

## International Litigation

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### I. Foreign Sovereign Immunities Act

#### A. FSIA BEFORE THE SUPREME COURT\*\*

Under the Foreign Sovereign Immunities Act (“FSIA”), a foreign state is immune from suit, and its property from execution, unless an exception applies.<sup>1</sup> In *Samantar v. Yousuf*, the Supreme Court resolved the circuit split on whether FSIA governs questions of immunity of foreign officials acting in their official capacities, holding that they are governed by the common law, not the FSIA.<sup>2</sup> Finding no reason to believe that Congress wanted to eliminate the State Department’s role in foreign official immunity determinations, the Court declined to define “the precise scope of an official’s immunity at common law” and remanded for further proceedings.<sup>3</sup> The Court emphasized the narrowness of its holding, noting that not every case “can be successfully pleaded against an individual official alone,” and that the FSIA might apply if a foreign state is a required party under Federal Rule of Civil Procedure (“FRCP”) 19(a)(1)(B) or if a suit is against a foreign official where the state is the real party in interest.<sup>4</sup>

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1. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1604, 1609 (2011).

2. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2285-93 (2010).

3. *Id.* at 2289-93. Previously, a foreign state could request a “suggestion of immunity” from the State Department, which, if granted, led the court to surrender its jurisdiction. *Id.* at 2284. Otherwise, the court had authority to decide whether immunity existed. *Id.*

4. *Id.* at 2292 n.20 (plaintiffs must establish personal jurisdiction over foreign officials without recourse to the FSIA’s service of process or jurisdiction provisions); *see also In re Terrorist Attacks on Sept. 11, 2001*, 718 F. Supp. 2d 456, 495 (S.D.N.Y. 2010) (dismissing foreign officials for lack of personal jurisdiction); *Abi Jaoudi & Azar Trading Corp. v. Cigna Worldwide Ins. Co.*, 391 F. App’x 173, 181 (3d Cir. 2010).

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B. EXCEPTIONS TO JURISDICTIONAL IMMUNITY

1. *The Commercial Activity Exception*

The commercial activity exception to jurisdictional immunity under Section 1605(a)(2) provides that a foreign state is not immune from suit where it has engaged in one of the enumerated categories of commercial activity.<sup>5</sup> For example, the refusal by a state to honor an agreement that payment could be demanded anywhere might constitute a “direct effect” under the statute.<sup>6</sup> Additionally, a state’s actions preventing a U.S. corporation from entering into contractually required subcontracts with two U.S. entities causing lost profits was a direct effect because they were guaranteed and the subcontracts had sufficient connections to the United States.<sup>7</sup>

Conversely, a successor state’s automatic succession to a prior state’s liability does not constitute sufficient “activity,” but an affirmative assumption of liability, e.g., through passage of a treaty and legislation agreeing to honor the debts of the prior state.<sup>8</sup> In *Guevara v. Peru*, the Eleventh Circuit declined to find that a sovereign’s failure to pay a reward within the U.S. was a form of “negative activity” constituting a “direct effect.”<sup>9</sup>

In *Guirlando v. T.C. Ziraat Bankasi A.S.*, the Second Circuit found no “direct effect” where a U.S. citizen caused money to be transferred out of the United States and where a foreign sovereign’s alleged negligence allowed a third party to steal that money.<sup>10</sup> In *Cruise Connections Charter Management 1, LP v. Attorney General of Canada*, where a foreign state’s actions prevented a U.S. corporation from entering into contractually required subcontracts with two U.S. entities, the court found that the corporation’s lost profits were a “direct effect” under Section 1605(a)(2) because they were guaranteed, and the subcontracts had sufficient connections to the United States.<sup>11</sup>

2. *The Expropriation Exception*

In *Cassirer v. Spain*, the Ninth Circuit, sitting *en banc*, held that the expropriation exception may apply if property is “taken” by an entity other than the foreign state, that a state art foundation’s promotion in the United States of the museum and the painting at issue constituted commercial activity, and that Section 1605(a)(3) did not mandate local exhaustion of remedies.<sup>12</sup>

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5. 28 U.S.C. § 1605(a)(2) (2011). Commercial activity is different from “sovereign activity,” which does not fall under this exception. See *Anglo-Iberia Underwriting Mgmt. Co. v. P.T. Jamsotek (Persero)*, 600 F.3d 171, 178 (2d Cir. 2010) (foreign state acting as the state’s “default health insurer” is sovereign activity). See also *In re Potash Antitrust Litig.*, 686 F. Supp. 2d 816, 822 (N.D. Ill. 2010) (foreign state’s reduction of exports is sovereign activity).

6. *DRFP L.L.C. v. Venezuela*, 622 F.3d 513, 516-17 (6th Cir. 2010).

7. *Cruise Connections Charter Mgmt. 1, LP v. Atty Gen. of Canada*, 600 F.3d 661, 662-65 (D.C. Cir. 2010).

8. *Mortimer Off Shore Servs., Ltd. v. Federal Republic of Germany*, 615 F.3d 97, 106-07, 110 (2d Cir. 2010).

9. *Guevara v. Peru*, 608 F.3d 1297, 1310 (11th Cir. 2010).

10. *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 78, 81-82 (2d Cir. 2010).

11. *Cruise Connections*, 600 F.3d at 664-65.

12. *Cassirer v. Spain*, 616 F.3d 1019, 1037 (9th Cir. 2010).

