

## **International Litigation**

AARON MARR PAGE, JONATHAN I. BLACKMAN,  
CARMINE D. BOCCUZZI, THEODORE J. FOLKMAN,  
PHILLIP B. DYE, JR., MATTHEW D. SLATER, HOWARD S. ZELBO,  
IGOR V. TIMOFEYEV, CHARLES A. PATRIZIA, AND  
JOSEPH R. PROFAIZER\*

This article summarizes developments in international litigation during 2017.

### **I. Foreign Sovereign Immunities Act**

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

#### **A. JURISDICTIONAL EXCEPTIONS**

In *De Csepel v. Republic of Hungary*, the D.C. Circuit reconciled an apparent intra-circuit conflict regarding the application of the expropriation exception to Hungary's seizures of Jewish property during the Holocaust, reversing in part the district court's decision and dismissing Hungary from the case on grounds of sovereign immunity.<sup>2</sup> The D.C. Circuit held that, with respect to a foreign state defendant, commercial activity carried on in the United States by the state itself (and not, as plaintiffs argued, the state's

---

\* The article was edited by Aaron Marr Page, managing attorney at Forum Nobis PLLC in Washington, D.C. Cleary Gottlieb Steen & Hamilton LLP partners Jonathan I. Blackman, in New York and London, and Carmine D. Boccuzzi, in New York, authored Sections I and VII, with assistance from James Blakemore, Ellie Norton, Alyssa Helfer, and Guilherme Duraes, associates at the same firm. (The firm represents the company Clearstream Banking S.A., referenced in Section I.) Theodore J. Folkman, a shareholder at Murphy & King in Boston and author of LETTERS BLOGATORY: THE BLOG OF INTERNATIONAL JUDICIAL ASSISTANCE, authored Section II. Phillip B. Dye, Jr., a partner at Vinson & Elkins L.L.P. in Houston, Texas, authored Sections III and VIII, with assistance from Liane Noble and Page Somerville Robinson, associates at the same firm. Matthew D. Slater, a partner at Cleary Gottlieb Steen & Hamilton LLP in Washington, D.C., authored Section IV, with assistance from associate Caroline Stanton and law clerk Brandon Levey of the same firm. Howard S. Zelbo, a partner at Cleary Gottlieb Steen & Hamilton LLP in New York, authored Section V, with assistance from associate Paul Kleist and law clerk Katie Gonzalez of the same firm. Igor V. Timofeyev, Charles A. Patrizia, and Joseph R. Profaizer, partners at Paul Hastings LLP in Washington, D.C., authored Section VI and IX, with assistance from Kate Lee, an associate at the same firm.

1. 28 U.S.C. § 1602 *et seq.*

2. 859 F.3d 1094, 1110 (D.C. Cir. 2017).

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

agencies or instrumentalities) is a necessary condition to satisfaction of the expropriation exception.<sup>3</sup> The court explained that throughout the Act the “FSIA carefully distinguishes foreign states from their agencies and instrumentalities,” and that “[c]ollapsing the well-worn distinction” would make little sense given the realities of sovereign litigation.<sup>4</sup> The court, however, instructed the district court to grant the plaintiffs leave to amend their complaint in light of the Holocaust Expropriated Art Recovery Act, enacted during the pendency of the appeal.<sup>5</sup>

In *Funk v. Belneftekhim*, the Second Circuit found that the district court exceeded its discretion when, as a discovery sanction, it struck the defendants’ claim of foreign sovereign immunity.<sup>6</sup> The district court twice ordered limited jurisdictional discovery to resolve whether the primary defendant was immune from suit as an agency or instrumentality of Belarus.<sup>7</sup> When monetary sanctions failed to induce the defendants’ compliance with the discovery orders, the district court struck the sovereign immunity defense to put the plaintiffs in “the same position [they] would have been in absent the wrongful withholding of evidence.”<sup>8</sup> After finding it had appellate jurisdiction under the collateral order doctrine, the Second Circuit held that the district court had abused its discretion, reasoning that by striking the sovereign immunity defense the district court risked impermissibly conferring subject-matter jurisdiction on itself where none existed.<sup>9</sup>

**B. EXECUTION EXCEPTIONS**

In *Peterson v. Islamic Republic of Iran*, judgment creditors of Iran sought the turnover of certain bond proceeds processed in New York by Clearstream Banking, S.A., and ultimately “recorded as a right to payment in Luxembourg” in the account of an entity acting on behalf of Markazi, Iran’s central bank.<sup>10</sup> The Second Circuit reversed the district court’s dismissal for lack of subject-matter jurisdiction, and held that a New York court may order “a non-sovereign third party to recall to New York extraterritorial assets owned by a foreign sovereign.”<sup>11</sup> The court reasoned that Clearstream, as a non-sovereign entity, does not possess sovereign immunity, and FSIA Section 1609 grants immunity from execution only to assets located “in the United States,” and thus not to a right to payment located in Luxembourg.<sup>12</sup> The Second Circuit emphasized “that the

---

3. *Id.* at 1107.

4. *Id.* at 1107-08.

5. *Id.* at 1110.

6. 861 F.3d 354, 371 (2d Cir. 2017).

7. *Id.* at 361-61.

8. *Id.* at 362.

9. *Id.* at 370-71.

10. 876 F.3d 63, 84 (2nd Cir. 2017).

11. *Id.* at 92.

12. *Id.* at 91-92.

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

INTERNATIONAL LITIGATION 193

plaintiffs are by no means assured success upon remand,” due, among other things, to the potential barriers to the exercise of personal jurisdiction over Clearstream, state law limitations on the turnover remedy, and the application of international comity.<sup>13</sup> The court also noted that recall of the assets to the United States would be inappropriate if it could be shown that the assets, once in the United States, did not satisfy the FSIA requirement that they are being “used for a commercial activity.”<sup>14</sup>

## II. International Service of Process

This year, the Supreme Court finally resolved the long-standing circuit split regarding the meaning of Article 10(a) of the Hague Service Convention, which provides that the Convention “shall not interfere with” a party’s “freedom to ‘send’ judicial documents directly to persons abroad” by postal channels.<sup>15</sup> Some circuits had held that Article 10(a) authorized or permitted service of process by mail.<sup>16</sup> Others had held that because Article 10(a) used the word “send,” while other articles in the Service Convention used the word “serve,” Article 10(a) did not permit service of process by mail.<sup>17</sup>

In *Water Splash, Inc. v. Menon*, on review from a Texas decision adopting the minority position, the Supreme Court decisively resolved the conflict by holding that Article 10(a) does indeed permit service of process by mail.<sup>18</sup> The Court further clarified that the provision permits *but does not itself affirmatively authorize* service by mail, such that service of process by mail, when the Service Convention applies, must be grounded in authority found elsewhere in the law of the forum, not in the Convention itself.<sup>19</sup> If the law of the forum imposes particular formal requirements (as federal procedural law does, by requiring that the documents be addressed and dispatched by the clerk<sup>20</sup>), they must be followed. The Court thus remanded for consideration of whether Texas procedural law authorized service by mail.

A potentially troublesome aspect of *Water Splash* is its reliance on the view that the Service Convention applies only to service of process and not to the transmission of other judicial documents to litigants abroad.<sup>21</sup> The Court relied on the Service Convention’s definition of its scope (it “app[lies] in all

---

13. *Id.* at 94-95.

14. *Id.* at 95.

15. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, art. 10(a), