

This e-book examines topics in the litigation, arbitration, and regulatory enforcement and investigation of international controversies.

INTERNATIONAL LITIGATION: TOPICS AND TRENDS

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Louis M. Solomon

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LOUIS M. SOLOMON

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International Practice – Authors

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Louis M. Solomon

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Biography

Louis M. Solomon, a senior trial lawyer, is the Global Co-Head, International Litigation at Greenberg Traurig, LLP. He is an internationally recognized practitioner on litigation issues affecting multinational companies operating across the globe.

Lou has tried over 50 complex commercial cases before judges, juries, and arbitral or governmental tribunals. Described by Chambers Guide to Leading Lawyers as “particularly prized for his strong international litigation experience,” Lou is among a small group of lawyers who maintains a practice that includes an intense focus on the litigation of international disputes and alternate means of resolving international controversies, such as international arbitrations. He is experienced in the often special issues, challenges, and opportunities that arise in matters affecting controversies touching multiple sovereign jurisdictions, providing clients doing business within and across national borders with the perspective required to successfully protect their interests.

He advises clients in all types of complex international commercial and business controversies, including those relating to leading multinationals, sovereigns, international organizations, and non-governmental organizations. These controversies include jurisdictional, procedural,

and substantive issues that arise in multijurisdictional and transnational civil and commercial disputes. This extensive experience has included litigations and arbitrations involving numerous EU countries, Latin America, Asia, Africa, the Middle East, as well as Romania, Russia, and other former Soviet countries. His successful trial involving Argentine debt restructuring made new law in both the international and securities fields.

A significant portion of his practice also involves counseling and advocacy outside the courtroom, through arbitration, mediation, and, in advocacy before regulatory and government agencies and officials. In this regard, our litigators act as counsel, as well as arbitrators and mediators, under many of the major arbitration conventions and rules.

In addition to working with clients to resolve disputes in and out of the courts, Lou assists clients in employing preventative measures, such as structuring corporate-wide strategic and cost-efficient arbitration/dispute resolution programs as well as in drafting arbitration clauses for particular international commercial contracts.

Among his international litigation work are proceedings:

- in the U.S. and in Argentina on behalf of creditors in multinational proceedings in a precedent-setting ruling from the U.S. Court of Appeals for the Second Circuit involving the reach of forum selection clauses
- representing one of the world's leading museums in a lawsuit by the heirs of Weimar-era artist George Grosz to recover three of his works.
- concerning the reach of the U.S. securities laws in the context of contested non-U.S. restructuring proceedings. Here we made new law in the area of how should the securities laws be interpreted.
- on behalf of a world-leading manufacturer of beverage products in breach of contract and tort claims in the U.S. as well as in numerous other countries.
- litigation and parallel enforcement proceedings involving international chip/mass storage company.
- involving the courts of the U.S. and Peru, including three

precedent-setting decisions by the U.S. Court of Appeals concerning “comity”

- concerning 28 U.S.C. Section 1782, including seminal case in the U. S. Court of Appeals for the Second Circuit.
- concerning a Chinese client involving a rare-mineral mine in South Africa.
- concerning the reach of U.S. copyright laws to non-U.S. claimants, as well as the remedies available in such cases.
- regarding forum non conveniens decision concerning claims under federal law (securities, RICO) by non-U.S. claimants in U.S. courts.

His international arbitrations include representation of:

- a multinational manufacturing corporation in arbitration before a three-member AAA panel involving environmental liabilities stemming from sale of chemical manufacturing business.
- one of the largest publicly traded fuel tanker companies in the world, in successfully resolving commercial disputes before a maritime arbitration panel involving a non-U.S. ship builder.
- a life and annuity reinsurance company operating in North America, Latin America and the Asia Pacific region in arbitration involving the reinsurance of annuity products.
- holders of U.S. and European patents in confidential arbitrations trials for patent infringements under the rules of the World Intellectual Property Organization.
- a Belgium-based international financial institution in prosecuting arbitration claims against a state-owned Indonesian insurance company before a Singapore International Arbitration Center panel.
- a leading mutual life insurance company in arbitration before a three-member panel arising out of the termination of its CEO and claims of breach of fiduciary duty, self-dealing and other misconduct.

In addition to his international work, Lou has served as lead counsel for clients in private and class action cases, as well as government and regulatory proceedings, in a wide range of substantive areas, includ-

ing complex commercial contracts; government regulation; patent and copyright; antitrust and false advertising; insurance and reinsurance, corporate and securities, financial services, and art.

He is recognized as a leading practitioner by: Chambers Guide to Leading Lawyers; Best Lawyers in America; LawDragon (500 Leading Lawyers in America, New Stars, New Worlds and Leading Lawyers in America); New York Super Lawyers; and Best of The U.S. Legal Directory (Best of Class: Commercial Litigation).

Lou also writes and lectures extensively. In addition to authoring monographs, books and treatise chapters, and articles, he is often quoted or featured in national and international broadcast and print media, such as The New York Times, The Wall Street Journal, Fox Business, and National Public Radio. A recipient of the 2006 Burton Award for Excellence in Legal Writing, he is former editor of, and contributor to, the “Law, Ethics, and Gender” column of the peer-reviewed Journal of Gender Medicine. Most recently, he was appointed to the Lawyers Committee of the National Center for State Courts (NCSC).

Lou received his B.A., *summa cum laude*, from Yeshiva University and his J.D., *magna cum laude*, from Harvard Law School.

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PART I

Introduction and
Overview

Introduction and Overview.

We are pleased to share this discussion and analysis of timely topics and trends under the general rubric of international practice – that is, controversies or disputes constituting or arising out of litigations, arbitrations, and regulatory enforcement and investigations of companies, laws, or regulations affecting more than one international sovereign power.

The need for this e-book, and the International Practice domain of which it is a part, can perhaps be demonstrated by considering the difficulty that exists in naming exactly what area of law and practice we are dealing with. There is no separate body of jurisprudence called “international litigation”, “international dispute resolution”, or “international controversies”. Indeed, these phrases typically conjure up cross-border disputes or what, in the middle of the last century, was commonly known as “public” international law. We do not treat those topics here; they are treated well elsewhere.

But despite the difficulty in naming the discipline or practice area, there is no difficulty in discerning it – or in finding crucially important challenges and opportunities that are unique to disputes that are international in the way we mean it here.

At bottom, these challenges and opportunities arise because commerce in today’s world increasingly ignores traditional geographic borders. Our tag-line, *The World’s Gone Global!* tries to capture that reality. The means of production, as well as the marketing and distribution of goods and services, routinely cross-cross the globe. Fueled by the Internet, we

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are collectively rendering all but moribund historical national and state boundaries for commercial or business purposes.

These realities have prompted a meteoric increase in both the sheer number but also the complexity of international, transnational, or cross-border disputes. This is especially true given overlapping, diverging, or converging regulatory regimes in countries where global companies do business.

By international, transnational, or cross-border business controversies, we encompass three types of controversies:

- disputes involving **companies, property** (real, intangible, intellectual), or **business practices** affecting different countries;
- disputes implicating the **laws, legal practices, or regulatory regimes** of different jurisdictions; and/or
- disputes where different **possible venues** are available to pursue, defend, and resolve the disputes.

Several decades of practice in this area has demonstrated to us that international controversies present not only challenges but often unique opportunities, for both the client and practitioner. These must be seized, whether our clients are prosecuting or defending cases or whether the adversary is a private or, as is becoming more common, a single or multiplicity of regulatory or enforcement bodies.

There are solutions to the puzzle presented by international disputes. Sometimes these include creating business structures, controls, and legal instruments that enable clients to avoid altogether the problems posed by international litigation or regulatory matters or to succeed in prosecuting or defending them when presented. Sometimes solutions include finding a way out of complex and conflicting regulatory regimes. Sometimes solutions arise from knowing the specific issues relating to seizing of jurisdiction, winning the battle of venue, forum, or remedy, how to protect privileges and obtain the evidence needed to win or settle favorably, and other very practical issues.

We have found that the crucial issues in cross-border commercial or regulatory disputes do not merely concern questions of where to sue or defend a case or what law to rely on, etc. Pursuing strategic alternatives available specifically *because* a controversy is cross-border in nature can affect, influence, and often determine a vast and varied array of other controversy-determining issues as well – for example, the type of disclosure or discovery available; whether privileges or immunities will apply and be symmetrical between plaintiff or claimant and the defendant/respondent; what the very evidence will be that is available to the trier of fact and, indeed, who the trier of fact will be; whether legal or contractual limitations can be enforced or avoided; whether a client can insist on or avoid an investigation, can insist on or avoid the presence of witnesses or documents, can enforce or avoid enforcement of an award or judgment – indeed, in our experience, whether the controversy can be resolved efficiently and successfully, or not.

The e-book is arranged in four major units, treating a total of 10 key topics. We did not opt for a comprehensive analysis of every aspect of every subject that arises in an international dispute. The topics are arranged as follows:

Opening Gambits

1. Jurisdiction
2. Choice of Law
3. The Special Case of Sovereign Entities

Ordering the Resolution of International Controversies

4. Provisional Remedies, Injunctions, Abstention
5. Comity
6. Simultaneous Regulatory or Enforcement Proceedings

Adjudicating International Controversies

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7. Proof: Pre-Trial Discovery and Evidentiary Privileges in International Controversies

8. Trials

9. Arbitrations

Endgames

10. Post-Adjudication Enforcement, Recognition, Challenges

We would enjoy hearing from you. With the Team and Blog associated with this e-book, we hope readers will receive not only timely updates of trends and even tendencies in this dynamically moving area; as important, we hope you will feel free to react and respond so that the resulting dialogue will assist writer, reader, and the development of this area of legal practice generally.

With thanks to the others who have made this work a reality, and with due disclaimer, we trust you will find *International Practice: Topics and Trends* to be a useful tool in your own efforts to confront, resolve, and avoid the issues that arise when a commercial or regulatory dispute impacts multiple national jurisdictions.

Louis M. Solomon

PART III

Topic 1 - Jurisdiction

I. Personal Jurisdiction.

A. Definitions and Applications

1. **What is Personal Jurisdiction.** Personal jurisdiction refers to one prerequisite of a court's authority to render binding judgments over a party or a certain piece of property. It can be conceptualized with a view to its main purposes: first, the requirement of enough control over the person or property for a judgment to be enforceable; and second, a Due Process concern that a party has some degree of notice and consents to being subjected to the laws of a jurisdiction.

2. **How Is Personal Jurisdiction Determined.** The determination of personal jurisdiction is in essence a two-step process:

2.1 First, according to Federal Rule of Civil Procedure 4, personal jurisdiction in a federal court is limited by the long-arm statute of the state in which the court sits. Federal laws have developed some piecemeal exceptions to this rule, providing for nationwide service of process in certain types of lawsuits, including bankruptcy, securities, and antitrust actions.

2.2 Second, personal jurisdiction is limited by the Due Process Clause of the Constitution.

Jurisdiction can be constitutionally granted by a long-arm statute in two ways:

2. 2. 1 *General Jurisdiction* – personal jurisdiction may be granted over any party, in any controversy, arising inside

or outside a particular state, if that party has “systematic and continuous” contacts within the state.

2. 2. 2 *Specific Jurisdiction* – jurisdiction over a party may also be granted even if the party only has “minimum contacts” with the state, as long as the present controversy arises out of the party’s activities in the state. *Int’l Shoe Co. v. Wash.*, 326 U.S. 310 (1945). The “constitutional touchstone” of the minimum contacts standard is that the defendant “purposefully avails” itself of the benefits of conducting business in the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

3. Personal Jurisdiction in the International Context. In the context of international parties and international controversies, the principles of personal jurisdiction work in the same fashion, with close cases of jurisdiction centering on a determination of “minimum contacts.” One of the most significant extensions of the doctrine—having repercussions in both the domestic and international arenas—has arisen out of the now-universal role of technology and cross-border communications and their implications for personal jurisdiction.

3.1 Generally, the issue of personal jurisdiction can be raised on a motion early in U.S.-based litigation. Unlike other defenses, however, it is not immediately appealable in federal court but must await the case’s conclusion — or must be tacked onto an issue that is immediately appealable and then found to be “inextricably intertwined” with that issue. For a discussion of the collateral order doctrine, see our **OneWorld blog** post of 8/23/10.

3.2 In a much-cited opinion, the Western District of Pennsylvania laid out the test for when Internet usage is of such a character as to allow a court to exercise personal jurisdiction under the “minimum

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contacts” standard. *Zippo Mfg. Co. v. Zippo DOT Com*, 952 F. Supp. 1119 (W.D. Pa. 1997). The decision lays out three levels of Internet usage and their respective treatment for jurisdictional purposes.

3. 2. 1 The first category is when “the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the internet.” In this case, sufficient minimum contacts with a forum state arise for a court to exercise personal jurisdiction.

3. 2. 2 The second category of Internet usage is the hosting of a “passive” website, which although it can be viewed repeatedly from the forum state, “does little more than make information available to those who are interested in it.” No personal jurisdiction exists in these cases.

3. 2. 3 The third category is a middle ground composed of interactive websites “where a user can exchange information with the host computer.” Personal jurisdiction in these cases is determined by measuring “the level of interactivity and commercial nature of the exchange of information that occurs” on the site.

3.3 Preventing an American patent holder from suing non-U.S. wireless providers, a District Court in Maryland issued a significant ruling in *Technology Patents, L.L.C. v. Deutsche Telekom AG*, 573 F. Supp. 2d 903 (D. Md. 2008). The District Court found that the international defendants, because they do not supply wireless services outside their home countries, did not do business in the state of Maryland sufficient for the court to exercise personal jurisdiction over them. The fact that their

wireless subscribers sent text messages to Maryland residents did not impute to defendant wireless companies the purposeful interaction required between them and the forum state. The court ruled that the defendants did not fully control how text messages were transmitted to Maryland, and the roaming agreements among wireless companies that permitted the texting were themselves insufficient to be deemed purposeful activity aimed at Florida.

4. Imputation of Contacts Between Parent and Subsidiary. Another important development at the intersection of personal jurisdiction and international controversies is the parent–subsidiary relationship and whether the minimum contacts of one can be imputed to the other.

4.1 In *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088 (9th Cir. 2009), the Ninth Circuit addressed the question of whether a subsidiary’s contacts with a jurisdiction could be attributed to its parent, thus allowing for the exercise of personal jurisdiction by that forum over the parent company. This case was brought by Argentine residents against DaimlerChrysler to recover for human rights violations allegedly perpetrated by its Argentine subsidiary. The court held that a two-part test was required to determine whether the principal–agent relationship was sufficiently strong to impute the contacts necessary for personal jurisdiction. First, “the parent must exert control that is so pervasive and continual that the subsidiary may be considered an agent or instrumentality of the parent,” and second, the subsidiary “must also be sufficiently important to the parent corporation that if it did not have a representative, the parent corporation would undertake to perform substantially similar services.” 579 F.3d at 1095. The majority notes, however, that circuits are split as to how much control is required before contacts

are imputed. Because DaimlerChrysler's interactions with its subsidiary were consistent with its "investor status," sufficient control was not established, and personal jurisdiction was found not to exist.

4. 1. 1 In May 2010, the Ninth Circuit vacated this opinion, and granted a petition for rehearing, *Bauman v. DaimlerChrysler Corp.*, 2010 U.S. App. LEXIS 9310 (9th Cir. May 6, 2010), to decide the question of whether control is, in fact, an element of the circuit's agency test for personal jurisdiction, possibly indicating a willingness to extend its exercise of personal jurisdiction in the future.

II. In Rem and Quasi in Rem Jurisdiction.

A. Definitions and Applications

1. **Definition of *in rem* Jurisdiction.** *In rem* jurisdiction implicates a court's power to determine the status or ownership of a particular piece of property situated within its jurisdiction, regardless of the existence of personal jurisdiction over any party claiming an interest in the property. *In rem* jurisdiction, because of its very nature, does not present important issues when litigating international controversies in United States courts. Since *in rem* cases are centered on a particular piece of real or personal property located within a jurisdiction, rather than on a controversy between parties, the status of interested parties as international would have no implications for the conduct of the case, as it does not form an integral aspect of the litigation.

2. **Definition of *quasi in rem* Jurisdiction.** Cases implicating *quasi in rem* jurisdiction, unlike *in rem* jurisdiction, center on the parties to the litigation. It may also be exercised despite a lack of personal jurisdiction, as long as some property of the defendant is found in the jurisdiction, which may be used to satisfy a judgment against that defendant. To illustrate: If A and B, neither of whom have minimum contacts with New York, dispute ownership over a car located in New York, a court in that jurisdiction may exercise *in rem* jurisdiction over the car (*In re Toyota Camry*). If, however, A sues B over an unrelated debt, and B owns a motorcycle within the borders of New York, then a New York court may exercise *quasi in rem* jurisdiction over

the case, and attach B's motorcycle in anticipation of satisfying a judgment against B (A v. B). *Quasi in rem* jurisdiction may be the only means of utilizing the U.S. courts for recovery when both the parties and the interests are international, and when no personal jurisdiction exists over the defendant.

2.1 In *Shipping Corp. of India v. Jaldhi Overseas PTE Ltd.*, 585 F.3d 58 (2d Cir. 2009), the Second Circuit induced a sea change for *quasi in rem* jurisdiction. In this case, an Indian company brought suit against a corporation from Singapore to recover monies owed under a contract. Neither had sufficient contacts to allow the district court to exercise personal jurisdiction over the matter, but the court's previous decision in *Winter Storm Shipping Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002), held that in maritime and admiralty disputes, courts may exercise *quasi in rem* jurisdiction when, due to the location of branches of a party's bank, electronic fund transfers (EFTs) momentarily pass through the forum jurisdiction. After *Winter Storm*, lawsuits seeking to attach funds, arising out of *quasi in rem* jurisdiction over the EFTs, came to compose fully one third of all lawsuits filed in the Southern District of New York. 585 F.3d at 62. The court in *Jaldhi* overruled the seven-year precedent of *Winter Storm*, holding that federal law did not compel the finding—required in *quasi in rem* proceedings—that EFTs were the property of defendants, and that under New York law, they were not. As a result, an extremely popular method of adjudicating foreign disputes in U.S. courts was closed.

III. Subject Matter Jurisdiction.

A. Definitions and Applications

1. **Definition of Subject Matter Jurisdiction.** While personal, *in rem*, and *quasi in rem* jurisdiction determine whether a court has authority to issue a binding judgment against a particular party, the doctrine of subject matter jurisdiction implicates particular courts' ability to hear certain types of cases at all.

1.1 State courts exercise a "general" subject matter jurisdiction, which means they can hear every type of case other than those that fall under the exclusive jurisdiction of some non-state tribunal (e.g. federal, administrative, or tribal courts).

1.2 Federal courts, on the other hand, may only exercise "limited" subject matter jurisdiction. Federal courts have no jurisdiction except what is given to them by statute, which must fall within certain limits laid out by the Constitution. A very small amount of jurisdiction is provided for directly by the Constitution.

2. **Sources of Federal Subject Matter Jurisdiction.** The two main sources of federal court jurisdiction are "federal question" jurisdiction, 28 U.S.C. § 1331, and diversity jurisdiction, 28 U.S.C. § 1332. Many other statutes exist, however, that give the federal courts jurisdiction over specific claims or areas of law.

2.1 Since federal question jurisdiction covers all causes of action whose claims arise under federal law, a number of lawsuits in the international

commercial litigation arena find their way into federal court via this path. Securities and antitrust law are two of the prime examples, with causes of action arising out of the Securities Exchange Act of 1934, the Sherman Antitrust Act, and the Clayton Antitrust Act. And since it is the rare lawsuit that contains only federal causes of action, Congress has provided for federal courts to exercise supplemental jurisdiction to hear state law claims that “form part of the same case or controversy” as the federal claims. 28 U.S.C. § 1367.

2.2 The federal question statute acquires its breadth of application in accordance with the many contours of federal law. Thus, one vital source of subject matter jurisdiction over international disputes is the extraterritoriality of federal laws.

2. 2. 1 In *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), the Supreme Court interpreted the reach of The Foreign Trade Antitrust Improvements Act of 1982, which excludes from the Sherman Act’s reach certain anticompetitive conduct causing foreign injury. Both domestic and international vitamin manufacturers were alleged to have engaged in price fixing, which caused injury both in the United States and abroad. The majority made use of a canon of statutory interpretation which forces them to “assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.” Due to that deference, the Court held that the law was intended to keep claims of foreign anticompetitive conduct causing independent foreign injury out of U.S. courts. In such cases, “application of [American securities] laws creates a

serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs.”

2. 2. 2 *Morrison v. National Australia Bank Ltd.*, No. 08-1191 (June 24, 2010), was the first “foreign-cubed” securities action to appear before the Supreme Court—in which (i) non-U.S. plaintiffs, (ii) sued a non-U.S. issuer, (iii) based on securities transactions outside of the United States. In *Morrison*, non-U.S. investors brought a securities fraud class action against an Australian bank. They argued that the bank's Florida subsidiary falsified its corporate records, and thereby caused the Australian bank to submit materially false filings to foreign securities markets. Below, the Second Circuit used their decades-old “conduct and effects” test to decide if the degree of U.S. involvement warranted the exercise of jurisdiction by an American court. Subject matter jurisdiction would exist, the court held, if the alleged infringing U.S. activity was “more than merely preparatory” to the fraud abroad, and if the specific acts, or failures to act, within the U.S. directly resulted in losses to non-U.S. investors. Using this test, the Second Circuit ruled that the federal court lacked subject matter jurisdiction over the class action because the non-U.S. activity of the Australian bank was a more dominant factor in the fraud and led more directly to the injury of affected investors than the U.S. conduct of the bank's subsidiary in Florida. Justice Scalia, writing for the majority, affirmed the Second Circuit's decision, albeit on different grounds. He

criticized the “conduct and effects” test—which had been adopted in various forms by circuit courts across the country—as enabling judges to determine, on a policy level, what they think Congress would have decided about extraterritorial applicability if they had considered it, thereby substantially ignoring the well-recognized canon establishing a presumption against extraterritorial application of U.S. laws. Applying that canon to the Securities and Exchange Act of 1934 and relevant regulations, the majority held that Congress did not affirmatively provide for application of the statute in cases such as that presented here, and that the Act is only meant to apply when “the purchase or sale [of a security] is made in the United States, or involves a security listed on a domestic exchange.” Notably, for the purposes of this chapter, Scalia also rejected the Second Circuit’s framing of this issue as one of subject matter jurisdiction, explaining that the Act itself gave U.S. district courts the power to hear the merits of a claim brought to determine whether the Act applies to the bank’s conduct. He also admitted however, that nothing in this case turned on such a distinction—only that the motion to dismiss ought to have been based on the failure to state a claim rather than a lack of subject matter jurisdiction. There has been a great deal of commentary on *Morrison*. We discuss it in our **OneWorld** blog in several contexts relating to jurisdiction over securities cases (though the principles

adumbrated in the decision would not seem unique to that federal scheme (see posts on 7/16/10, 7/19/10, 7/21/10, 8/4/10), and, in nonsecurities contexts, on 8/27/10 and 8/30/10.

2.3 Federal question jurisdiction gives U.S. district courts the authority to hear cases where the cause of action arises under federal law, treaties, or the Constitution. In keeping with the limited nature of federal jurisdiction, however, courts express a very strong preference for express, rather than implied, causes of action.

2. 3. 1 In the treaty context, the D.C. Circuit recently gave a limiting interpretation to a treaty which seemed like it could imply a private right of action. In *McKesson Corp. v. Islamic Rep. of Iran*, 539 F.3d 485 (D.C. Cir. 2008), the American company, McKesson, owned shares in an Iranian company, and alleged that Iran illegally expropriated its equity interest in the company and unlawfully withheld its dividends. The D.C. Circuit held that the Treaty of Amity did not provide a private plaintiff with a cause of action, reversing the district court. They reasoned that although treaties are presumed to be self-executing under the Supremacy Clause, it is also commonly presumed that international agreements do not provide for implied private causes of action in domestic courts. In the Treaty of Amity, they ruled, there was nothing to overcome this latter presumption. The court also noted that the notion of recognizing implied causes of action in treaties, much as courts recognize implied causes of action in the Constitution, is inappropriate, as the

presumptions concerning constitutional rights and treaty rights are very different. The Constitution “stands apart from other texts” as courts traditionally assert freer reign over its interpretation, and courts have a special role in protecting constitutional rights. By contrast, finding an implied cause of action in treaties “embroils the judiciary in matters outside its competence and authority.” Absent an express cause of action, treaty disputes should be left to the political branches and to diplomatic relations between the signatories.

2.4 Even when subject matter jurisdiction does exist as a matter of federal law, courts sometimes impose upon themselves a sort of prudent subject matter jurisdictional limit. For example, the political question doctrine has been found by the Supreme Court to remove certain classes of cases from their jurisdiction based on prudential concerns of manageability and deference to the political branches. Being of a prudential nature, the lines of this doctrine are not always very clear, but below are some examples of U.S. courts choosing not to exercise subject matter jurisdiction over certain types of international disputes.

2. 4. 1 In *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (en banc), island residents in Bouganville, Papua New Guinea (“PNG”) filed suit against Rio Tinto, a coal mining company, in a California district court under the Alien Tort Statute (“ATS”), a law that grants jurisdiction to a U.S. district court over civil actions by aliens for torts that violate a U.S. treaty or international law. The plaintiffs alleged Rio Tinto engaged in war crimes, environmental torts and

racial discrimination. The Ninth Circuit observed that in international law a state is usually not compelled to adjudicate a non-U.S. claim until remedies in the country of origin have been exhausted, except where “such remedies are clearly sham or inadequate or their application is unreasonably prolonged.” (quoting Restatement (Third) § 713 cmt. f).

Guided by prudential concerns and basic principles of international law, the court held that some ATS claims require exhaustion—especially where both the claim’s “nexus” to the United States is weak and the claim does not involve matters in which a state may exercise jurisdiction, without regard to territory or nationality of the defendants. See *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D. Va. 2009) (finding that *Sarei’s* exhaustion requirement probably did not apply, since the conduct complained of consisted of U.S. citizens working with the U.S. government, in a country then occupied by the United States).

2. 4. 2 Compare *Sarei* with *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007). In *Khulumani*, the Second Circuit held that subject matter jurisdiction did exist under the ATS for plaintiffs to sue South African corporations in the United States for allegedly aiding and abetting crimes against humanity by South Africa’s apartheid regime. The court remanded, however, for determination of prudential questions of jurisdiction. On remand, in *S. African Apartheid Litig. v. Daimler AG*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009), the

district court determined that of the two primary prudential concerns—the political question and international comity—neither justified the prudential abstention exhibited in *Sarei*. Specifically, exhaustion was not required in this case because no adequate forum existed in South Africa to hear suits such as these.

2. 4. 3 When courts address prudential concerns, bright line rules often make way for fact-specific determinations of jurisdiction. In *Bondi v. Capital & Fin. Asset Mgmt., S.A.*, 535 F.3d 87 (2d Cir. 2008), the court carefully tailored its jurisdiction to hear the case in accordance with principles of deference, comity, and efficiency. Parmalat, an Italian dairy and food company, filed for bankruptcy amid reports of financial fraud. Investors then filed class actions in the United States against Parmalat and other alleged participants in the fraud. As a result, the Extraordinary Commissioner of the Parmalat bankruptcy in Italy (similar to a U.S. bankruptcy trustee) petitioned the U.S. Bankruptcy Court to enjoin actions regarding property involved in the Italian bankruptcy proceedings. Parmalat’s successor in interest, Parmalat, S.p.A. (“New Parmalat”), then made a motion in the district court to prevent plaintiffs in the U.S. class actions from directly suing New Parmalat. The district court rejected New Parmalat’s motion, ordering that it would be subject to any claims that would arise in that court. The Second Circuit affirmed on appeal. They rejected New Parmalat’s argument that the order violated the objective of “economical and

expeditious administration of the foreign estate” set forth in Bankruptcy Code §304. Any Italian court that handled the securities fraud litigation would be compelled to evaluate the U.S. legal and regulatory scheme for which “there is no Italian analog.” The majority also ruled that the district court’s order had due regard for principles of international comity since, in an unusual twist, it had determined that the Italian courts would handle enforcement of any U.S. judgment against New Parmalat.

2.5 In the international controversies context, one of the more important specific statutory grants of jurisdiction is that concerning foreign arbitral awards, 9 U.S.C. § 203, which gives district courts jurisdiction to hear all actions falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), June 10, 1958, 21 U.S.T. 2517. This statutory grant of jurisdiction is a prime example of another of Congress’s powers over federal court jurisdiction—the ability to not only limit the types of cases that district courts can hear, but also the claims and even the remedies that they can entertain.

2. 5. 1 In *Gulf Petro Trading v. Nigerian Nat’l Petrol. Corp.*, 512 F.3d 742 (5th Cir. 2008), a Swiss arbitration panel initially decided that a Texas oil company could not maintain its claims against a Nigerian oil company. The Texas company thereafter claimed, in litigation commenced in a U.S. federal court, that the Swiss arbitral award was invalid because it was obtained in a scheme of corruption, bribery and fraud. Viewing the lawsuit as a collateral attack on a non-

U.S. arbitration award, the Fifth Circuit held that U.S. federal courts could not exercise subject matter jurisdiction over the suit. Explaining its holding, the court observed that the New York Convention distinguished between a country of primary jurisdiction (the country where an arbitral award is made) and a country of secondary jurisdiction (all other countries). The New York Convention, it concluded, basically limited the review of awards in courts of secondary jurisdiction to whether such awards should be enforced. The fraud, bribery, and corruption claims were collateral attacks on the award because, in the court's view, the injury claimed by the plaintiff was not caused by the alleged acts, but rather by the effect the alleged acts had on the award. The court left open the possibility that allegations of civil rights violations by participants in arbitration proceedings may not constitute a collateral attack, even where a major component of the damages sought would consist of modifying the amount of the award.

IV. Forum Non Conveniens.

A. Definitions and Applications

1.

What Does *Forum Non Conveniens* Cover? Often both personal and subject matter jurisdiction can be established in more than one jurisdiction. If defendants dispute the plaintiff's choice of forum, they may move to dismiss based upon *forum non conveniens*, or request that a judge transfer the case to any other forum in which it could have been brought in the first instance. 28 U.S.C. § 1404. Courts conduct a balancing test taking numerous factors into account, including, but not limited to, undue hardship for the defendant, the location of potential witnesses or evidence, the availability of other adequate forums, and public policy concerns. The plaintiff's choice of forum, however, retains a heavy presumption of convenience and appropriateness.

2.

According to the general forum statute, at 28 U.S.C. § 1391, when the defendant is an alien or alien corporation, venue is appropriate in any U.S. district court that can exercise jurisdiction over it. § 1391(d). Venue for actions against a foreign state is always appropriate in the District Court for the District of Columbia, but can be had elsewhere in accordance with § 1391(f).

3.

When the plaintiff is an alien or alien corporation, the forum non conveniens balancing test is significantly altered in favor of the defendant.

3.1

In *Geier v. Omniglow Corp.*, 357 Fed. Appx. 377 (2d Cir. 2009), plaintiffs, survivors of a ski train fire in Austria, as well as family members of the deceased, filed suit against defendants in the Southern District of New York. Defendants moved to dismiss the suit based on *forum non conveniens*. The court held that while normally the plaintiff's choice of forum is given deference in deciding a *forum non conveniens* challenge, the rationale does not hold when the plaintiff is from outside the United States, in part due to the "strong inference that forum shopping motivated their decision to sue in the United States." 357 Fed. Appx., at 380 (internal quotation marks omitted). The opinion also confirmed the ability of a district court to respond to a *forum non conveniens* motion without reaching other threshold questions such as personal and subject matter jurisdiction.

4.

Potential *forum non conveniens* objections can be waived or contracted around. Forum selection clauses, both mandatory and permissive, are found in many international commercial contracts, and those clauses are to be given heavy, though not dispositive, weight in the *forum non conveniens* balancing. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). They can also be held invalid if "enforcement would be unreasonable and unjust, or [if] the clause was invalid for such reasons as fraud or overreaching." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

5.

The majority in *Aguas Lenders Recovery Group LLC v. Suez S.A.*, 585 F.3d 696 (2d Cir. 2009), subscribes to the view that forum selection clauses are an especially valuable tool to eliminate uncertainty in international commerce, and that it is possible to apply a forum selection clause against a non-signatory to that clause. In this case, an Argentine water company, Aguas, entered into loan agreements with multiple companies, including some in the United States. These agreements included a New York forum selection clause and a *forum non conveniens* waiver. When Aguas defaulted on payments under the loan agreements, however, the Argentine government terminated its utility concession and assigned it to the appellee in this case, AySA, who also received the assets built and purchased with the money originally borrowed by Aguas. The Second Circuit held that if successorship is established under the relevant law, then a forum selection clause is among the contractual obligations that cannot be evaded by a formalistic change in ownership of assets and liabilities. In this case, a non-signatory is just as bound by a forum selection provision as by any other obligation of the predecessor.

6.

The doctrine of foreign non conveniens may take on even more importance after the Supreme Court's decision in *Morrison v. National Australia Bank, Ltd.*, No. 08-1191 (June 24, 2010). *Morrison* is discussed above, in the section on subject matter jurisdiction. One of its holdings was that the statutory "reach" question was not, strictly speaking, a question of subject matter jurisdiction but was rather a "merits" issue. To the extent courts read this holding as precluding an analysis of the "reach" issue at the beginning of the case, then, as we predicted in our **OneWorld blog** discussion, courts will have to find other avenues of determining whether an international dispute is properly in federal court. One such way is via the doctrine of *forum non conveniens*. This has already been demonstrated, in a case discussed in our **OneWorld blog** post of 8/4/10.

PART IV

Topic 2 - Choice of Law

I. Overview.

A. Importance

1. In transnational litigation, the resolution of choice of law issues may be dispositive of the entire case. The law of the possibly relevant jurisdictions may vary substantially with respect to statute of limitations, presumptions, the burdens of overcoming those presumptions, and even the existence of certain causes of action.

II. Choosing which set of choice of law rules will apply.

1. Within the 53 jurisdictions of the United States—50 states, the District of Columbia, Puerto Rico, and Federal maritime law—there are eight different methods of resolving choice of law issues, though several of them are closely related. A forum's choice of law rules are as important as the competing laws from which the court will choose.

III. Depeçage.

1. Choice of law is resolved on an issue by issue basis. A given set of facts may give rise to a single suit applying the law of several different nations.
2. Consider, for example, in a forum applying the First Restatement, a lawsuit arising from a plane crash. The action against the pilots for negligent operation of the plane will be resolved under the law of the country where the plane crashed. The action against the airline for negligent maintenance will be resolved under the law of the country where the airline performs maintenance. The breach of contract claims may be resolved individually under the laws of every country in which passengers bought tickets. Whether the country of purchase permits choice of law provisions will then determine whether to apply the law of the country of purchase or the law selected by the choice of law provision. For each of these actions, the law that governs claims for compensatory damages may be different from the law that governs claims for punitive damages. This is the worst-case-scenario, but indicates the potential complexity of transnational litigation.

IV. Type of Jurisdiction.

1. The type of jurisdiction governing the dispute can affect what choice of law rules will apply:

- **Federal Diversity Cases.** U.S. District Courts, when their jurisdiction derives from diversity of the parties, will use the choice of law rules of the state, district, or territory in which they sit. *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975).
- **Federal Maritime Torts.** Federal maritime law has its own choice of law rules.
- **Other Federal Question Cases.** Non-maritime federal question cases are generally governed by the provisions of the Second Restatement of Conflict of Laws. *E.g., Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 842 (D.C. Cir. 2009).
- **General Jurisdiction of State Courts.** State courts hearing a transnational dispute will apply their own choice of law rules.

V. Type of Dispute.

1. Within the eight choice of law systems, different rules sometimes govern contracts and torts. Additionally, many states use different systems for different causes of action.
2. For example, the First Restatement dictates that most tort disputes will be resolved according to the law of the place of harm. In contract disputes, the First Restatement generally applies the law of the place in which the contract was formed. The Second Restatement uses a completely different system. Florida applies the First Restatement to contract disputes and the Second Restatement to tort disputes.
3. The significance of the choice should not be underestimated. In *Bakalar v. Vavra, et al.*, 08-5119-cv (2d Cir. 9/2/10), the Second Circuit Court of Appeals analyzed one of the growing number of so-called “Nazi-looted art” cases — that is, cases seeking the return of paintings, drawings, and other objects d’art on the ground that the property was stolen or that its possession for forcibly changed by the Nazi regime. The case involved an untitled drawing by the Egon Schiele. The Second Circuit reviewed after trial a pre-trial determination by the District Court that Swiss law applied, a ruling that had significant ramifications to the trial of the action. The Second Circuit determined that the District Court erred in finding that Swiss law applied, holding that the District Court erred in holding that New York’s choice of law rules would apply the law of the state “where the property is located at the time of the alleged transfer”. The District Court erred, said the Circuit Court, because “the New York Court of Appeals explicitly rejected the ‘traditional situs rule’ in favor of interest analysis”. This

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use of a different paradigm changed the result in the application of choice of law; the Circuit Court held that New York, not Swiss law, should apply, and because of that the District Court imposed the burden of proof on the wrong party. The Circuit Court vacated and remanded the case.

VI. Taxonomy of Choice of Law Systems.

1. **First Restatement.** The First Restatement is more rules-based than the modern approaches. In a court applying the First Restatement, litigants can generally predict what substantive law the court will choose. The tort rules of the First Restatement are used in ten states and the contract rules are used in twelve states. (These states have either adopted the Restatement explicitly or employ a methodology that is substantively identical.)

1.1 **Torts.** Most torts are governed by the law of the place where the last event necessary to make an actor liable for an alleged tort takes place—not the place where the harm is sustained. Restatement (First) of Conflict of Laws § 337. Frauds are an exception to this rule. Frauds are governed by the law of the place where the harm is sustained, not the law of the place where the fraudulent misrepresentation is made.

1.2 **Contracts.** Questions regarding the formation of the contract, i.e. validity, are resolved according to the law of the “place of contracting.” *Id.* § 311.

1.3 **Property.** Disputes over property are governed by the law of the jurisdiction in which the property sits.

1.4 **Public Policy Exceptions.** The choice of law rules of the First Restatement are subject to override when the choice of law rules dictate an outcome that violates the public policy of the forum state. *Kilberg v. Northeast Airlines, Inc.*, 172 N.E.2d 256 (N.Y. 1961). The other methodologies

tend to resolve public policy conflicts through the method itself, rather than as an exception.

2. Second Restatement. The Second Restatement enumerates different types of contacts that are relevant to different causes of action. These contacts create the list of states whose law may apply to the dispute. The law to be applied is chosen based on which state has the most “significant relations” to the dispute based on the seven factors listed in section 6 of the restatement. The Second Restatement is the dominant approach, applied in twenty-three states for both contracts and torts.

2.1 Section 6 factors.

- 2. 1. 1 The needs of the interstate and international system;
 - 2. 1. 2 the relevant policies of the forum;
 - 2. 1. 3 the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
 - 2. 1. 4 the protection of justified expectations;
 - 2. 1. 5 the basic policies underlying the particular field of law;
 - 2. 1. 6 the certainty, predictability, and uniformity of result, and;
 - 2. 1. 7 ease in the determination and application of the law to be applied.
- Restatement (Second) of Conflict of Laws § 6.

2.2 Tort contacts. In a tort action, these contacts generally determine which states must be considered under the Section 6 factors—some torts, such as fraud and personal injury, have their own sets of contacts and presumptive governing state:

- 2. 2. 1 The place where the injury occurred;
- 2. 2. 2 the place where the conduct causing the injury occurred;
- 2. 2. 3 the domicile, residence,

nationality, place of incorporation, and place of business of the parties;
2. 2. 4 the place where the relationship, if any, between the parties is centered. Restatement (Second) of Conflict of Laws § 145.

2.3 Contract contacts. In a contract dispute, these contacts determine which states must be considered:

2. 3. 1 The place where the injury occurred;
2. 3. 2 the place where the conduct causing the injury occurred;
2. 3. 3 the domicile, residence, nationality, place of incorporation, and place of business of the parties;
2. 3. 4 the place where the relationship, if any, between the parties is centered. Restatement (Second) of Conflict of Laws § 188. Although the Second Restatement provides a single guide to choice of law problems across all the jurisdictions that employ it, practitioners should be wary of applying case law from one Second Restatement jurisdiction to another. For example, Ohio is less apt to apply forum selection clauses to consumers than to commercial entities, which is a distinction not recognized in federal common law. *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 826-27 (6th Cir. 2009).

3. Significant Contacts. In a state applying the Significant Contacts methodology, the court considers which country is at the “center of gravity” of the dispute. This approach is used by three states for tort disputes and five states for contract disputes. Significant contacts is similar to the Second Restatement, but without the emphasis on the policy interests of the relevant states.

4. **Government Interest Analysis.** Under the government interest methodology, the law of the forum is presumed to apply. The analysis uses a three step procedure:

4.1 **Real Conflict.** The relevant provision of the foreign law must be “materially different” from the forum law, so as to create a “real conflict.”

4.2 **True Conflict.** Second, a proponent on non-U.S. law must demonstrate that the forum state and the foreign state both have legitimate government interests in the application of their law to the conflict. If only one state has a legitimate interest, that state’s law will be applied. If neither state has an interest, the law of the forum applies.

4.3 **Comparative Impairment.** Where both states have a legitimate interest in the application of their law and the law of the two (or more) states is materially different, the court engages in an analysis of which state would experience the greater comparative impairment were its law not applied. *CRS Recovery Inc., v. Laxton*, 600 F.3d 1138, 1142 (9th Cir. 2010). Government interest analysis is only used in three states—and only for torts—but it is incorporated in significant measure by the Second Restatement through the first, second, third, and fifth Section 6 factors.

5. **Lex Fori.** *Lex Fori* is similar to the government interest analysis approach in that the law of the forum is the presumed law of choice. That presumption is rebuttable on a showing that the forum state lacks significant contacts to the dispute, a foreign state has an interest in having its law applied, and the forum state’s interest do not mandate the application of foreign law. In some cases, an overwhelming foreign interest in the application of its law may overcome a mild forum interest. *Lex Fori* is only used to resolve choice of law issues in tort disputes in Kentucky and Michigan.

6. **Better Law.** Five states employ an approach that calls on judges to consider five “choice-influencing considerations” in deciding what law to apply:

6.1 Predictability of results;

- 6.2 maintenance of interstate and international order;
- 6.3 simplification of the judicial task;
- 6.4 advancement of the forum's governmental interest; and
- 6.5 application of the better rule of law.*Drinkwater v. American Fam. Mut. Ins. Co.*, 714 N.W.2d 568, 576 (Wis. 2006).

7. Other Combined Modern Approaches. Ten states use an approach which combines elements of these methodologies. New York, in particular, uses a system whereby torts are classified as conduct regulating or loss allocating. Where the tort is conduct regulating, the laws of the place where the tort occurred control—like the First Restatement. Loss allocating torts are subject to a three-part test.

8. Maritime Tort Disputes. Choice of law in maritime tort disputes are governed by their own eight factor test:

- 8.1 The place of the wrongful act;
- 8.2 the law of the flag of the ship;
- 8.3 the allegiance or domicile of the injured party;
- 8.4 the allegiance of the ship owner;
- 8.5 the place of contract;
- 8.6 the inaccessibility of an alternative forum;
- 8.7 the law of the domestic forum; and
- 8.8 the shipowner's base of operations.*Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 308-09 (1970).

VII. Transferring to a New Forum Should Not Affect Choice of Law.

A. When a case is transferred to a new forum, that court applies the law of the transferor court, not its own. This is true both of the substantive law of the transferor and the choice of law rules of the transferor. In applying methodologies that refer to the home forum, the home forum is the transferor forum. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

VIII. Choice of Law Governs Only Substantive Issues of Law.

1. Choice of law questions are limited to the substantive law of the case. The procedures employed in trying the case are those of the local forum. All choice of law methodologies recognize this substantive/procedural distinction, but it is not dispositive in all states. States employing the Second Restatement may also consider whether the issue is one that is likely to affect the outcome and whether, for contract cases, whether this issue is one that the parties would have given thought when entering the transaction. States also vary on whether certain rights are procedural or substantive. For example, New York considers statutes of limitations to be procedural, *Portfolio Recovery Assoc. v. King*, 2010 N.Y. Int. 68 (N.Y. Ct. App. 2010), whereas states that follow the Uniform Conflict of Laws Limitation Act take the statutes of limitations from the state whose substantive law will be applied, 12 U.L.L.A. 61.

2. **Statutes of Limitations in Particular.** Many states have resolved statutes of limitations questions through “borrowing statutes” that apply the shorter of the forum state’s and the foreign state’s limitations period. *E.g.*, New York C.P.L.R. 202. For a discussion of recent application of borrowing statutes, which can have dispositive effect on the timeliness of cases, see our **OneWorld blog** posts of 9/1/10.

3. *Renvoi.* In resolving choice of law questions, courts distinguish between the substantive law of a foreign jurisdiction and that jurisdiction’s choice of law rules. Generally, when the local forum determines that foreign

substantive law should apply, the court does not consider the foreign jurisdiction's choice of law rules, even when the foreign jurisdiction would not have applied its own substantive law if the case were tried in the foreign court. However, in some cases, a court may apply the foreign jurisdiction's choice of law rules, under a doctrine known as "*renvoi*." *Renvoi* may be applied in two circumstances under the Second Restatement:

3.1 When the objective of the local forum's choice of law rule is to reach the same result as would be reached were the case litigated in the foreign forum. In this case, because the foreign forum would apply the law of a different jurisdiction, the goal of reaching the same result is only achieved by applying the foreign forum's choice of law rules; or

3.2 When the forum state has no substantial relationship to the issue and all the interested states would agree about the law to be applied. For example, were the case litigated in jurisdiction X or Y, both agree that the law of X should apply. The local forum, F, which has no substantial relationship to the issue, would apply the law of Y under its own choice of law rules. In this case, the forum may instead choose to invoke *renvoi* and apply the law of X, as the two interested states would have done. Restatement (Second) of Conflict of Laws § 8.

IX. Proving Non-U.S. Law.

1. Proof of non-U.S. law may present significant problems in many cases. Proving Canadian law is a qualitatively different undertaking from proving, for example, Kyrgyz law. In both federal and state courts, judges are generally empowered to both hear and seek out evidence that would not normally be admissible in resolving questions of foreign law.

2. **F.R.C.P. 44.1.** Federal judges are empowered to consider any source, regardless of admissibility under the Federal Rules of Evidence. Although determination of foreign law will frequently turn on the credibility of competing expert witnesses, foreign law is considered a question of law. As a consequence, appellate review of determinations of foreign law is *de novo* and questions of foreign law are susceptible to determination through summary judgment. In reviewing decision of the district courts, the courts of appeal may consider additional evidence of foreign law not in the record. *Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212, 216 (3d Cir. 2006).

3. There is a growing controversy concerning the extent to which judges should rely on affidavits or testimony of experts in the determination of non-U.S. law.

Our **OneWorld blog** entries of 8/2/10 and 9/3/10 discuss two decisions from the Southern District of New York, each of which suggest gently that witnesses should not be first resort for the court to rely on.

4. As predicted in our **OneWorld blog** entries, this issue is becoming important to more and more courts. On this subject, “must reads” are the discussions by three highly

esteemed judges of the United States Court of Appeals for the Seventh Circuit in *Bodum USA, Inc. v. La Cefetiere, Inc.*, No. 09-1892 (7th Cir. 9/2/10). The majority opinion, written by Chief Judge Easterbrook, goes through a choice of law analysis (here, of French law) and states that “Judges should use the best available sources” for determining non-U.S. law. He goes on to explain that, while perhaps an expert may be useful, or even essential, where non-U.S. law is not translated into English, in general “[t]rying to establish foreign law through experts’ declarations not only is expensive (experts must be located and paid) but also adds an adversary’s spin, which the court must then discount”.

4.1 The concurrences, written by Judges Posner and Wood, then go into an extensive discussion of just this topic. In earlier decisions Judge Posner has decried the overuse of experts for proving non-U.S. law. In *Bodum* he marshalls all the arguments in favor of relying on published texts and commentary of non-U.S. law.

