I. Developments in Personal Jurisdiction

David Lombardero**

A. ALTERNATIVE MODES OF SERVICE OF PROCESS: SERVICE BY E-MAIL


RIO had difficulty serving process on RII. Although RII used the address of its international courier, IEC, in Miami when it registered its domain names, IEC was not authorized to accept service of process on RII. Nonetheless, RIO mailed the summons and complaint to IEC, which forwarded it to RII. This prompted a telephone call from a Los Angeles attorney, requesting that RIO send him a more legible copy of the complaint. Although RIO obliged, the attorney declined to accept service of process. RIO was unable to find a physical address for RII. It was told that physical mail should be sent to IEC, but the preferred method of communication was via e-mail.

Rather than attempting to serve RII in a manner authorized by Fed. R. Civ. P. 4(f)(2), i.e., as authorized by Costa Rican law for service of process issuing from Costa Rican courts, or in accordance with directions from the Costa Rican government pursuant to letters rogatory, RIO elected to apply to the district court for an order pursuant to Fed. R. Civ. P. 4(f)(3), "by other means . . . as may be directed by the court." The district court

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1. Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007 (9th Cir. 2002).
authorized RIO to effect service of process by physically mailing it to IEC and Carpenter, coupled with sending it to RII electronically at its e-mail address, and RIO did so. RII responded by moving, unsuccessfully, to dismiss for insufficiency of service of process and lack of personal jurisdiction. After RII repeatedly failed to respond to discovery and comply fully with the court's orders, the district court entered judgment by default against RII and awarded RIO monetary sanctions. RII appealed.

In challenging service of process, RII argued that RIO had to attempt to effect service pursuant to Rule 4(f)(2) before making application under Rule 4(f)(3). The Ninth Circuit disagreed, holding that "court-directed service under Rule 4(f)(3) is as favored as service available under" any other subsection of Rule 4(f). It also held that the method of service authorized by the district court was reasonable under the circumstances; it was calculated to give RII actual notice of the lawsuit, and in fact did so.

This opinion should not be read as giving district courts carte blanche to approve service of process by e-mail, especially not as a stand-alone method of service. The court stated that the district court must "balance the limitations of email service against its benefits in any particular case." In this case, it was obvious that RII in fact had received the process through IEC and had even forwarded it to its attorney.

B. No Jurisdiction Over Internet Service Provider

In ALS Scan, Inc. v. Digital Service Consultants, Inc., plaintiff brought suit in federal court in Maryland for copyright infringement. Among others ALS, sued Digital, which was the Internet Service Provider (ISP) for the defendants who maintained and posted allegedly infringing photographs on their website. Digital, however, was based in Georgia and did not solicit business in Maryland, where ALS brought suit. The court held that the passive act of providing internet access that allowed patrons to create and maintain websites to display material that would be accessed and viewed in other states and possibly cause injury there was insufficient to subject the ISP to personal jurisdiction in those other states. Although there is nothing unusual about this analysis, the result is important. Absent such a rule, any ISP would be exposing itself to suit virtually anywhere in the world.

C. In Rem and Personal Jurisdiction Under the Anticybersquatting Consumer Protection Act

In 2002, the Fourth Circuit decided, in tandem, two noteworthy cases regarding the constitutionality and scope of jurisdiction under the in rem jurisdictional provision of the Anticybersquatting Consumer Protection Act (ACPA). The specific provision for in rem jurisdiction is 15 U.S.C. § 1125(d)(2)(A), which provides for in rem jurisdiction over the domain name if the owner of a registered mark or a mark protected by § 1125(a) (infringe-

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3. See Rio Props., Inc., 284 F.3d at 1014-15. Costa Rica is not a party to the Hague Convention or other agreement with the United States regarding service of process, so that Fed. R. Civ. P. 4(f)(1) was not applicable. Id. at 1015 & n.4.
4. See id. at 1015.
5. See id. at 1017-19.
6. See id. at 1018.
8. See id. at 715-16.
ment) or § 1125(c) (dilution) "is not able to obtain in personam jurisdiction over" the owner or registrar of the mark.9 The remedies are limited to "forfeiture or cancellation of the domain name" or its transfer to the owner of the protected mark.10 The domain name is deemed to be situated, inter alia, where the registry is located.11 Network Solutions, Inc. (NSI), now a subsidiary of VeriSign, Inc., was and remains the sole registry worldwide of internet domain names ending in .com, .net, and .org, and is located in Virginia.

Harrods Ltd. v. Sixty Internet Domain Names12 involved a dispute between the famous London department store and its erstwhile Argentine affiliate over the rights to use various internet domain names containing the name "Harrods." Harrods brought suit in rem against the domain names under the ACPA, asserting a variety of trademark claims. In Porsche Cars N. Am., Inc. v. Porsche.net,13 Porsche brought suit against several defendants, foreign and domestic, alleging trademark dilution arising out of their use of domain names containing "Porsche" or "Porscha." In addition to forfeiture of the domain names, Porsche sought injunctive and other relief.

The Fourth Circuit upheld the constitutionality of in rem jurisdiction under the ACPA. Together, the cases raised and answered four principal questions. First, are domain names a form of "property" over which in rem jurisdiction could be exercised? In Porsche, the court relied on district-court precedent to hold that Congress has the power under the Constitution to treat an internet domain name as property and clearly did so in the ACPA.14

Second, is registration in the forum state a "minimum contact" sufficient to permit the exercise of jurisdiction over a domain in the forum state? In both cases, the court held that because the very subject-matter of the lawsuits was ownership of the names in question, or a claim that the owner of the names had violated his rights and duties regarding the use the names, the suits constitutionally could be maintained in rem in Virginia, where the owners registered the names.15 Further, because NSI, the registry, was based in Virginia, that state had a sufficient interest in ensuring marketability of domain names and resolving disputes over them to support the exercise of jurisdiction.16

Third, are "bad faith" registration and use claims under 15 U.S.C. § 1125(d)(1) the only claims that can be brought in rem under the ACPA? The Harrods court disagreed with the majority of district courts regarding the scope of the in rem jurisdictional provision of the ACPA. In a lengthy discourse on the legislative history and statutory interpretation, the court held that the in rem provision was not limited to trademark claims under 15 U.S.C. § 1125(d)(1) ("bad faith" registration, trafficking in, or use of a domain name).17

Fourth, does the predicate for the invocation of jurisdiction in rem have to be satisfied throughout the proceedings, or only initially? In Porsche, the Fourth Circuit held that the jurisdictional predicate for the invocation of in rem jurisdiction need only be met at the time the court makes the finding that the plaintiff could not obtain in personam jurisdiction

14. See id. at 260.
15. See id. at 259-60; Harrods, 302 F.3d at 224-25.
16. See Harrods, 302 F.3d at 224-25.
17. See id. at 227-32.

SUMMER 2003
in the United States. The court held that, although a defendant may be able to defeat in rem jurisdiction by having a suitable representative consent to personal jurisdiction in a federal court, such an effort must be timely. Here, any objection was waived because the defendant did not consent to jurisdiction—in a court across the continent—until three days before the scheduled trial date.18

D. FEDERAL ARBITRATION ACT DOES NOT CONFER PERSONAL JURISDICTION

In two unrelated decisions, the Fourth Circuit and the Ninth Circuit each held that Chapter II of the Federal Arbitration Act, 9 U.S.C. §§ 201–208, merely gives federal courts subject-matter jurisdiction over actions to enforce foreign arbitral awards, but that an independent ground, satisfying the standard constitutional due-process analysis, is required for the exercise of personal jurisdiction over the defendant.19 While these appear to be the first pronouncements on this specific issue to come from appellate courts, they are, as the Ninth Circuit stated, "unexceptional."20 More interestingly, the two courts diverged in dictum regarding enforceability of the arbitral award against property in the forum state—i.e., quasi in rem. The Fourth Circuit would apply a standard "minimum contacts" analysis, with the presence of the property serving merely as a contact of minor significance,21 but the Ninth Circuit might uphold quasi-in-rem jurisdiction, in treating the foreign arbitral award much as if it already were a judgment that was being enforced.22

E. DEFAULT JUDGMENT DOES NOT PRECLUDE LITIGATION OF JURISDICTIONAL ISSUES INTERTWINED WITH THE MERITS

In Jackson v. FIE Corp.,23 the plaintiff accidentally dropped a loaded semi-automatic pistol, which discharged, rendering him a quadriplegic. He filed a product-liability suit in Louisiana, suing several defendants, including three Italian corporations, all containing the family name "Tanfoglio" that allegedly manufactured the pistol and/or its parts. All of the Tanfoglio firms defaulted and, after a hearing on liability and damages, the district court entered a judgment for over $11 million against them.24 Nearly two years later, Defendant Fratelli Tanfoglio filed a motion in the district court to set aside the judgment under Rule 60(b)(4) as void ab initio for lack of personal jurisdiction.25

Fratelli Tanfoglio argued that it did not manufacture the type of pistol involved until a year after the accident, and that it did not have continuous and systematic contacts with Louisiana. As a consequence, Fratelli Tanfoglio argued, it lacked minimum contacts that would enable the court to exercise either general jurisdiction over it, or specific jurisdiction with respect to Jackson's claims. Fratelli Tanfoglio thus directly attacked the conclusory testimony of Jackson's firearms expert that the pistol was "made by Giuseppe Tanfoglio and

19. Glencore Grain Rotterdam, B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1121 (9th Cir. 2002); Base Metal Trading, Ltd. v. OJSC, 283 F.3d 208, 212 (4th Cir. 2002).
20. Glencore Grain Rotterdam, B.V., 284 F.3d at 1121.
22. See Glencore Grain Rotterdam, B.V., 284 F.3d at 1127.
23. Jackson v. FIE Corp., 302 F.3d 515 (5th Cir. 2002).
24. Id. at 519–20.
25. Id. at 520.
Fratelli Tanfoglio. The district court denied the motion, reasoning that Fratelli Tanfoglio's default "conclusively established" that it had manufactured the pistol in question, and that its discovery responses established that it had the "minimum contacts" with Louisiana necessary to support the exercise of jurisdiction. Fratelli Tanfoglio then appealed.

The Fifth Circuit first held that Fratelli Tanfoglio's nearly two-year delay in seeking to vacate the judgment was not a ground for denying relief because "at least absent extraordinary circumstances ... the mere passage of time cannot convert an absolutely void judgment into a valid one." Most importantly, the court held that in seeking to vacate the judgment, Fratelli Tanfoglio remained free to establish that it had not manufactured the pistol in question, even though this fact was essential to the merits.

In coming to this holding, the Fifth Circuit looked to Supreme Court precedent from the nineteenth century allowing a collateral attack on a foreign-state judgment for lack of personal jurisdiction based upon facts that were also essential to the merits. The court also concluded that "the protections of personal jurisdiction must trump the doctrine of claim preclusion," because underlying jurisdictional challenges are of constitutional dimension and appear in formal rules, whereas the doctrine of res judicata is merely judicially created. The court noted the possibility of an anomalous result if Fratelli Tanfoglio were found on remand to be subject to general but not specific jurisdiction: The default judgment then would become binding and conclusively determine that Fratelli Tanfoglio was liable for having manufactured the pistol, even though it in fact had not done so. That, apparently, is one of the prices of defaulting.

II. Recent Developments in the Service of Process Abroad

N. Jansen Calamita

A. Introduction

In the federal courts, the service of process outside the United States in civil actions is governed by Rule 4 of the Federal Rules of Civil Procedure. In state courts, the particular procedures of the forum state must be determined. In either case, however, where service is to be made in a foreign state that is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (Hague Convention), the Supreme Court has directed that the Hague Convention provides the exclusive means for effecting service on the territory of a signatory state. Where service on a foreign party may be effected in
the United States without the need for service abroad, the Supreme Court has held that the Hague Convention is not applicable.\(^{35}\)

**B. DEVELOPMENTS UNDER THE HAGUE CONVENTION**

1. **Service by Mail under Hague Convention Article 10(a)**

   One issue that continues to cause disagreement among federal and state courts is whether article 10(a) of the Hague Convention, preserving "the freedom to *send* judicial documents, by postal channels, directly to persons abroad,"\(^{36}\) authorizes the *service* of judicial documents by mail, or whether it merely authorizes the mailing of documents other than process.\(^{37}\)

   In *Nuovo Pignone, SpA v. Storman Asia M/V*,\(^{38}\) the Fifth Circuit Court of Appeals adopted the reasoning of the Eighth Circuit's leading decision in *Bankston*,\(^{39}\) and lined up on the side of the courts that have held that article 10(a) does not permit service of process by mail.\(^{40}\) In rejecting a broad reading of the term "*send*," the court observed that "because the drafters purposely elected to use forms of the word 'service' throughout the Hague Convention, while confining the use of the word 'send' to article 10(a), we will not presume that the drafters intended to give the same meaning to 'send' that they intended to give to 'service.'"\(^{41}\)

   A similarly narrow reading of "*send*" was adopted by a federal bankruptcy court in Florida.\(^{42}\)

   As 2003 began, however, a bankruptcy court in Delaware, citing the absence of controlling precedent in the Third Circuit sided with the proponents of a liberal construction of article 10(a) and permitted service of process by mail on defendants located in the United Kingdom. Persuaded by the Second Circuit's decision in *Ackerman*,\(^{43}\) the court determined that for the purposes of article 10(a), "*send*" means "service of process" and "the drafters only varied the language used."\(^{44}\)

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35. Id.
36. Emphasis added. Article 10(a) of the Hague Convention provides in pertinent part, "Provided the State of destination does not object, the present Convention shall not interfere with (a) the freedom to send judicial documents, by postal channels, directly to persons abroad; . . . " Hague Conference PIL Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, art. 10 [hereinafter Hague Convention].
37. In either case, article 10(a) may only be used if the receiving state has not registered its opposition pursuant to article 21.
41. *Nuovo Pignone*, 310 F.3d at 384.
42. In re *Greater Ministries Int'l., Inc.*, 282 B.R. 496 (Bankr. M.D. Fla. 2002) (noting the absence of controlling precedent in the Eleventh Circuit and "refus[ing] to incorporate service into the meaning of the word 'send' in Article 10(a)'").
43. *Ackerman v. Levine*, 788 F.2d 830 (2d Cir. 1986).
Absent controlling guidance from the courts of appeals or the Supreme Court, given this uncertainty, practitioners remain well advised to exercise caution and avoid reliance on service by mail under the Hague Convention.45

C. DEVELOPMENTS UNDER RULE 4 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Nearly ten years after Congress completely overhauled Rule 4 with the 1993 amendments, the provisions of the rule continue to raise some thorny issues.

1. Service of Process on Corporations Abroad Pursuant to the Laws of the Foreign Country

In both Convention and non-Convention cases over the past year, courts struggled with the interpretative difficulties that can arise under Rule 4 when service of process is made on a corporation abroad pursuant to the rules prescribed by the laws of the foreign country. Under Rule 4(h)(2), service of process on a corporation outside of the United States may be made "in any manner prescribed for individuals" pursuant to Rule 4(f), except by means of "personal delivery" under Rule 4(f)(2)(C)(i). 46 Rule 4(f)(2)(A), however, provides that service of process abroad may be made "in the manner prescribed by the law of the foreign country for service in that country."47

In 2002, one federal court had occasion to address the issue of conflicting rules when "the manner prescribed by the law of the foreign country" includes service by personal delivery upon the corporation.48 In Ryan v. Brunswick Corp., the court found that if personal service on a corporation is permitted under the laws of the foreign country in which service is to be effected, then, regardless of Rule 4(h)(2)'s limitations, the service is appropriate under Rule 4(f)(2)(A).49 As the court reasoned: "The proscription against personal service on a foreign corporation in FRCvP 4(h)(2) is expressly limited to service under FRCvP 4(f)(2)(C)—not service under FRCvP 4(f)(2)(A)."50 Accordingly, where service is undertaken "in the manner prescribed by the law of the foreign country for service in that country," the relevant provision for analysis is Rule 4(f)(2)(A), regardless of the specific means of service prescribed by the foreign country’s law.51

A similar issue arose under Rule 4(h)(2) in the context of article 10(b) of the Hague Convention. Under Article 10(b), in the absence of objection by the receiving state, the “freedom” of judicial officers, officials, or other competent persons of the originating state “to effect service of judicial documents directly through the judicial officers, officials, or

48. Id.
50. Id.
51. As the court noted, the Advisory Committee notes on the 1993 amendment make the point that under Rule 4(f), “[s]ubparagraphs (A) and (B) prescribe the more appropriate methods for conforming to local practice or using local authority. Subparagraph (C) prescribes other methods authorized by the former rule.” Ryan, 2002 WL 1628933, at *1 n.5.

SUMMER 2003
other competent persons" of the receiving state is preserved. In the United States, most courts that have considered article 10(b) have concluded that it provides an additional means for service under the Hague Convention by sanctioning service in accordance with the means prescribed by the law of the state in which service is effected.

In a number of cases, however, the issue has arisen whether the proscription against personal service on a foreign corporation in Rule 4(h)(2) limits the availability of such service under article 10(b), if personal service is otherwise permitted by the laws of the receiving state. In *Dimensional Communications, Inc. v. OZ Optics Ltd.*, the district court found that where, pursuant to article 10(b), service had been personally served upon an officer of the defendant Canadian corporation at the corporation's offices in Ontario in accordance with Ontario law, nothing in Rule 4(h)(2) would render such service defective. In so doing, the court distinguished an earlier decision by another district court in which service on a corporate officer at his home address in England was rejected as improper on the grounds that under Rule 4(h)(2) service on a corporate defendant abroad may not be made by personal delivery. According to the court in *OZ Optics*, the critical prohibition embodied by the exception of the Rule 4(f)(2)(C)(i) personal service option from Rule 4(h)(2) is not personal service as such, but rather personal service on behalf of the corporation upon an individual at his home instead of his business address.

*OZ Optics* seems to leave open the possibility that service of process on a corporate officer at a non-business address, which is appropriate under foreign law and article 10(b) of the Hague Convention, is nevertheless defective for not complying with Rule 4(h)(2) and its exception of Rule 4(f)(2)(C)(i). Surely such a result could not be right, particularly given the admonition in the 1993 Advisory Committee notes to Rule 4 that "the revised rule authorizes the use of any means of service provided by the law not only of the forum state, but also of the state in which a defendant is served. . . ." Accordingly, in a case in which it was found under article 10(b) that the law of the foreign state allowed personal service on corporations, nothing in Rule 4(h)(2) and its exception of Rule 4(f)(2)(C)(i) could render that service defective. Instead the operative provision of Rule 4(f) being incorporated into Rule 4(h)(2) would be Rule 4(f)(1), which requires the use of the Hague Convention's provisions in cases where the Hague Convention applies.

Like Article 10(a), Article 10(b) may only be used if the receiving state has not registered its opposition pursuant to Article 21.


54. See id. at 656–57.

55. See id. (addressing *Trump Taj Mahal Assoc. v. Hotel Services, Inc.*, 183 F.R.D. 173 (D.N.J. 1998)). The court in *Trump* did not address whether the service as effected conformed with the laws of England where the corporate officer was served.

56. *Id.* at 657. See also *Marcantonio v. Primorsk Shipping Corp.*, 206 F. Supp. 2d 54 (D. Mass. 2002) (holding that service had not been properly effected under either the Hague Convention or Rule 4(h)(2), where plaintiff served the defendant shipping company by leaving a copy of the summons and complaint with the captain of one of the defendant's ships in Canada).


58. See *Volkswagenwerk AG*, 486 U.S. at 699. Note also the statement in the 1993 Advisory Committee notes that the provisions of Rule 4(f)(2) and its subsections, e.g., Rule 4(f)(2)(C)(i), are meant to be "alternative methods for use when internationally agreed methods are not intended to be exclusive. . . ." Clearly these provisions are not applicable in a case in which the Hague Convention exclusively applies.

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2. The Availability of Court Directed Service under Rule 4(f)(3)

Under Rule 4(f)(3), a district court is authorized to direct that service of process be made outside of the United States by any means not prohibited by international agreement. Two non-Hague Convention cases decided over the past year came to different conclusions about whether parties seeking court-directed service must first show that other methods of service identified in Rule 4(f) have been attempted or are otherwise unavailable. In *Rio Properties, Inc. v. Rio International Interlink*, the Ninth Circuit Court of Appeals rejected the idea that "Rule 4(f) should be read to create a hierarchy of preferred methods of service of process." Referring to the Rule's text, its structure, and the Advisory Committee notes, the court came to "the inevitable conclusion that service of process under Rule 4(f)(3) is neither a 'last resort' nor 'extraordinary relief.' It is merely one means among several which enables service of process on an international defendant."

In *Ryan v. Brunswick Corp.*, the district court, while acknowledging the Ninth Circuit's analysis in *Rio*, nevertheless concluded that "in order to prevent parties from whimsically seeking alternate methods of service and thereby increasing the workload of the courts," a federal district court may, "in exercising the discretionary power permitted by FRCvP 4(f)(3), impose a threshold requirement for parties to meet before seeking the court's assistance." Under the standard set by the court, while a party need not exhaust all possible methods of service prior to seeking an order from the court, it is necessary "to show that they have reasonably attempted to effectuate service on the defendant(s) and that the circumstances are such that the district court's intervention is necessary to obviate the need to undertake methods of service that are unduly burdensome or that are untried but likely futile."

D. Developments in the Relationship Between U.S. State Law and the Hague Convention

Courts continue to wrestle with the meaning of the Supreme Court's pronouncement in *Volkswagenwerk AG v. Schlunk*, that "[i]f the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Convention applies." As the decisions over the past year show, there has been more than a measure of truth to Justice Brennan's concern in *Schlunk* that a rule which leaves the determination of the Hague Convention's application to "the internal law of the forum state" runs the risk in the United States of creating fifty different standards for fifty different states.

In *Eto v. Muranaka*, for example, the Supreme Court of Hawaii held that because service of process on a foreign defendant was permitted via publication under Hawaii law, no

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59. *Rio Props., Inc.*, 284 F.3d at 1014 (allowing service of process by email).
60. Id. at 1015 (citation omitted). Because *Rio* was not a Hague Convention case, there was no occasion for the court to consider whether the same would be true if the Convention applied. However, the Advisory Committee notes clearly express that in cases in which the Hague Convention applies, "resort may be had" to court-directed service under Rule 4(f)(3) only in limited circumstances. Fed. R. Civ. P. 4, 1993 Advisory Committee Notes.
61. *Ryan*, No. 02-CV-0133E(F), 2002 WL 1628933, at *2 (W.D.N.Y. May 31, 2002) (allowing service of process on corporation in Taiwan "by regular mail, fax and/or e-mail").
62. Id.
64. Id. at 708 (Brennan J., concurring).
transmittal of documents abroad was implicated and therefore the Hague Convention did not apply. In that case, the court reasoned that since the plaintiff had been unable to locate the defendant abroad in Japan, the plaintiff was entitled to rely upon a Hawaii rule permitting service of process in Hawaii by publication. According to the court, because the plaintiff had shown that the defendant could not be found in Japan despite a variety of efforts, process by publication was appropriate and did not raise any prospect of conflict with the Hague Convention because the Hague Convention does not apply where the address of the person to be served is not known.

In *Lafarge v. Altech Environmental USA*, however, a federal district court indicated that there may be considerable scrutiny in cases where state court rules requiring actual service of process are bypassed in favor of “last resort” rules that permit service to be effected in the forum without the transmission of documents abroad. There, prior to the case being removed to federal court, the plaintiff had obtained a state court order that permitted it to serve the defendant foreign corporation in Michigan through its U.S. subsidiary. Under the applicable state court rule, such an order was appropriate only “[o]n a showing that service of process cannot reasonably be made” on the defendant abroad. Reviewing the matter on the foreign defendant’s Rule 12(b)(5) motion to dismiss, the federal court concluded that regardless of the state court’s order permitting service on the U.S. subsidiary, “no explanation” sufficient to the federal court had been provided to justify the plaintiff’s failure to effect service abroad in the first place. As a result, and on that basis, the federal court rejected the service as an impermissible attempt to circumvent the Hague Convention.

While federal review of a state court order, as in *Lafarge*, is relatively rare, practitioners should remain aware that even if service on a foreign defendant by means of publication (or other domestic method) is upheld by a U.S. court, difficulties may be encountered in enforcing any subsequent judgment in the defendant’s home jurisdiction.

E. Additional Signatories to International Conventions

1. Hague Convention


2. Inter-American Convention on Letters Rogatory

There were no new signatories to the Inter-American Convention or its Additional Protocol in 2002.

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65. *Eto*, 57 P.3d at 413.
66. *Id.* at 498, 423 (citing article 1). Hague Convention art. 1 reads in pertinent part: “This Convention shall not apply where the address of the person to be served with the document is not known.” Hague Convention, supra note 36, art. 1.
68. *Id.* at 831–32 (quoting the state court rule and finding that it “effectively requires the service of documents abroad”).
69. *Id.*
70. *See, e.g., Eto*, 57 P.3d at 424, n.8.
III. Enforcement of Foreign Judgments

Heather Fan and Glenn W. Rhodes

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (REFAA Convention) governs the recognition and enforcement of foreign arbitration awards in U.S. courts. The principles of comity as set forth in Hilton v. Guyot govern recognition and enforcement of foreign court judgments in U.S. courts. The principles set forth in Hilton are codified in the Uniform Foreign Money-Judgments Recognition Act, which has been adopted by many states. A Special Commission of the Hague Conference on Private International Law is preparing a draft REFAA Convention on international jurisdiction and the effects of foreign judgments. At a meeting of a Commission on General Affairs and Policy of the Diplomatic Sessions in April 2002, it was decided to move to an informal process to explore new ways of negotiating. To that end, the Informal Working Group on the Judgments Project met in October 2002 to assist in the preparation of the REFAA Convention.

A. The Recognition of Foreign Arbitral Awards

1. Procedural grounds for non-recognition of foreign arbitral awards

In In the Matter of the Arbitration between: Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine, a citizen of Monaco sought to enforce an arbitral award rendered in Moscow against Ukrainian parties in a breach of contract dispute. The Second Circuit declined on the procedural ground of forum non conveniens. The court held that forum non conveniens could be applied to domestic cases brought under the REFAA Convention and proceeded to evaluate the relevant factors. First, the court gave little deference to the foreign plaintiff's choice of forum. Second, the court exhibited a reluctance to find foreign courts "corrupt" or "biased" and determined that the Ukrainian judicial system provided an adequate alternative forum. Third, the court found the extensive discovery and factual investigation required to bind the Ukrainian non-signer of the arbitration agreement involved foreign language documents, witnesses beyond the subpoena power of the United States,
and an award more easily satisfied in the Ukraine. Finally, the court found U.S. interest in the case to be marginal, as only through its role as a signatory to the REFAA Convention. In view of the balance of these factors, the court affirmed the district court's dismissal of the proceedings.

2. Substantive grounds for non-recognition of foreign arbitral awards

In Sarhank Group v. Oracle Corp., an Egyptian corporation petitioned the court to confirm an arbitral award rendered in Egypt against a Cyprian corporation and its U.S. parent. Although the U.S. parent corporation did not agree to arbitrate the dispute, it was held liable under principles of contract and agency. The court examined the defendant's arguments for vacatur. First, the court found no "extraordinary circumstances" including deference to the findings of the arbitrator. In particular, the court rejected the argument that U.S. substantive law should apply to assess arbitrability. Next, the court balanced the interests of international comity with the goals of arbitration in favor of enforcing the award despite parallel proceedings in the Egyptian Supreme Court. Finally, the court favored a narrow reading of the public policy exception and held that because the defendant had ample notice and was represented by counsel at the arbitration, there was no violation of due process of law.

3. Execution of foreign arbitral awards against disputed funds

Issues relating to the execution of awards may arise when parties seek to enforce foreign arbitral awards against funds affecting non-parties, as in Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara. The underlying dispute involved an Indonesian oil and gas company (Pertamina) that was owned and operated by the Republic of Indonesia. The plaintiff, a Cayman Islands company, obtained an arbitration award against Pertamina in Switzerland, after Pertamina suspended its energy extraction projects

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79. See id. at 500.
80. See id.
81. See id. at 501.
83. Id.
84. The Convention sets forth the following grounds for refusing to recognize a foreign arbitral award: (a) The parties to the agreement referred to in Article II were under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. Convention, supra note 71, art. V(1). Enforcement may also be refused if the subject matter being arbitrated is not capable of being settled by arbitration under the law of that country, or the recognition of the award would be contrary to public policy of that country. Id. art. V(2).
85. See Sarhank Group at *13.
86. See id. at *14-15.
87. See id. at *17.
88. See id. at *20.
89. See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70 (2d Cir. 2002).
in the midst of the Indonesia's fiscal and political instability. The Swiss arbitration award was later registered in a U.S. federal court. This case arose on an interlocutory appeal after the plaintiff sought to execute against fifteen U.S. bank accounts held by Pertamina for distribution to the Republic of Indonesia. The defendants contested attachment, claiming that the funds in the U.S. accounts belonged to the Republic of Indonesia rather than Pertamina, the party against whom the judgment was sought.

Pursuant to the Foreign Sovereign Immunity Act, the court first looked to New York's choice of law provisions to determine which assets were subject to attachment against foreign states. The court then held that New York law looked to property interests and mandated application of Indonesian property law to determine the ownership rights in the bank accounts. Applying Indonesian property law, the court found that all of the funds, except for a portion, belonged to the Republic of Indonesia. Despite plaintiff's arguments that Pertamina held initial title and controlled the allocation of funds, the court held that Pertamina lacked the requisite control over most of the disputed bank accounts. Further, the court found that the sophistication of the parties cut against finding reasonable reliance on the notion that Pertamina owned all of the funds. The court also acknowledged comity concerns involving Indonesia's interpretation of laws, which the court afforded "some degree of deference." Based on these findings, the court affirmed the district court's decision to deny attachment of the main portion of the U.S. funds.

B. The Recognition of Foreign Court Judgments

In Society of Lloyd's v. Turner, the Fifth Circuit affirmed a district court's summary judgment recognizing English monetary judgments against two American members of English insurance syndicates. The Society of Lloyd's (Lloyds) brought suit in England against the American underwriters (Names) who refused to pay reinsurance premiums. After a series of lengthy litigations, the English court entered a money judgment against underwriter Turner for breach of contract, as well as a default money judgment against underwriter Webb who did not answer or defend in the English litigation. The U.S. case arose when Lloyd's sought recognition of both English monetary judgments in U.S. district court under the Texas Foreign Country Money-Judgment Recognition Act.

The court examined the provisions for non-recognition under the Uniform Foreign

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90. See id. at 77–78.
92. See Karaha Bodas, 313 F.3d at 78–79.
93. See id. at 84.
94. See id. at 83.
95. See id. at 88.
96. See id. at 92.
97. See id. at 83, 86.
98. See id. at 90.
99. Id. at 92.
100. See id. at 93.
101. See Society of Lloyd's v. Turner, 303 F.3d 325 (5th Cir. 2002).
102. See id. at 327–29.
103. See id. at 328–29.
104. See id. at 329.
Country Money-Judgment Recognition Act. First, the court determined that England provided a sufficiently "fair and neutral" forum with "impartial tribunals or procedures compatible with the requirements of due process of law," as required by statute. The court stated that a foreign proceeding need not comply with the traditional due process requirements of U.S. law to be recognized by the court. Further, the court rejected appellant's argument that the different legal standards for breach of contract claims in England offended public policy, holding that the relevant inquiry was whether the cause of action, rather than the standards for evaluating the cause of action, offended the public policy of the forum. Based on these considerations, the court denied the defendant's motion for non-recognition.

In contrast, in Jaffe v. Accredited Surety and Casualty Co., Inc. the Fourth Circuit was reluctant on public policy grounds to recognize a foreign money judgment when it would result in a party's profiting from his own wrongdoing. The case involved husband and wife plaintiffs, whose claims arose after the husband failed to appear for his trial on a series of fraudulent real estate transactions. After serving sentences on his convictions, the couple fled to Canada and became Canadian citizens. They then obtained Canadian default judgments against the U.S. bond company who, according to the Canadian court, had illegally abducted the bond jumper husband to the United States for trial. Relying on the Foreign Country Money-Judgments Recognition Act, as codified in Virginia law, the husband and wife then sought to enforce their separate default judgments against the bond company in the United States.

The main issue in the case was whether enforcement of the judgment would be repugnant to Virginia's public policy. The court acknowledged a possible conflict in allowing recovery when the husband would be profiting from his wrongful act of jumping bond. The court also questioned recovery because the husband was a fugitive in criminal fraud charges pending in the United States. Given these uncertainties, the court certified the issue to the Supreme Court of Virginia.

IV. Discovery in International Litigation

Catherine Piché*

A. Introduction

In United States federal courts, 28 U.S.C. §§ 1781–84 and the Federal Rules of Civil Procedure govern international discovery practices. In addition, where the other country

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105. A foreign judgment should be recognized in a U.S. court if the foreign forum (1) allowed for a court of competent jurisdiction to give a full and fair trial on the issues presented, (2) ensured that justice was impartially administered, (3) ensured that the trial was free of fraud or prejudice, (4) had proper jurisdiction over the parties, and (4) the judgment of the foreign forum did not violate public policy.

106. Society of Lloyd's, 303 F.3d at 331.

107. See id. at 332.

108. See id. at 333.


110. See id. at 593–94.

111. See id. at 594–95, 597.

112. See id. at 598.

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concerned is also a State Party, the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention) provides procedures for judicial authorities of one signatory country to use in requesting evidence located in another signatory country.\(^{113}\)

Pursuant to subsection 1782(a)(2), a U.S. district court is authorized to order a person who resides or is "found" in the district where the court sits to comply with letters rogatory or requests made by a foreign or international tribunal, or by the application of any "interested person," "for use in a proceeding in a foreign or international tribunal."\(^{114}\) In 2002, two federal circuits significantly expanded the scope of 28 U.S.C. § 1782.

**B. Second Circuit Applies Principles of Tag Jurisdiction to Deposition Subpoenas**

In *In re Application of Asher B. Edelman*, the Second Circuit was asked to determine whether an individual, who lives and works abroad, could be subpoenaed for deposition pursuant to § 1782(a) while traveling in the United States.\(^{115}\)

The ruling in *Edelman* originated from litigation in France involving Société du Louvre (SDL), a French corporation, which had sued Asher Edelman and five investment funds that he controlled. Edelman countersued, alleging that Taittinger, a member of SDL's board of directors, mismanaged the company for his own benefit. SDL filed subpoena requests in U.S. federal court for discovery and subsequently obtained documents from Edelman and his companies. Edelman responded by filing subpoena requests of his own. When the court granted the discovery requests, Taittinger was in France. Three days later, however, while visiting New York, he was served with the subpoena for deposition testimony and discovery of documents. After returning to France, Taittinger moved to quash the subpoena, contending that he was not "found" in the court's jurisdiction, pursuant to § 1782(a). The district court agreed. Taking a broad interpretation of § 1782, the Second Circuit revised, holding that "a person who lives and works in a foreign country is not necessarily beyond the reach of § 1782(a) simply because the district judge signed the discovery order at a time when that prospective deponent was not physically present in the district."\(^{116}\)

The Second Circuit began its analysis by explaining that "[w]hat a person will testify to is located wherever that person is found."\(^{117}\) It then analyzed the language of § 1782, and more precisely the meaning of "resides or is found [in the district in which the issuing court sits]."\(^{118}\) The Second Circuit noted that § 1782(a) provides that discovery must be had in accordance with the Federal Rules of Civil Procedure, and that Federal Rules 45(c)(3)(A)(ii)

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114. And, "to the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure." 28 U.S.C. § 1782(a) (2003). See *Esses v. Hanania*, 101 F.3d 873, 875 (2d Cir. 1996).

115. *In re* Edelman, 295 F.3d 171 (2d Cir. 2002).

116. Id. at 180.

117. Id. at 177.

118. Id. at 177 (emphasis added).

SUMMER 2003
and 26(c), in particular, are sufficient to protect a nonresident prospective deponent from burdensome travel.\textsuperscript{19} The court rejected the suggestion by Taittinger that the words "is found" meant that a prospective deponent needed to be in the district at the precise time when the district court issued the discovery order, reasoning that it saw no benefit in "requiring those involved in this process to be compelled to jump through such procedural hoops."\textsuperscript{20} The court explained that since the exercise of personal jurisdiction by U.S. courts based on nothing more than physical presence—i.e., "tag jurisdiction"—was consistent with due process, the discovery mechanism provided under § 1782(a) required no more, and that discovery could be had from a witness who came traveling to the United States under 28 U.S.C. § 1782(a).\textsuperscript{21}

Looking at the legislative history of § 1782(a), the Second Circuit noted that the paragraph had first been partly amended to "... permit depositions in any judicial proceeding without regard to whether the deponent is 'residing' in the district or only sojourning there," and again amended to authorize other forms of discovery, in addition to depositions, to describe the types of foreign proceedings for which discovery may be granted, and to describe who may petition for discovery.\textsuperscript{22} The court concluded that "if a person is served with a subpoena while physically present in the district of the court that issued the discovery order, then for the purposes of § 1782(a), he is 'found' in that district."\textsuperscript{23}

Notwithstanding its holding that Taittinger was not beyond the scope of § 1782, the Second Circuit agreed with Taittinger's claim that Fed. R. Civ. P. 45(c)(3)(A)(ii) could bar the deposition as he could not be compelled to travel more than 100 miles from his residence to be deposed in the United States.\textsuperscript{24} As a consequence, the court remanded Taittinger's claim to the trial court, and suggested that the district court consider the twin aims of the statute,\textsuperscript{25} as well as the "effect of its decision on the 'procedural parity' of the parties to the French litigation," while deciding whether or not to quash the subpoena.\textsuperscript{26}

C. NINTH CIRCUIT PERMITS DISCOVERY FOR USE IN EUROPEAN COMMISSION ANTITRUST INVESTIGATIONS

In Advanced Micro Devices, Inc. v. Intel Corp.,\textsuperscript{27} the Ninth Circuit concluded that Advanced Micro Devices (AMD) could obtain domestic discovery from Intel Corp. (Intel), both United States-based manufacturers of microprocessors, for use in antitrust investigations by the Directorate General-Competition of the European Commission (Directorate General).

The dispute in *Intel Corp.* arose in the context of an investigation of Intel Corporation by the Directorate, initiated by a complaint by AMD. AMD alleged that its competitor

\textsuperscript{19} Id. at 178.
\textsuperscript{20} Id.
\textsuperscript{22} Edelman, 295 F.3d at 179–80 (emphasis added).
\textsuperscript{23} Id. at 180.
\textsuperscript{24} Id. at 181.
\textsuperscript{25} Esses, 101 F.3d at 876 ("providing ... assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts").
\textsuperscript{26} Edelman, 295 F.3d at 181.
\textsuperscript{27} Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664 (9th Cir. 2002). Petition for Certiorari was filed in *Intel Corp.* on October 11, 2002.

VOL. 37, NO. 2
Intel was abusing its dominant market position in Europe. To support its complaint, AMD applied under 28 U.S.C. § 1782, to the district court in California for access to documents and transcripts from a proceeding pending in federal court in Alabama. The district court rejected AMD's request for discovery, on the basis that the matter before the Directorate General was not "a proceeding in a foreign or international tribunal."

Reversing in an opinion by Judge Hawkins, the Ninth Circuit first summarized the workings of the Directorate General and rejected Intel's assertions that the complaint process before the Directorate General was purely administrative in nature and preliminary to a non-judicial proceeding. The court found, to the contrary, that the process takes care to permit both the complainant and alleged infringer an ample opportunity for input in the eventual recommendations and inserts an independent entity, the European Commission Advisory Committee, between the Directorate's recommendation that a formal complaint be issued and the Commission's decision to file a final enforceable decision. The court concluded that the Directorate's investigation leads "at a minimum" to quasi-judicial proceedings and qualifies as a "proceeding before a tribunal" within the broad interpretation of § 1782. It also impliedly found that AMD was an "interested person" in the investigation, apparently on the basis that the action was initiated because of AMD's complaint.

The Ninth Circuit further addressed the issue of whether, prior to obtaining the discovery under § 1782, it is necessary to demonstrate that the discovery sought in the U.S. court would be available under the rules of the foreign proceeding itself. In the face of a circuit split on that issue, the Ninth Circuit sided with the Second and Third Circuits and held that such a showing was not required, based on the fact that there is nothing in the plain language or legislative history of § 1782 or its amendments that would require a threshold showing that what is sought would be discoverable in the foreign proceeding.

Finally, acknowledging that its decision allowed for "liberal discovery," the Ninth Circuit emphasized that its view was consistent with the twin aims of § 1782 and reversed and

128. Id. at 666.
129. Id. at 667–68.
130. Id. at 668.
131. Id. at 667–68.
132. Id. at 665 n.1.
133. See, e.g., Four Pillars Enters Co., Ltd. v. Avery Dennison Corp., 308 F.3d 1075, 1080 (9th Cir. 2002) ("This question, which has occasioned a divergence among the federal circuits, was recently resolved for this circuit by [Intel Corp.]. . . [t]here we rejected any requirement of discoverability in the foreign tribunal."). The First and Eleventh Circuits have imposed a discoverability requirement, based on a twofold rationale. First, they sustain that there is a fear of offending foreign courts by using U.S. procedures to circumvent the foreign country's own procedures and laws. Second, there is a concern that, without the discoverability requirement, a U.S. litigant before a foreign court would be at a disadvantage relative to its foreign opponent, who could freely seek broad discovery against its U.S. opponent pursuant to § 1782, while the U.S. party would be limited to the discovery procedures of the foreign jurisdiction. See Application of Asta Medica S.A., 981 F.2d 1, 5–7 (1st Cir. 1992); Lo Ka Chum v. Lo To, 858 F.2d 1564, 1566 (11th Cir. 1988); In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151, 1154–55 (11th Cir. 1988), cert. denied 488 U.S. 1005 (1989).
134. Intel Corp., 292 F.3d at 669 ("Had Congress wished to impose such a [discoverability] requirement on parties, it could have easily done so."); see also In re Hughes, 281 B.R. 224, 229–30 (S.D.N.Y. 2002) ("[S]ection 1782 does not limit discovery to that which would be permitted in the foreign state where the litigation is taking place . . . section 1782(a) is consistent with section 304 of the Bankruptcy Code's policy of enabling U.S. courts to assist foreign courts, particularly in matters involving discovery.").
remanded the proceedings such that the district court could proceed to consider AMD's request on the merits.\(^{135}\)

V. Developments in the Doctrine of *Forum Non Conveniens*

KRISTEN BOON*

The doctrine of *forum non conveniens* grants courts the discretion to decline to exercise jurisdiction over a controversy, even where jurisdiction and venue are proper. In *Piper Aircraft Co. v. Reyno*, \(^{136}\) the Supreme Court indicated that this power should be exercised where the convenience of the parties and the court and the interests of justice indicate that the action is more appropriately tried in another forum. Defendants bear the burden of proof in an action to dismiss for *forum non conveniens* and must establish that a foreign forum is adequate and available and that the public and private interest factors laid out in *Gulf Oil Corp. v. Gilbert*, \(^{137}\) weigh in favor of the alternate forum.

A. Deference to Plaintiff's Choice of Forum

In general, great deference is granted to a plaintiff's choice of forum.\(^{138}\) Last year the Second Circuit considered "what degree of deference . . . the district court [should] accord to a United States plaintiff's choice of a United States forum where that forum is different from the one in which the plaintiff resides." \(^{139}\) The court found that a plaintiff's choice of any U.S. forum is to be respected where the decision to proceed in that forum is motivated by recognized legal principles such as obtaining jurisdiction over defendants, witnesses and evidence, rather than an improper motive such as forum shopping.\(^{140}\)

In 2002, the Second Circuit elaborated that the level of deference accorded to a plaintiff is undiminished by the fact that the U.S. plaintiffs are acting in a representative capacity as part of a shareholder class action, where the majority of the plaintiff class have a *bona fide* connection with the U.S. forum because they are residents.\(^{141}\)

B. Adequacy of the Alternative Forum

Under *Piper & Gulf Oil*, a defendant must demonstrate that an adequate alternative forum exists to successfully obtain a *forum non conveniens* dismissal. Whereas foreign courts with different procedures, standards of due process, or levels of efficiency are generally considered to be adequate absent evidence of corruption or undue influence,\(^{142}\) a recent decision by the Southern District of New York suggests the adequacy of non-judicial fora will be more closely examined. In *In re: Assicurazioni Generali S.p.A. Holocaust Insurance Litigation*,\(^{143}\)

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135. *Intel Corp.*, 292 F.3d at 669.

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138. *Id.* at 508 ("unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed").


140. *See id.* at 75.


the court dismissed defendants' *forum non conveniens* argument that the International Commission on Holocaust Era Insurance Claims, a private commission set up by European insurance companies, governmental entities, and non-governmental organizations to resolve unpaid Holocaust-era insurance claims, was an adequate alternative forum. The district court found that as an ad-hoc, non-judicial, private international claims tribunal created and potentially controlled by defendants, the Commission was not entitled to the same deference as the courts or an administrative arm of a foreign nation.

Efforts to base inadequacy on the *quantum* of remedy have, however, been strictly rejected. In *Gonzalez v. Chrysler Corp.*, the Fifth Circuit Court of Appeals held that Mexico was an adequate alternative forum despite a cap on damages which would entitle the plaintiff to a *de minimus* recovery only. The Court rejected plaintiff's argument that the forum was inadequate, even though the lawsuit would never be brought in Mexico because the costs of litigating the case would exceed the potential recovery.  

C. *The Warsaw Convention and the Forum Non Conveniens Doctrine*

In *Hosaka v. United Airlines*, the Ninth Circuit considered whether the doctrine of *forum non conveniens* survives the Warsaw Convention, which is silent on the availability of the doctrine. Departing from the Fifth Circuit's holding in *In re Air Crash Disaster Near New Orleans Louisiana on July 9, 1982*, the Ninth Circuit held that courts do not retain their discretionary *forum non conveniens* power where the Convention applies, because: (1) the purpose of the Convention is to achieve uniformity and to balance the interests of air carriers against those of passengers; (2) the drafting history of the Convention suggests that the *forum non conveniens* doctrine was not incorporated into Article 28; and (3) other international agreements which are silent on the doctrine do not permit its application.

VI. *Foreign Sovereign Immunities Act*

Andrew B. Loewenstein*

A. *The FSIA and Agencies or Instrumentalities of Foreign States*

The Foreign Sovereign Immunities Act (FSIA), governs the amenability of foreign sovereigns, including their "agencies or instrumentalities," to suit in the courts of the United States. Perhaps the most significant development in FSIA jurisprudence to occur in 2002 was the Supreme Court's decision to grant *certiorari* in *Patrickson v. Dole Food Company* in order to consider two issues concerning the immunities of "agencies or instrumentalities" of foreign states.

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144. See *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 381 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 1928 (2003); *see also Lueck v. Sundstrand Corp.*, 236 F.3d 1137 (9th Cir. 2001) (holding New Zealand no-fault compensation scheme adequate despite far lower damages as a remedy).


146. *In re Air Crash Disaster Near New Orleans, LA on July 9, 1982*, 821 F.2d 1147, 1162 (5th Cir. 1987).


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Under the FSIA, agencies and instrumentalities of foreign states, such as state-owned corporations, are accorded the same immunity as are bestowed upon foreign states themselves. Patrickson will resolve a circuit split over whether entities owned by agencies or instrumentalities of foreign states (a structure known as “tiering”) are themselves entitled to immunity under the FSIA. Patrickson will also determine whether a corporation is entitled to immunity under the FSIA if a majority of its shares were owned by a foreign state at the time of the events giving rise to litigation, but not at the time the plaintiff commenced suit against the corporation.

B. Exceptions to Sovereign Immunity

Under the FSIA, foreign sovereigns are presumptively immune from suit absent the applicability of one of the statute’s enumerated exceptions to immunity. In 2002, federal courts considered cases involving the waiver, commercial activity, expropriation, immovable property, tortious activity, and terrorism exceptions to sovereign immunity.

1. Waiver Exception

Under the FSIA’s waiver exception, a foreign sovereign is not immune from suit in actions “in which the foreign state has waived its immunity either explicitly or by implication.” In World Wide Minerals, Inc. Ltd. v. Republic of Kazakhstan, the D.C. Circuit determined the proper scope of a foreign sovereign’s explicit waiver. The plaintiff, a foreign investor in Kazakhstan’s oil industry, executed four contracts with Kazakhstan. One contract unambiguously waived Kazakhstan’s sovereign immunity under the FSIA; a second contract also waived sovereign immunity, but did not specifically reference the FSIA. The remaining two contracts did not address waiver of immunity. When the plaintiff sued alleging breach of all four contracts, the district court ruled that Kazakhstan’s express waiver of immunity gave it jurisdiction over all the claims, including the claims for breaches of the contracts that did not have waiver clauses.

On appeal, the D.C. Circuit reversed, explaining that because the waivers in the first two contracts did not suggest that they encompassed claims for breaches of the other two contracts, the plaintiff could not maintain claims based on the latter two. The D.C. Circuit found support for this holding in the Supreme Court’s domestic sovereign immunity ju-

152. An agency or instrumentality is defined as “any entity” which “is a separate legal person, corporate otherwise,” which is “an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof,” and which “is neither a citizen of a State of the United States . . . nor created under the laws of any third country.” 28 U.S.C. § 1603(a)(a), (b).
153. Compare Gates v. Victor Fine Foods, 54 F.3d 1457 (9th Cir. 1995) (subsidiaries of tiered, foreign state-owned corporations are not entitled to immunity under the FSIA), with In re Air Crash Disaster Near Roselawn, Indiana, 96 F.3d 932 (7th Cir. 1996) (the FSIA grants immunity to subsidiaries of foreign state-owned corporations).
157. See id. at 1162 n.13.
158. See id. at 1162.
159. See id. at 1163.
risprudence, noting that "explicit waivers of sovereign immunity are narrowly construed 'in favor of the sovereign' and are not enlarged 'beyond what the language requires.' \footnote{160}

2. Commercial Activity Exception

The most frequently invoked exception to immunity under the FSIA is the commercial activity exception.\footnote{161} In \textit{First Merchants Collection Corp. v. Republic of Argentina},\footnote{162} the District Court for the Southern District of Florida considered whether Argentina's confiscation of merchandise was a "commercial activity" for purposes of the FSIA. The court held that "seizure of goods by a nation's police force is not the type of action by which a private party engages in trade, traffic or commerce," as the Supreme Court required for a commercial activity in \textit{Republic of Argentina v. Weltover, Inc.} \footnote{163} Rather, "such an action is quintessentially sovereign in nature." \footnote{164}

\textit{First Merchants Collection} also reaffirmed that the legality of a foreign sovereign's conduct is not relevant for determining whether it is a commercial activity. The court explained that "even assuming, arguendo, that Plaintiff's merchandise was unfairly, or even unlawfully, confiscated by Argentine officials, such does not transform a clear exercise of sovereign police power into a commercial activity." \footnote{165} The Sixth Circuit came to the same conclusion in \textit{Keller v. Central Bank of Nigeria}. \footnote{166}

Courts also interpreted the requirement under the first two clauses of the commercial activity exception that the claim be "based upon" commercial activity in the United States. In \textit{Lempert v. Republic of Kazakstan},\footnote{167} the plaintiff alleged a breach of contract claim based on Kazakstan's alleged failure to pay for services rendered pursuant to a consulting contract. The District Court for the District of Columbia rejected the plaintiff's contention that the action was based upon a commercial activity carried on in the United States because preliminary negotiations between the parties and the solicitation of the plaintiff's services took place in the United States.\footnote{168} Noting that both the plaintiff's performance and Kazakstan's non-payment occurred in Kazakstan, the court held that the action was not "based upon" a commercial activity carried on in the United States.\footnote{169} Conversely, in \textit{BP Chemicals, Ltd. v. Jiangsu Sapo Corp. (Group) Ltd.},\footnote{170} the Eighth Circuit found that the plaintiff's claim for misappropriation of trade secrets was based upon commercial activity carried on in the United States. The court ruled that since the plaintiff alleged that the defendant had disclosed trade secrets to American vendors in the United States, its action was "based upon" commercial activity in the United States.\footnote{171}

Under the third clause of the commercial activity exception, a foreign sovereign is not immune from suit where the claim is based upon an act outside the United States in

\footnotesize{\textsuperscript{160} Id. at 1162 (quoting Library of Cong. v. Shaw, 478 U.S. 310, 318 (1986)).
\textsuperscript{161} 29 U.S.C. § 1605(a)(2).
\textsuperscript{163} First Merchs., 190 F. Supp. 2d at 1338 (citing 504 U.S. 607, 614 (1992)).
\textsuperscript{164} Id. at 1338-39.
\textsuperscript{165} Id. at 1339.
\textsuperscript{166} Keller v. Cent. Bank of Nig., 277 F.3d 811, 816 (6th Cir. 2002) ("any fraud or bribery involved did not render the plan non-commercial").
\textsuperscript{168} Id. at 203.
\textsuperscript{169} Id.
\textsuperscript{170} BP Chems., Ltd. v. Jiangsu Sapo Corp. (Group) Ltd., 285 F.3d 677 (8th Cir. 2002).
\textsuperscript{171} Id. at 684.}
connection with a commercial activity of the foreign state that causes a direct effect in the United States. The circuits are split over what qualifies as a "direct effect."172

In Virtual Countries, Inc. v. Republic of South Africa,173 the Second Circuit rejected the suggestion that a foreign sovereign's issuance of a press release had a sufficient immediate consequence in the United States for purposes of the direct effect test, because "the press release's effect falls at the end of a long chain of causation and is mediated by numerous actions by third parties."174 Likewise, in Filetech S.A. v. France Telecom S.A.,175 the plaintiff alleged that France Telecom monopolized the United States market for certain marketing lists in violation of the Sherman Antitrust Act.176 The Second Circuit rejected the argument that France Telecom fell within the FSIA's commercial activity exception on the ground that France Telecom's alleged anti-competitive activity in France had a direct effect on United States commerce. The plaintiff had not, the court found, "shown with even a modicum of detail any instances where American companies were deterred" from publishing the plaintiff's marketing data by France Telecom's alleged anti-competitive activity abroad.177 Nonetheless, the Second Circuit acknowledged the possibility that a "somewhat diminished showing of a 'direct effect' might be warranted in an antitrust action where the plaintiff alleges that the complained of anti-competitive activity prevented entry into the market as opposed to the impairment of competition already underway."178

In Croesus EMTR Master Fund L.P. v. Federative Republic of Brazil, the D.C. district court ruled that:

non-payment could have had no 'immediate consequences'—and thus no 'direct effect'—in the United States where there was never any designation of a place in the United States where payment was to be received, much less any firm basis to believe that such a designation would have been accepted by Brazil and proper as a matter of Brazilian law.179

Similarly, in Lempert v. Republic of Kazakstan,180 the plaintiff, an American citizen who had entered into a consulting contract with Kazakstan, argued that the Kazakstan's alleged refusal to pay the plaintiff money owed under the contract caused a direct effect in the United States, namely the plaintiff's alleged financial loss. The court ruled that "refusal to pay for services performed by an American plaintiff usually does not meet the direct effect requirement," absent an assurance that payment would be made specifically in the United States.181

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172. In the Second, Ninth, and Tenth Circuits, a commercial activity outside the United States has a direct effect in the United States only if the effect is "legally significant." See Weltover, Inc. v. Republic of Arg., 941 F.2d 145, 152 (2d Cir. 1991) (aff'd 504 U.S. 607 (1992)); Adler v. Fed. Republic of Nig., 107 F.3d 720, 727 (9th Cir. 1997); United World Trade, Inc. v. Mangshlaknet Oil Prod. Ass'n, 33 F.3d 1232, 1239 (10th Cir. 1994). Similarly, the D.C. Circuit, although not expressly adopting the legal significance test, holds that a plaintiff's financial loss in the United States satisfies the direct effect test only if the foreign sovereign was obligated to render payment in the United States. See Goodman Holdings v. Rafidain Bank, 26 F.3d 1143, 1146–47 (D.C. Cir. 1994)); Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1514–15 (D.C. Cir. 1988). On the other hand, the Fifth Circuit rejects the legal significance test, and holds that financial loss by an American plaintiff, if it is an immediate consequence of the defendant's activity, is a direct effect in the United States. See Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 897 (5th Cir. 1998).


174. Id. at 237.


177. Filetech, 304 F.3d at 182.

178. Id.


181. Id.
However, the Lempert opinion, following the concurrence in Goodman Holdings, suggested that the direct effect test might be satisfied if there was a "longstanding consistent customary practice" of sending payment to the United States.  

Courts in other jurisdictions, however, adopted the Fifth Circuit's position that a commercial activity need not cause a legally significant event in the United States in order to qualify as a direct effect. The Sixth Circuit, in Keller v. Central Bank of Nigeria, ruled that an effect need not be legally significant to be a direct effect in the United States since that requirement is not found in the text of the FSIA and "the addition of unexpressed requirements to the statute is unnecessary." Similarly, in Saudi Basic Indus. Corp. v. ExxonMobil Corp., the District Court for the District of New Jersey ruled that "there is no requirement of a 'legally significant act in the U.S. beyond a financial loss' to satisfy the direct effect requirement." Consequently, Saudi Basic held that the financial loss of a United States corporation, without more, "suffices for 'direct effect' such that the commercial activity exception applies."  

3. Expropriation Exception

In Altmann v. Republic of Austria, the Ninth Circuit addressed whether seizure of art by the Nazis during World War II constituted the taking of property in violation of international law for purposes of the FSIA expropriation exception to sovereign immunity. The court reiterated the three-pronged standard for a taking to be valid under international law: (1) the expropriation must "serve a public purpose"; (2) aliens cannot "be discriminated against or singled out for regulation by the state"; and (3) an "otherwise valid taking is illegal without the payment of just compensation." The Ninth Circuit found that the allegations of the seizure of artwork, taken as true, established that the art had been "wrongfully and discriminatorily appropriated in violation of international law," since the seizure had not been done for a public purpose but rather had been sold for personal gain.  

4. Immovable Property Exception

The FSIA creates an exception to sovereign immunity for "any case in which . . . rights in immovable property situated in the United States are at issue." In Fagot Rodriguez v. Republic of Costa Rica, the plaintiffs sued Costa Rican diplomats for, among other things,
non-payment of rent and trespass, and argued that the immovable property exception to sovereign immunity gave the court jurisdiction over their claim. The First Circuit rejected this argument. The court held that the immovable property exception to sovereign immunity "was not intended broadly to abrogate immunity for any action touching upon real estate." Therefore, a "simple contract dispute over nonpayment of rent" does not fall within the exception to immunity. The First Circuit thus set the rule that "the immovable property exception applies only in cases in which rights of ownership, use, or possession are at issue."

5. Tortious Activity Exception

Under the FSIA's tortious activity exception to sovereign immunity, federal courts have jurisdiction over claims in which "money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." This exception, however, does not apply to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused."

In Fagot Rodriguez, the plaintiffs sought damages for an alleged tortious trespass by Costa Rican diplomats. The First Circuit assumed, without deciding, that the plaintiffs had stated a claim for tortious trespass and that the diplomats acted within the scope of their employment when the alleged trespass occurred. Nonetheless, the court ruled that the plaintiffs could not establish jurisdiction under the tortious activity exception because the trespass claims were based upon acts within the diplomat's discretion.

In determining that the diplomats' actions were discretionary, the First Circuit adopted the Supreme Court's discretionary function test for construing claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(a). This test first requires that the court determine whether the conduct in question "is a matter of choice for the acting employee." If a "statute, regulation or policy specifically prescribes a course of action for an employee to follow," then there is no room for choice and the discretionary function exception does not apply. Second, assuming that the challenged conduct "involves an element of judgment," that judgment must be "of the kind that the discretionary function exception was designed to shield," i.e.,— to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort."

