiorari,⁹⁵ and heard oral argument on November 12, 2019. A decision is expected by June 2020.

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.⁹⁶ State law, however, governs the recognition and enforcement of foreign court judgments.

88. *Bascuñán v. Elsaca*, 927 F.3d 108, 116–25 (2nd Cir. 2019).

89. *Id.* at 116 (discussing *Bascuñán v. Elsaca*, 338 F. Supp. 3d 301, 307, 316–17 (S.D.N.Y. 2018)).

90. *Id.* at 116–20.

91. *Id.* at 121–25.

92. *See Hernandez v. Mesa*, 885 F.3d 811, 814 (5th Cir. 2018) (en banc).

93. *Id.* at 815.

94. *Id.* at 822–23.

95. *Hernandez v. Mesa*, 139 S. Ct. 2636 (2019).

96. 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

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A. FOREIGN ARBITRAL AWARDS

In February 2019, the D.C. Circuit affirmed the district court's 2016 decision confirming Crystallex International's \$1.2 billion ICSID award against Venezuela involving the expropriation of a gold mine.⁹⁷ The court rejected Venezuela's argument that the district court applied an impermissibly deferential standard of review to the tribunal's damages calculation, explaining that even if, as Venezuela alleged, the damages calculation "raises a question of arbitrability," the ICSID rules—to which Venezuela had consented—"unmistakably delegate questions of arbitrability to the tribunal."⁹⁸

While the appeal of the award confirmation was pending in the D.C. Circuit, Crystallex registered its judgment in the federal district court in Delaware. Claiming that the Venezuela-owned oil company *Petróleos de Venezuela, S.A. (PDVSA)* was the "alter ego" of Venezuela, Crystallex successfully attached PDVSA's shares in its wholly-owned American subsidiary.⁹⁹ Venezuela and PDVSA (as intervenor) appealed, both asserting sovereign immunity and challenging the alter ego finding.¹⁰⁰ As noted in section I, above, the Third Circuit affirmed the grant of an attachment, rejecting the jurisdictional objections of the appellants and holding that Crystallex was not required to establish a separate immunity exception when seeking to register and enforce the judgment in a different district.¹⁰¹ Given the extensive day-to-day control Venezuela exerted over PDVSA, the court found that it was appropriate to attach PDVSA's non-immune shareholdings in its subsidiary to satisfy the judgment against Venezuela.¹⁰²

B. FOREIGN COURT JUDGMENTS

In *DeJoria v. Maghreb Petroleum Exploration, S.A.*, the Fifth Circuit addressed for the second time the validity of a \$123 million Moroccan court judgment obtained by Maghreb Petroleum against John Paul DeJoria, the eponymous founder of John Paul Mitchell hair products and co-owner of Patrón tequila, in connection with a failed oil exploration project.¹⁰³ In earlier enforcement proceedings, DeJoria claimed he had been denied due process in Morocco, because his interests there were adverse to those of the royal family, with whom he had previously partnered.¹⁰⁴ In a 2015 decision, the Fifth Circuit had reversed and remanded the lower court's invalidation

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.

97. *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 760 F. App'x 1 (D.C.Cir. 2019).

98. *Id.*

99. *Crystallex*, 932 F.3d at 135.

100. *Id.* at 135–36.

101. *Id.* at 137.

102. *See id.* at 139, 146–49.

103. *DeJoria v. Maghreb Petroleum Expl., S.A.*, 935 F.3d 381, 396 (5th Cir. 2019).

104. *Id.*

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of the judgment. The lower court's decision was based solely on the finding that DeJoria himself was denied due process, not that Morocco's legal system as a whole was so deficient that no Texas court should ever recognize a Moroccan judgment—which, the Circuit court held, was the necessary basis for non-recognition under Texas's version of the Uniform Foreign Money Judgments Recognition Act. The Fifth Circuit permitted the lower court to consider alternative grounds for nonrecognition under the Act on remand.

While on remand, the Texas legislature—with DeJoria's case square in its sights—updated the law to permit nonrecognition “if the specific proceeding in the foreign court leading to the judgment was not compatible with requirements of due process of law.”¹⁰⁵ Citing the updated law, DeJoria obtained nonrecognition in the district court a second time. This time, the Fifth Circuit affirmed. The Fifth Circuit rejected Maghreb's argument that the new law violated the Texas Constitution's prohibition against bills of attainder or ex post facto laws, reasoning that Maghreb did not have a right to recognize an unfair judgment, and also that the district court did not err in determining that DeJoria had, in fact, been denied due process in Morocco.¹⁰⁶

VIII. Forum Non Conveniens

The U.S. Supreme Court has instructed that “the plaintiff's choice of forum should rarely be disturbed”¹⁰⁷ in a *forum non conveniens* analysis, because the court may “assume that the choice is convenient.”¹⁰⁸ For decades, courts have agreed that this assumption of convenience “applies with less force” to foreign plaintiffs,¹⁰⁹ but courts have been slow to clarify the amount of deference due in various circumstances. In 2019, the Courts of Appeals for the District of Columbia Circuit and the Sixth Circuit squarely addressed how much deference to give a plaintiff's choice of forum and when this deference should apply.¹¹⁰

In *Shi v. New Mighty U.S. Trust*, the D.C. Circuit distilled the test into a sliding scale analysis, explaining that courts must “give greater deference to a

105. *Id.* at 387.

106. *Id.* at 389, 392–94.

107. *Gulf Oil v. Gilbert*, 330 U.S. 501, 508 (1947).

108. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981) (“When the home forum has been chosen, it is reasonable to assume that this choice is convenient.”); *see also Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007) (stating that “[a] defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing the plaintiff's chosen forum); *see also El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 676–77 (D.C. Cir. 1996), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010); *Zions First Nat'l Bank v. Moto Diesel Mexicana, S.A. de C.V.*, 639 F.3d 520, 523–24 (6th Cir. 2010).

109. *Piper Aircraft*, 454 U.S. at 255–56.

110. *See Jones v. IPX Int'l Equatorial Guinea, S.A.*, 920 F.3d 1085 (6th Cir. 2019); *Shi v. New Mighty U.S. Trust*, 918 F.3d 944 (D.C. Cir. 2019).

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plaintiff's forum choice" when it is "motivated by legitimate reasons,"¹¹¹ but must give less deference to the plaintiff's forum choice when it is "motivated by tactical advantage."¹¹² The court then considered what constitutes a "legitimate reason," on the one hand, and a tactical pursuit, on the other.

The court described two chief legitimate reasons: the plaintiff's convenience and the ability to obtain original jurisdiction over the defendant.¹¹³ It explained that the plaintiff in the case at hand had no choice but to sue the defendants in the United States because "they did not appear to be subject to jurisdiction anywhere other than in the United States."¹¹⁴ Because the doctrine of *forum non conveniens* is premised on the assumption that there are "at least two forums in which the defendant is amenable to process,"¹¹⁵ the court held that "the lack of an original alternative forum constitutes a 'legitimate reason' for a foreign plaintiff's choice of a U.S. forum."¹¹⁶

Notably, the court found that the unavailability of an alternative forum at the outset of a case would suffice to support the plaintiff's jurisdictional choice, even if a defendant later consented to jurisdiction elsewhere. At the pre-lawsuit stage, the court explained, the plaintiff would not know whether the defendant might consent and would thus have a reasonable, non-tactical reason to sue in the forum.

The Sixth Circuit Court of Appeals addressed the reverse situation of how much deference to give a resident plaintiff's choice of forum in *Jones v. IPX Int'l Equatorial Guinea, S.A.*¹¹⁷ There, the plaintiff argued that his choice of a U.S. forum should be accorded strong deference because he was a U.S. citizen.¹¹⁸ The court rejected this position, pointing out that the purpose of deferring to a plaintiff's forum choice is grounded on the "assumption that the plaintiff will choose a convenient forum."¹¹⁹ The court explained that when "the facts plainly show that the assumptions do not hold true, courts need not adhere blindly to the corresponding levels of deference."¹²⁰ Because "nearly everything else about this case suggest[ed] [the plaintiff] did not select his home forum"—rather, the plaintiff had "worked overseas most of his professional life" and "was happy to invest, work, and live in Equatorial Guinea" before commencing the suit—the Sixth Circuit found that the "district court thus acted within its discretion when it did not give heightened deference to his choice of forum."¹²¹

111. *Sbi*, 918 F.3d at 950 (quoting *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 73 (2d Cir. 2001)).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Gilbert*, 330 U.S. at 506–07.