4.2 Judge Wood’s opinion disagrees that Rule 44.1 “itself establishes no hierarchy four courses of foreign law, and I am unpersuaded by my colleagues’ assertion that expert testimony is categorically inferior to published, English-language materials”, stating simply (what this author has found over many years and in many cases), “Exercises in comparative law are notoriously difficult, because the U.S. reader is likely to miss nuances in the foreign law, to fail to appreciate the way in which one branch of the other country’s law interacts with another, or to assume erroneously that the foreign law mirrors U.S. law when it does not”.

5. **States.** Most of the states treat non-U.S. law as a matter which may be judicially noticed. *E.g.*, New York C.P.L.R. 4511, Calif. Evidence Code § 452(f), 455.

X. Questions of Timing.

1. F.R.C.P. 44.1 requires that a party intending to rely on foreign law must give written notice, but does not say when. New York's C.P.L.R. 4511 similarly only requires notice before presentation of evidence. The advisory committee notes to F.R.C.P. 44.1 state only that the timing must be reasonable. Factors to be considered in deciding whether notice is reasonable include:
 2. The stage of the case;
 3. the reason proffered for failure to give notice earlier; and
 4. the importance to the case as a whole of the issue of foreign law being raised.

HSH Nordbank v. M/V Ahmetbey, 2004 WL 911789 at *1 (E.D. Pa. Mar. 29, 2004).

5. Notice has been found to be *reasonable as late as* remand from appeal, *Thyssen Steel Co. v. M/V Kavos Yarakas*, 911 F. Supp. 263, 267 (S.D. Tex. 1996), and *unreasonable as early as* motion to reconsider motion to dismiss, *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995). Notice of an intent to rely on non-U.S. law after the pre-trial conference subjects the proponent to the risk that the court will not accept their notice and apply forum law. *DP Aviation v. Smith Indus. Aero. and Defense Sys. Ltd.*, 268 F.3d 829, 848 (9th Cir. 2001).

XI. Forum Non Conveniens.

A. The doctrine of *forum non conveniens*, discussed in greater depth under Topic 1, allows a court to dismiss a case, without prejudice, if there is another more suitable court that could provide a remedy for the plaintiff. *Forum non conveniens* dismissal was historically reserved for cases where the plaintiff is able to establish jurisdiction in a U.S. court, but few other relevant connections exist and litigation in the U.S. court would be substantially more burdensome than litigation closer to the nexus of the event or transaction. However, recent cases suggest that the practical requirements for a *forum non conveniens* dismissal have loosened. See, e.g., *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 666 (9th Cir. 2009) (affirming *forum non conveniens* dismissal of a case between a U.S. citizen plaintiff and a U.S. corporation defendant); *Stroitelstvo Bulgaria Ltd. v. Bulgarian-American Enterprise Fund*, 589 F.3d 417, 419–20 (7th Cir. 2009) (affirming *forum non conveniens* dismissal of a RICO action against a U.S. defendant).

PART V

Topic 3 - The Special Case
of Sovereign Entities in
U.S. Litigation

I. Overview.

A. The need for non-U.S. nations to avoid suit in the U.S.

1.

The past ten years have been marked by a widely documented economic crisis. Non-U.S. states have faced massive financial demands, leading many governments to employ creative strategies to avoid the legal consequences. As a result, the principle of sovereign immunity has moved into the spotlight.

2.

Sovereign immunity is the general rule that a sovereign state is immune from the jurisdiction of U.S. courts, and the Foreign Sovereign Immunity Act (FSIA) provides the sole basis for obtaining U.S. jurisdiction over a non-U.S. state. *See, e.g., Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989).

3.

Argentina, presenting one of the most striking examples of economic decline, may serve as the impetus for changes in sovereign entity litigation. In 2001, the country produced the largest debt default in history, stopping payments on \$88 billion in bonds such that hundreds of thousands of small investors in Europe and Japan will probably never be fully repaid. Matt Moffett, *Going South: After Huge Default, Argentina Squeezes Bond Holders—Offer of 25 Cents on the Dollar Angers Creditors, Including Many European Retirees—Asking for Piece of Patagonia*, *The Wall Street Journal*, Jan. 14, 2004, at A1.

4.

Argentina is not the only nation facing overwhelming economic demands, however. In 2010, Greece had a national debt that was 115% of its gross domestic product. Other countries, including in the former Soviet Union and South America, are also facing expropriation claims, and some have engaged in procedural tactics to impede them.

5.

In Belize, for example, the government enacted “anti-arbitration” legislation to thwart the effect of an arbitration award after it had already obtained an injunction to restrain claims against the proceedings (Belize Supreme Court Anti-Injunction Order, Feb. 5 2010, *available at* <http://ita.law.uvic.ca/documents/BelizeSupCtAnti-SuitInjunctioninDunkeld.pdf>). Specifically, a large private investor had sought damages from Belize, which allegedly expropriated the investor’s stake in Belize Telemedia Limited in violation of a bilateral investment treaty. The injunction from the Supreme Court of Belize prevented the investor from continuing with the arbitration. Belize legislators also passed a law such that its courts could impose large fines on any person that violated that order, and any arbitral award made in disregard to the injunction would be void. Supreme Court of Judicature (Amendment Act 2010, s. 3 (amending s.106A(8))(Belize).

6.

In a four-week period during the Summer of 2010, no fewer than four separate Courts of Appeals rendered rulings, each rejecting the sovereign immunity defense made by the non-U.S. entity.

7.

Sovereign nations have also strategically used criminal proceedings against plaintiffs. For example, Bolivia initiated criminal actions against Chilean investors who had initiated arbitration proceedings against the state for allegedly expropriating a mining concession. After the parties had reached a tentative settlement, Bolivia asserted that the claimants had forged corporate minutes. Ultimately, the International Centre for Settlement of Investment Disputes (ICSID) found that Bolivia had audited the claimants as

retaliation for the initial arbitration. Bolivia's response to this finding was to call for the disqualification of the ICSID arbitrators. *Quiborax S.A. v. Plurinational State of Bolivia*, No. ARB/06/2, Decision on Provisional Measures (ICSID Feb. 26, 2010) (arbitral tribunal: Gabrielle Kaufmann-Kohler (Switzerland), Marc Lalonde (Canada), Brigitte Stern (France)).

8.

It is important to pay close attention to the actions litigants and courts have taken in response to these types of events.

II. Trends.

1. Given the above backdrop, several trends are emerging regarding sovereign entities and immunity from U.S. courts:
2. First, there is likely to be a spike in the number of unlawful taking or expropriation claims.
3. Next, litigants (on both sides) are seeking to either narrow or broaden the scope of contractual waivers of sovereign immunity. This strategy has been met with varied success.
4. Courts are also beginning to clarify the application of the Act of State doctrine, addressing changes in regime, “consensus condemnation,” and privately initiated criminal proceedings in recent cases.
5. Finally, despite the efforts of litigants to curb potentially abusive actions of sovereign states, immunity principles continue to be strengthened. Specifically, courts have allowed non-U.S. states to escape “required” joinders, and expanded FSIA protection to organs of the state and majority-owned entities.

III. The Global Financial Crisis may Yield a Rise in Expropriation Claims -- From Which Sovereign States Are Not Immune - - Particularly in Latin America.

- A. The risk of expropriation
 - 1. This risk has grown with the strength of the recession, and with it the likelihood of unlawful takings claims, particularly in Latin America. According to a 2009 risk report, this political and economic unrest may have severe consequences for businesses. See *Global recession: the magnifying glass for political instability*. Report by Lloyd's Risk Insight and Control Risks, *available at* http://www.lloyds.com/News-and-Insight/News-and-Features/Lloyds-News/Lloyd's-News-360/Lloyds_political_risk_report.
 - Venezuelan President Hugo Chavez has already begun to nationalize shipping and port assets. The risk of expropriation is generally higher in Latin America because the political elite in that part of the world have been uniquely explicit in their expropriations. Leaders such as Chavez often present such actions as a means to protect local resources from exploitation from international firms. Jerry Frank, *Lloyd's warns political risks on*

III. The Global Financial Crisis may Yield a Rise in Expropriation Claims -- From Which Sovereign States Are Not Immune -- Particularly in Latin America. 52

the rise as global recession deepens, Focus, June 25, 2009, at 6.

· Russia and African nations are also vulnerable to state seizure of property, but not to the same extent as Latin American states. In Russia, the country's former largest oil company, OAO Yukos, is facing an expropriation claim of up to \$100 billion by former shareholders. The company had tens of billions of dollars in back-tax claims before its main assets were sold off to state-controlled Russian companies. Gregory L. White, *Yukos Holders Can Proceed with Claim Against Russia*, The Wall Street Journal, Dec. 1, 2009. In Africa, countries are less likely to have the necessary infrastructure to take over a company. See Frank, at 6.

- 2. Expropriation issues are important in the context of sovereign immunity because the FSIA does not protect sovereign entities from unlawful expropriation claims that include a “commercial nexus” between the state and the claim. U.S. 28 USC § 1605(a)(3).
- B. The expropriation exception to the FSIA
 - 1. The expropriation exception has been litigated widely, but the D.C. Circuit has begun to fine-tune this jurisprudence in recent years. In *Agudas Chasidei Chabad of the U.S. v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008), the court discussed an expropriation test.
 - 2. To trigger the expropriation exception, a plaintiff must:
 - First, establish the character of his claim. Specifically, plaintiff must assert that the defendant (or its predecessor) has taken

the plaintiff's rights in property (or those of its predecessor in title) in violation of international law.

2.1.1

Another D.C. Circuit case, *Nemarian v. Ethiopia*, turned on the court's interpretation of "rights in property." 491 F.3d 470 (D.C. Cir. 2007). The court distinguished "rights in bank accounts" from the "contractual right to receive payment" in response to takings claims against Ethiopia and its central bank. Ultimately, the court held that Ethiopia had not taken possession of the *contractual* right, but rather simply declined to perform its contractual obligations.

In addition to demonstrating the character of the claim, a plaintiff seeking to invoke the expropriation exception must establish a commercial nexus between the U.S. and the defendants. To do so he must show that commercial activity of a special type is carried on in the U.S. That special type is either that property is located in the U.S. in connection with the commercial activity, or property "exchanged" for that property is owned or operated by the agency of the non-U.S. state, and that such instrumentality is engaged in commercial activity.

2.2.1

The term "commercial activity" is defined as either a regular

III. The Global Financial Crisis may Yield a Rise in Expropriation Claims -- From Which Sovereign States Are Not Immune -- Particularly in Latin America. 54

course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by the nature of the course of conduct or particular transaction, rather than by its purpose. 28 U.S.C. § 1603(d).

- 3. The *Agudas* court also discussed the burdens of proof for expropriation claims:

For factual matters the court said the following:

3.1.1

A plaintiff has what the law terms the “burden of production,” that is, the obligation to present sufficient competent evidence for the trier of fact to determine the elements of the cause of action in its favor. It is the plaintiff who has the burden of production to demonstrate the facts of diversity for purposes of jurisdiction under 28 U.S.C. § 1332. Typically, this evidence must be presented when jurisdiction is questioned by the defendant.

3.1.2

Separate from the “burden of production” is the “burden of persuasion” — presenting enough evidence so that the trier of fact will be persuaded of the substance of the position.

The burden of persuasion rests with the non-U.S. sovereign claiming immunity. It is that entity that must bring forth the absence of the plaintiff's right to sue. This, too, must be shown by the likelihood of the evidence standard.

With respect to other matters, the court stated that generally jurisdiction extends to a properly laid and pleaded claim unless the claim is immaterial, made just to obtain access to court, or if the claim is "wholly insubstantial and frivolous." In such a case the court, as gatekeeper, will not allow access.

— 4.

Finally, the D.C. Circuit discussed the issue of exhaustion, which is not required by the FSIA. *Agudas*, 528 F.3d at 948-49.

The D.C. Circuit questioned Justice Breyer's position presented four years earlier that U.S. constitutional principles should extend to international law, so that a plaintiff must demonstrate the lack of remedies available in the sovereign state to prove a taking had occurred. *Rep. of Austria v. Altmann*, 541 US 677, 714 (2004) (Breyer, J., concurring).

IV. Litigants are Strategically Seeking Changes in the Scope of Contractual Waivers.

A. Section 1605(a)(1) of the FSIA

1.

This provision contains an exception to sovereign immunity when “the foreign state has waived its immunity either explicitly or by implication.” The FSIA also discusses waivers in specific circumstances in § 1610(a)-(c), § 1610(d) and § 1611(b)(1).

2.

Generally, U.S. courts enforce contractual agreements to waive sovereign immunity as zealously as they protect the immunity itself. As a result of these competing interests, the waiver exception may serve as a useful basis for litigants seeking to either expand *or* narrow the reach of sovereign immunity.

3.

One of the most recent changes with respect to contractual waiver of sovereign immunity occurred in *Capital Ventures Int’l v. Argentina*, 552 F.3d 289 (2d Cir. 2009), in which the Second Circuit seemed to broaden the effect of contractual waivers. The case specifically discussed the meaning of “explicitness” in this context.

4.

Argentina had waived its immunity with respect to German bonds, but made no mention of jurisdiction in the United States, and therefore argued that the FSIA exception did not

apply. The court ruled against Argentina, holding that explicit waivers need not reference the United States, as the waiver of immunity in “any court,” for example, would suffice.

5.

Litigants have sought to manipulate the scope of a contractual waiver in other cases as well. Indeed, at least two recent cases reflect this strategy—in the first, the plaintiff sought a broader interpretation of a waiver, while in the second, the sovereign state argued for a narrower reading of a waiver. In these cases, however, the tactic was less successful than it was in *Capital Ventures*:

5.1

In *Aurelius Capital Partners, LP v. The Republic of Argentina*, 07-CIV-2715 (TPG) (S.D.N.Y. 2008), a New York district court’s decision seemed to create a new avenue for plaintiffs to circumvent the sovereign immunity exception, until it was reversed on appeal. In that case, Argentina had waived its sovereign immunity from claims by bondholders seeking to enforce judgments against the state for defaulting on payments on debt instruments. Controversy emerged after legislators proposed a law that would make the entity that managed an Argentine social security system (the “Administration”) a part of the Republic of Argentina. Once the legislation passed, the Administration would be subject to Argentina’s creditors because the country had waived its immunity on this issue.

5.2

The District Court ruled in favor of the bondholders, ordering the Administration’s assets, including \$200 million of Argentine pension funds, to attach to Argentina’s upon the legislation’s passage. In other words, the court interpreted the waiver to be broad enough to permit the plaintiffs to recover from the Administration’s assets.

5.3

The Second Circuit reversed, holding that even when a non-U.S. state completely waives its immunity from execution, U.S. courts may execute only against property that (1) is owned by the non-U.S. state yet located in the U.S. and (2) was used for a commercial activity at the time the writ of attachment or execution was issued. 584 F.3d 120 (2d Cir. 2009).

5.4

Because the assets of the Administration did not become effective until the passage of legislation transferring the assets, neither the Administration nor the Republic had the opportunity to use the funds for any *commercial activity* whatsoever. As a result, the plaintiffs had not satisfied the second prong. The court reversed the district court's decision and vacated its orders.

6.

In *Belize Telecom v. Belize*, 528 F. 3d 1298 (11th Cir. 2008), it was the sovereign state that unsuccessfully sought to change the court's construction of a waiver. Specifically, the government of Belize entered into agreements with Innovative Communications Company for the sale of Belize Telecommunications Ltd. shares. The agreements included a forum selection clause that indicated a waiver of immunity. Belize did not deny the waiver, but rather argued that issues related to the Articles of Association fell outside its scope.

6.1

The 11th Circuit rejected this argument because the clause submitted the parties to "nonexclusive jurisdiction of the U.S. District Court for the Southern District of Florida for any suit, action or other proceedings arising out of this agreement, or the subject matter hereof." 528 F. 3d at 1309, n. 13. In other words, the court read the waiver as being quite inclusive, and thus it encompassed the Articles.

V. Courts are Clarifying the Act of State Doctrine: Changes in Regime, “Consensus Condemnation,” and Privately Initiated Criminal Proceedings.

A. The Act of State Doctrine

1.

Sovereign states enjoy not only the statutory protections of the FSIA, but also the largely non-statutory protections of the Act of State doctrine that was developed through case law. *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); 22 U.S.C. § 2370. The doctrine provides that usually U.S. courts may not review or question an action by a another nation that is lawful under that nation’s laws, thereby keeping such courts from getting entangled in international affairs that are more properly left to the political branches.

2.

In *Agudas Chasidei*, the D.C. Circuit set limits on the Act of State doctrine with respect to regime change and “consensus condemnation”:

2.1

The Act of State doctrine cannot be ignored simply due to changes in regime. To the extent that such an exception exists, it applies solely where it is obvi-

V. Courts are Clarifying the Act of State Doctrine: Changes in Regime, “Consensus Condemnation,” and Privately Initiated Criminal Proceedings. 60

ous the current regime does not attempt to justify or rely on the previous regime’s actions. *Agudas Chasidei*, 528 F. 3d at 951–53.

2.2

The court also rejected the idea that certain behavior was so objectionable that it would encounter a “consensus of condemnation” by all countries, thereby eliminating debate among nations. *Id.* at 955.

3.

Meanwhile, the Seventh Circuit determined that, despite the potential for abuse, the Act of State doctrine applies to privately initiated criminal proceedings.

3.1

In Poland, as in some other countries, private citizens can commence a criminal action. In *Nocula v. UGS Corp*, the plaintiff alleged that the defendants filed criminal charges against the plaintiff’s Polish affiliate only to apply commercial pressure on the plaintiff. 520 F.3d 719 (7th Cir. 2008). Accordingly, the plaintiff challenged the Polish police’s alleged seizure and destruction of property in Poland.

3.2

The court held for the defendant, stating that the Act of State doctrine continued to apply because the “decision of a foreign sovereign to exercise its police power through the enforcement of its criminal laws plainly qualifies as an act of state.” *Id.* at 728.

VI. U.S. Courts Seem to be Strengthening Sovereign Immunity Despite the Potential for Abuse, – Though This Trend may be Changing Swiftly.

- A. Required joinders

- 1.

First, courts are allowing non-U.S. states to escape “required” joinders.

- 2.

Provisions in the FSIA can directly conflict with joinder rules under the Federal Rules of Civil Procedure. Specifically, Fed. R. Civ. P. 19 requires plaintiffs to join certain parties to their actions, which poses a problem if that party is a sovereign state. In circumstances in which joinder is not feasible, courts must consider “whether in equity and good conscience” the action should proceed.

- 3.

The Supreme Court addressed the issue of joinder in the context of sovereign immunity in *Philippines v. Pimentel*, __US__, 128 S. Ct. 2180 (2008). The Court concluded that if sovereign immunity has been asserted by parties whose joinder is “required” by Fed. R. Civ. P. 19(a), the entire action must be dismissed if: the sovereign’s substantive claims or defenses are not “frivolous,” and the sovereign’s

VI. U.S. Courts Seem to be Strengthening Sovereign Immunity
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interests would potentially be harmed by proceeding with the lawsuit without the state's participation. *Id.* at 2191. The Court seemed to suggest that such injury was in effect presumed in all lawsuits where a sovereign is a required party. It noted that the potential prejudice to the sovereign entities outweighed potential prejudice to private litigants who might be deprived of a forum.

- B. "Organs" of the state
 - 1.

Courts are also expanding FSIA protection to "organs" of the state and majority-owned entities.

- 2.

FSIA immunity applies to sovereign states as well as their "political subdivisions," "agencies and instrumentalities," and subdivisions.

"Agencies and instrumentalities" covers organs of the state and majority-owned entities. 28 U.S.C. § 1603(b).

2.1.1

To be "majority-owned" under § 1603(b) requires direct ownership by the state or political subdivision. *See Dole Food Co. v. Patrickson*, 538 US 468, 474 (2003).

- 3.

Recently the Ninth Circuit potentially expanded FSIA immunity to entities *indirectly* owned by a state or political subdivision. There the court held that where a state is the beneficial owner of a company it holds indirectly through another entity, the company is immune under the FSIA.

See Cal. Dep't of Water Resources v. Powerex Corp., 533 F.3d 1087, 1100 (9th Cir. 2008) (finding that the defendant was an organ of British Columbia, Canada with regard to FSIA claims, in part because the state indirectly held defendant through BC Hydro and was therefore defendant's "beneficial owner.")

- C. Is the trend shifting back?

- 1.

However, in the face of this trend is an equally powerful one, dating from the summer of 2010, when four Circuits in four weeks rejected the sovereign immunity defenses asserted in each case. *Cassirer v. Kingdom of Spain, et al.*, No. 06-56325, 06-56406 (9th Cir. 8/12/10); *Mortimer Off Shore Services, Ltd. v. Federal Republic of Germany*, Nos. 08-1783-cv, 08-2358-cv (2d Cir. 7/26/10); and *World Holdings v. The Federal Republic of Germany*, No. 09-14359 (11th Cir. 8/9/10); *OSS Nokalva, Inc. v. European Space Agency*, Nos. 09-3602, 3640 (3d Cir. 8/16/10). For a discussion of these cases, see our **OneWorld blog** entries for 8/20/10, as well as the postings discussed therein. In addition, two other unpublished decisions, from the Second and Third Circuits, similarly reject invocation of the sovereign immunity defense (see our **OneWorld blog** discussion of 9/7/10 and 9/8/10).

PART VII

Topic 4 - Ordering the
Resolution of Competing
International
Controversies: Provisional
Remedies, Anti-Suit
Injunctions, Abstention

I. Overview.

- A. Scenario
 - 1. You have now secured the jurisdiction of your client’s choice, which you have painstakingly determined is the optimal one from a strategic standpoint. You then learn that your client has been sued by the defendant in your suit in the very jurisdiction that you had determined was singularly the *worst* for your client. What do you do?
 - 2. We treat in this chapter various issues that arise when trying to order competing international cases (or even investigations and parallel proceedings in certain circumstances). Specifically, we address three issues:
 - Whether **provisional relief** is available in the U.S. jurisdiction, since the litigant who is able to secure such relief at the outset of a proceeding can likely dictate or influence the forum for the resolution of the dispute
 - The means for actually stopping a competing suit, or **anti-suit injunctions**; and
 - The circumstances under which a U.S. suit will defer to a non-U.S. proceeding – the topic of **abstention**
- B. Provisional Remedies
 - 1. Any lawyer or client, whether U.S. or non-U.S. who bemoans the slow pace at which American civil litigation proceeds is well-advised to study the

dynamics of cases that commence with a provisional remedy.

- 2. Provisional remedies are those that courts can impose at or toward the commencement of the litigation or arbitration or, in the right case, even in regulatory or enforcement proceedings. These include, for example, attachments of assets available to secure an ultimate judgment, an injunction to maintain the status quo, an injunction to ensure that competing litigation is not started or if started is not pursued, etc.
- 3. The element of surprise, combined with the accelerated speed with which they can be granted, make provisional remedies one of the plaintiff's most potent weapons and can compel a defendant to settle at an early stage in the proceedings. At a minimum, the ability to secure a provisional remedy, coupled as it often is with an ability to discover and try the case quickly, can usually dictate or heavily influence the forum that will win out in the context of competing cases.
- 4. Provisional remedies are especially potent tools in transnational disputes. Provisional remedies can incentivize non-U.S. defendants to settle quickly for three primary reasons.
 - First, non-U.S. defendants often believe that what they think of as their absence from the jurisdiction of a court hearing a dispute renders them impervious to the outcome of a suit. This false sense of security can be quickly shattered when a defendant finds that his assets have been frozen through a provisional remedy.
 - Second, provisional remedies can reinforce the fear or concern already inspired abroad by what is perceived to be burdensome discovery, unpredictable juries, and excessive damage awards notorious in American civil procedure.

- Finally, obtaining such a remedy depends on a plaintiff's ability to demonstrate that he will not be sufficiently compensated for damages after a trial. In a transnational proceeding, the defendant's absence from the jurisdiction may be a factor for the court to consider in granting a provisional remedy. Hence, U.S. courts may appropriately be more willing to grant a provisional remedy when it is directed against a non-U.S. defendant.
- C. Attachments
 - 1. We can discuss the possible attachment of assets as an example of the related types of remedies at the commencement of suits.
 - 2. Some form of pre-judgment attachment of assets at the outset of a lawsuit is permissible throughout the U.S. and in many non-U.S. jurisdictions.
 - 3. Practical suggestion: Locate and identify the adversary's assets before choosing where to litigate, since an order of attachment usually applies only to assets within the jurisdiction of the court issuing the order.
 - 4. U.S. Pre-Judgment Attachment
 - State law governs the requirements for attachment.
 - A federal court will follow the attachment law of the state where it sits, no matter what the basis for the federal court's jurisdiction. Fed. R. Civ. P. 69(a).
 - 5. In New York law, pre-judgment attachment is available under New York CPLR 6201 where the plaintiff can show:
 - his claim for monetary damages exceeds all known counterclaims; and
 - he is likely to succeed on the merits of such claim; and
 - reason for attachment:

5.3.1 the defendant is a non-resident of New York or non-New York company not qualified to do business in New York; or

5.3.2 the defendant is in the process of, or imminently will be, disposing of property to defraud creditors or to frustrate the enforcement of a judgment against it; or

5.3.3 the claim is based on a foreign judgment entitled to recognition in New York.