192. Id. at 12 (quoting MacArthur Area Citizens Ass'n v. Republic of Peru, 809 F.2d 918, 921 (D.C. Cir. 1987)).
193. Id. at 12.
194. Id. at 13.
196. Id.
197. Rodriguez, 297 F.3d at 8.
198. Id. at 8-9; see also Maalouf v. Swiss Confederation, 208 F. Supp. 2d 31, 35 (D.D.C. 2002) (adopting the Supreme Court's FTCA's discretionary function test for determining whether the tortious activity exception to foreign sovereign immunity applies).
199. Rodriguez, 297 F.3d at 9.
200. Id. (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)).
201. Id. (quoting United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines, 467 U.S. 797, 814 (1984)).

VOL. 37, NO. 2
In applying the first prong of the discretionary function test the First Circuit noted that it was uncontested that the diplomats had authority to establish a consulate and that this necessarily involved an element of choice or judgment. The plaintiffs, however, argued that the diplomats acted outside the scope of that authority by installing the consulate on property allegedly in violation of the terms of a lease agreement and remaining on the property without paying rent after the lease had been terminated. The First Circuit rejected this argument, holding that a more specific directive than the diplomats' "general obligation to avoid unlawful activity [was] required before we can conclude that the diplomats' conduct was not the product of judgment or choice." 202

Turning to the second prong of the test, the court observed that the "critical question" for this inquiry is "whether the acts or omissions that form the basis of the suit are susceptible to a policy-driven analysis," or, put differently, "whether some plausible policy justification could have undergirded the challenged conduct." 203 The court had little trouble finding that the diplomats' decisions satisfied this standard, noting that the initial choices as to whether, where, and how to set up the consulate, and their actions concerning the early termination of the lease and demand for rent "clearly implicated policy issues." 204

6. Terrorism Exception

In 1996, Congress amended the FSIA to add an exception to sovereign immunity for actions "in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... for such an act." 205 For this exception to apply, the foreign state must be designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979, and the claimant or victim must be an American national when the act upon which the claim is based occurred.

In Cronin v. Islamic Republic of Iran, 206 the District Court for the District of Columbia held that Section 1605(a)(7) does not merely provide an exception to foreign sovereign immunity, but also creates a cause of action for victims of state-sponsored terrorism against culpable foreign states.

C. OTHER FSIA-RELATED ISSUES

In several notable decisions, the courts addressed a number of other FSIA-related issues. In Price v. Socialist People's Libyan Arab Jamahiriya, 207 the D.C. Circuit held that "foreign states are not 'persons' protected by the Fifth Amendment" and thus are not entitled to a separate personal jurisdictional inquiry under constitutional due process standards. 208 In Keller v. Central Bank of Nigeria, 209 the Sixth Circuit ruled that foreign states are immune from civil RICO claims. And in In re Republic of Philippines, 210 the Ninth Circuit held that

202. Id. at 10 (quotation omitted).
203. Id. at 11 (quoting Shansky v. United States, 164 F.3d 688, 692 (1st Cir. 1999)).
204. Id. (citing MacArthur Area Citizens Ass'n v. Republic of Peru, 809 F.2d 918, 922 (D.C. Cir. 1987)).
208. Id. at 96. The Supreme Court suggested in Republic of Arg. v. Weltower, Inc., 504 U.S. 607, 619 (1992) that a foreign sovereign might not be a "person" under the Due Process Clause, but did not resolve the question.
210. In re Republic of Phil., 309 F.3d 1143, 1149 (9th Cir. 2002).
district courts are required to consider a foreign sovereign's claim to immunity before addressing other issues.

VII. Developments in the Act of State Doctrine
CAROLINE LUCKENBACH*

The act of state doctrine precludes U.S. courts from reviewing a foreign sovereign's public acts committed within its own territory.\(^{211}\) For a claim to be barred by the act of state doctrine, a threshold determination of applicability must be made that the claim involve (1) an official act of a foreign sovereign, (2) performed within its own territory, and (3) relief sought that would require the court to declare the sovereign's act invalid.\(^{212}\) However, even where applicable, courts will not apply the doctrine unless, on balance, the doctrine's underlying policies—international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations—justify its application.\(^{213}\) Once invoked, the doctrine serves as a rule of decision, which requires that "the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid."\(^{214}\)

In several developments this year, U.S. courts have further restricted the circumstances in which the act of state doctrine will be found to bar courts from adjudicating claims involving acts by a foreign sovereign.

A. War Crimes and Crimes Against Humanity Do Not Constitute Official Sovereign Acts

In 2002, war crimes and crimes against humanity were added to the growing list of acts for which the act of state doctrine is no longer available to bar claims. In Sarei v. Rio Tinto PLC,\(^{215}\) the District Court for the Central District of California held that the act of state doctrine did not bar claims asserting war crimes and crimes against humanity based on the conduct of the military of Papua New Guinea (PNG) during a civil war, although it did bar environmental tort and racial discrimination claims. The plaintiffs, a class of PNG

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211. See World Wide Minerals, 296 F.3d at 1164 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401, 84 S. Ct. 923, 926, 11 L.Ed.2d 804 (1964)).


214. World Wide Minerals, 296 F.3d at 1165 (internal quotes and cites omitted). Accord Sarei, 221 F. Supp. 2d at 1184 ("the doctrine is not one of abstention; rather, it is a 'principle of decision binding on federal and state courts alike'") (quoting W.S. Kirkpatrick, 493 U.S. at 406, emphasis in original, internal quote omitted). But see Sirico v. British Airways, No. 98-CV-4938, 2002 WL 113877, at *2 (E.D.N.Y. Jan. 22, 2002) ("the act of state doctrine is an abstention doctrine") (citing Bigio, 239 F.3d at 451).

residents, brought claims against Rio Tinto, PLC, an international mining group, based on allegations that Rio Tinto’s mining operations destroyed their island’s environment, harmed the health of its people and incited a ten-year civil war.

The court found that although orders given by military commanders during wartime are typically viewed as official sovereign acts, where the commands do not involve legitimate warfare, the acts in question are illegal acts committed during war, and the outcome is different. The court concluded that the act of state doctrine was not applicable to the claims of war crimes and crimes against humanity here because a blockade and purported acts of torture, rape, and pillage could not be deemed official acts of state.

B. Commercial Exception to Official Acts Limited to Exclude Acts Peculiar to Sovereign Power

Although there is some question as to the existence of a commercial activity exception to the act of state doctrine, two cases in 2002 at least recognized the possibility of such an exception. The district court, in Sarei v. Rio Tinto, noted that cases have recognized a commercial exception limited to “situations where governments are not exercising powers peculiar to sovereigns.” The court concluded that the acts relevant to plaintiffs’ environmental tort and racial discrimination claims—PNG’s grant of a concession to exploit natural resources to Rio Tinto—constituted “public and governmental” and not “private and commercial” actions because control over natural resources is a power peculiar to sovereigns. With respect to the environmental tort and racial discrimination claims, the court found that because the act of state doctrine was applicable and because two of the three policy considerations supported its application, the claims were barred.

In the World Wide Minerals decision discussed in last year’s article, the District Court for the District of Columbia declined to consider claims against Kazakhstan that would have required a determination of the validity of official acts of Kazakhstan. In 2002, the D.C. Circuit affirmed the district court’s dismissal of World Wide Mineral’s claims, in part through a straightforward application of the act of state doctrine. At oral argument, World Wide argued that the case should come within the commercial activity exception to the act of state doctrine because the claims were based on purely commercial conduct by Kazakhstan. Citing W.S. Kirkpatrick and Alfred Dunhill of London v. Cuba, the Court of Appeals acknowledged the existence of such an exception as an unsettled question, which it had never before addressed. Though because the commercial conduct cited by World

216. See id. at 1188-89.
217. See id. at 1189.
218. Id. at 1186 (quoting Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 408 (9th Cir. 1983) (citing Alfred Dunhill)).
219. See id. at 1193. The district court did not consider what the Ninth Circuit subsequently articulated as a “fourth factor”—whether the sovereign’s actions were taken in the public interest (see infra)—which might have affected the balance had the court considered it.
224. 296 F.3d at 1166, 1166 n.20.
Wide was not the basis for the claims to which the act of state doctrine applied, it was unnecessary for the court to reach the question of whether such an exception exists.225

C. Fourth Factor Added to Balancing Test

The Ninth Circuit has articulated a balancing test that further restricts the circumstances under which the act of state doctrine should bar claims. In a consolidated action, John Doe I et al. v. Unocal Corp., the Ninth Circuit held that the act of state doctrine did not bar the plaintiffs' claims against Unocal, an American oil company, despite finding that the doctrine technically was applicable.226

Residents of Myanmar brought claims against the Myanmar Military (the new military government that took control of Burma in 1988 and renamed it Myanmar); Myanmar Oil, a state-owned company established to produce and sell the nation's oil and gas resources; Total, a French oil company; and Unocal. The plaintiffs alleged that the Myanmar Military subjected villagers of the Tenasserim region of Myanmar to forced labor, murder, rape, and torture while constructing a gas pipeline through the region.227

The Ninth Circuit found the act of state doctrine applicable to the case because plaintiffs' claims required the court to review official acts by the Myanmar Military within its own territory.228 To determine whether to apply the doctrine, the court weighed the three policy considerations first articulated in Sabbatino, plus a fourth factor added by the Ninth Circuit in Liu v. Republic of China:229 whether the foreign state was acting in the public interest.230 The court found that apart from the respect to be accorded to Myanmar as a foreign sovereign acting on its own territory all of the other factors weighed against application of the act of state doctrine. Noting the international consensus against murder, torture, rape, and slavery, the fact that the U.S. government already has denounced Myanmar's human rights abuses and imposed sanctions, and that it would be difficult to contend that Myanmar's actions were taken in the public interest, the court held that the act of state doctrine did not bar the plaintiffs' claims.231

In two decisions in 2002, courts in the Southern District of New York decided not to apply the act of state doctrine as a bar where the underlying policy considerations did not justify such application. In Wiwa v. Royal Dutch Petroleum Co., the court declined to apply the doctrine because the plaintiffs' claims would not interfere with Nigerian-American relations where the accused military regime had been replaced by a democracy and the new government had set up a commission to investigate the alleged abuses.232 In U.S. v. Portrait of Wally, in addition to questions about whether either the "act" or "state" requirements were met, the court found that the underlying policies weighed against application of the doctrine because the case would not interfere with foreign relations where the action was brought by the executive branch and restoration of proper ownership of seized property was a pronounced goal of Austrian law.233

225. Id. at 1166.
226. Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976, at *7–8 (9th Cir. Sept. 18, 2002).
227. Id. at *20–21.
228. Id. at *20.
229. 892 F.2d 1419, 1424 (9th Cir. 1989).
231. Id. at *21.
VIII. Extraterritorial Application of United States Law

Vincent Chirico*

In 2002, courts dealt with the question of the extraterritorial application of U.S. law in various spheres, including bankruptcy, securities transactions, antitrust, immigration, the internet, and the Americans with Disabilities Act.