116. *Sbi*, 918 F.3d at 950.

117. *Jones*, 920 F.3d at 1085.

118. *Id.* at 1094.

119. *Id.*

120. *Id.*

121. *Id.* at 1089, 1095.

IX. Parallel Proceedings

A. INTERNATIONAL ABSTENTION

In *In re Picard*—a bankruptcy case involving the ongoing fallout from Bernard Madoff’s Ponzi scheme—the U.S. Court of Appeals for the Second Circuit held that international comity principles should not prevent a bankruptcy trustee administering the liquidation of Madoff’s investment company (Madoff Securities LLC) from seeking to recover property from a foreign subsequent transferee.¹²² The bankruptcy court dismissed the Trustee’s recovery claims against foreign feeder funds that invested with Madoff Securities after concluding that the United States “had no interest” in regulating the relationship between those funds and their investors (or the liquidation of those funds and the payment of their investors’ claims), and that the foreign nations where those funds were in liquidation had a greater interest in regulating those activities.¹²³

The Second Circuit disagreed. The court noted that, “[a]t the threshold, ‘[i]nternational comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction,’ and that [a] true conflict exists if ‘compliance with the regulatory laws of both countries would be impossible.’”¹²⁴ The Second Circuit then applied its established choice-of-law test, “‘tak[ing] into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law.’”¹²⁵ The court concluded that the United States has a compelling interest in allowing domestic estates to recover fraudulently transferred property and that, by contrast, the interest of the foreign jurisdictions was not compelling.¹²⁶ After considering additional factors, the Second Circuit held that “the United States’ interest in applying its law to these disputes outweighs the interest of any foreign state.”¹²⁷

In *Accent Delight International Ltd. v. Sotheby’s*, the U.S. District Court for the Southern District of New York refused to abstain from proceeding with a lawsuit brought against the New York-based auction house and its parent company alleging fraudulently inflated art appraisals in favor of a subsequently-filed Swiss lawsuit.¹²⁸ Applying the eight-factor “totality of the circumstances” test for abstention in light of simultaneous foreign litigation set out by the Second Circuit in *Royal & Sun Alliance Insurance Co. of Canada*

122. *In re Picard, Trustee for Liquidation of Bernard L. Madoff Inv. Secs. LLC*, 917 F.3d 85, 100–05 (2nd Cir. 2019).

123. *Id.* at 94.

124. *Id.* at 102 (quoting *In re Maxwell*, 93 F.3d 1036, 1049–50 (2nd Cir. 1996)).

125. *Id.* at 103 (quoting *In re Maxwell*, 93 F.3d at 1048).

126. *Id.* at 103–04.

127. *Id.* at 105.

128. *Accent Delight Int’l Ltd. v. Sotheby’s*, 394 F. Supp. 3d 399, 411–13 (S.D.N.Y. 2019).

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*v. Century International Arms, Inc.*¹²⁹ and reaffirmed in *Leopard Marine & Trading, Ltd. v. Easy Street Ltd.* (analyzed in last year's Year in Review),¹³⁰ the court acknowledged that "the suits are parallel because substantially the same parties are contemporaneously litigating substantially the same issue in another forum," and further that "[th]e convenience factors are neutral because both New York and Swiss courts can adequately resolve these claims."¹³¹ The court decided against abstention, however, out of concern for potential prejudice to the plaintiff and the fact that the U.S. suit "appears to have made more progress than the Swiss suit, which has yet to be served."¹³²

129. *Royal & Sun All. Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88, 94 (2d Cir. 2006).

130. *Leopard Marine & Trading, Ltd. v. Easy St. Ltd.*, 896 F.3d 174, 189–90 (2d Cir. 2018).

131. *Sotheby's*, 394 F. Supp. 3d at 412.

132. *Id.* at 413.

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