- 6. *Ex Parte* Basis: One may seek an order of attachment on an *ex parte* basis. *See, e.g.*, NY CPLR 6211. The plaintiff must then move within five days for an order confirming the *ex parte* attachment.
 - Although this provision remains on the books, New York courts are increasingly reluctant to grant *ex parte* attachments if opposing counsel can be found.
 - Similar remedies are available in other countries, such as Germany, Italy, and France.
- D. *Mareva* Injunctions
 - 1. England has the most potent property-oriented provisional remedy available to plaintiffs: A *Mareva* injunction, issued at the start of a lawsuit to prevent the defendant from transferring or liquidating any assets if the plaintiff can show that the defendant is likely to dispose of such assets to avoid their collection in a judgment.
 - 2. If obtained, such an injunction can put a stop to many, if not all, of a defendant's commercial activities. A *Mareva* injunction is also binding on third parties within the jurisdiction who have knowledge of the order. *Z Ltd. v. A-Z*[1982] Q.B.

558. A *Mareva* injunction can in effect “freeze” all of a defendant’s assets globally. See Michael Bundock, *The Onward March of the Mareva*, 139 NEW L.J. 496 (1989). While asset-freezing orders have been available for decades where one is seeking equitable relief as to specific funds or assets, the *Mareva* injunction is novel in that it is available to those seeking ordinary legal relief in the form of money damages. See generally, Kern Alexander, *The Mareva Injunction and Anton Piller Order: The Nuclear Weapons of English Commercial Litigation*, 11 Fla. J. Int’l L. 487 (1996-1997).
- 3. The U.S. Supreme Court and the New York Court of Appeals have both rejected the use of a *Mareva* injunction on the grounds that it departs from established equity jurisprudence, with no statutory authorization. See *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999); *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541 (2000).
 - 4. An interesting question is whether a U.S. court would recognize or grant comity to a *Mareva* injunction.
 - 5. Practical suggestion: The availability of *Mareva* injunctions affords a plaintiff a strategic advantage in commencing litigation in England rather than in the United States, where both courts have jurisdiction. Such a benefit, however, must be weighed against the broader discovery rights and more easily obtained types of damages one finds in US courts.
- E. Risk of Attachments to plaintiffs.
 - 1. Courts usually require the posting of a bond or undertaking to protect the defendant in case the attachment is shown to be unjustified. Furthermore, in some jurisdictions the plaintiff can be liable for the defendant’s costs and damages, including attorneys’ fees, if the defendant prevails in the dispute or the court decides that the plaintiff

was not entitled to an attachment in the first place. Such liability may exceed the amount of any required bond or undertaking.

II. Anti-Suit Injunctions and Related Remedies.

- A. Introduction
 - 1. Another powerful provisional remedy in cross-border disputes is an anti-suit injunction. In an anti-suit injunction, the movant in a U.S. proceeding petitions the court to enjoin either a non-U.S. proceeding or the parties to that non-U.S. proceeding from participating in the non-U.S. proceeding. If the party tries to contravene this anti-suit injunction, the U.S. court granting the anti-suit injunction can issue a contempt order against the party.
- B. Rarely granted
 - 1. Because of their potency, and because of the obvious international implications, anti-suit injunctions are granted only rarely. See *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35-36 (2d Cir. 1987); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992).
- C. Sequence
 - 1. The ordinary sequence to obtain anti-suit injunction proceeds in three steps.
 - First, the plaintiff files suit in the domestic court.
 - Second, the defendant files suit, often one seeking declaratory relief, in a court with jurisdiction abroad.
 - Finally, the plaintiff who filed suit in the U.S. court or the defendant who filed in

the non.-U.S. jurisdiction petitions the court in which they filed suit to issue an anti-suit injunction enjoining the opposing party from proceeding with its lawsuit.

- D. Utility of anti-suit injunctions
 - 1. Anti-suit injunctions are useful under four circumstances:
 - To stop threatened or pending litigation of the same dispute in another jurisdiction, *e.g., Cargill, Inc. v. Hartford Accident & Indem. Co.* 531 F. Supp. 710 (D. Minn. 1982);
 - To save a prevailing party in a completed case from re-litigating the same dispute in the other forum, *e.g., Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939);
 - To consolidate related but not identical claims in the moving party's preferred forum, *e.g. Seattle Totems Hockey Club Inc. v. National Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981); and
- E. No Supreme Court guidance
 - 1. The U.S. Supreme Court has not set out with specificity the elements that must be proven in order to obtain an injunction of this type. The law has been left to develop in the Courts of Appeals. This has led to variations on what needs to be proven in order to obtain an anti-suit injunction.
 - To pre-empt the opponent party from seeking an anti-suit injunction in the other forum through an “anti-anti-suit injunction.” *E.g. Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926-27 (D.C. Cir. 1984).
- F. Court of Appeals variation
 - 1. Based on our research, it appears that courts impose one of three different standards: restrictive,

liberal, and intermediate. The following chart is a general summary:

Circuit	Standard
D.C.	Restrictive
First	Intermediate
Second	Restrictive
Third	Restrictive
Forth	N/A
Fifth	Liberal
Sixth	Restrictive
Seventh	(Liberal)
Eighth	(Liberal)
Ninth	Liberal
Tenth	N/A
Eleventh	(Restrictive)

N/A means that the Circuit has not expressly adopted the standard.

- 1. As one would predict, the standards in each jurisdiction share some elements. So for example, all courts require that the parties in the competing proceedings be or at least include the same persons or entities and that the final determination of the case in the court issuing the injunction will determine the action being enjoined as well. E.g., *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987).
- 2. After that, however, the articulation and in some cases the substance of the elements differ. In the

seminal case in the area, the Second Circuit's decision in *China Trade*, additional elements such as the potential that an injunction would frustrate an important policy of the enjoining (or, independently, the enjoined) forum; whether there is in rem or quasi in rem jurisdiction, and other considerations.

- 3. Circuits following the restrictive approach favor anti-suit injunctions only when they are deemed necessary to protect the jurisdiction of the issuing forum or to stop the circumvention of important public policies of the enjoining court.
 - 4. A U.S. court's jurisdiction may be threatened by foreign proceedings in two scenarios:
 - 5. In *in personam* proceedings where the foreign court is trying to establish exclusive jurisdiction over the action, *see, e.g., China Trade*, 837 F. 2d at 35; or
 - 6. Where jurisdiction is based on the presence of a *res* within the court's jurisdiction boundary, and a court in a parallel non-U.S. proceeding may order the *res* to be transferred out of the jurisdictional boundary of the first court.
- G. Restrictive approach
 - 1. An anti-suit injunction under the restrictive approach may also be granted when a party tries to evade compliance with an arbitration clause or a forum selection clause, *e.g., Smith/ Enron Cogeneration Limited Partnership, Inc. v. Smith Cogeneration Int'l*, 198 F.3d 88, 99 (2d. Cir. 1999); *Laker Airways, Ltd.*, 731 F.2d at 931 n.73; *see generally Mastercard Int'l Inc. v. Fed'n Internationale de Football Assoc.*, 2007 WL 631312 (S.D.N.Y. Feb. 28, 2007)
 - H. Liberal approach
 - 1. In liberal Circuits adopting the "liberal" view of anti-suit injunctions, the decisions tend to stress that the delay, inconvenience, and costs attached to parallel actions justify an anti-suit injunction. This

approach has the advantage of preventing conflicting and inconsistent rulings and decisions that may result from parallel hearings of the same issue. The downside of this approach is that it assigns little weight to comity interests.

- I. Intermediate approach
 - 1. In court adopting the intermediate standard, *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 19 (1st Cir. 2004), is a good example, the courts reject the liberal standard because it assigns insufficient importance to comity interests. But they also reject the restrictive standard because it is too inflexible by not focusing on the specific facts of a case but only on the preservation of the court's jurisdiction.
- J. Risks Of Anti-Suit Injunctions.
 - 1. A motion for an anti-suit injunction requires a number of strategic considerations. For instance, active involvement in the non-U.S. proceedings may constitute a waiver of the right to an injunction in the domestic court. Thus, a plaintiff may suffer a procedural disadvantage if he refrains from taking action abroad but eventually fails to obtain the anti-suit injunction in the domestic forum. A plaintiff is also well-advised to consider what effect a request for an anti-suit injunction may have on non-U.S. court, especially when the request for an injunction fails was denied. Courts whose proceedings are subject to an anti-suit injunction may feel animosity toward the issuing court and the plaintiff requesting the injunction.
 - 2. A party should also consider whether the decision to obtain an anti-suit injunction abroad will create the impression that he is unable to succeed on the merits of his claim in the domestic forum where the litigation is proceeding.

III. Abstention and Other Policies of Withholding Jurisdiction Over International Controversies.

- A. Introduction
 - 1. Although parties in anti-suit injunctions ask courts to stop judicial proceedings in foreign courts, sometimes it will be in the parties' strategic interest in parallel proceedings if U.S. courts do the exact opposite – stay their own proceedings in favor of an action in a non-U.S. forum. After the non-U.S. court issues a judgment in the issue, that decision can be brought to the U.S. for such effects as it might have.
- B. Standards
 - 1. Just as with the grant of anti-suit injunctions, there is no singular, uniform standard as to when U.S. courts will stay in pending parallel proceedings.
 - 2. It is generally within the discretion of the district court to decide when to abstain in parallel foreign proceedings, and there is little case law that is controlling on this issue. In some jurisdictions, judges liken the U.S.-non-U.S. abstention question to the law that governs in purely U.S. jurisdictions. This is the standard adumbrated by the U.S. Supreme Court in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).
 - 3. In other cases, courts emphasize specific

concerns of international comity and of the benefits and burdens of multiple or parallel litigation. These cases will look at the similarity of the parties and issues involved in the proceedings; the temporal sequence of filing; fairness and prejudice considerations; non-U.S. forum relief available; judicial efficiency; and similar considerations.

PART VIII

Topic 5 - The Role of
Comity in International
Disputes

I. Introduction.

- A. Hierarchy in single system of jurisprudence
 - 1.

Within a single system of law or jurisprudence, there typically exists a hierarchy that gives finality to certain types of decisions, judgments, or rules. In U.S. jurisdictions, for example, there are principles of finality, preclusion, and mutual recognition of judgments that guide and in some cases dictate a subsequent court in giving conclusive recognition to the final judgments of a court in a coordinate branch of government. E.g., the Full Faith and Credit Clause of the U.S. Constitution.
- B. Hierarchy between systems
 - 1.

Between systems of law or jurisprudence, however, the rules of the game are typically quite different. So, for example, the enforcement in the U.S. of a judgment rendered by a court outside the U.S. is not entitled to the protections of the Full Faith and Credit Clause.
- C. “Comity”
 - 1.

Instead, another – and until quite recently powerful – tool used to give litigants the protections (and saddle them with the burdens) of final litigated results elsewhere is called “comity.”
 - 2.

The principle was adumbrated in an early decision by the U.S. Supreme Court, *Hilton v. Guyot* 159 U.S. 113 (1895). As the Court stated there:

“Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it 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.” *Hilton*, 159 U.S. at 163-64.

— 3.

As the influential Second Circuit Court of Appeals articulated the principle more recently, international comity is “concerned with maintaining amicable working relationships between nations, a shorthand for good neighborliness, common courtesy and mutual respect between those who labor in adjoining judicial vineyards.” *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005) (internal quotations omitted).

• D. Is Comity A Limited Doctrine?

— 1.

There have been other articulations of the principle of comity – some much more narrow and limited than that quoted in *Hilton* above. So for example, the Supreme Court in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993), ruled that comity comes into play when a litigant is subject to conflicting or inconsistent regulations – that is, when complying with the rules of one jurisdiction will lead to violating the rules of another. As the Supreme Court said there: “No conflict exists . . .

‘where a person subject to regulation by two states can comply with the laws of both.’” *Hartford Fire Ins. Co.*, 509 U.S. at 799 (citing Restatement (Third) of Foreign Relations Law § 403 (1987)).

— 2.

This limited approach has been articulated by other courts as well. So for example, the Second Circuit has said: “International comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction.” *In re Maxwell Comm’n Corp.*, 93 F.3d at 1049; *In re Treco*, 240 F.3d 148, 157–8 (2d Cir. 2001).

— 3.

At least one author has rejected modern international comity jurisprudence as an incoherent agglomeration of several disparate doctrines: “[T]here is no coherent generalized doctrine of ‘comity’ that informs how and when foreign acts are to be given effect in federal court.” Michael D. Ramsey, *Escaping “International Comity”*, 83 Iowa L. Rev. 893, 895 (1998).

II. How Far Does Comity Extend?

- A. Even further than domestic rules?
 - 1.

It has been held: “Even assuming that a contrary result would be forthcoming in a domestic context,” U.S. courts will accord comity to the judgments of non-U.S. tribunals in the interests of the international commercial system’s need for predictability. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

- 2.

Because the extension or denial of comity is discretionary, decisions are reviewed for abuse of discretion. *See, e.g., Sarei v. Rio Tinto PLC*, 487 F.3d 1193, 1211 (9th Cir. 2007); *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998); *Remington Rand Corporation-Delaware v. Business Systems, Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987).

- B. Applicability to non-final non-U.S. judgments?
 - 1.

Just as it is just as typical to see one jurisdiction refusing to recognize as binding even the final decisions, judgments, or rules of another jurisdiction, it is even more common to see one jurisdiction refusing to recognize as final the non-final judgments of another jurisdiction, even in cases where the jurisdiction in which the non-final judgment

is entered would in fact recognize the judgment as final.

— 2.

See for example, *Banco Nacional De México, S.A., Integrante Del Grupo Financiero Banamex v. Societe Generale*, 820 N.Y. Supp.2d 588 (1st Dept. 2006), which stated: “In any event, even under the traditional comity analysis, there is no basis for the motion court to recognize the Mexican injunctions because they are non-final, ex parte orders of Mexican courts. CPLR 5302 permits recognition of foreign judgments under certain circumstances if they are final, conclusive and enforceable where rendered. This Court has consistently held that although the decision whether to extend comity is a matter of discretion, it is normally not extended by New York courts to non-final, non-merit orders. See *In re Estate of Johnson*, 142 Misc.2d 388, 391-392, 539 N.Y.S.2d 243, 246 (N.Y. County Sur. Ct., 1988), *aff’d*, 145 A.D.2d 388, 536 N.Y.S.2d 363 (1st Dept. 1988); see also *LBS Bank-New York v. Yutex, Inc.*, 283 A.D.2d 281, 724 N.Y.S.2d 313 (1st Dept. 2001).”

III. What is the Source of Judicial Power to Accord a Non-U.S. Judgment “Comity”?

- A. *Hilton v. Guyot*’s articulation:
 - 1.

In the famous quote above from *Hilton v. Guyot* 159 U.S. 113 (1895), it seems clear that the Court believed it had inherent power to accord comity to a non-U.S. judgment.

- 2.

And, over the more than a century that the principle of comity has been practiced and extended by U.S. courts, courts have, on the whole, seen the question as one going to their jurisdiction to hear a case – not in the technical sense of lacking the power to hear a case but in the “prudential” sense of not being willing to disregard what appears to be the validly entered judgment of a non-U.S. tribunal.

- B. *Morrison v National Australia Bank*.
 - 1.

This use of “jurisdiction” has been called into question – possibly inadvertently – by the U.S. Supreme Court.

- 2.

In *Morrison v National Australia Bank*, No. 08-1191 (June 24, 2010), the Supreme Court addressed the

case whether the U.S. Securities Exchange Act of 1934 could be found applicable to regulate conduct described as “foreign cubed” or “f-cubed” in nature. That short-hand has been used to apply to a case where a non-U.S. (or “foreign”) claimant attempts to sue in the U.S. a “foreign” defendant with respect to alleged fraud relating to securities listed, not on a U.S. exchange, but on a “foreign” exchange (hence there are three “foreigns” and hence the moniker, “f-cubed”).

— 3.

The Supreme Court found that the U.S. securities laws did not apply to such conduct in a case brought by a private party. The Court’s reasoning, however, is what is important to the analysis of the principle of “comity”.

— 4.

In reaching its decision, the Supreme Court said that the question it was addressing was not a question of subject matter jurisdiction but rather was one going to the “merits” of whether the federal securities laws “reached” the alleged acts. The Court said that, “to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question.”

Relatedly, the Court held that the federal court had jurisdiction (under 15 U.S.C. § 78aa) because of an express grant of exclusive jurisdiction over all claims to enforce the Securities and Exchange Act. This gave the court the judicial power to adjudicate the question of whether § 10(b) applied to the conduct at issue.

III. What is the Source of Judicial Power to Accord a Non-U.S. Judgment “Comity”? 86

— 5.

The Supreme Court was right that, over the decades, the prior cases had invoked subject matter jurisdictional concerns to analyze the question whether a federal law, rule, or statute would extend to largely “foreign” conduct. This prudential use of jurisdiction has several salutary benefits to litigants. For example, challenges to jurisdiction are most commonly done at the commencement of lawsuits in the U.S., before the parties embark on protracted and expensive disclosure and discovery proceedings.

— 6.

In rejecting that approach, and in holding instead that the proper question was one addressed to the “merits” of the issue, a concern arises whether courts faced with such motions will be as courageous in taking a hard look at the case to determine if its international scope renders it inappropriate for U.S. federal court determination.

— 7.

For example, can a district court be as solicitous of their limited power at the commencement of litigation if they are faced, not with a “subject matter jurisdiction” challenge, but with a “merits” challenge? Can a district court consider interests and facts outside the complaint on a Rule 12(b)(6) motion as on a jurisdictional motion, where considering matters outside the complaint is routine? See Fed. R. Civ. P. 12(d) (requiring conversion of the motion to one for summary judgment if matters outside the pleadings are presented and not excluded by the court).

— 8.

The Supreme Court in *Morrison* did not address the implications of its ruling to the issue and important use of the principle of international comity. For example, in *United States v. Lee*, 106 U.S. 196, 237 (1882); *accord Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1086 (9th Cir. 2006), the courts have made it clear that, “Under the international comity doctrine, courts sometimes defer to the laws or interests of a foreign country and decline to exercise jurisdiction that is otherwise properly asserted”. It would be unfortunate – and we believe unintended – if *Morrison* were to be read to preclude an international comity analysis addressed at the early and initial phases of a case, whether the issue is denominated “merits” or “subject matter jurisdiction” based.

– 9.

This issue is discussed in our **OneWorld blog** post of 8/4/10.

– 10.

For an implicit and important use of the concept of international comity, see our **OneWorld blog** post of 8/25/10.

– 11.

And for discussion of invalidating forum selection and choice of law clauses in the name of international comity, see our **OneWorld blog** posts of 8/9/10 and 8/11/10.

IV. What Showing is Needed to Have a Court Accord Comity to a Non-U.S. Judgment?

- A. Interpretation of non-U.S. law
 - 1.

“Principles of international comity are not violated when U.S. courts hear cases that require them to interpret foreign law.” *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178-79 (2d Cir. 2006).
- B. Factors considered
 - 1.

In determining whether to grant comity to a non-U.S. judgment or proceeding in the case of a conflict of laws, courts consider various factors (*see Sarei v. Rio Tinto PLC*, 487 F.3d 1193, 1212 (9th Cir. 2007)):
 - 2.

The link of the regulated activity to the regulating state;
 - 3.

The connections between the regulating state and the persons to be regulated;
 - 4.

The character, importance, and general acceptability of regulation;
 - 5.

The manner in which justified expectations may be upset through the regulation;
 - 6.

V. Fundamental Reasons Why a U.S. Court Would Refuse to Accord Comity to a Non-U.S. Judgment.

- A. Basic principle
 - 1.

It has been held that a final determination of a matter obtained through “sound procedures” will still not be given due weight in a U.S. court where “(1) the foreign court lacked jurisdiction . . . ; (2) the judgment was fraudulently obtained; or (3) enforcement of the judgment would offend the public policy of the state in which enforcement is sought.” *Telenor Mobile Commc’ns v. Storm LLC*, 584 F.3d 396, 408 (2d Cir. 2009) (quoting *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986)).
 - 2.

If the non-U.S. court lacks sound procedures, then comity will not be forthcoming. See, e.g., *Int’l Transactions, Ltd. v. Embotelladora Agral Regiomotana, S.A.*, 347 F.3d 589, 594 (5th Cir. 2003) (“Notice is an element of our notion of due process and the United States will not enforce a judgment obtained without the bare minimum requirements of notice.”).
 - 3.

New York’s highest court has also held that, to be found to be “repugnant” to public policy, a non-U.S. judgment must be “inherently vicious, wicked or immoral, and shocking to the prevailing moral

sense.” *Sung Hwan Co. v. Rite Aid Corp.*, 7 N.Y.3d 78, 82 (2006).

— 4.

Perhaps because of the central role played by free speech principles in our courts, a non-U.S. judgment that ignore or tread upon constitutional rights, especially First Amendment rights, are often found to be “repugnant” to public policy. See *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 162 F. Supp.2d 1181, 1189-90 (N.D.Cal. 2001) (refusing to recognize a French judgment rendered under a law prohibiting Nazi propaganda because such a law would violate the First Amendment), *rev’d on other grounds*, 433 F.3d 1199 (9th Cir. 2006) (en banc); *Bachchan v. India Abroad Publ’ns Inc.*, 585 N.Y.S.2d 661, 662 (Sup. Ct. 1992) (determining a British libel decision to be constitutionally defective under the First Amendment and so unenforceable under principles of comity).

In determining whether granting comity is appropriate in free speech cases, courts should examine the level of First Amendment protection that is demanded by the public policy of the U.S. jurisdiction in a given case and then determine whether the non-U.S. legal regime offers “comparable protections.” *Sarl Louis Feraud Int’l v. Viewfinder Inc.*, 489 F.3d 474, 481-82 (2d Cir. 2007).

• B. Burden of proof

— 1.

Courts are split on the question of where the burden of proof lies in cases in which a defendant argues for non-recognition of a non-U.S. judgment. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1409 (9th Cir. 1995).

— 2.

V. Fundamental Reasons Why a U.S. Court Would Refuse to Accord Comity to a Non-U.S. Judgment. 92

At least one federal circuit court placed the burden on the plaintiff to demonstrate the propriety of the non-U.S. judgment under the UFMJA. See *Ackermann*, 788 F.2d at 842 n.12 (noting that “a plaintiff seeking enforcement of a foreign country judgment granting or denying recovery of a sum of money must establish *prima facie*: (1) a final judgment, conclusive and enforceable where rendered; (2) subject matter jurisdiction; (3) jurisdiction over the parties or the *res*; and (4) regular proceedings conducted under a system that provides impartial tribunals and procedures compatible with due process”).

— 3.

Some federal courts have speculated that the plaintiff bears the burden of showing that neither mandatory ground for refusing comity applies, thus shifting the burden to the defendant to demonstrate the applicability of at least one of the discretionary criteria for refusing recognition of the foreign judgment.

VI. Comity in the Context of Money Judgments

A. See TOPIC 10 of this e-book.

VII. Does Comity Apply Differently to International Restructurings: Chapter 15's Revisions to Section 304 of the Bankruptcy Code.

- A. Chapter 15 of the U.S. Bankruptcy Code
 - 1.

Chapter 15 was enacted in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act. The language of Chapter 15 tracks the Model Law on Cross-Border Insolvency formulated by the United Nations Commission on International Trade Law (“Model Law” and “UNCITRAL”), with some modifications that are designed to conform the Model Law with existing United States law.

- 2.

Chapter 15 imposes a procedural change, one that does not undermine principles of comity. In fact, though Section 304 case law is no longer controlling, it continues to inform judicial determinations under Chapter 15. See *Iida v. Kitahara (In re Iida)*, 377 B.R. 243, 256 (B.A.P. 9th Cir. 2007).

- 3.

Before obtaining relief, the foreign representative must obtain a recognition decision from the bankruptcy court. Recognition grants the foreign representative the capacity to sue and be sued in

United States courts and the authority to apply directly to a court in the United States for appropriate relief. All courts in the United States must grant comity to the foreign representative.

- B. Proceedings Under Chapter 15
 - 1. Under Chapter 15, recognition may only be granted to a foreign main or nonmain proceeding.
 - Both foreign main and foreign nonmain proceedings are eligible for relief under 11 U.S.C. § 1521.
 - In the case of non-U.S. nonmain proceedings, though, the relief is not automatic; rather, the bankruptcy court determines whether any such relief is appropriate “after notice and a hearing, at the court’s discretion, and subject to the requirement that all creditors be sufficiently protected.” *In re Ran*, No. 09-20288, 2010 BL 118666, at *14 (5th Cir. May 27, 2010).
 - 2. A foreign proceeding is a “foreign main proceeding” if it is “pending in the country where the debtor has the center of its main interests,” and a “foreign nonmain proceeding” if “the debtor has an establishment . . . in the foreign country where the proceeding is pending.” 11 U.S.C. § 1517(b).
 - Chapter 15 provides courts with some guidance in determining the “center of . . . main interests” (“COMI”): “In the absence of evidence to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor’s main interests.” 11 U.S.C. § 1516(c).
 - Comity plays no role in the initial determination of whether a court should grant recognition in the first place; recognition arises solely from the “strict application of objective criteria.” *In re*

VII. Does Comity Apply Differently to International Restructurings: Chapter 15's Revisions to Section 304 of the Bankruptcy Code. 96

Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 333 (S.D.N.Y. 2008).

· Comity, on the other hand, is an important discretionary principle that may only be granted after recognition has been accorded. *Id.* This distinguishes Chapter 15 from Section 304, that granted all relief discretionary basis informed by subjective, comity-influenced factors. *Id.* By bifurcating recognition and comity considerations, Chapter 15 promotes predictability in the pre-recognition stage while retaining flexibility in the post-recognition stage. *Id.*

· However, the Bankruptcy Code is silent on the type of evidence that would adequately rebut the presumption that the COMI is the debtor's registered office or habitual residence. One court speculated that rebuttal factors might include the locations of the debtor's headquarters, the debtor's managers (such as a holding company's headquarters), the debtor's primary assets, the majority of the debtor's creditors, and the jurisdiction whose law would apply to the majority of the disputes. *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006).

· For the purpose of determining whether a non-U.S. proceeding is a nonmain proceeding, the Bankruptcy Code defines an "establishment" as "any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. § 1502(2).

PART IX

**Topic 6 - Regulatory and
Enforcement:
Simultaneous or Parallel
Proceedings in Multiple
Countries**

I. Introduction.

A. Increased international regulatory activity.

1.

There is no doubt that there has been, and will continue to be, increased use of regulatory and enforcement proceedings in individual countries. As companies increase their presence globally, that will inevitably lead to increased governmental activity in more than one country, and typically more than one country at a time.

2.

We discuss below how these trends are manifesting themselves, taking two specific areas where the increase in multi-jurisdictional activity has been most pronounced: in the areas of antitrust and securities regulation.

II. Trends Towards Greater International Cooperation: Antitrust And Securities Regulation.

- A. Globalization as a challenge to national regulatory regimes.
 - 1.
In recent decades, the integration of the world economy has posed a challenge for antitrust and securities regulators. While the businesses they regulate are increasingly global in scale, their own powers are, for the most part, rooted in national legal regimes.
- B. Regulators' increasing international reach.
 - 1.
Nonetheless, regulators have become increasingly effective at operating on the same international playing field as the businesses they regulate. In both the antitrust and the securities arenas, cooperation agreements have sprung up to coordinate the activities of regulators in different countries, and regulators have become increasingly able to extend their investigation and enforcement activities into foreign jurisdictions. As a result, corporations and individuals can now become subject to enforcement actions based on activities that occur far from their main base of operations, and a single set of activities, if international in scope, can subject them to enforcement actions in multiple jurisdictions.

III. Simultaneous, Parallel Antitrust Proceedings.

- A. Recent cases as illustrations of regulators' increased international reach.
 - 1. There are few better ways of explaining the scope of activity in this area than simply by listing a few recent examples of multi-jurisdictional activity in the area of antitrust enforcement.
- B. Recent antitrust cases investigated and prosecuted simultaneously in multiple jurisdictions include:
 - 1.

DRAM computer component cases. An international conspiracy to fix prices for Dynamic Random Access Memory (DRAM) computer chips resulted in investigations and settlements in both the U.S. and the E.U. Between 2003 and 2005, the U.S. Justice Department obtained guilty pleas from at least five members of the conspiracy, as well as from numerous individual executives of the participating companies.

On May 5, 2010, the European Commission followed up on the U.S. investigation by settling with nine European and Japanese DRAM manufacturers for a €331 million fine. Those entering into the settle-

ments included such prominent names as Micron, Samsung, Hitachi, and Mitsubishi.

— 2.

Air Freight Cases. As of April 2009, the U.S. Justice Department had obtained guilty pleas from fifteen international airlines that had engaged in a conspiracy to fix prices for the shipment of air freight. The conspiracy encompassed carriers based in Asia (Asiana, Japan Airlines, Cathay Pacific), Europe (Air France, British Airways, Martinair Holland), South America (Aerolinhas Brasileiras), the Near East (El AL Israel), and even Australia (Qantas Airways Limited). A number of individual executives have also pleaded guilty. The European Commission once again piggy-backed on the U.S. investigation, sending a “Statement of Objections” to many of these same companies in 2010. A Statement of Objections represents an early stage in E.U. antitrust proceedings. It notifies the target of an E.C. antitrust investigation that the investigation is underway and gives the target an opportunity to present facts in its defense in the hopes of warding off a prosecution.

— 3.

LCD display panel cases. In 2008 and 2009, the U.S. Justice Department obtained guilty pleas from at least six Japanese, Korean, and Taiwanese manufacturers of liquid crystal display panels (LCDs) who participated in a price-fixing conspiracy. Those pleading guilty included LG Display Co. Ltd., Sharp, Hitachi, and Epson. Individual executives from many of the companies also entered into plea arrangements. The DOJ’s investigation in this matter is ongoing, and it obtained another indictment

against an LCD manufacturer as recently as June 2010. Meanwhile, as in the air freight case, the European Commission has sent a Statement of Objections to several of these same corporations.

— 4.

Marine hose cases. In 2008, the U.S. Department of Justice obtained guilty pleas to price fixing charges from a British (Dunlop) and an Italian (Manuli) manufacturer of marine hose. Numerous executives from both companies were also indicted, and many pleaded guilty. The E.C. subsequently fined these same two manufacturers.

• C. International Antitrust Cooperation Agreements.

— 1.

Governments have entered into treaties that encourage cooperation between national and regional enforcement agencies.

— 2.

The International Antitrust Code (proposed). In 1993, the International Antitrust Code Working Group proposed a draft International Antitrust Code for adoption as a GATT-MTO-Plurilateral Trade Agreement. The Code envisions the creation of an international antitrust enforcement authority with the power to bring charges against both individual firms and national governments. It also envisions a special international court empowered to hear international antitrust cases. Thus far, the Code has garnered little support, and it has never been adopted. Instead, antitrust enforcement at the international level is governed by a complex web of bilateral and multilateral agreements.

— 3.

Bilateral Agreements

1991 Agreement between the European Commission and the U.S. Government Regarding Application of Competition Laws

3.1.1

Although it encourages mutual assistance under some circumstances, the original 1991 antitrust agreement between the U.S. and the European Commission also seeks to limit the signatories' powers to pursue enforcement actions that would impinge upon each other's interests.

3.1.2

On the one hand, the parties to the agreement agree to share information that will facilitate effective application of their respective competition laws. The agreement also encourages the parties to coordinate their enforcement activities, provided that such cooperation would allow them to make more efficient use of their resources or would allow them to capitalize on one party's superior ability to obtain certain kinds of information.

3.1.3

On the other hand, the agreement requires each party to notify the other whenever its competition authorities become aware that their enforcement activities may affect the other party's interests. In cases in which one party's enforcement activities would adversely affect the other party, the agreement requires the party pursuing the enforcement action to consider curtailing its enforcement activities. To decide whether to curtail its activities in this way, the country pursuing the enforcement activity must weigh the significance of the adverse effects of the anticompetitive activities it is investigating against the adverse impact of its enforcement activities on the other party's interests.

1998 "Positive Comity" Agreement
Between the E.C. and the U.S. Govern-
ment

While the original, 1991 antitrust agreement between the E.C. and the U.S. was largely geared towards negative comity (i.e., consideration for the counterparty's interests when deciding whether to pursue enforcement activities), the "positive comity" agreement that followed it in 1998 clearly aimed at bringing about

effective cooperation and coordination between European and U.S. enforcement authorities.

3.2.1

The agreement allows the competition authorities of one of the parties to request that the competition authorities of the other party investigate and, if warranted, remedy anti-competitive activities over which they have jurisdiction.

3.2.2

The party honoring such a request proceeds in accordance with its own, domestic antitrust laws.

3.2.3

In order to make such a request, it is not necessary that the activity in question violate the requesting party's competition laws, nor is it necessary that the requesting party's own competition authorities take action against the entity it is asking the other party to investigate.

3.2.4

If the requesting party *is* in the process of investigating the entity it suspects of anticompetitive behavior, however, then it will generally defer or suspend its own enforcement activities to

the extent the anticompetitive activity in question has an impact primarily in the jurisdiction receiving the request and/or to the extent that the enforcement actions of the jurisdiction receiving the request are likely to sufficiently remedy the anti-competitive behavior's adverse impact on the requesting party.

In addition to the bilateral agreements between the U.S. and the European Commission, bilateral antitrust cooperation agreements exist between many countries. These agreements are too diverse and too numerous to describe here. For a partial catalogue of such agreements, see, e.g., *The International Antitrust Cooperation Handbook* (Chicago: The American Bar Association, 2004).

— 4.

Multilateral Agreements and Organizations

The International Competition Network. In October 2001, the U.S. Department of Justice and antitrust enforcement agencies from thirteen other countries created the International Competition Network. By holding conferences and workshops for representatives of antitrust enforcement agencies around the world, the ICN seeks to bring about a degree of uniformity in

global antitrust law. The clearly observable tendencies towards convergence in the antitrust laws of jurisdictions as diverse as the U.S., the E.U., and China can probably be attributed, at least in part, to the ICN's efforts. The antitrust enforcement agencies of nearly a hundred countries are now ICN members.

- D. Criteria for granting amnesty and leniency
 - 1.

Leniency in the U.S. In 1993, the DOJ Antitrust Division instituted a leniency program that extends immunity from criminal liability to corporations that report violations of antitrust law. Corporations are eligible for two different types of leniency, depending on whether they report the wrongdoing before or after the Department of Justice has begun an investigation.

To qualify for pre-investigation, or “Type A” leniency, the corporation must meet a series of conditions. Most importantly, the DOJ must not have received any information about the violation from any other source at the time the corporation reports it, the corporation must report the wrongdoing as soon as it learns of it, and the corporation must act promptly and appropriately to terminate its own involvement in the wrongdoing. In addition, the confession must be a corporate as opposed to an individual act, and the corporation must make restitution to injured parties if possible. If the corporation led the con-

spiracy or coerced others into participating in it, it does not qualify for immunity.

Even if a company fails to report wrongdoing before the DOJ has learned about it from another source, it can still qualify for “Type B” immunity if it meets the conditions for “Type A” immunity not related to being the first to report, along with a few others. In place of Type A’s requirement that the DOJ have no information about the wrongdoing from any other source, Type B requires that the DOJ would lack sufficient evidence to convict the reporting company if not for the confession. In addition, the DOJ’s Antitrust Division must determine that granting leniency to the reporting company would not unfairly favor it in comparison to other companies involved in the conspiracy.

The DOJ will also sometimes grant what is known as “Leniency Plus.” This occurs when a company that is under investigation for one antitrust conspiracy, but has failed to report its involvement in time to obtain “Type A” leniency, reports its involvement in a separate antitrust conspiracy of which the DOJ was previously unaware. In addition to granting the company and its executives immunity for their involvement in the second, newly-discovered conspiracy, the DOJ, under “Leniency Plus,” would also recommend

a reduction in the company's fine for its involvement in the first conspiracy.

— 2.

Leniency in the U.K. The U.K. has a leniency program closely modeled on that in the U.S. Specifically, the U.K. antitrust enforcement agency, the Office of Fair Trading (OFT), grants corporations and individuals either “Type A” or “Type B” immunity, depending on whether they are the first to report the illegal conduct. “Type A” immunity entitles the first corporation to report a violation to total immunity, while “Type B” immunity grants a corporation a reduction in its penalties commensurate with the value of the information it provides. Unlike “Type A” immunity, which is guaranteed to the first member of a cartel to report the illegal activity, grants of “Type B” immunity are discretionary and depend on a balancing analysis by the OFT. The OFT must determine if the information gained by granting immunity is valuable enough that it is in the public interest to forgo prosecution of the cartel participant who reports. As in the U.S., the OFT does not grant immunity to corporations it deems to be “coercers,” i.e. corporations that coerced others into participating in the cartel.

— 3.

Leniency in the E.U. In 2006, the European Commission instituted a leniency program that closely resembles that in the U.S. and the U.K.

The program awards total immunity to the first company to report a previously undetected cartel and a reduction of fines to companies that furnish the Commission

with evidence that “adds value” to the Commission’s case against the cartel. This is the functional equivalent of “Type A” and “Type B” immunity in the U.S. and U.K.

The DRAM computer component case, cited above, illustrates the workings of the E.U. leniency system. Micron received total immunity, because it was the first company to reveal the existence of the cartel to the Commission. The European Commission reduced the fines for the other companies by 10%, because they confessed to their wrongdoing.

– 4.

Leniency in China. Chapter 7, Article 46 of the 2007 Anti-Monopoly Law of the PRC (AML) states that a business operator who voluntarily reports an illegal monopoly agreement and provides important evidence to the anti-monopoly enforcement authorities may receive either a mitigated punishment or an exemption. The relevant regulatory authorities are still in the process of promulgating specific rules establishing criteria for making the discretionary grants of immunity described in Article 46. Thus far, the draft rules which the PRC’s main enforcement agency, the State Administration for Industry and Commerce (SAIC), have offered for comments appear to envision a leniency system similar to that in the U.S., the U.K., and the E.U. The draft rules the SAIC submitted on May 27, 2010 provide that the first party to voluntarily report a violation of the AML will be exempted from punishment, and that the second and third parties to make such a report might be eligible for a reduction in

punishment. The proposed regulation disqualifies those who organize a monopoly or coerce others into joining one from receiving immunity.

- E. Avoiding and Reporting Violations.
 - 1.

In many cases, a business's best response to increased international antitrust enforcement activity will be to avoid violations and/or to report them once they occur.

- 2.

Avoiding Violations: The Importance of an Effective Compliance Program. Developing an effective compliance program is the key to avoiding potentially costly antitrust violations.

Increased international cooperation between enforcement agencies reduces the odds that regulatory violations will go undetected, and the possibility that a business's involvement in such a conspiracy will result in sanctions in multiple jurisdictions raises the potential cost of violating competition laws. Hence, it is more important than ever for businesses to develop robust and sophisticated regulatory compliance programs.

The American Bar Association recommends that, when designing a compliance program for a business operating on an international scale, the compliance standards should be pitched to satisfy the requirements of the most demanding national regulatory regime that is likely to

have jurisdiction over any of the business's conduct. See *Antitrust Compliance: Perspectives and Resources for Corporate Counselors* (Chicago: American Bar Association, 2005).

The ABA similarly recommends that compliance programs focus more on compliance with general principals of international competition law than on the laws of a particular country. An absolute prohibition on cartel activity, for example, will go a long way towards insuring compliance with the competition laws of many jurisdictions simultaneously. The international convergence in competition laws in recent years makes a compliance strategy based on broad principles practicable, as these principles are increasingly uniform across regulatory regimes.

— 3.

Reporting Violations: Seeking Leniency as a First Resort. Reporting antitrust violations and winning the race to receive leniency can often be a company's best strategy for avoiding the expense of an enforcement action.

International cooperation between enforcement agencies has both increased the potential cost of antitrust violations and increased the likelihood that such violations will be detected. For this reason, businesses that have become involved in anticompetitive arrangements should seri-

ously consider seeking leniency as their first and best strategy for extricating themselves from these illegal arrangements at minimum risk and expense.

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The structures of the leniency programs described above give businesses a strong incentive to report violations of competition laws as soon as they discover them. If a business is able to report such a violation before the enforcement agencies are aware of it, the business can receive total immunity, hence avoiding the legal expense of defending against an enforcement action and the potentially catastrophic effects of a large civil penalty or a criminal conviction. Even to receive “Type B” immunity, a business must report the violation as soon as it discovers it, so time is of the essence even after the opportunity to qualify for “Type A” immunity has passed.

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To maximize its chances of obtaining leniency from all the relevant authorities, a business should simultaneously report a violation to all of the enforcement agencies, in any jurisdiction, that might pursue an enforcement action. Doing so will also help the business to establish that it reported the violation as soon as it became aware of it.

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Once an enforcement agency has entered

into a leniency agreement, it is extremely difficult for it to revoke its grant of leniency. To date, the DOJ has attempted to revoke a grant of immunity in only one case, *U.S. v. Stolt-Nielsen S.A.* Stolt-Nielsen, a Luxemburg-based shipping company, obtained “Type A” immunity by reporting its involvement in a customer allocation conspiracy to the DOJ. The other members of the conspiracy subsequently claimed that Stolt-Nielsen had not terminated its involvement in the conspiracy promptly and appropriately, and the DOJ revoked the grant of immunity and indicted Stolt-Nielsen. A federal court ultimately dismissed the DOJ’s indictment, however, because the DOJ lacked sufficiently credible evidence that Stolt-Nielsen had failed to terminate its involvement. Once the DOJ has entered into an immunity agreement, the court held, it bears the burden of proving that the recipient of immunity has failed to live up to the conditions of the agreement. The DOJ’s lack of success in its efforts to rescind an immunity agreement should give businesses comfort that they will generally be able to rely on a grant of immunity unless there is strong evidence that they have failed to comply with its conditions.

Conversely, the press has reported that the U.K.’s OFT may revoke the immunity it accorded Virgin Airlines in 2006 for reporting a price-fixing conspiracy with British Airways. Virgin

failed to divulge all of the incriminatory material in its possession until after OFT had taken its case against British Airways to trial, at which point it was too late for OFT to use the evidence. If Virgin ultimately loses its immunity, the case will illustrate the importance of full cooperation with the enforcement agencies as a precondition for receiving immunity. Until OFT actually carries through on its threat to revoke immunity, however, and until such a revocation survives the court challenge that would likely follow, the case instead illustrates the difficulty of rescinding a promise of immunity once granted.

IV. Simultaneous, Parallel Securities Enforcement Proceedings.

- A. Recent cases as illustrations of regulators' increased international reach
 - 1.
Examples of securities enforcement cases investigated and litigated simultaneously in multiple jurisdictions demonstrate the same phenomenon as we saw above, concerning antitrust:
 - 2.
Manterfield. Beginning in 2007, the SEC and the U.K.'s Financial Services Authority cooperated in the investigation and prosecution of Glenn Manterfield, a U.K. citizen and a principal of the Boston-based financial advising firm Lydia Capital. The SEC alleged that Manterfield made a series of material misrepresentations that defrauded investors in one of Lydia's hedge funds. In the course of this international investigation and prosecution, the SEC appeared in both U.S. and U.K. courts. Specifically, the SEC successfully appeared before the Supreme Court of Judicature Court of Appeal in order to prevent Manterfield from lifting a freeze that the U.K.'s Financial Services Authority had earlier obtained on his assets. The SEC ultimately obtained a default judgment against Manterfield and a final Judgment by consent enjoining Lydia Capital from further violations of Section 17(a) of the Securities Act of

1933, Section 10(b) of the Securities Exchange Act, and Sections 206(1) and 206(2) of the Investment Advisers Act of 1940.

— 3.

Kohler. In 2009, the Swiss Financial Market Supervisory Authority assisted the SEC in the investigation of some suspicious call options purchased on CNS stock just before CNS merged with GlaxoSmithKline. The SEC ultimately filed an insider trading complaint against Swiss national Lorenz Kohler and against Swiss Real Estate International Holdings AG, a Swiss corporation Kohler controlled. The complaint alleged that Kohler possessed material non-public information to the effect that GlaxoSmithKline was about to acquire CNS, and that he purchased the call options on the basis of this information. The complaint also charged a Bulgarian national with involvement in the scheme. The complaint sought permanent injunctive relief, the disgorgement of all illegal profits, and the imposition of civil monetary penalties. The case is still pending in U.S. federal court.

— 4.

Kan King Wong. In 2008, the Hong Kong Securities and Futures Commission assisted the SEC in its investigation of an insider trading ring led by a member of Hong Kong's Legislative Counsel who also served on Dow Jones Corporation's board of directors. This investigation led to a civil complaint against four citizens of Hong Kong in U.S. federal court. The complaint alleged that the Executive Committee member tipped off a friend that News Corporation was about to acquire Dow Jones, and that the member's friend in turn tipped off his daughter and son-in-law, who traded on the information. The Hong Kong-based defendants ultimately settled with the SEC.

- B. International Securities Regulation Organizations and Agreements.
 - 1.

Much like regulators in the antitrust area, securities regulators have entered into a number of international agreements that allow them to coordinate their enforcement activities.
 - 2.

International Organization of Securities Commissions (IOSCO) and the IOSCO Multilateral Memorandum of Understanding (MMoU). In 2002, the International Organization of Securities Commissions (IOSCO) proposed a Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU) that establishes procedures for cross-border co-operation among securities regulators around the world. Signatories to the memorandum commit themselves to assisting foreign enforcement agencies even if the conduct the foreign agency is investigating would not be a violation of the laws of the jurisdiction receiving the request. The country receiving an information request can refuse the request if satisfying the request would require it to violate domestic laws, however, or if the agency receiving the request has already initiated a criminal proceeding in its own jurisdiction based on the same facts and against the same persons. Since MMoU's inception, regulators have made hundreds of international information requests each year.
 - 3.

European Securities Committee (ESC) and Committee of European Securities Regulators (CESR). Unlike in the antitrust arena, where the European Commission already has independent authority to undertake antitrust enforcement actions, no single agency currently possesses jurisdiction over the enforcement of securities

regulations for the entire E.U. The European Commission has created two committees whose mission is to work towards a greater uniformity in E.U. securities regulation, however. The European Securities Committee (ESC) assists the European Commission in the development of directives aimed at harmonizing the regulatory regimes of the member states, and the member states then implement these directives by enacting domestic legislation. The Committee of European Securities Regulators (CESR), meanwhile, seeks to coordinate the activities of the member states' enforcement agencies, much as IOSCO does on the broader, global level.

- C. Seek the Advice of Local Counsel
 - 1. Continuing differences in national enforcement regimes make the advice of local counsel a necessity
 - 2. **The persistence of national differences.** In spite of significant moves towards harmonization, global securities law remains fragmented. For this reason, it is important to enlist the guidance of expert local counsel when undertaking securities transactions in unfamiliar jurisdictions.
 - 3. **The persistence of national differences in Europe.** Similarly, when undertaking securities transactions in Europe, consult the national laws of the specific jurisdictions in which the transactions take place, as E.U. securities law has not yet evolved to the point that E.U. regulations supersede national regulatory regimes.

PART XI

**Topic 7 - Proof: Pre-Trial
Discovery and Evidentiary
Privileges in International
Controversies**

I. Introduction.

A. Proof in international disputes

1.

We take up here the two most common issues arise in connection with evidentiary hearings and trials, at least in the U.S., of an international controversy: pre-hearing or pre-trial discovery and evidentiary privileges.

2.

In both areas the issues that arise in international disputes can be quite different from those that occur in purely domestic controversies.

II. Pre-Trial Discovery.

- A. How different are the rules?
 - 1.

With several important exceptions, discovery of persons or entities in a U.S. proceedings works generally the same way as in a purely domestic suit.

- 2.

We take up the most significant exception here:
28 U.S.C. § 1782.