A. Bankruptcy

In Stonington Partners v. Lernout & Hauspie, Lernout & Hauspie (L&H), a Belgian corporation, purchased a dictation technology company from Stonington, a United States corporation, in a stock transaction. On November 27, 2000, Stonington sued L&H in the Delaware Chancery Court alleging that the acquisition was procured by fraud. The next day, Stonington obtained a Belgian court order directing L&H to turn over its shares of the acquired company to a Court-appointed trustee. On November 29, 2000, L&H filed a Chapter 11 bankruptcy petition in the United States District Court for the District of Delaware. The very next day, L&H also filed for bankruptcy protection in Belgium. The proceedings ensued simultaneously. In May 2001, the district court granted L&H's request for a declaratory judgment that any claim asserted by Stonington in the Delaware Chancery Court would be subject to mandatory subordination under section 510(b) of the United States Bankruptcy Code. In Belgium, however, Stonington asserted its right to pursue treatment of its unsecured claims on parity with other unsecured creditors, so that they would not be subject to subordination, and the Belgian court rejected L&H's application to confirm the district court's reorganization plan, which would have subordinated Stonington's claims. L&H subsequently filed an amended adversary proceeding complaint in Delaware and sought a declaratory judgment that the claims should be determined exclusively by the Delaware Court in accordance with the Bankruptcy Code. The Delaware Court granted declaratory and injunctive relief, directing Stonington not to pursue its argument in Belgium. The order was affirmed by the district court.

The Third Circuit reversed, finding that the applicable case law unequivocally directed U.S. courts to exercise restraint in enjoining foreign proceedings. Noting its skepticism that an anti-suit injunction could be found appropriate under these circumstances, the appellate court nonetheless remanded the action to the Bankruptcy Court to determine whether an anti-suit injunction was appropriate in light of various comity concerns that were not previously considered. In so doing, the Third Circuit reiterated the well-established notion that enjoining a party from resorting to a foreign court is equivalent to enjoining foreign proceedings.325

B. Securities Litigation

In United International Holdings, Inc. v. The Wharf (Holdings) Ltd., the defendant was a cable company that obtained a license to operate a cable service in Hong Kong. The plaintiff

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234. 310 F.3d 118 (3rd Cir. 2002).
was a cable systems investor that negotiated with the defendant to provide various resources in exchange for a right to invest in the cable service. The terms of this agreement were never reduced to writing. After the defendant was awarded the license, it failed to honor its commitment to the plaintiff. The plaintiff sued and won compensatory and punitive damages; the defendant appealed.

The Tenth Circuit affirmed the judgment, holding that the anti-fraud provisions of the Securities Exchange Act 237 "prohibit fraud in the sale of securities when significant conduct occurs in the United States or conduct occurs anywhere and has substantial effects on investors in the United States." 238 The Court noted that the crux of plaintiff's 10b-5 claim was a meeting between the plaintiff and the defendant in Colorado, where the negotiations and sale of the security took place, and the most material of the defendant's misrepresentations were made at that meeting. The Court also noted that the defendant had not demonstrated a compelling reason to justify a reversal based on comity grounds because a true conflict between United States and Hong Kong law did not exist since compliance with the judgment did not require the defendant to violate Hong Kong law.

C. ANTITRUST

In Kruman v. Christie's International, 239 plaintiffs brought an action pursuant to the Clayton 240 and Sherman 241 Acts, alleging that defendant auction houses entered into an agreement to fix the prices they charged their clients for their services as auctioneers performing auctions outside the United States. The United States District Court for the Southern District of New York dismissed the action on the ground that the conduct alleged was not subject to the antitrust laws pursuant to the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA). 242 Although the Second Circuit agreed that the FTAIA applied to the defendants' alleged conduct, it vacated the portion of the District Court's judgment granting the defendants' motion to dismiss. The Second Circuit found that the Sherman Act applied to the conduct in question because it had the "requisite effects" of injury to domestic commerce, which was regulated by the Sherman Act. The court noted that while the antitrust laws do not extend to conduct that exclusively affects foreign markets, anticompetitive conduct directed at foreign markets can also directly affect the competitiveness of domestic markets.

D. THE AMERICANS WITH DISABILITIES ACT

In Torrico v. International Business Machines Corporation, 243 the plaintiff was a citizen of Chile employed in New York by IBM. The plaintiff's responsibilities included frequent travel to various countries throughout Latin America, including Chile. In June 1995, the plaintiff and IBM agreed to a three-year temporary rotational assignment to IBM's facilities.

237. 17 C.F.R. § 240.10b-5.
238. Id. at 1223.
239. 284 F.3d 384 (2d Cir. 2002).
in Chile in order to help the plaintiff perform his duties more effectively. During the assignment, the plaintiff became ill and required a temporary leave of absence, during which he remained in Chile. Due to a subsequent reorganization, IBM advised the plaintiff that it would not retain his position and that he should endeavor to obtain another available position with the company by January 31, 2000. Upon learning that a position was expected to open in March 2000 and because his physical condition would not enable him to secure a position prior to that date the plaintiff requested an extension of his termination date. IBM rejected the plaintiff's request and terminated him effective January 31, 2000. The plaintiff sued alleging violations of *inter alia* the Americans with Disabilities Act (ADA)\(^\text{244}\) and the New York Human Rights Law.\(^\text{245}\)

IBM moved to dismiss the action for lack of subject matter jurisdiction and for judgment on the pleadings, arguing that the plaintiff was not within the class of individuals protected by the statute because he was a non-U.S. citizen who was working in Chile at the time of his termination. The court denied the motion, holding that the facts as alleged in the complaint and in opposition to the motion might support a conclusion that he was “employed in the United States,” and thus covered by the protections of the ADA. The Court also held that the extraterritorial provision of the New York Human Rights Law\(^\text{246}\) did not interfere with the federal government’s conduct of foreign relations.\(^\text{247}\)

E. Immigration

In *United States of America v. De Leon*,\(^\text{248}\) the defendant, who had previously been deported to the Dominican Republic after satisfying a prison sentence following a drug dealing conviction, was accused of seeking to make a surreptitious entry into the United States on a vessel found off the coast of Puerto Rico. After his conviction, the defendant appealed, claiming that 8 U.S.C. § 1326, which makes it a crime for an alien who has previously been deported to enter unless certain conditions are met, did not apply to conduct that occurred wholly outside the United States. The defendant’s argument was based on the Convention on the Territorial Sea and the Contiguous Zone,\(^\text{249}\) and claimed that the United States, by ratifying the Convention, impliedly agreed that it would not apply its laws to conduct occurring beyond the Zone (twelve miles from the shore).

The Court of Appeals rejected defendant’s argument, noting that the Convention did not “bar the application of federal statutes to conduct, whether within or beyond the contiguous zone, that has a substantial adverse effect within the United States,” and that various statutes explicitly permitted such conduct.\(^\text{250}\)

F. The Internet

*Dow Jones & Co. v. Harrods, Ltd.*\(^\text{251}\) involved an April Fool’s joke by Harrods, the well-known London department store. On March 31, 2002, Harrods issued a press release, and

\(^{244}\) 42 U.S.C. § 12101.

\(^{245}\) N.Y. Exec. Law § 290.

\(^{246}\) N.Y. Exec. Law § 298-a(1).

\(^{247}\) 213 F. Supp. 2d at 410.

\(^{248}\) 270 F.3d 90 (1st Cir. 2001).


subsequently posted a web announcement indicating that Harrods planned to “float” Harrods by building a ship version of the store to be moored in London on the Thames River. Individuals seeking further comment were directed to contact “Loof Lirpa” (“April Fool” spelled backward). Dow Jones read the release as purporting to announce that Harrods planned to issue a public offering of its stock, and published an article to that effect in both its print version (Wall Street Journal) and on its website. Upon learning that the offer was a joke, Dow Jones published a correction in print and on the web. On April 5, 2002, Dow Jones issued its own story, apparently intended as its light-hearted response, entitled “The Enron of Britain?” Harrods subsequently advised Dow Jones that its article “caused serious damage” to Harrods’ reputation worldwide by linking Harrods with Enron, and demanded an apology. Dow Jones denied that its article was defamatory and offered to print an opinion piece provided by Harrods. Harrods refused and commenced a defamation action in the High Court of Justice in London.

Dow Jones subsequently commenced an action in the Southern District of New York, seeking a declaratory judgment and injunctive relief precluding Harrods from pursuing its claims in London. Dow Jones argued, *inter alia*, that its April 5 article represented only protected expressions of opinion under the First Amendment to the United States Constitution that defending the London action would cause Dow Jones to incur significant costs, and that permitting the London action would subject Dow Jones to related litigation throughout the world due to the publishing of its web version of the April 5 article.

The district court granted Harrods’ motion to dismiss, holding in part that it was doubtful that any injunctive ruling would gain recognition in a foreign tribunal, that comity warranted the dispute to be resolved by the London court, and that the New York action amounted to strategic forum shopping motivated by pursuit of a tactical edge over an opponent. In response to Dow Jones’s claim of the existence of a true conflict between United States and British courts on the defamation issue, the district court noted that Dow Jones’s argument was at best premature since no actual controversy existed, particularly because the London court had not yet ruled on the dispute before it. In support of its holding, the district court reiterated the general rule that “except in very narrow, compelling circumstances such as to prevent ‘an irreparable miscarriage of justice,’ there is no justifiable basis for issuing a restraining order for this purpose, especially where the restraint affects the forum where an alleged injury occurred and whose laws are being invoked.”

252. *Id.* at *108.