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**II. Service of Process Abroad\*\*\***

FRCP Rule 4(f) allows service outside the United States “by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention.”<sup>13</sup> If ratified, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (“Hague Convention”) provisions are the exclusive means to effectuate process.<sup>14</sup>

**A. SERVICE OF PROCESS BY INTERNATIONAL MAIL**

Article 10(a) of the Hague Convention provides that, as long as a foreign state “does not object, the present Convention shall not interfere with . . . send[ing] judicial documents, by postal channels, directly to persons abroad.”<sup>15</sup> In *Knit With v. Knitting Fever, Inc.*, a district court applied Article 10(a), finding that service in Italy was improper because Italian law does not permit an attorney to use a private mail carrier for service of process, and service in England was improper because the plaintiff did not comply with Rule 4(f)(2)(C)(ii), requiring a court clerk to send the documents.<sup>16</sup>

**B. IMPROPER SERVICE**

International service of process must comply with the host country’s laws. In *Marcus Food Co. v. DiPanfilo*, a Canadian defendant unsuccessfully challenged a default judgment on grounds of improper service.<sup>17</sup> Because Article 10(b) of the Hague Convention allows “competent persons” to effect service if the destination state has not objected and Canada failed to object, the court upheld service.<sup>18</sup>

In *GMA Accessories, Inc. v. Solnicki*, the plaintiff attempted service on the defendant in Argentina with a subpoena through a local attorney.<sup>19</sup> Article 19 of the Hague Convention permits any method of service specifically authorized by the host country,<sup>20</sup> but the plaintiff could not prove that such service was approved under Argentine law.<sup>21</sup>

**C. ALTERNATIVE SERVICE OF PROCESS**

FRCP Rule 4(f)(3) permits service by other means not prohibited by international agreement if prior court approval is obtained. In *Jimena v. UBS AG Bank*, the court de-

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\*\*\* Contributed by William Lawrence, partner at Frommer, Lawrence & Huag, LLP, New York, New York.

13. FED. R. CIV. P. 4(f)(3).

14. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988).

15. *The Knit With v. Knitting Fever, Inc.*, No. 08-4221, 08-4775, 2010 WL 2788203, at \*4 (E.D. Pa. July 13, 2010).

16. *Id.* at \*7-8.

17. *Marcus Food Co. v. DiPanfilo*, No. 09-1261-EFM, 2010 U.S. Dist. LEXIS 107269, at \*8 (D. Kan. Oct. 5, 2010).

18. *Id.* at \*14-15.

19. *GMA Accessories, Inc. v. Solnicki*, No. 07 Civ. 3219, 2010 U.S. Dist. LEXIS 101256, at \*6 (S.D.N.Y. Sept. 24, 2010).

20. *Id.*

21. *Id.* at \*13.

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nied a plaintiff's motion to serve a defendant through an attorney who represented him in another case.<sup>22</sup> While Rule 4(f)(3) allows court-directed service if it is not prohibited by international (or other countries') laws and is reasonably calculated to give notice, service on an attorney is generally inappropriate because of the adverse effect it may have on the attorney-client relationship.<sup>23</sup>

In *Tracfone Wireless, Inc. v. Distelec Distribuciones Electronicas, S.A.*, the court considered a Honduran defendant's motion to dismiss for improper service of process and plaintiff's motion for alternative service under Rule 4(f)(3).<sup>24</sup> Because Honduras is not a signatory to the Hague Convention, the court applied Honduran law. The court granted plaintiff's request for service by FedEx on defendant and hand delivery on defendant's U.S. attorneys because this method was not expressly prohibited by Honduran law.<sup>25</sup> In *Chanel Inc. v. Zhong Zhibing*, the plaintiff sought to serve a Chinese defendant via e-mail because defendant's address was unknown.<sup>26</sup> Although China is a signatory to the Hague Convention, the court approved service by e-mail because it provided the "greatest likelihood" of reaching the defendant, which was an e-commerce business.<sup>27</sup>

In *re TFT-LCD (Flat Panel) Antitrust Litigation* highlights the fact-specific nature of international service of process. One plaintiff moved to authorize service on the attorneys for a Taiwanese defendant.<sup>28</sup> The defendant argued that letters rogatory must be used because Taiwan was not a signatory to the Hague Convention.<sup>29</sup> The court granted the motion because Rule 4(f)(3) service is not the exclusive means of service and letters rogatory were expensive and time-consuming.

### III. The Act of State Doctrine\*

The act of state doctrine is a prudential limitation on the exercise of judicial review in matters of foreign relations more appropriately left to other branches of government.<sup>30</sup> U.S. courts avoid reviewing cases that require judging the validity of official acts of a foreign state performed in its own territory.<sup>31</sup>

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22. *Jimena v. UBS AG Bank*, No. CV-F-07-367, 2010 U.S. Dist. LEXIS 57359, at \*1-2 (E.D. Cal. June 10, 2010).

23. *Id.* at \*12, \*17-18.

24. *Tracfone Wireless, Inc. v. Distelec Distribuciones Electronicas, S.A. de DV*, 268 F.R.D. 687, 688-89 (S.D. Fla. 2010).

25. *Id.* at 690.

26. *Chanel, Inc. v. Zhong Zhibing*, No. 2:09-cv-02835-cgc, 2010 WL 1009981, at \*1-2 (W.D. Tenn. Mar. 17, 2010).

27. *Id.* at \*3-4.

28. See generally *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 270 F.R.D. 535, 536-37 (N.D. Cal. 2010).

29. *Id.* at 5366.

\* Contributed by William Lawrence, partner at Frommer, Lawrence & Huag, LLP, New York, New York.

30. See *Siderman de Blake v. Argentina*, 965 F.2d 699, 707 (9th Cir. 1992).

31. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *Credit Suisse v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 130 F.3d 1342, 1348 (9th Cir. 1997).

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A. RELATIONSHIP TO THE FSIA

In *Samantar v. Yousuf*, the Supreme Court held that immunity claims of foreign government officials are subject to common law, not FSIA.<sup>32</sup> The Court reaffirmed that the act of state doctrine may be invoked with respect to acts taken by an individual government official and not only the acts of a foreign state per se.<sup>33</sup>

B. APPLICATION OF DOCTRINE

In *Wultz v. Islamic Republic of Iran*, the court determined that a state's knowledge that certain funds were destined for a terrorist group's bank account was not an "act" of a foreign state.<sup>34</sup> In *United States v. Knowles*, the Eleventh Circuit held that a U.S. court could not judge the legality of foreign authorities' decision to extradite the defendant because that decision was an "official act of a foreign sovereign," to which the act of state doctrine applied.<sup>35</sup>

C. COMMERCIAL ACTIVITY EXCEPTION

Unlike another circuit,<sup>36</sup> in *Animal Science Products v. China National Metals*, the court concluded that the act of state doctrine includes a "commercial activity" exception" precluding its application to commercial, as opposed to sovereign, acts.<sup>37</sup> The court in *McKesson v. Islamic Republic of Iran*<sup>38</sup> similarly held the doctrine inapplicable to Iran's purely commercial acts. Regarding Iran's non-commercial acts, the court rejected the act of state doctrine because plaintiff's expropriation claim fell under the Second Hickenlooper Amendment.<sup>39</sup>

D. DETERMINING WHETHER SOVEREIGN ACTS ARE IMPLICATED

In *In re Potash Antitrust Litigation*, the court denied a motion to dismiss under the act of state doctrine because the record was unclear whether the court would ever be called upon to assess the validity of state action, or whether the "alleged conduct was compelled by an official act of the Republic of Belarus."<sup>40</sup>

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32. *Samantar*, 130 S. Ct. at 2292.

33. *Id.* at 2290.

34. See *Wultz v. Islamic Republic of Iran*, No. 08-cv-1460, 2010 U.S. Dist. LEXIS 111469, at \*106, \*109 (D.D.C. Oct. 20, 2010).

35. *United States v. Knowles*, 390 Fed. App'x 915, 928 (11th Cir. 2010).

36. See *Honduras Aircraft Registry, Ltd. v. Honduras*, 129 F.3d 543, 550 (11th Cir. 1997).

37. *Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Import & Export Corp.*, 702 F. Supp. 2d 320, 420-21 (D.N.J. 2010).

38. *McKesson Corp. v. Islamic Republic of Iran*, No. 82-0220, 2009 U.S. Dist. LEXIS 109368, at \*17-18 (D.D.C. Nov. 20, 2009).

39. See 22 U.S.C. § 2370(e)(2) (2011).

40. *In re Potash Antitrust Litigation*, 686 F. Supp. 2d 816, 825 (N.D. Ill. 2010).

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E. VIEWS OF THE UNITED STATES GOVERNMENT

In *In re Refined Petroleum Products Antitrust Litigation*, the district court dismissed plaintiffs' claim that defendant oil companies violated the Sherman Antitrust Act by allegedly conspiring with Saudi Arabia, Venezuela, Russia, and others to fix prices through limits on their production of crude oil.<sup>41</sup> On appeal now pending, the Fifth Circuit requested the United States' views on whether the act of state and political question doctrines apply. The Government strongly endorsed dismissal on both grounds.<sup>42</sup>

**IV. International Discovery\***

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

Several court decisions analyzed the factors set out in 28 U.S.C. §1782(a) and the Supreme Court in *Intel Corp. v. Advanced Micro* determined whether to exercise discretion and allow discovery pursuant to Section 1782(a).<sup>43</sup> In *Ecuadorian Plaintiffs v. Chevron Corp.*, the Fifth Circuit noted that while work product protection was waived in this case, even when discovery is permissible under Section 1782(a), a party may not seek information protected by "privileges recognized by foreign law."<sup>44</sup> But, when a motion is tardy under FRCP 45, work product and attorney client privileged communications may be discoverable. Additionally, journalist privilege can be overcome by demonstrating "likely relevance to a significant issue in the case" and that such evidence was "not reasonably obtainable from other available sources."<sup>45</sup>

In *In re Winning (HK) Shipping Co.*, the court considered whether private arbitral bodies fall within the scope of tribunals to which Section 1782(a) applies, holding that in this case it was applicable because the arbitral tribunal's decision would be subject to judicial review in England pursuant to the Arbitration Act of 1996.<sup>46</sup>

Recently, some courts have demonstrated an increased willingness to apply Section 1782 where the evidence produced will be used in arbitration under a bilateral investment treaty ("BIT").<sup>47</sup>

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41. *In re Refined Petroleum Prods. Antitrust Litig.*, 649 F. Supp. 2d 572, 576-77, 598 (S.D. Tex. 2009).

42. *Spectrum Stores Inc. v. CITGO Petroleum Corp.*, — F.3d —, 2011 WL 386871, at \*n.11 (5th Cir. 2011).

\* Contributed by Howard S. Zelbo, Partner at Cleary, Gottlieb, Steen & Hamilton LLP in New York, New York, with assistance from Diana C. Miller and Heide Motaghi Irvani, associates at the same firm.

43. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 243 (2004).

44. *Ecuadorian Plaintiffs v. Chevron Corp.*, 619 F.3d 373, 377 (5th Cir. 2010).

45. *See In re Chevron Corp.*, 709 F. Supp. 2d 283, 295 (S.D.N.Y. 2010).

46. *In re Winning (HK) Shipping Co.*, No. 09-22659, 2010 U.S. Dist. LEXIS 54290, at \*27-28 (S.D. Fla. Apr. 30, 2010).

47. *In re Chevron Corp.*, 709 F. Supp. 2d at 291; *In re Veiga*, No. 10-370, 2010 U.S. Dist. LEXIS 111468, at \*33 (D.D.C. Oct. 20, 2010).

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

In the case of *In re Air Cargo Shipping Services Antitrust Litigation*,<sup>48</sup> Societe Air France withheld documents based on a French blocking statute allegedly requiring plaintiffs to seek the documents under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (“Hague Convention”).<sup>49</sup> Applying the balancing test set forth in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for Southern District of Iowa*,<sup>50</sup> the court granted the plaintiffs’ request to compel production, holding that resort to the Hague Convention would not be “effective” or “efficient” under the circumstances.<sup>51</sup> The court also held that the U.S. public policy of enforcing antitrust laws outweighed interests of comity.<sup>52</sup>

Addressing procedural requirements for Letters of Request under the Hague Convention, the court in *Pronova BioPharma Norge AS v. Teva Pharmaceuticals USA, Inc.* rejected Pronova’s argument that Letters of Request were “inappropriate” because they sought privileged information.<sup>53</sup> The court reasoned that, if that was the case, “the requests will presumably be narrowed by the appropriate judicial authorities in those countries.”<sup>54</sup>

V. Extraterritorial Application of U.S. Law\*

In determining whether to apply U.S. law extraterritorially, courts follow the principles articulated in the *Restatement (Third) of Foreign Relations*.<sup>55</sup> Last year, U.S. courts applied these principles widely, considering extraterritoriality in disputes involving securities law, civil RICO claims, and criminal statutes.

A. SECURITIES LAW

In *Morrison v. National Australia Bank Ltd.*, the Supreme Court held that, absent a clear indication that a statute is intended to apply extraterritorially, it has no extraterritorial reach.<sup>56</sup> The Court considered whether §10(b) of the Securities and Exchange Act provides a cause of action to foreign plaintiffs suing foreign and American defendants in connection with securities traded on foreign exchanges.<sup>57</sup> The district court had dismissed the complaint for lack of subject matter jurisdiction.<sup>58</sup> The Second Circuit affirmed, noting that the acts performed in the United States did not constitute the “heart of the al-

48. *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 1775, 2010 U.S. Dist. LEXIS 30598, at \*52-53 (E.D.N.Y. Mar. 29, 2010).

49. See generally Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Oct. 7, 1972, 23 U.S.T. 2555.

50. 482 U.S. 522, 546 (1987).

51. *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2010 U.S. Dist. LEXIS 30598 at \*57-58.

52. *Id.* at \*60-62. See also *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 1775, 2010 U.S. Dist. LEXIS 75974, at \*41, \*45 (E.D.N.Y. July 23, 2010) (compelling discovery under “alternative means” test).

53. *Pronova Biopharma Norge AS v. Teva Pharms. USA, Inc.*, 708 F. Supp. 2d 450, 453 (D. Del. 2010).

54. *Id.*

\* Contributed by Karen E. Woody, attorney at Cadwalader, Wickersham & Taft LLP.

55. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 402 (1987).

56. *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2888 (2010).

57. *Id.* at 2875.

58. *Id.* at 2876.

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leged fraud.”<sup>59</sup> The Supreme Court disagreed, noting that the court had jurisdiction to hear the case, but affirmed the dismissal for failure to state a claim upon which relief could be granted because there was no affirmative indication that §10(b) applied extraterritorially.<sup>60</sup>

**B. CIVIL RICO**

The Second Circuit held that the Racketeer Influenced and Corrupt Organization Act (“RICO”) did not apply extraterritorially.<sup>61</sup> The district court dismissed for lack of subject matter jurisdiction because the principal events underlying the claim occurred outside the United States.<sup>62</sup> The Second Circuit affirmed because the statute gave no clear indication of extraterritorial application.<sup>63</sup>

**C. CRIMINAL STATUTES**

In *United States v. Leija-Sanchez*, defendant moved to dismiss a charge under 18 U.S.C. § 1959, which prohibits violent crime in aid of a racketeering enterprise, arguing that the statute did not apply extraterritorially.<sup>64</sup> Leija-Sanchez was accused of arranging the murder of a Mexican citizen in Mexico; the assassins were also Mexican citizens. The Seventh Circuit held that a section 1959 offense includes “multiple acts by which a crime such as murder facilitates the criminal enterprise,” reasoning that the statute applied because Leija-Sanchez was in the United States when he planned the murder and because its purpose was to reduce competition in a crime syndicate based in the United States.<sup>65</sup>

In *United States v. Frank*, the circuit court affirmed the defendant’s conviction under 18 U.S.C. § 2251A, prohibiting the purchase of a minor with intent to engage in sexually explicit conduct and produce any visual depiction of such conduct.<sup>66</sup> The Eleventh Circuit held that section 2251A applied extraterritorially because the statute included language stating that, in the course of the prohibited conduct, the defendant or minor “travel in . . . interstate or foreign commerce.”<sup>67</sup>

**VI. Enforcement of Foreign Arbitral Awards and Judgments\***

In U.S. courts, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>68</sup> governs the recognition and enforcement of foreign arbitral awards

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59. *Id.*

60. *Id.* at 2888.

61. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 622 F.3d 148, 152 (2d Cir. 2010).

62. *Id.* at 150.

63. *Id.* at 152.

64. *United States v. Leija-Sanchez*, 602 F.3d 797, 798 (7th Cir. 2010).

65. *Id.* at 800.

66. *United States v. Frank*, 599 F.3d 1221, 1229 (11th Cir. 2010).

67. *Id.* at 1230.

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68. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].



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and is implemented in U.S. law through Chapter Two of the Federal Arbitration Act (“FAA”).<sup>69</sup> The New York Convention applies to awards “made in the territory” of a State other than the enforcing State and to awards “not considered as domestic awards” in the enforcing State.<sup>70</sup> State law, however, governs the recognition and enforcement of foreign court judgments. Many states have adopted the Uniform Foreign Money-Judgments Recognition Act, which is based upon the comity principles expressed in *Hilton v. Guyot*.<sup>71</sup> Other state courts generally apply the *Hilton* principles as a matter of common law.

A. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the Supreme Court held that sections 10 and 11 “provide exclusive regimes for the review provided by the [FAA].”<sup>72</sup> Subsequently, several cases have addressed whether manifest disregard of the law remains a viable ground for vacatur under the FAA.<sup>73</sup> In *Stolt-Nielsen S.A. et al. v. AnimalFeeds International Corp.*, the Supreme Court vacated an arbitral award permitting class arbitration where the arbitration clause was silent on that issue because the arbitral panel “imposed its own policy choice and thus exceeded its powers.”<sup>74</sup> Because the parties had stipulated that their arbitration clause was silent on class arbitration, the panel was required “to identify the rule of law that governs in that situation.”<sup>75</sup> The panel failed to do so, instead reaching a conclusion “fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.”<sup>76</sup>

In *Republic of Argentina v. BG Group PLC*, the court rejected Argentina’s petition to vacate or modify an approximately \$185 million arbitral award issued in Washington, D.C.<sup>77</sup> Argentina claimed that the court had jurisdiction because the New York Convention (“Convention”) applied, while arguing the contrary with respect to a cross-motion for a pre-judgment bond issued pursuant to article VI of that Convention.<sup>78</sup> Referring to section 202 of the FAA, the court found it had jurisdiction because, given that the Con-

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69. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-08 (2011).

70. New York Convention, *supra* note 68, art. I(1). See also Inter-American Convention on International Commercial Arbitration, June 16, 1976 (Panama Convention), available at <http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp> (governing the recognition and enforcement of awards among member States of the Organization of American States (OAS) who are party and implemented in U.S. law through Chapter 3 of the FAA); 9 U.S.C §§ 301-07 (2011). Unless otherwise agreed, the Panama Convention applies to the exclusion of the New York Convention “[i]f a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the [Panama Convention] and are members States of the [OAS.]” See 9 U.S.C. § 305.

71. See generally *Hilton v. Guyot*, 159 U.S. 113 (1895).

72. See generally *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008).

73. See *Stolt-NielsenNielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1766-76 (2010); *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124-25 (1st Cir. 2008); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009); *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1281-83 (9th Cir. 2009).

74. *Id.* at 1766-67, 1770, 1777.

75. *Id.* at 1768.

76. *Id.* at 1767-68, 1775.

77. *Argentina v. BG Group PLC*, 715 F. Supp. 2d 108, 114, 118, 126 (D.D.C. 2010).

78. *Id.* at 116-17.

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vention could cover arbitral awards involving two domestic parties under certain circumstances:

it would be nonsensical . . . to conclude that the Award—which was issued in a dispute involving two *foreign* parties, a *foreign* treaty, and a *foreign* investment—falls outside the reach of a treaty that was ratified for the purpose of recognizing and enforcing *foreign* arbitral awards.<sup>79</sup>

Ultimately, the court rejected Argentina’s arguments on the merits, refusing to vacate or modify the award.<sup>80</sup>

**B. RECOGNITION AND ENFORCEMENT OF FOREIGN COURT JUDGMENTS**

In *Servaas Incorporated v. Republic of Iraq*, the court denied defendants’ motion to dismiss for lack of personal and subject matter jurisdiction and for failure to state a claim in a recognition proceeding of a judgment issued by the Paris Commercial Court against the Iraqi Ministry of Industry.<sup>81</sup> Applying the “commercial activities” exception of the FSIA, the court found that it had jurisdiction over both Iraq and its “alter ego,” the Ministry of Industry.<sup>82</sup> The court then noted that article 53 of New York’s Uniform Foreign Country Money-Judgments Recognition Act applies to “any foreign country judgment which is final, conclusive and enforceable where rendered even [if] an appeal . . . is pending or it is subject to appeal.”<sup>83</sup> Noting that the French judgment was both final and enforceable, the court stated that a foreign country judgment:

is considered “conclusive between the parties to the extent that it grants or denies recovery of a sum of money” . . . unless (1) “the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;” or (2) “the foreign court did not have personal jurisdiction over the defendant.”<sup>84</sup>