- B. 28 U.S.C. § 1782
 - 1.

In relevant part this statute provides that: “The district court of the district in which a person resides or is found may order him to give testimony or statement or to produce a document or other thing for use in a proceeding or international tribunal, including criminal investigations conducted before formal accusation.

- 2.

The statute has been read broadly, to fulfill the “twin aims” that have been stated for it:

“providing efficient means of assistance to participants in international litigation in our federal” courts

“encouraging foreign countries by example to provide similar means of assistance to our courts”. *In re Application of Maley Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir 1992); accord *Metallgesellschaft v. Hodapp*, 121 F.3d 77, 79 (2d Cir. 1997).

- C. The Hague Convention

- 1.

- This convention contains many provisions relating to the taking of evidence for use in international proceedings.

III. Evidentiary Privileges – The Attorney Client Privilege.

- A. Introduction

- 1.

How does the most standard privilege, i.e., the lawyer-client privilege, differ in the resolution of international disputes?

- B. Application

- 1.

Documents and other communications that fall within attorney-client privilege are immune from discovery. This protection is intended to encourage complete disclosure of information between the attorney and client and to further the interest of justice. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

- 2.

Many non-U.S. jurisdictions have some parallel mechanism for the protection of communications between attorney and client. However, the scope and quality of these protections can vary greatly depending on the specifics of the international dispute. Some of the most important differences are listed below.

- 3.

Who is considered a client: Because cross-border

litigation often involves large corporate entities, the issue becomes which agents of these entities are afforded the privilege in their communications with legal counsel. Within the U.S., courts disagree about how far down the corporate chain the privilege extends. Some courts have held that the privilege extends only to communications between attorneys and employees who have actual control over legal decisions. This has been termed the “control group” test. See *Diversified Indus., Inc. v. Meredith*, 572 F. 2d 596, 608 (8th Cir. 1978). Other courts have held that the privilege extends to any corporate agent so long as the agent’s communication with legal counsel is under the direction of his superiors and the communication is made in the course of the agent’s duties as an employee. See *Harper & Row Publishers, Inc. v. Decker* 423 F. 2d 487, 492 (7th Cir. 1970).

Courts in Canada, for example, have afforded protection to communications between corporate employees and legal counsel, regardless of the employee’s position in the corporate hierarchy. The privilege has also been extended to employees of subsidiary companies.

In the United Kingdom, however, courts have allowed only a narrow set of corporate employees to be considered clients for purposes of asserting the privilege. Those employees who do not consult with legal counsel on a regular basis are treated as third parties to the litigation and are therefore not entitled to assert a privilege

for their communications with legal counsel.

When engaging in legal communications with multiple agents of a corporate entity in multiple jurisdictions, it would be wise to determine the physical location of each agent and the treatment of legal communications with corporate agents in each relevant jurisdiction.

– 4.

Who is considered the attorney – the treatment of in-house counsel: In the U.S., the confidential communications of in-house corporate counsel are generally afforded the same protection from discovery as those of outside independent counsel. In many non-U.S. jurisdictions, particularly across Europe, there is a wide variation in the legal treatment of communications between businesses and their in-house counsel.

In some European countries, in-house counsel are not permitted to join their national bar organization because of the nature of their occupation as in-house, as opposed to independent, counsel. *See generally* Josephine Carr, “Are Your International Communications Protected?” 14 No. 6 ACCA Docket 32 (November/December 1996). Since they are not subject to the ethical standards required of membership in a national bar association, in-house counsel in these countries are apparently not considered to possess the

necessary independence and obligation to enforce the law which would entitle them to the legal protection of their communications with clients.

Above the national level, the European Union seemingly does not extend the privilege to in-house counsel, treating their communications in the same way that it treats communications between all other agents of a business. In *Australian Mining & Smelting Europe (AM&S) v. Commission of the European Communities*, 1982 EUECJ C-155/79, 1982 E.C.R. 1575, the European Court of Justice found that in-house counsel's lack of independence from their employers was fatal to their assertion of privilege. In *Akzo Nobel Chemicals Limited and Akros Chemicals Limited v. Commission of the European Communities*, 2007 EUECJ T-125/03, the Court went further to find that this lack of independence could not be cured despite the ability of in-house counsel in some countries to gain membership to their national bar organization. See generally Kristen M. Angus & J. Triplet Mackintosh, *Conflict in Confidentiality: How E.U. Laws Leave In-House Counsel Outside the Privilege*, 38 Int'l Law. 35 (2002).

This lack of recognition has gotten more pronounced. In September 2010, the EU's highest court confirmed the absence

of privilege for in-house counsel acting as such — counsel with an employment relationship with the party claiming the privilege. *Akzo Nobel Chemicals, Ltd, et al. v. The Commission, et al.*, C-550/07 P (Grand Chamber) (European Court of Justice Sept. 14, 2010). See the discussion of this case in our **OneWorld blog** post of 9/15/10.

These decisions become important in the context of a European Community Law dispute, which could lead to an investigation by the European Commission. In the event of such a government investigation, documents produced by in-house counsel would be subject to the same scrutiny as documents produced by any other agents of the business. Even marking a document as “privileged” and filing it separately from normal business documents is no guarantee that it will be left untouched.

Businesses with multiple European branch offices must be cognizant of the rules in each country where they communicate between corporate branches. Documents sent from one jurisdiction where they would be privileged may lose that privilege if they are sent to a jurisdiction that does not recognize a privilege for in-house counsel. See *generally* Josephine Carr, “Are Your International Commu-

nications Protected?” 14 No. 6 ACCA Docket 32 (November/December 1996).

4.5.1

If a business has offices located in a state that does not recognize an in-house privilege, it would be wise for corporate counsel to visit those offices in person as opposed to communicating through written or electronic documents; to the extent possible, all legal documents should be stored at offices in states that do recognize an in-house privilege. *Id.* at 33.

4.5.2

Any communications by in-house counsel that must be delivered to the business in written form should be sent through outside counsel as an intermediary. All such documents should be produced on the outside firm's letterhead. *Id.* at 34.

4.5.3

If outside counsel is employed to overcome privilege obstacles, in-house counsel should not add internal comments or notes to those communications, as this could destroy the privilege.

4.5.4

All sensitive internal investiga-

tions should be conducted orally or through an external lawyer. *Id.* at 37.

In a ruling concerning intra-U.S. attorney-client relations, but with implications to international disputes as well in our view, Magistrate Judge Cott in the Southern District of New York addressed the question whether the attorney-client privilege protected the communications with an in-house U.S. counsel who was an *inactive* member of the California bar. *Gucci America, Inc. v. Guess?, Inc. et al.*, 09 Civ. 4373 (SAS)(JLC) (S.D.N.Y. 6/29/10). In this case, the Court determined not only that an inactive bar member was not “authorized” to engage in the practice of law; in addition, the Court found that the Company did not act reasonably in failing to determine the lapse of the active status — hence the Company could not rely on the “apparent” authority of its own employee, who held titles of “legal counsel”, “director of legal services”, and “Vice President, Director of Legal and Real Estate”.

4.6.1

Gucci should be instructive in the context of international litigations, for example, in cases where non-U.S. in-house counsel *are* authorized to practice law.

IV. Traditional Choice of Law Analysis Determines Which Privilege Laws Apply.

- A. “Touch base” test of *Golden Trade*

“Touch base” test of *Golden Trade*: In deciding which nation’s privilege laws should be applied, courts have held that considerations of comity should be balanced against the interests of preserving jurisdictional laws. In *Golden Trade S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 520 (S.D.N.Y. 1992), the court applied these principles in holding that “any communications touching base with the United States will be governed by the federal discovery rules while any communications related to matters solely involving a foreign country will be governed by the applicable foreign statute.” In *Golden Trade*, the plaintiff had licensed a third party, Istituto Guido Donegani (IGD), to use the patent at issue. The defendant moved to require the plaintiff to obtain, through IGD, any files held by IGD’s foreign patent agents concerning the prosecution of foreign patents corresponding to the patent being litigated. The documents in question were between IGD, an Italian corporation and not a party to the suit, and patent agents located in various foreign countries; the documents concerned the processing of patents in these countries. In applying this “touch base” analysis, the court found that the countries in which the patent agents worked had the dominant interest in determining whether the communications should be treated as confidential and so applied the privilege laws of those jurisdictions.

– 1.

The principles of comity and preservation of jurisdictional law animating the decision in *Golden Trade* have been followed in subsequent decisions. See *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 145 F.R.D. 298 (E.D.N.Y. 1992) (applying British privilege law to protect communications between British patent agent and plaintiff corporation regarding execution of a European patent); *In re: Philip Services Corp. Securities Litigation*, 2005 WL 2482494 (S.D.N.Y.) (applying American privilege law to protect communications sent to a Canadian corporation regarding a public offering in the U.S.).

– 2.

Some courts have found that a more sophisticated analysis is required in order to activate the motivating principles behind the *Golden Trade* test. In *VLT Corporation v. Unitrode Corporation*, 194 F.R.D. 8, 16 (D. Mass. 2000), the court found that the “touch base” test should be analyzed as a traditional balancing test and consider such factors as the subject matter at issue, the parties to the communication and whether they are parties to the lawsuit. Also, courts should consider which sovereign has the “most direct and compelling interest” in the issue and defer to the law of that sovereign “unless that law is clearly inconsistent with important policies embodied in federal law.” *Id.*

– 3.

Unpredictability of the “touch base” test:
Generally speaking, the United States employs broad and permissive discovery rules which surpass the scope of discovery found in many non-U.S.

jurisdictions. In order to counterbalance these strong discovery rules, American privilege laws are correspondingly quite strong, creating a fair amount of certainty with regards to communications between clients and counsel within the U.S. When choice of law analysis results in the application of foreign privilege laws within the confines of the broad discovery of a lawsuit in a U.S. court, judges are cognizant of the fact that the delicate balance between the scope of privilege and discovery can be disrupted. This imbalance can weigh heavily on their choice of law analysis. For example, in *Astra Aktiebolag v. Andrx Pharmaceuticals Inc.*, 208 F.R.D. 92 (S.D.N.Y. 2002) the court refused to apply Korean law to assess plaintiff's assertion of privilege over communications between it and a Korean patent agent regarding a Korean patent application. Because Korean law had such restrictive discovery rules to complement its corresponding lack of privilege protections for attorney-client communications, the court held it to be against American policy interests to use Korean privilege laws in conjunction with the liberal discovery rules of American jurisprudence. *Id.*

- B. Strategic Considerations

Given the variation across jurisdictions as well as across individual cases of the application of choice of law analysis to privilege issues, it would be wise not to expect to maintain your own domestic privilege laws when engaging in business transactions and legal communications internationally. Below are some actions that could be taken to help preserve one's domestic privilege laws.

- 1.

Businesses may want to consider inserting language that specifies choice of law in the dispute resolution section of their transactional documents. These

IV. Traditional Choice of Law Analysis Determines Which
Privilege Laws Apply. 134

documents could state that in the event of a dispute, persons acting in the capacity of counsel will be accorded the highest form of privilege and immunity that is available to any party to the deal.

— 2.

It may be beneficial for non-U.S. companies, or U.S. companies with non-U.S. offices or subsidiaries, to include this type of language in their policy manuals as well as in documents given to prospective business parties.

— 3.

Businesses could employ American counsel as much as possible in cross-border communications. This would make a court more likely to find that these communications “touch base” with the U.S.

— 4.

If trying to avoid non-U.S. privilege laws (or a lack thereof), be sure to carefully analyze the policy implications of employing those laws in U.S. litigation. This is an important element of the choice of law balance and should be given close attention. *See Astra Aktiebolag v. Andrx Pharmaceuticals Inc.*, 208 F.R.D. 92 (S.D.N.Y. 2002).

V. When U.S. Courts Recognize a Privilege that the Law of the Non-US Entity does not.

- A. Implying a privilege when none exists in a non-U.S. forum

A. Implying a privilege when none exists in a non-U.S. forum: If a court chooses to apply non-U.S. law to its privilege analysis, the way in which it interprets this law can have a tremendous impact on the outcome of a case.

- 1.

Common law jurisdictions versus civil law jurisdictions:

The existence and scope of privilege laws varies greatly depending upon the underlying legal regime that exists in a non-U.S. jurisdiction.

Generally speaking, civil law countries employ laws that prohibit an attorney from disclosing information about his client, whereas common law countries employ laws that seek to protect the spe-

cific communications between an attorney and his client.

For example, in Germany the relationship between a lawyer and his client is protected by regulations that prohibit a lawyer from divulging any confidential information or documents obtained in the course of his professional activities. However, it is not that the communication between attorney and client itself is privileged, but that the lawyer is under a duty not to disclose the information in it. *See generally* Diana Good, et al., *Privilege: A World Tour*, PLC Cross Border Quarterly, vol. IX (Dec./Jan. 2004), available at <http://www.practicallaw.com/2-103-2508>. The penalty for violating this duty of confidentiality is usually imposed through the foreign jurisdiction's equivalent of a bar association, and can even result in criminal penalties.

However, laws requiring confidentiality often do not extend to protect documents in the hands of the client. This limitation corresponds to the equally limited scope of discovery permitted in those jurisdictions. In many of these countries, there is no formal process by which a party to a lawsuit may be compelled to disclose information in its possession for the benefit of the opposing party; they must produce only the exhibits that they intend to use to present their case. *Id.*

— 2.

The distinction between the laws of confidentiality of many civil law jurisdictions and the privilege laws of many common law jurisdictions become more pronounced when these confidentiality laws are interpreted and applied by an American court. It appears that courts incorporate the same concerns of comity and preserving jurisdictional policy interests in interpreting non-U.S. laws as they do when performing their choice of law analysis. This complicated balancing of competing interests has led to a variation across cases in the interpretation of non-U.S. laws.

For example, in *Alpex Computer Corp. v. Nintendo Co.*, 1992 WL 51534 (S.D.N.Y.), the court declined to interpret Japanese law as containing a privilege which would protect communications with a Japanese patent agent (or “Benrishi”) since no such protection was specifically provided for in the relevant Japanese statutes. Acknowledging that “American Judges issue opinions that change the law because they see the court as a vehicle to do so,” the court went on to note that “rarely, if ever, would a Japanese Judge agree with this view.” *Id.* at 2. The court held that communications between agents at Nintendo and a Japanese Benrishi did not come within the ambit of the United States attorney-client privilege because Japanese law protects only the right of the Benrishi

to refuse to testify regarding information that he obtains in the course of his duties.

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By contrast, the court in *VLT Corp. v. Unitrode Corp.*, 194 F.R.D. 8 (D. Mass. 2000) held that Japanese law protected communications between a Benrishi and a client from American discovery. The court found that Japanese law should treat communications from Benrishi similarly to how American law treats communications from attorneys because Benrishi perform very similar functions as American attorneys. *Id.* at 17. The court found that the protection afforded by the Japanese statutes “arises out of an implied, if not, an actual privilege.” *Id.* at 17 n.5.

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In *Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc.*, 1998 WL 158958 (S.D.N.Y.) the court held that French confidentiality rules did not rise to the level of an evidentiary privilege sufficient to protect the communications between a French patent agent and the defendant. The court found that “the fact that a statute requires a party to keep clients’ affairs secret does not mean that a privilege exists.” *Id.* at 3.

.

However, the court in *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (S.D.S.Car. 1979) found that French secrecy statutes did protect communica-

tions with a patent agent from discovery in a U.S. court. The court looked at Article 378 of the French Penal Code, the same article which was analyzed in the *Bristol-Myers Squibb Co.* case. The court found that because this article required French patent agents to “preserve the secrecy of certain confidential communications from clients,” it would therefore afford an attorney client privilege to those communications. *Id.* at 1170.

In *Golden Trade S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 520 (S.D.N.Y. 1992) the court applied German, Norwegian, and Israeli law to the communications between patent agents of those respective countries. In finding that the documents in question would be protected from discovery under the law of each country and that “such protection would not offend any serious policy interests of this jurisdiction,” the court held that these documents would likewise be protected from discovery under American law. *Id.*

- B. The Hague Convention

- 1.

Under the Convention, privileges are respected, essentially if they exist under U.S. or the other applicable country’s laws.

- 2.

The important judicial decision in this area is *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442 (D. Del. 1982). There, the court interpreted the Evidence Convention to mean, in the context of documents located in France, that privilege would

be respected if recognized under either French or U.S. law.

— 3.

In *Renfield*, the communications at issue were between the defendants and their French in-house counsel. French in-house counsel are not allowed to become members of their national bar association, a typical requirement to qualify attorney communications as privileged under U.S. law. *See Re Grand Jury Investigations*, 599 F.2d 1224, 1233 (3d Cir. 1979).

— 4.

However, the court determined that because the French in-house attorneys served in the same capacity as an American attorney, they would be considered the functional equivalent of a qualified attorney for purposes of asserting privilege. *Renfield* 98 F.R.D. at 444.

— 5.

The *Renfield* court’s “functional equivalence” analysis, has not been followed by subsequent decisions. *See Louis Vuitton Malletier v. Doone & Bourke, Inc.*, 2006 U.S. Dist. LEXIS 87096 (S.D.N.Y.) (rejecting the *Renfield* “functional equivalence” test and noting that the Third Circuit had also declined to follow it); *Honeywell, Inc. v. Minolta Camera Co., Ltd.*, 1990 U.S. Dist LEXIS 5954 (D. N.J.) (rejecting the *Renfield* “functional equivalence” test and adopting a test that looked at the attorney’s legal credentials and certification).

— 6.

In *Louis Vuitton Malletier v. Doone & Bourke, Inc.*, 2006 U.S. Dist. LEXIS 87096, the court declined to

extend the protection of U.S. attorney–client privilege to plaintiff’s French in-house counsel despite the applicability of the Hague Evidence Convention. The court found that the plaintiff waived the privilege since there was “no reason to believe that there was any expectation by the participants that confidentiality could be maintained in the face of French law,” which does not extend a privilege to in-house counsel *Id.* at 58.

– 7.

The court in *Renfield* explicitly rejects this argument, noting that the policy of the Hague Evidence Convention was to preserve jurisdictional privileges as opposed to limiting them. 98 F.R.D. at 444. However, a litigant in the U.S. trying to compel the discovery of documents could use the *Louis Vuitton Malletier* decision to argue that U.S. privilege was waived on the ground that communications made in the non-U.S. jurisdiction were made without an expectation of privacy.

- C. Protecting against and creating leverage with disparities in privilege laws:

– 1.

It may be possible, through effective use of the disparities between privilege laws in the U.S. and other countries, to convince a court to compel discovery of documents that would normally be barred from discovery in litigation taking place in the jurisdiction that the communication took place. Likewise, an unwitting litigant could be subject to this same kind of intrusive discovery of his own internal communications.

– 2.

To protect against this kind of intrusive discovery, businesses should be aware of all the relevant privi-

lege laws in the jurisdictions in which they interact as well as the way that those laws may complement or contradict one another.

- 3.
Further, it is important to employ communication strategies which would preserve privilege in all possible avenues of litigation. For example, while confidential advice on U.S. law given by U.S. counsel to a European company would normally be protected from discovery in an American court, this communication may not be afforded protection in connection with a proceeding in the European Union since the privilege there is extended only to members of a European national bar association.
- D. Practically, what to do?
 - 1. Learn the laws relating to attorney-client communications in all the jurisdictions in which your company conducts its business. It may be helpful to establish different policies for communicating with legal counsel in the different jurisdictions that would account for any differences in privilege laws.
 - 2. Potential non-U.S. litigants may want to bring suit in the U.S. in order to take advantage of its broad discovery rules. But they should be equally familiar with the U.S.'s correspondingly broad protection afforded to litigants by the attorney-client privilege and work product doctrine.
 - 3. Although in most instances it would be most beneficial to have American privilege law apply to one's communications with legal counsel, that is not always the case. Cross-border litigation often arises in the context of patent litigation. While U.S. law generally does not extend the attorney-client privilege to communications made to patent agents, *Benckiser G. m. b. H. v. Hygrade Food Products Corp.*, 253 F. Supp. 999 (D.N.J. 1966), the law of some non-U.S. jurisdictions does. *See*

Duplan Corp., 397 F. Supp. at 1170. When communicating with foreign patent agents, it may therefore be wise to separate these communications from American legal counsel or American patent agents to the extent possible in order to preserve the privilege of the foreign jurisdiction.

- 4. Include a choice of law provision in all transactional documents – this is not an option in the context of a government investigation, however.
- 5. Mark all communications as confidential and privileged; separate them from regular business correspondence and specify that they are being produced exclusively for legal decision-making. These procedures would be evidence of an expectation of privacy for these communications and may persuade an American court to imply a privilege from non-U.S. law.
- 6. Even if non-U.S. laws requiring attorney secrecy and confidentiality do not amount to a privilege for purposes of discovery in a U.S. court, these laws could be employed as an alternative means of protecting communications. It may be possible to keep legal documents from being subject to American discovery proceedings by leaving them in the possession of a non-U.S. attorney who is required to obey these laws of secrecy and confidentiality.

VI. Fifth Amendment Rights of Resident and Non-Resident Aliens.

- A. Overview
 - 1. The Fifth Amendment provides, among other things, that a witness has the right to refuse to disclose any information which the witness believes could be used against him in a criminal proceeding or could lead to other incriminating evidence. Courts have consistently held that resident and non-resident aliens are within the protection of the Fifth Amendment.
- B. Resident Aliens
 - 1. A resident alien may invoke Fifth Amendment rights in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. *See Kwon Hal Chew v. Colding*, 344 U.S. 590 (1953).
- C. Non-resident aliens questioned before criminal proceedings in the United States
 - 1. The Second Circuit ruled that statements given abroad to U.S. law enforcement personnel must be preceded by a recitation of the individual's Fifth Amendment rights. *United States v. Odeh* (2d Cir. 2008) (statements admissible when the U.S. law enforcement officials apprised the defendant of his Fifth Amendment rights while abroad). *See also U.S. v. Bin Laden*, 132 F. Supp. 2d 168, 181 (S.D.N.Y. 2001).
- D. Non-resident aliens appearing in U.S. civil proceeding
 - 1. Courts have narrowly interpreted decisions such

as *Odeh* and *Bin Laden* and have not extended their protections to non-resident aliens in civil cases. To illustrate, in *Bear Stearns & Co. v. Wyler*, 182 F. Supp. 2d 679 (N.D. Ill. 2002), the court upheld the issuance of a subpoena upon a Dutch businessman that required the production of bank, wire transfer and phone records. The court noted in dictum that it “was not self-evident that the Fifth Amendment’s privilege against self-incrimination is available to non-resident aliens.” *Wyler*, 182 F. Supp. 2d at 680–81.

- E. Fifth Amendment inapplicable where there is fear of prosecution in another country.
 - 1. In *United States v. Balsys*, the Supreme Court decided there was no Fifth Amendment protection for aliens who feared being prosecuted in another country. 524 U.S. at 672 (1998). The Supreme Court found that the phrase “any criminal proceeding” in the compelled self-incrimination clause only protects a witness “when reasonably fearing prosecution by the government whose power the Clause limits, but not otherwise.” Accordingly, a witness fearing prosecution by a non-U.S. government will be compelled to testify where such witness is granted immunity from prosecution in the United States. *See also United States v. Gecas*, 120 F.3d 1419, (11th Cir. 1997). Yet in dictum the Court held out the possibility that someday “cooperative conduct between the United States and other nations could develop to a point at which a claim could be made for recognizing fear of prosecution.”

PART XII

**Topic 8 - Evidentiary
Hearings and Trials**

I. Introduction.

A. The Source of Law in an International Dispute

1. Hearings or trials of controversies with international dimensions should be no different in kind from trials of purely domestic disputes. That, after all, is one of the fundamental tenets of the U.S. Constitution's promise of fundamental, procedural, and substantive equality of treatment of litigants. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *Sanchez Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fl. 2009) ("foreign litigants cannot be subjected to a legal regime unfairly different from that applied to domestic litigants simply because they are foreigners").
2. That is not to say that there do not exist highly pertinent differences and special challenges in trying an international controversy. The trial of international disputes involves certain special considerations beyond those that typically arise in litigation. Many of these issues concern the admission of non-U.S., or "foreign," records and testimony, as well as the use of translators and interpreters for testimony and evidence that is presented in languages other than English. In some cases special concerns arise from the need to prove non-U.S. law to the court hearing the matter. In other cases there are particular issues that arise from witness unavailability and therefore the need to introduce deposition testimony instead of live testimony at the trial. Finally, trials of international disputes may be decided by juries, thereby introducing questions of bias and "home court advantage" that lawyers must examine in preparing for trial.

3. Rather than serve as an overview of all the tactical and evidentiary issues involved in preparing for a trial, this chapter focuses on those features of trial litigation that are most commonly addressed by U.S. courts in international disputes, especially by federal courts.

II. Authentication of Non-U.S. Records under Fed. R. Evid. 901 and 902.

- A. Overview
 - 1. Before a document may be admitted to be relied upon by the trier of fact, the party offering the document or testimony must demonstrate that the document is “authentic.” Several provisions of the Federal Rules of Civil Procedure and the Federal Rules of Evidence relate to the admission into evidence of non-U.S. public records and records of regularly conducted business activity.
- B. Authentication Requirement
 - 1. In a federal court and many state court evidentiary proceedings, “authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Fed R. Evid 901.
 - 2. This provision, and similar provisions in state court proceedings, allow authentication to occur through the sworn testimony of a witness with knowledge, expert opinion, and various other methods. *See, e.g., United States v. Doyle*, 130 F.3d 523 (2d Cir. 1997) (the certification of the Maltese officials was adequate to authenticate the documents under Rule 901 and show that these were truly the records of the Customs Department).
 - 3. In a federal evidentiary proceeding, again with some counterparts in state court practice, the

authentication of non-U.S. documents is specifically provided for. The Federal Rules of Civil Procedure address the use of non-U.S. public records in Rule 44(a)(2). That Rule relates to public records, which is a narrower universe of documents than “public documents.” A public document has been defined as an official paper, the maintenance of which may not be required. A public record, however, is more broadly seen as a document that is required by law to be maintained.

- C. Self-Authenticating Documents under Fed. R. Evid 902(3)
 - 1. Fed. R. Evid 902(3) states that a non-U.S. public document that is executed or attested to by an official authorized to execute it is self-authenticating if it is:

[A]ccompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in chain of certificates of genuineness of signature and official position relating to the execution or attestation.

Fed. R. Evid. 902(3) additionally states that:

A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States.

- D. Authentication Under New York CPLR
 - 1. As an example of how state courts and procedures treats these same issues, the Civil Practice Law and Rules of the State of New York, Section 4542, states that a copy of a non-U.S. official record is self-authenticating if: (1) the copy is attested by an authorized official, and (2) a “final certification” is made with respect to the authenticity of the signature and official position either of (a) the person who attested the copy or (b) any other non-U.S. official who made the certification concerning the attestation. As in Fed. R. Evid. 902(3), Section 4542 provides that “[a] final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States.”
- E. Self-Authenticating Documents under Fed. R. Evid. 902(12)
 - 1. Fed. R. Evid. 902(12) provides that “[i]n a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under [Fed. R. Evid.] 803(6) [is self-authenticating] if accompanied by a written declaration by its custodian or other qualified person certifying that the record (a) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (b) was kept in the course of the regularly conducted activity; and (c) was made by the regularly conducted activity as a regular practice.” *See, e.g., Venture Global Eng’g*, 233 Fed. Appx. 517 (6th Cir. 2007) (affirming the district court’s ruling admitting into evidence consent of the Reserve Bank of India to enforcement of the lower court’s award).

- F. Authentication of Non-U.S. Records
 - 1. There are also special rules for authenticating non-U.S. official records. Fed. R. Civ. P. 44(a)(2) (identifying four ways to authenticate a non-U.S. official record that is “admissible for any purpose” at trial). *See also* 28 U.S.C.A. § 174; Fed. R. Evid. 902 (non-U.S. public documents that are executed or attested as set forth in Fed. R. Civ. P. 44(a)(2) are self-authenticating); *see generally* C. Wright & A. Miller, *Federal Practice & Procedure, Civil 2d* §§ 2431-37.

III. Documents and other Evidence Being Used by the Trier of Fact.

- A. Introduction
 - 1. Trials and evidentiary hearings in the U.S. are based on the introduction of documents and testimony on which the trier of fact is entitled to rely. In both state and federal courts, rules of evidence must be observed. This section addresses the rules that most likely will be faced in connection with the evidentiary aspects of an international dispute.
- B. Hearsay objections
 - 1. The most typical challenge to documents or testimony being used as evidence is the hearsay rule. Rule 801 of the Federal Rules of Evidence (“Fed. R. Evid.”) defines hearsay as “a statement, other than made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.” Because of the breadth and scope of what constitutes hearsay, the litigator needs to find an exception to the hearsay rule to have documents or out-of-court testimony (such as a deposition) be considered by the trier of fact. Exceptions to the hearsay rule come in two forms: those that are denominated “non-hearsay,” and those that are clearly hearsay but are admissible into evidence because of a specific exception to the hearsay rule. We address here several examples of “non-hearsay” and exceptions to the hearsay rule

that should be looked at when considering non-U.S. documents or testimony.

- C. Admissions of a Party-Opponent
 - 1. If the opposing party in a litigation makes an admission, that statement is typically deemed not to be hearsay, whether the statement was made in the U.S. or outside the U.S. Fed. R. Evid. 801(d)(2). Because an interpreter functions as the agent of a party, it is irrelevant that an admission is done in a translation. *See United States v. Da Silva*, 725 F.2d 828 (2d Cir. 1983); *Saavedra v. State*, 297 S.W.3d 342 (Crim. App. Tx. 2009).
- D. Statements of Co-Conspirators
 - 1. In both criminal and civil cases, a statement of one co-conspirator is admissible against the others as an admission of a party-opponent, if made in the course of the conspiracy and in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E).
- E. Records of Regularly Conducted Activity
 - 1. Another exception to the hearsay rule relates to records of regularly conducted activity, created and maintained in the regular course of business as a regular practice of a business. Fed. R. Evid. 803(b)(6).
- F. Public Records
 - 1. Certain records, reports, statements, or data compilations of public officers or agencies may be admissible as public records. Fed. R. Evid. 803(8). This exception applies to statements that set forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law, as to which matters there was a duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil cases, and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of

information or other circumstances indicate lack of trustworthiness.

- G. Foreign Public Records
 - 1. Certain sections of Fed. R. Evid. 803(8) are not limited to U.S. public records. *See, e.g., In re Parmalat Sec. Litig.*, 477 F. Supp. 2d 637 (S.D.N.Y. 2007) (admitting reports of foreign public offices and agencies under 803(8)); *FAA v. Landy*, 705 F.2d 624, 633 (2d Cir. 1983) (admitting a German telex, which was identified by the FAA inspector to whom it had been sent, as a public record and report under 803(8)(B)(C); *United States v. Grady*, 544 F.2d 598, 604 (2d Cir. 1976) (the court admitted Irish public police records under 803(8)(B) for the limited purpose of showing when the weapons were found in Northern Ireland).
- H. Residual Exception
 - 1. There is also a “residual” exception to the hearsay rule for documents or testimony with the indicia of trustworthiness found sufficient by the court. Fed. R. Evid. 807. *See also U.S. v. Pluta*, 176 F.3d 43 (2d Cir. 1999) (because a passport is, “in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer,” *Haig v. Agee*, 453 U.S. 280, 292 (1981), under 807 a U.S. court may admit a foreign passport as proof of foreign citizenship).

IV. Translation of Documents and Non-U.S. Records.

A. Duty to translate?

1. Although this is not free from doubt, some courts have held that a producing party does not have a duty to translate documents that are regularly kept in a language other than English. *See, e.g., Grundstad v. Ritt*, 1998 U.S. Dist. LEXIS 5111 at 7 (N.D. Ill. 1998) (the producing party is not obligated to translate foreign documents into English. The documents must be produced as they currently exist, and the opposing party will have to bear any cost of translation if necessary); *In Re: Toyota Motor Corp. Unintended Acceleration Marketing Sales Practices, and Products Liability Litigation*, 2010 U.S. Dist. LEXIS 62393 (C.D. Ca. 2010) (“Defendants are not obligated to provide English translations of the documents if such translations do not exist in the documents produced to the Government entities”). *See also Galliano v. Stallion*, 2010 N.Y. Slip Op. 04829 (N.Y. June 08, 2010).

V. Use of Deposition Transcripts at Trials Involving Non-U.S. Litigants.

- A. Overview
 - 1. In cases involving a non-U.S. litigant, counsel will often need to introduce deposition testimony at trial given by non-U.S. witnesses who are outside the United States and beyond the scope of the court's subpoena power. Such witnesses are therefore typically seen by the court as unavailable for trial testimony.
- B. Use of Deposition at Trial
 - 1. Both the Federal Rules of Civil Procedure and the Federal Rules of Evidence have provisions governing the use of depositions at trial. Fed. R. Civ. P. 32 permits liberal use of deposition testimony for impeachment — Fed. R. Civ. P. 32(a)(2) allows the adverse party's deposition to be used "for any purpose." This is permissible regardless of the adverse party's availability at trial.
- C. Depositions as an Exception to Hearsay
 - 1. Although a deposition is technically hearsay, Fed. R. Evid. 802, 803, and 804 permit the use of deposition testimony as an exception to the hearsay rule in certain circumstances. However, the deposition of an adverse party is never hearsay because it is an admission under Fed. R. Evid. 801(d)(2). *See e.g., Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Maryland 2007) (if the deponent's testimony would qualify under 801(d)(2), then the deposition testimony may be

admitted to prove the contents of the writings, recordings and photographs described therein).

- D. Third-party witnesses
 - 1. With respect to third-party witnesses, Fed. R. Civ. P. 32(a)(3) allows the use of a deposition of an unavailable witness “by any party for any purpose” if, among other factors, the court determines that the witness is located further than 100 miles from the place of trial or outside the United States, unless the party offering the deposition caused the witness’s absence.
- E. Depositions of Employees
 - 1. A corporate party may be permitted to use the depositions of its employees who are situated outside the United States, even if the corporation would be able to produce those employees as live witnesses at trial. *See Glaverbel Societe Anonyme v. North Lake Mktg. and Supply, Inc.*, No. H88-383 (N.D. Ind. March 31, 1992).
- F. Former Testimony Exception
 - 1. Fed. R. Evid. 804(b)(1) creates an exception to the hearsay rule for former testimony, where the witness is unavailable and the “deposition [was] taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop testimony by direct, cross, or redirect examination.”
- G. Unavailability of a Witness
 - 1. The definition of witness unavailability is broader in Fed. R. Evid. 804 than in Fed. R. Civ. P. 32(a)(3). Under Fed. R. Evid. 804 a declarant is deemed unavailable on the grounds of privilege, refusal to testify, lack of memory, or if the proponent has been unable to compel attendance by “process or other reasonable means.” In addition, unless the unavailability was procured for

the purpose of preventing the witness from attending or testifying, the court is not bound by the evidence rules in deciding the issue of unavailability. Fed. R. Evid. 104.

- H. Catch-all
 - 1. Where no specific exceptions under Fed. R. Evid. 804(b)(1)-(4) apply, deposition testimony may be admissible under the residual exception, Fed. R. Evid. 807.

VI. Use of an Interpreter at Trial.

- A. Overview
 - 1. Frequently international lawsuits in U.S. courts frequently involve testimony by witnesses who cannot speak English and may need an interpreter to translate counsel’s questions and witness replies. While some witnesses may need interpreters for only certain portions of their testimony, others may need an interpreter throughout their trial time.
- B. Translator and Interpreters
 - 1. The terms “translator” and “interpreter” are not the same, though frequently used interchangeably. “[T]ranslation deals with the written word . . . [while] interpretation . . . allows two or more persons who do not speak the same language to communicate orally.” Elena M. DeJongh, *An Introduction to Court Interpreting: Theory and Practice*, 35-36 (1992); Debra L. Hovland, *Errors in Interpretation: Why Plain Error is Not Plain*, 11 *LAW & INEQ. J.*, 473, 474 n.3 (1993).
- C. Appointment of Interpreter
 - 1. Both civil and criminal rules of procedure allow the court to appoint an interpreter and set reasonable compensation. See Fed. R. Civ. P. 43(d) and Federal Rules of Criminal Procedure Rule 28. Interpreters are usually required where a witness does not speak English well enough to enable a jury to understand the testimony, or where a criminal defendant cannot speak English well

enough to communicate with counsel and comprehend the proceedings.

- D. Importance of an Interpreter
 - 1. Courts in civil cases emphasize the jury's need accurately to hear and understand the testimony and the requirement that court reporter produce a complete and accurate transcript. This is especially true where an individual's fundamental rights are at stake. *See, e.g.*, Exec. Order No. 13166 (Aug. 11, 2000) (An order improving Access to Services for Persons with Limited English Proficiency, without making any distinction between civil and criminal trials).
- E. The Court Interpreters Act
 - 1. The Court Interpreters Act commissions the Director of the Administrative Office of the United States Courts to establish the use of interpreters, either sua sponte or on the motion of a party, for individuals who speak only or primarily a language other than English. It allows for making court interpreters available for trials and having their qualifications certified. 28 U.S.C.A. § 1827.
- F. The Court has Discretion in Appointing an Interpreter
 - 1. A trial court has wide discretion in deciding if an interpreter is needed when it learns a party or witness has trouble with English. *See United States v. Obeid*, 256 Fed. Appx. 816 (7th Cir. 2007); *United States v. Carrion*, 488 F.2d 12, 14-15 (1st Cir. 1973).
 - 2. A translation usually does not contribute to the hearsay of the underlying testimony since the interpreter simply functions to transmit language. *United States v. Ushakow*, 474 F.2d 1244, 1245 (9th Cir. 1973); *United States v. Sanchez-Godinez*, (8th Cir. 2006).
- G. Interpreters in Multi-Defendant Cases
 - 1. In a multi-defendant case, each defendant does not require a different interpreter, according to the Court Interpreters Act. *United States v. Bennett*, 848

- F.2d 1134, 1140-41 (11th Cir. 1988); *United States v. Sanchez*, 928 F.2d 1450, 1455 (6th Cir. 1991).
- 2. An interpreter for a criminal defendant must interpret everything spoken in the courtroom, whether by the judge, an attorney, or a witness.
 - H. Interpreter Qualifications
 - 1. The court must determine that the interpreter has adequate translating qualifications, and this assessment must be based on something other than the interpreter's own self-evaluation. *United States v. Rodriguez-Hernandez*, 2007 U.S. App. LEXIS 1263 (9th Cir. 2005).
 - I. Interpreters must Qualify under Fed. R. Evid. 702
 - 1. Fed. R. Evid. 604 requires an interpreter to satisfy the rules of evidence relating to an expert witness as set forth in Fed. R. Evid. 702, which in turn requires that by reason of knowledge, skill, experience, training, or education, the interpreter is able to provide a true translation. *See United States v. Gomez*, 67 F.3d 1515 (10th Cir. 1995) (citing *United States v. Brown*, 540 F.2d 1048, 1053-54 (10th Cir. 1976)). Accordingly, before an interpreter is permitted to function, a court may first have to make or allow a preliminary inquiry into the interpreter's competence.

VII. Sixth Amendment Rights in International Criminal and Civil Cases.

- A. Overview.
 - 1. The Sixth Amendment to the U.S. Constitution guarantees that anyone charged with a crime shall have compulsory process for obtaining witnesses in his favor. These protections, however, have not usually been extended outside the United States.
- B. A Court cannot compel the presence of a foreign national.
 - 1. The U.S. government typically lacks the power to compel foreign nationals residing outside the United States to appear in court.
- C. Admission of business records does not violate the Sixth Amendment.
 - 1. The Supreme Court established an absolute requirement of confrontation under the Sixth Amendment in *Crawford v. Washington*, 541 U.S. 36 (2004), where it was held that testimonial statements may only be admitted into evidence if the declarant is unavailable and the defendant previously had the opportunity to cross-examine the declarant. Since then, several appeals courts, including the Sixth Circuit, have held that business records are non-testimonial evidence and thus not subject to the absolute requirement of confrontation established in *Crawford*. See e.g., *United States v. Jamieson*, 427 F.3d 394, 411 (6th Cir. 2005); *United States v. King*, 161 F. App'x 296, 297 (4th Cir. 2006).

PART XIII

Topic 9 - Arbitrating
International
Controversies

I. Overview of Arbitration.

1. Access to effective and efficient dispute resolution is an essential component of any business. When businesses expand beyond their home market the resolution of disputes becomes more complex and presents challenges not faced in the domestic context. To prepare for these cross-border disputes, companies may wish to enter into arbitration agreements in the hopes of obtaining a neutral, cost-effective, and fast-moving forum. Though aimed at securing fair and efficient resolution of disagreements, international arbitration is not without pitfalls and provides no guarantee one will avoid the judicial system.

2. Arbitration typically provides parties with greater procedural flexibility than litigation; in arbitration, parties are free to choose the rules and procedures that will govern the resolution of their dispute. Parties may choose to select an arbitral forum that will govern procedure or to abide by the rules of an established arbitral institution. Among these institutions are: the International Chamber of Commerce (“ICC”), American Arbitration Association (“AAA”), and the London Court of International Arbitration (“LCIA”). Parties are also free to craft their own procedural rules. In the event that parties fail to select a law and procedure by which they will resolve their dispute, it will typically be the law of the country in which the arbitration is located.

2.1 While the breadth of issues governed by agreed-upon rules of arbitration varies depending on the “host” country, one area of typical application is that the law of the forum will be looked to in order to ascertain the extent to which

the courts can intervene in the dispute. For example, the Convention on Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), June 10, 1958, 21 U.S.T. 2517 (enacted as chapter two of the Federal Arbitration Act), permits courts situated in the country where the arbitration occurred to be accessed to overturn or “vacate” arbitral awards.

2.2 Absent agreement to the contrary, courts will intervene if an arbitration clause is vague or ambiguous in specifying which arbitral body’s rules apply. Courts may also step in to appoint an arbitrator when there is no specific provision guiding selection of arbitrators, when parties cannot agree, or when the arbitrator named by the parties is unable to hear the dispute. Once the tribunal has been established, a district court does not have authority to overturn the selections until later when it is ruling on an application to vacate an award.

II. Efforts to Compel and to Avoid Arbitration.

- A. The Attraction and the Opposition to Arbitration.

- 1.

Frequently parties will be eager to compel or eager to resist the arbitration process. Arbitration is a contract matter, and a party can only be compelled to submit disputes to arbitration where he has previously agreed to arbitrate. Seeking to avoid dispute resolution before a court, parties can enter into a legally binding agreement to arbitrate rather than to litigate. Because it is a relinquishment of a party's courtroom rights, the decision to arbitrate must be express, and can occur before or after a dispute actually arises. A pre-dispute agreement to arbitrate is usually encompassed in a clause in a commercial contract, while a post-dispute agreement typically stands alone.

- 2.

In an effort to avoid arbitration, a party can attempt to invalidate the arbitration agreement or clause, or it can endeavor to assert that the disputed issue is not governed by the arbitration agreement. Whether a court or an arbitrator will hear and decide an issue depends upon the type of argument set forth by the petitioning party and the terms of the arbitration agreement.

- B. Rent-A-Center v. Jackson

– 1.

Recently, in *Rent-A-Center v. Jackson*, No. 09-497 (June 24, 2010), the Supreme Court limited a court's authority over arbitration agreements. It held that if an agreement provides that an arbitrator will decide all issues pertaining to enforceability, an arbitrator, not a court, must decide the issue of enforcement. In *Jackson*, an employee signed an agreement to arbitrate that granted the arbitrator authority to resolve any dispute relating to the enforceability or formation of the agreement. Later, the employee filed an action against his employer and the trial court granted the employer's motion to compel arbitration and dismiss the action. The employee challenged the trial court's decision, arguing that the arbitration agreement was unconscionable and the issue of unconscionability should be determined by a court, not an arbitrator. The Supreme Court held that under the Federal Arbitration Act ("FAA") (codified at 9 U.S.C. § 1 *et seq.*), when an agreement grants an arbitrator authority to decide issues of enforceability, if a party challenges the enforceability of that particular delegation agreement, the district court should consider the challenge. However, if a party challenges the enforceability of the agreement as a whole, the challenge is for an arbitrator. In *Jackson*, because the employee did not challenge the provision granting exclusive authority to arbitrators for the resolution of enforceability questions, his challenge was found to be a challenge of the whole agreement and subject to an arbitrator's review.

- C. Granite Rock Co. v. International Brotherhood of Teamsters

– 1.

On the same day as *Jackson*, the Supreme Court also

decided *Granite Rock Co. v. International Brotherhood of Teamsters*, No. 08-1214 (June 24, 2010), holding that the issue of formation of the arbitration agreement is a question properly decided by a court, not an arbitrator. Rejecting the argument that arbitration was appropriate because of the “federal policy in favor of arbitration,” the Court held that because disputes are arbitral only if parties agree to arbitrate, a court must first determine if such agreement between the parties actually exists. In *Granite Rock*, two parties began negotiating a new Collective Bargaining Agreement (“CBA”). Later, a dispute between the parties arose, and a lawsuit and subsequent motion to compel arbitration were filed. At the heart of these issues was the disagreement between the parties as to when the CBA had been ratified. Although the CBA had required arbitration for all disputes “arising under” it, the question of when the CBA was ratified did not arise under the CBA because it “concerns the CBA’s very existence.” Therefore, the question of formation was properly directed towards a court and not towards an arbitrator.

— 2.

Granite Rock is distinguished from *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), where the party resisting arbitration conceded that it had executed the contract containing the arbitration clause, but asserted that the entire contract was invalid due to a usurious interest provision. The Supreme Court concluded that arbitration was required for resolution of the issue of contract validity because the arbitration clause was valid and severable from any invalid provisions. Reversing the Florida Supreme Court’s decision, the U.S. Supreme Court held that the arbitration provision was enforceable, despite a

claim that the contract containing the arbitration agreement was illegal.

- D. Requirements for Arbitration Agreement Enforcement.
 - 1.

Introduction. For an arbitration clause or agreement to be enforced, it must meet certain internationally recognized requirements. The New York Convention sets out the requirements for enforcement and includes basic rules such as the agreement must be in writing and involve an existing or future dispute, the agreement must be valid under the relevant jurisdiction's law, etc.

- 2.

Grounds for Invalidity. The exceptions for finding an arbitration agreement invalid are narrow. Under the New York Convention, a court should refer disputing parties to arbitration unless it concludes that the agreement is “null and void, inoperative or incapable of being performed.” Art. II (3). The relevant language of the other institutions is nearly identical. Grounds for finding an agreement null and void are limited to duress, fraud, mistake, and waiver. These exceptions require a party to demonstrate that the obligation or remedy is fundamentally prohibited by statute, declaration, or the public policy of the forum.

Under the severability doctrine, an arbitration clause can survive a court's invalidation of the rest of the contract. In 2006, the Supreme Court declared that the doctrine of severability applies to both voidable (contract exists subject to possible rescission) and void *ab initio* contracts. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

- 3.

Disputed Issue not Subject to Arbitration. Still, the recognition of an arbitration agreement does not guarantee that the dispute will be subject to arbitration, because the arbitration agreement may not cover the asserted claim.

For agreements under the FAA, courts apply the federal substantive law of arbitrability to determine whether an issue is subject to arbitration. The FAA adopts a liberal policy favoring arbitration agreements, establishing that as a matter of law, any inquiry as to the scope of arbitrable matters should be decided in favor of arbitration. A broad arbitration clause, such as “any and all claims” stemming from a contract will be arbitrated, creates a presumption in favor of arbitration. Yet courts have held that tort claims are not subject to arbitration, though a contract claim cannot be removed from arbitration merely by framing it as a tort. With a narrow arbitration clause, a court will permit arbitration for a claim that is *prima facie* addressed by the clause. While parties may mutually decide to have matters arbitrated that otherwise fall outside the scope of the arbitration clause, the ICC, as well as some other arbitral institutions, only permit new claims at the tribunal’s discretion.

- E. Motion to stay litigation and compel arbitration.

- 1.

Situations can arise in which one party will file a suit in a court at the same time the other party files an arbitral proceeding. The party who wants arbitration should file with a United States district court a motion to compel the arbitration and stay

the litigation. *See FAA* § 4. The state where the motion to compel is filed will either be the one in which the parties agreed to arbitrate their claims, or where the current litigation is pending. A court will compel arbitration where the parties have agreed to arbitrate and the scope of the arbitration agreement covers the claim asserted. A United States court may compel arbitration in any country that is a signatory to the New York Convention.