Finding that neither exception applied, the court held that the plaintiff stated a claim under article 53.<sup>85</sup> On enforceability, the court rejected Iraq’s argument that its assets in the United States were immune because Executive Order 13,364 only bars “judgments with respect to certain delineated Iraqi assets in the United States.”<sup>86</sup>

In *Continental Transfert Technique Ltd. v. Federal Government of Nigeria*, the court denied Nigeria’s motions to dismiss actions to enforce a \$252 million arbitral award issued in the United Kingdom under Nigerian law and an English court order enforcing that award.<sup>87</sup> The court denied Nigeria’s motion to dismiss with respect to enforcement of the arbitral award under the FAA and New York Convention.<sup>88</sup> The court also rejected Nigeria’s

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79. *Id.* at 119-20.

80. *Id.* at 120-25.

81. *Servaas Inc. v. Republic of Iraq*, 686 F. Supp. 2d 346, 348-50 (S.D.N.Y. 2010).

82. *Id.* at 354-58.

83. *Id.* at 359 (quoting N.Y. C.P.L.R. 5302 (McKINNEY 2005)).

84. *Id.* (quoting N.Y. C.P.L.R. 5303-04 (McKINNEY 2005)) (citation omitted).

85. *Id.*

86. *Id.* at 359-60.

87. *Cont’l Transfert Technique Ltd. v. Nigeria*, 697 F. Supp. 2d 46, 52, 65 (D.D.C. 2010).

88. *See id.* at 55-58, 61-62.

motion with respect to enforcement of the English court's order under the Uniform Foreign Money-Judgments Recognition Act ("D.C. Money-Judgments Recognition Act").<sup>89</sup> Finding that the English court order was a judgment as defined by the statute,<sup>90</sup> the court rejected Nigeria's claim that the English court order was "obtained by fraud" because only extrinsic fraud constitutes a ground for non-enforcement.<sup>91</sup> Finally, the court rejected Nigeria's argument that enforcement should be dismissed or stayed because it was seeking to set aside the English court order.<sup>92</sup> The D.C. Money-Judgments Recognition Act does not authorize dismissal of proceedings if an appeal is pending, or the defendant is entitled to appeal, and Nigeria was not entitled to a stay in part because it failed to demonstrate that any "attack" on that order was "likely to be successful."<sup>93</sup>

## VII. Forum Non Conveniens\*

A court held that "under the common law doctrine of *forum non conveniens*, a court with proper jurisdiction and venue over a matter may refrain from hearing the case if another significantly more appropriate forum exists."<sup>94</sup> The party seeking dismissal for forum non conveniens must show that: (1) "an adequate alternative forum exists; and (2) . . . the balance of private and public interest factors favors dismissal."<sup>95</sup>

### A. ADEQUACY OF REMEDIES IN THE ALTERNATE FORUM

An alternative forum is "adequate" if the "remedy provided by the alternative forum is [not] so clearly inadequate or unsatisfactory that it is no remedy at all."<sup>96</sup> The remedy need not be judicial. In *Steward International Enhanced Index Fund v. Carr*, shareholders sued the directors of Cadbury, a U.K. corporation, in connection with its acquisition by Kraft Foods.<sup>97</sup> Plaintiffs argued that the proceedings were administrative and did not offer the opportunity to litigate.<sup>98</sup> The court disagreed, stating that "the proper inquiry should be premised upon the fairness of the procedures and potential remedies that the forum can provide."<sup>99</sup>

In *Tang v. Synutra International*, Chinese citizens sued a U.S. corporation in Maryland in the wake of the milk contamination crisis in China.<sup>100</sup> The Chinese government had organized a compensation fund independent of the Chinese judicial system, which refused

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89. *See id.* at 54-55, 62, 65.

90. *Id.* at 62-63.

91. *Id.* at 62-64.

92. *Id.* at 65.

93. *Id.*

\* Contributed by Phillip B. Dye, Jr. and Russell T. Gips of Vinson & Elkins LLP in Houston, Texas.

94. *Trabucco v. Intesa Sanpaolo, S.P.A.*, 695 F. Supp. 2d 98, 105 (S.D.N.Y. 2010).

95. *Cook v. Champion Shipping AS*, No. 2:09-CV-03605, 2010 WL 3069346, at \*2 (E.D. Cal. Aug. 4, 2010). The relevant private and public interest factors to be balanced are set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

96. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981).

97. *Steward Int'l Enhanced Index Fund v. Carr*, No. 09-CV-5006, 2010 WL 336276, at \*1, \*3 (D.N.J. Jan. 22, 2010).

98. *Id.* at \*4.

99. *Id.* at \*5.

100. *Tang v. Synutra Int'l, Inc.*, No. 09-0088, 2010 WL 1375373, at \*1 (D. Md. Mar. 29, 2010).

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to address the victims' claims.<sup>101</sup> The court rejected the plaintiffs' argument that the Chinese courts' inaction rendered them unavailable, observing that "another remedy is undisputedly available, namely, the compensation program."<sup>102</sup>

**B. RE-LITIGATING FORUM NON CONVENIENS**

In *Can v. Goodrich Pump & Engine Control Systems, Incorporated*, Turkish citizens filed suit in federal court in Connecticut, asserting claims against U.S. manufacturers stemming from a helicopter crash in Turkey.<sup>103</sup> An Indiana state court had previously dismissed an almost identical suit on forum non conveniens grounds. The court held that collateral estoppel prohibited the plaintiffs from filing again in the United States, reasoning that the issue "was not whether the action should be tried in Indiana or Connecticut . . . but whether the action should be tried in the *United States or Turkey*."<sup>104</sup>

In contrast, in *Meijer v. Qwest Communications*, a federal court in Colorado found that a previous forum non conveniens dismissal did not preclude the plaintiffs from refileing in Colorado.<sup>105</sup> The New Jersey district court and Third Circuit decisions "analyzed most of the relevant factors by comparing the United States generally and the Netherlands" instead of New Jersey and the Netherlands.<sup>106</sup> Thus, the Third Circuit stated that this decision did "not necessarily mean that this action may not be maintainable in another federal district."<sup>107</sup> The Colorado court therefore conducted its own analysis from a Colorado perspective and eventually dismissed the claims based on forum non conveniens.

**C. PRIVATE INTEREST FACTORS**

In weighing the private interest factors, courts consider ease of access to proof in the competing fora. In *Rodriguez v. Samsung Electronics Company*, the court noted it could not "evaluate the importance of [the] potential witnesses' testimony" where the defendant had merely listed the witnesses' names.<sup>108</sup> In contrast, in *Marnavi Splendor GMBH & Co. KG v. Alston Power Conversion, Incorporated*, the defendants provided a descriptive list of potential witnesses and the court found that the location of the defendants' witnesses weighed in favor of their choice of forum.<sup>109</sup>

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101. *Id.*

102. *Id.* at \*9-10.

103. *Can v. Goodrich Pump & Engine Control Sys., Inc.*, 711 F. Supp. 2d 241, 245 (D. Conn. 2010).

104. *Id.* at 251.

105. *Meijer v. Qwest Commc'ns Int'l, Inc.*, No. 09-cv-00162-REB-KLM, 2010 WL 1348668, at \*3 (D. Colo. Mar. 31, 2010).

106. *Id.*

107. *Id.* (quoting *Windt v. Qwest Commc'ns Int'l, Inc.*, 529 F.3d 183, 192 (3d Cir. 2008)).

108. *Rodriguez v. Samsung Elecs. Co., Ltd.*, No. 09-11028-NMG, 2010 WL 3238839, at \*5 (D. Mass. Aug. 16, 2010); *see also* *Rogers v. Petróleo Brasileiro, S.A.*, Nos. 09 Civ. 08227 (PGG), 09 Civ. 08228 (PGG), 2010 WL 3768158, at \*12 (S.D.N.Y. Sept. 27, 2010) (denying motion and observing that no specific witnesses in Brazil were identified).

109. *Marnavi Splendor GMBH & Co. KG v. Alston Power Conversion, Inc.*, 706 F. Supp. 2d 749, 757-58 (S.D. Tex. 2010).

### VIII. Parallel Proceedings\*

Parallel proceedings exist where “substantially the same parties are litigating substantially the same issues simultaneously in two fora.”<sup>110</sup> U.S. courts confronted with motions to stay or dismiss parallel proceedings and motions for anti-suit injunctions invoke principles of international comity and abstention to resolve them.

#### A. THE COLORADO RIVER ABSTENTION DOCTRINE

In cases involving foreign proceedings, most courts have extended the factors set out in *Colorado River Water Conservation District v. United States* to determine whether to abstain from hearing a case in favor of a pending foreign suit.<sup>111</sup> These factors include the relative inconvenience of the two fora, “the need to avoid piecemeal litigation,” the order in which the proceedings were filed, and whether domestic or foreign law provides the rule of decision.<sup>112</sup> Additionally, the court must determine whether “exceptional circumstances” justify surrender of jurisdiction.<sup>113</sup>

In *Kitaru Innovations Inc. v. Chandaria*, a Barbados company sued a British patent holder, seeking a declaratory judgment that it had not infringed a patent.<sup>114</sup> The defendants moved to dismiss based on parallel proceedings in the Superior Court of Justice for Ontario, Canada. Although both cases involved the same parties and similar issues, the district court denied the motion to dismiss because the first-filed Canadian action had not “progressed significantly since that filing.”<sup>115</sup> The court also rejected the defendants’ argument that having to litigate in two fora, where the locus of core facts was in Canada, constituted “exceptional circumstances” justifying abstention.<sup>116</sup>

In *Farhang v. Indian Institute of Technology Kharagpur*, the court held that the *Colorado River* factors need not be considered if there is substantial doubt as to whether the foreign proceeding will resolve the federal action.<sup>117</sup> One defendant moved to stay the federal case pending resolution of proceedings in the High Court at Calcutta, India, under the international abstention doctrine.<sup>118</sup> The court denied the motion in part because of doubt that the Indian proceedings would resolve all the issues in the case.

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\* Contributed by Lorraine de Germiny, Associate, King & Spalding LLP.

110. *Groeneveld Transp. Efficiency, Inc. v. Lubecore Int’l, Inc.*, No. 1:10 CV 702, 2010 WL 2991504, at \*3 (N.D. Ohio July 28, 2010) (quoting *Finova Capital Corp. v. Ryan Helicopters U.S.A.*, 180 F.3d 896, 898 (7th Cir. 1999)).

111. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 801 (1976).

112. *Groeneveld Transp. Efficiency, Inc.*, 2010 WL 2991504 at \*3; *Brake Parts, Inc. v. Lewis*, Nos. 09-132-KSF, 10-212-KSF, 2010 WL 3470198, at \*3-4 (E.D. Ky. Aug. 31, 2010); *Farhang v. Indian Inst. of Tech., Kharagpur*, No. C-08-02658 RMW, 2010 WL 2228936, at \*2 (N.D. Cal. June 1, 2010).

113. *Kitaru Innovations Inc. v. Chandaria*, 698 F. Supp. 2d 386, 390 (S.D.N.Y. 2010) (quoting *Royal & Sun Alliance Ins. Co. of Can. v. Century Int’l Arms, Inc.*, 466 F.3d 88, 93 (2d Cir. 2006)).

114. *Id.* at 386.

115. *Id.* at 391.

116. *Id.* See also *Brake Parts, Inc.*, 2010 WL 3470198 at \*5.

117. *Farhang*, 2010 WL 2228936 at \*2-3.

118. *Id.* at \*1.

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**B. PARALLEL PROCEEDINGS AND INTERNATIONAL COMITY**

International comity is “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.”<sup>119</sup> In *ITL International, Inc. v. Walton & Post, Inc.*, the court dismissed the case on grounds of international comity, fairness, and efficiency, noting that in the Eleventh Circuit these three factors determine whether a court should abstain from exercising jurisdiction.<sup>120</sup> The court relied on the fact that the Dominican Republic proceedings had been litigated for several years and that the Dominican courts had already rendered a final judgment.<sup>121</sup>

In *Farhang*, the defendant based its motion to stay pending resolution of the Indian legal proceedings on grounds of international comity.<sup>122</sup> The court noted that principles of international comity apply when there is a “true conflict between domestic and foreign law” and that a possible inconsistency between future judgments of a domestic court and a foreign court is not a “true conflict.”<sup>123</sup> Because the Indian court had not yet rendered factual findings, there was no conflict; the court denied the motion.<sup>124</sup>

*Dedon GMBH v. Janus et Cie.* involved a motion to stay proceedings on the issue of arbitrability in favor of an ICC arbitration in London.<sup>125</sup> Raising the question of international comity and noting that “neither party ha[d] seriously briefed the issue,”<sup>126</sup> the court stated that it had an “undoubted responsibility” to rule on the question of arbitrability and denied the motion to stay.<sup>127</sup>

**C. PARALLEL PROCEEDINGS AND ANTI-SUIT INJUNCTIONS**

A court may issue an anti-suit injunction barring parties from participating in foreign litigation only if the parties are the same in both proceedings and resolution of the domestic case is dispositive of the foreign action.<sup>128</sup> In *SEC v. Pension Fund of America*, the Eleventh Circuit held that the anti-suit injunction was invalid because neither condition was met.<sup>129</sup>

Even when both conditions are met, courts will apply one of two standards to determine whether to issue an anti-suit injunction. Under the conservative approach, the movant

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119. *ITL Int'l, Inc. v. Walton & Post, Inc.*, No. 10-22096-CV, 2010 WL 3853272, at \*2 (S.D. Fla. Sept. 29, 2010) (citations omitted).

120. *Id.* at \*3-4.

121. *Id.*

122. *Farhang*, 2010 WL 2228936 at \*1.

123. *Id.* (citations omitted).

124. *Id.*

125. *Dedon GMBH v. Janus et Cie.*, No. 10 Civ. 04541 (CM), 2010 WL 4227309, at \*8-9 (S.D.N.Y. Oct. 19, 2010).

126. *Id.* at \*10.

127. *Id.*

128. *SEC v. Pension Fund of Am., L.C.*, No. 10-10464, 2010 WL 3582429, at \*3 (11th Cir. Sept. 15, 2010) (quoting *Canon Latin Am., Inc. v. Lantech (CR), S.A.*, 508 F.3d 597, 601 (11th Cir. 2007)); *Abbott Labs. v. Qiagen Gaithersburg, Inc.*, No. 10 CV 712, 2010 WL 1539952, at \*4 (N.D. Ill. Apr. 15, 2010).

129. *Pension Fund of Am., L.C.*, 2010 WL 3582429 at \*4; *Abbott Labs.*, 2010 WL 1539952 at \*4-5. See also *Int'l Litigation*, 44 INT'L LAW. 167, 211 (2010).

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must demonstrate (1) that the foreign action would prevent U.S. jurisdiction or threaten a vital U.S. policy, and (2) that the domestic interests outweigh international comity concerns.<sup>130</sup> Under the liberal approach, courts will enjoin foreign litigation if it will (1) frustrate a policy of the enjoining forum, (2) be “vexatious or oppressive,” (3) threaten the domestic court’s *in rem* or *quasi in rem* jurisdiction, or (4) “prejudice other equitable considerations.”<sup>131</sup> If any of these factors is present and if “the impact on comity is tolerable,” the court may grant an anti-suit injunction.<sup>132</sup>

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130. *Cont'l Cas. Co. v. Axa Global Risks (UK) Ltd.*, No. 4:09-CV-00335-FJG, 2010 WL 1268038, at \*3 (W.D. Mo. Apr. 2, 2010).

131. *Teck Metals Ltd. v. Certain Underwriters at Lloyd's, London*, No. CV-05-411-LRS, 2009 WL 4716037, at \*3 (E.D. Wash. Dec. 8, 2009).

132. *Id.*

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