- F. Joining Third Parties.

- 1.

A party may wish to join to an arbitration proceeding a third party who is not a signatory to the arbitration agreement. Third parties can only be joined when a legal theory permits the tribunal to find that such third party can be deemed to have agreed to the arbitration agreement. Theories include: (1) incorporation by reference of the agreement into a subsequent contract; (2) assumption or assignment of rights and obligations; (3) piercing the corporate veil; (4) agency; and (5) equitable estoppel, where a party is estopped from avoiding arbitration pursuant to an arbitration agreement while it benefits from such agreement by enforcing its other provisions.

- 2.

In some countries, including the United States, courts can subpoena third parties to attend a hearing before the arbitral tribunal or to produce documents. *See FAA* § 7.

- 3.

A non-signatory to an arbitration agreement may compel a signatory into arbitration where either the signatory relies on the terms of such agreement to assert its claims against the non-signatory, or the signatory alleges wrongdoing by both signatory

and non-signatory that is largely interrelated. Some courts also allow non-signatories to assert the doctrine of equitable estoppel with a signatory who tries to avoid arbitration by litigating issues substantially intertwined with the arbitration agreement.

— 4.

A party's ability to force another into arbitration has become easier over time. Recently, the Supreme Court in *Arthur Andersen LLP v. Wayne Carlisle*, 129 S. Ct. 1896 (2009) upheld a non-signatory's ability to compel arbitration. The court stated: "There is no doubt that, where state law permits it, a third-party claim is 'referable to arbitration under an agreement in writing.'"

• G. Strategies to Attempt to Avoid Arbitration.

— 1.

There are several choices for a party who wishes to get out of an arbitration once it has already begun.

— 2.

Boycott: On occasion a party assumes the risk of not participating in an arbitration, which will probably proceed *ex parte* to conclusion. Once an award has been issued, the boycotting party may attempt to have it set aside or may challenge enforcement on jurisdictional grounds. This is an ill-advised approach, however, because where the boycotting party has received proper notice as to the constitution of the tribunal and the arbitral hearings and deadlines, the award is usually enforceable against such party, who often will be ordered to pay costs.

— 3.

Object on jurisdictional grounds before the arbitral institution: The basis for possible jurisdictional challenges include the lack of an arbitration agreement or the lack of such an agreement that covers the

disputed matters, or the existence of an arbitration agreement under the rules of a different arbitral institution. However, these objections typically fail because most arbitral rules set an extremely low threshold for proceeding. The ICC Court, for example, only needs to conclude that it is “*prima facie* satisfied” that there may exist an arbitration agreement under its rules (Art. 6(2)). In fact, if all parties to an arbitration are signatories to an arbitration agreement, it is doubtful that the arbitration will not proceed.

— 4.

Once objections are raised, a tribunal usually schedules an exchange of written briefs on the jurisdictional issue, followed by a preliminary hearing where the parties make their case. An arbitral tribunal may then withdraw entirely, or it may find a middle ground by denying itself the competence to arbitrate certain claims while allowing other claims to proceed. It is unlikely that an arbitrator will find that it has absolutely no jurisdiction. Typically, the tribunal’s decision on jurisdiction is subject to review by a court at any time before or during the arbitration on the merits, or after an award is ordered. Courts reviewing an arbitral decision regarding jurisdiction may grant a stay of the arbitration pending its review.

A tribunal may choose to issue an interim award while determining the jurisdictional question. Yet where the tribunal views the facts that form the basis of the jurisdictional challenge as deeply intertwined with the merits of the case, it may

join the jurisdictional issue to the merits and issue no interim award.

Challenges to jurisdiction can be either partial or total. While a partial challenge raises the question of whether certain claims or counterclaims are subject to arbitration, a total challenge questions whether the agreement to arbitrate is valid at all.

— 5.

Seek relief from a national court: A party wishing to object to an opponent's request to arbitrate could seek relief from a national court, primarily in the form of a stay of arbitration. A party could file suit in the court at the seat of arbitration or in another court that has jurisdiction, where there is a reason or benefit to applying to such court. It is critical that parties who have received a request to arbitrate act quickly and within the requisite timeframe. For example, under New York CPLR 7503, a party seeking to stay an arbitration must make its application within twenty days of its receipt of the request to arbitrate. It is best for a party seeking action from a national court to do so before the arbitral tribunal has formed, as the arbitration is likely to proceed once the tribunal is formed, despite a separate court challenge.

A party may also appear before the national courts seeking a declaration stating that the tribunal lacks jurisdiction with respect to certain claims.

When applying for relief in a national

court, a party must have a basis for personal jurisdiction. Because arbitrations are governed by treaty, the federal courts have original jurisdiction. Most courts consider a forum selection clause in an arbitration agreement an adequate basis for personal jurisdiction, so a party will usually be permitted to litigate in court in the forum specified in such clause. Furthermore, many states have adopted long-arm statutes conferring jurisdiction when there is a forum selection clause. A party must have a separate basis for personal jurisdiction if it attempts to proceed in a court not situated in the forum specified in the forum selection clause.

— 6.

Continue with arbitration and challenge the final award: A party may oppose the award, or the enforcement of the award, in the courts of the country where the arbitration took place. However, this strategy may fail unless the party fully complies with the rules of the forum. For example, LCIA Rule, Art. 23.2 provides that once arbitration ends, a party may be deemed to have impliedly consented to arbitration, and will be precluded from making a jurisdictional objection, if he participated in the arbitration without challenging jurisdiction.

III. Provisional Measures and Interim Relief In or Affecting Arbitration.

A. Procedure.

1.

At any point before or during the arbitration process, a party may apply for an urgent, protective, or provisional measure. As many nations and institutions recognize concurrent jurisdiction of courts and tribunals with respect to provisional measures, application can usually be made to the tribunal, a court, or another authority (such as an ICC pre-arbitral referee) unless the agreement or applicable law specifies otherwise. Therefore, sometimes a court may intervene in the international arbitration process to obtain or enforce an interim measure. A party who seeks interim relief will not lose its right to arbitrate if it pleads that its request for interim relief shall not be deemed a waiver of its right to arbitrate.

2.

Most major arbitral organizations authorize the use of provisional measures. For example, Article 21(1) of the AAA Rules states: "At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property." Likewise, Article 23(1) of the ICC Rules states: "Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate."

3.

At the commencement of arbitration, parties often seek provisional remedies, such as an injunction to prevent ongoing harm by an opponent, an injunction to prevent an opponent from filing an action in another forum, an order to preserve evidence, or the attachment of assets to prevent their being squandered.

4.

Whether or not a court has authority to grant interim measures depends upon the applicable national and arbitral body's laws and the terms of the parties' agreement. Some laws— for example, the English Arbitration Act — give priority to arbitrators and require parties to apply first to the arbitral tribunal instead of a court.

5.

Other countries, such as Italy and China, do not permit arbitrators to award interim measures. When a court is vested with the authority to grant such measures, it acts as a supporting authority rather than a supplanting authority, and the court's decision will be subject to later review by the tribunal. Under most national laws, a court within the country in which the seat of arbitration is located will have jurisdiction. Whether or not a court has authority to grant an award could also depend upon whether or not the arbitral tribunal has formed. For example, under the ICC, once a tribunal has been constituted, the parties are only permitted to apply to a court "in appropriate circumstances." Under the LCIA, application can only be made "in exceptional cases."

5.1

While the FAA does not specifically authorize courts to grant injunctive or other preliminary relief, most courts have held that courts do have such authority in appropriate cases. Only the Eighth Circuit has held that courts lack authority to grant such relief unless the parties have specifically consented to permit the court to do so.

5.2

The circuit courts are divided as to whether the New York Convention permits courts to grant

such preliminary relief. The Third and Fourth Circuits have held that the Convention precludes district courts from granting provisional remedies where the parties have agreed to arbitrate.

6.

One frequently sought-after interim measure is a stay of litigation. When the arbitration is governed by the FAA, courts must stay proceedings upon a party's request where the issues involved are subject to arbitration or related to actions pending the outcome of an arbitration. The court must then issue an order to compel arbitration of such issues. Where a party is not a signatory to the agreement, the court exercises discretion as to whether a stay should be issued. Additionally, a stay may be issued where the matter in dispute may render a litigation redundant or moot.

7.

In deciding whether to apply to a court or a tribunal for an interim award, a party should be advised of the impact the decision has on confidentiality. The desire to keep issues confidential is often one of the reasons parties are drawn to arbitration. However, once an application is made to a court, detailed factual information may need to be disclosed in order to support the request. While it is possible for a court to seal the record and close the hearings, a court may require a very strong showing of need before it agrees to do so.

IV. Enforcement of Interim Awards.

A. General Application and Limitation

1.

Interim awards granted by a tribunal are not as easily enforced as final awards. Under the FAA and the New York Convention, an award must be final to allow judicial review and enforcement. Arbitral tribunals lack the coercive powers that courts of law possess. Yet an interim measure is binding on the parties, and it would be short-sighted for a party to ignore an interim award granted by the tribunal ultimately deciding the merits of the dispute.

2.

There are limited instances where a court may enforce an arbitrator's interim award. First, an award that is confined to a discrete, time-sensitive claim may be confirmed by a court despite other claims continuing in arbitration. Additionally, interim equitable awards, such as an award for preliminary injunctive relief, may be enforced by a court where doing so is necessary to make a final arbitral award meaningful. For example, an arbitrator's interim equitable award of freezing assets could be necessary to assure that any final award granted would be meaningful.

3.

The disinclination of courts to interfere with an arbitration, even a final one and particularly an ongoing one, is exemplified by the Fifth Circuit's decision in *Positive*

Software Solutions, Inc. v. New Century Mortgage Corp., et al.,
No. 09-10355 (5th Cir. 9/13/10), which is discussed in our
OneWorld blog posting of 9/20/10.

V. Enforcement and Recognition of Arbitral Awards.

A. See Topic 10 for a discussion of this topic.

PART XV

Topic 10 - Post-
Adjudication Enforcement,
Recognition, Challenge of
Judgments and Awards

I. Introduction.

A. Three most common areas of enforcement.

1. Issues relating to enforcement, recognition, and challenge arise most commonly from judicial adjudications, from the specific case of judicial adjudications leading to money judgments, and from arbitral awards. We address these separately.

II. Judicial Adjudications.

- A. Introduction
 - 1. We address the special cases of money awards and arbitral awards below. Here, we consider the remainder – for example, a judgment that requires specific performance for the transfer of an object.
- B. Factors leading to enforcement
 - 1. The extent to which such a judgment will be enforced will depend largely on four factors and their related variants:
 - Whether the country of grant and the country of enforcement have made treaties with each other;
 - How much deference or “comity” will the second court give the judgment of the first, which we treat in TOPIC 5 (in some cases presumptions of correctness are present; in some the plaintiff has to start all over again; and in some the prior adjudication is seen as conclusively or virtually so);
 - Whether the object of the judgment is consonant or repugnant to the public policy of the enforcing court; and
 - Whether the enforcing court’s legislature has enacted any special legislation (such as claw back statutes) that read on judgments rendered by other countries’ courts.
- C. Defensive use of judgments

- 1. There is also a defensive use of judgments – in certain cases claims will be found precluded (whether on res judicata or collateral estoppel grounds) because they were adjudicated to conclusion elsewhere.
- D. Different parties and claims
 - 1. An interesting example of how the issues relating to the enforcement of non-U.S. judgments plays out is in the specific case of a U.S. proceeding involving the same subject matter but different parties and different causes of action from the non-U.S. matter.
 - 2. For example, take the case where not all defendants can be found in the same jurisdiction, and in one jurisdiction, some are sued for breach of contract while in the other jurisdiction, they are sued for tort claims arising from the breaches of contract – e.g., inducement to breach or interference with contract.
 - 3. Now suppose a judgment is rendered in one of the jurisdictions, say, in the non-U.S. jurisdiction, and the plaintiff secures less than what he feels will make him whole. Are his claims against the other defendants in the U.S. jurisdiction barred?
 - 4. The critical fact here is that the parties and the claims are different. The international comity analysis would arguably be quite different in such a case, especially if the plaintiff tried or was willing to adjudicate the entire controversy in one jurisdiction.
 - 5. We are not aware of special international practice rules that apply in such a case. Under the general law of New York, the only time when one could avoid paying because of the judgment against another is when that other judgment is satisfied in full.
- E. New York's CPLR § 3002
 - 1. This provision provides in part:
 - Where causes of action exist against

several persons, the commencement or maintenance of an action against one, or the recovery against one of a judgment which is unsatisfied, shall not be deemed an election of remedies which bars an action against the others.

· Where causes of action exist against several persons for the conversion of property and upon express or implied contract, the commencement of maintenance of an action against one, or the recovery against one of a judgment that is unsatisfied, either for the conversion or upon the contract, shall not be deemed an election of remedies which bars against the others for the conversion or upon the contract.

- 2. In *Prudential-Bache Securities Inc. v. Golden Larch-Sequoia, Inc.*, 118 A.D. 2d 487 (1st Dep 1986), the plaintiff inadvertently wired \$25,000 into the account of the corporate defendant. After becoming aware of the error, the plaintiff informed both the corporate and individual defendants of the mistake and demanded return of the excess funds. The court found that the recovery of judgment “which is unsatisfied, against one defendant shall not be deemed an election of remedies which bars an action against the others.” The court went on to say that this is especially true “when causes of action exist against several persons under theories of implied contract (in this case, money had and received) and conversion.” *Id.* at 2
- 3. However, CPLR § 3002 applies only when a judgment is unsatisfied. “Once the award was reduced to judgment and satisfied, defendants, as joint tortfeasors, were released from liability.” *Velazquez v. Water Taxi, Inc.*, 66 A.D. 2d 691 (1st Dep. 1978).
- 4. In *Gillespie v. Flight Line Pub, Inc.*, 2 A.D. 3d

1014 (3d Dep. 2003), the plaintiff brought suit against defendant tortfeasor after having already gone to trial with another tortfeasor. However, the issues of damages had not been finally resolved. The court found that “[s]ince there is no proof that a judgment for damages has been entered and satisfied in the action against Girard, there is not yet an issue regarding election of remedies or duplicative recoveries.”

III. Enforcement and Recognition of Money Judgments.

- A. Introduction
 - 1. Many jurisdictions have made specific attempts to facilitate the enforcement of non-U.S. money judgments, which is typically accomplished through initiation of an action in a country where the judgment debtor has assets,
 - 2. In most states of the U.S., and in many non-U.S. jurisdictions, legislatures have enacted all or meaningful parts of the Uniform Foreign Country Money-Judgments Recognition Act, which speed the enforcement of “foreign” money judgments.
- B. *Galliano v. Stallion*
 - 1. New York’s Court of Appeals recently spoke to issues relating to the Uniform Act as enacted by New York. In *Galliano v. Stallion*, No. 93, 2010 NY Slip Op. 04829 (June 8, 2010), <http://nyca.vlex.com/vid/209362837>, New York’s highest court reaffirmed New York’s commitment to facilitating the recognition of non-U.S. money judgments. The court held that there were quite limited grounds on which a valid non-U.S. judgment could be denied recognition in New York, such as lack of personal jurisdiction over the defendant in the non-U.S. proceeding, lack of notice of the proceedings, or a fundamentally unfair process in the non-U.S. tribunal.
- C. New York CPLR § 5304
 - 1. CPLR § 5304(a) *mandates* that courts refuse

comity to foreign judgments if that judgment arises in a judicial system that “does not provide impartial tribunals or procedures compatible with the requirements of due process of law” or when the non-U.S. court lacked personal jurisdiction over the defendant.

- 2. Additionally, CPLR § 5304(b) offers eight factors courts *may* consider at their discretion in denying recognition to a foreign decision:
 - The non-U.S. court lacked subject matter jurisdiction;
 - The defendant in the non-U.S. court “did not receive notice of the proceedings in sufficient time to enable him to defend”;
 - The judgment was “obtained by fraud”;
 - “[T]he cause of action on which the judgment is based is repugnant to the public policy of this state”;
 - The non-U.S. judgment conflicts “with another final and conclusive judgment”;
 - The non-U.S. proceeding was “contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court”;
 - “in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action”; or
- D. Whose burden?
 - 1. Whose burden is it to challenge enforcement of a non-U.S. money judgment?
 - 2. *Browne v. Prentice Dry Goods, Inc.*, No. 84 Civ. 8081 (PKL), 1986 WL 6496, *2 (S.D.N.Y. June 5, 1986), suggests that the burden rests on the defendant to challenge jurisdiction. However, that decision was later criticized as inappropriately invoking interstate “full faith and credit” principles

- in an international comity case. *CIBC Mellon Trust Co. v. Mora Hotel Corp.*, 743 N.Y.S.2d 408, 423 (App. Div. 1st Dep't 2002).
- 3. Other courts shift the burden in all cases to the defendant, reasoning that the statutory grounds for non-recognition constitute affirmative defenses. See *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1005 (5th Cir. 1990) (“[The UMFJA] provides that a ‘foreign country judgment need not be recognized’ if certain conditions exist. These conditions are phrased as affirmative defenses. Therefore, the burden of non-recognition rested with [the defendant].”); *Fiske, Emery & Assocs. v. Ajello*, 577 A.2d 1139, 1141–43 (Conn. 1989) (characterizing the UFMJA’s grounds for non-recognition as “defense[s]”); *Kam-Tech Sys. Ltd. v. Yardeni*, 340 N.J. Super. 414, 424 (N.J. App. Div. 2001) (noting that putting the burden on the party opposing recognition would “foster the entirely sensible policies of the [UFMJRA]” and would accord with the state’s general rule regarding the burden of proving affirmative defenses.
 - 4. The presumption also accords with the New York Court of Appeals’ admonition that “a departure from settled comity principles can be justified only as a rare exception.” *Gotlib v. Ratsutsky*, 83 N.Y.2d 696, 699 (1994).
 - 5. Note: Failure to raise grounds for non-recognition of a non-U.S. judgment before the motions court constitutes a waiver of them. *CIBC Mellon Trust Co.*, 743 N.Y.S.2d at 423.

IV. Enforcement and Recognition of Arbitral Awards.

- A. Overview.
 - 1. While interim awards may be granted throughout the arbitration process, the final award disposes of all issues addressed by arbitration and usually cannot be appealed. An award by an arbitral tribunal could be unanimous or have concurring or dissenting opinions. In *Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960), the Supreme Court held that arbitrators are not obligated to set forth reasons for the awards they grant. Nevertheless, arbitral organizations generally require some statement of reasoning. Each arbitral organization has its own rules for the granting, correcting, and interpreting of an award. For example, under the ICC Rules (Article 24), the tribunal must render a final award within six months after all parties have signed a summary of the disputed claims and issues (Terms of Reference), though the ICC court has authority to extend this time. Additionally, each country has different statutes of limitations controlling when a party can no longer seek to vacate an award.
 - 2. Parties may themselves limit the type of award or relief available in their arbitration agreement. The awards issued by arbitral tribunals confer rights and obligations only upon the parties to the arbitration agreement.
 - 3. An arbitral award may include any of the

following remedies: (1) monetary relief (damages, restitution, disgorgement); (2) punitive damages; (3) specific performance; (4) injunctive or declaratory relief; (5) rectification or adaptation of contracts; (6) interest; (7) attorneys' fees; and (8) costs.

- B. Enforcing Awards Across Borders.
 - 1. International arbitral awards rendered in one country can usually be enforced without difficulty elsewhere, a fact crucial when the prevailing party must enforce the judgment or award in the country where the non-prevailing party's assets are located. There is limited opportunity to prevent or delay an award's enforcement once it is granted.
 - 2. To make sure an arbitral award will be recognized and enforced, an arbitrator or tribunal is required to:
 - Assure it has jurisdiction to decide the disputed matter;
 - Follow all procedural rules governing the arbitration;
 - Comply with any provisions set forth in the arbitration agreement;
 - Apply the substantive law governing the dispute;
 - Have the award approved by the arbitral organization if required, as is the case with the ICC.
 - 3. The New York Convention facilitates enforcement. Ratified by over 140 countries, it requires signatory nations to recognize and enforce arbitral awards granted in other nations.
 - As a practical matter, a party considering entering into an arbitration agreement should investigate whether the other party has assets in a country that is a signatory to the New York Convention.
 - Additionally, the Panama Convention, modeled after the New York

Convention, compels enforcement in the Latin American countries that are signatories. The grounds for refusal of enforcement under the Panama Convention are nearly identical to those under the New York Convention.

- C. Grounds for Refusal To Enforce an Arbitral Award.
 - 1. Article V of the New York Convention sets forth limited grounds that would permit a court to refuse recognition or enforcement of an arbitral award: (1) the parties lacked capacity when the arbitration agreement was made, or the arbitration agreement is invalid pursuant to the laws of the country designated in the agreement; (2) the non-prevailing party was not given adequate notice or was unable to present his case; (3) the award addresses a matter not covered by the arbitration agreement; (4) the arbitral tribunal or process did not comply with the arbitration agreement or the laws of the country where the arbitration was held; (5) the award is not yet binding on the parties or has been set aside or suspended by a competent authority in the country in which, or under the law of which, the award was made; (6) the subject matter of the dispute cannot be arbitrated pursuant to law of the country where enforcement is sought; or (7) the award would be contrary to the public policy of the country in which enforcement is sought. These defenses may be deemed to have been waived if a party fails to raise them during arbitration.
 - 2. The New York Convention permits a losing party to attempt to vacate or annul an award either in the country where the award was ordered or in the country whose procedural rules were used in arbitration. Courts do not have to defer to the order of a court in another country to vacate a foreign award where such court lacked primary jurisdiction. In addition, a court with secondary

jurisdiction may stay an enforcement decision pending the outcome of an application to set aside by a court with primary jurisdiction. In deciding whether to issue a stay of enforcement proceedings, a court will balance the competing rights of the parties. It must consider if a stay will impede prompt resolution of the disputed matter, and if not granting a stay would potentially yield conflicting outcomes. Furthermore, the New York Convention favors deference to proceedings in the country that granted the arbitral award because such court has the best understanding of its own law and can therefore better assess the validity of the award.

- 3. For a discussion of the ability of a challenging litigant to go beyond the grounds specified in the convention, for example in cases where the arbitration agreement specifically permits such challenges, see the discussion of Vacatur, Section D, below, and our **OneWorld blog** post of 9/6/10.
- D. Vacatur of “Non-Domestic” Awards..
 - 1. While “foreign” awards, those awards made abroad, are subject only to the New York Convention, “non-domestic” awards, those awards made in the United States that involve one or more non-citizens, foreign property, or where the arbitration agreement provides for arbitration or performance outside of the United States, are subject to both the Convention and the domestic “vacatur” law.
 - 2. FAA § 10 provides the grounds for vacating a non-domestic award: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitration; (3) where the arbitrators were guilty of misconduct; or (4) where the arbitrators exceed their powers. In addition, United States courts have held that an arbitrator’s manifest disregard of the law is a ground for challenging the

confirmation of an arbitral award. The standard for finding manifest disregard is extremely high requiring a showing that (1) the law is unambiguous and clearly applies; (2) the arbitrator knew the law; and (3) the arbitrator chose to ignore the law despite knowledge of same.

- 3. In the context of cases under FAA § 10, the law is clear that the “manifest disregard of law” standard is no longer applicable to challenge an arbitral decision (*Hall Street Associates, L. L. C. v. Mattel, Inc.*, 552 U. S. 576 (2008) — See our **OneWorld blog** post of 9/6/10. Courts are split on whether the use of manifest disregard is still valid as a “judicial gloss on the enumerated grounds for vacatur of arbitration awards under 9 U. S. C. § 10”. The Second Circuit has so ruled; on appeal to the Supreme Court, the Court declined to approve or reject the practice. *Stolt-Nielsen SA v. Animalfeeds Int’l Corp*, No. 08-1198, discussion at note 3 (April 27, 2010), the Court refused to quash the debate by declining an opportunity to decide the fate of manifest disregard.

V. Settlement in Lieu of Enforcement.

A. When used

1. Parties often prefer negotiating a settlement to enforcing a judicial or arbitral award, thereby saving the time and money of enforcement and preserving a relationship with the other party. The practice is most popular in the industrial manufacturing, energy, oil and gas, and insurance industries.
2. Parties also often voluntarily comply with arbitral awards, especially where one side wants to maintain a business relationship with the other party.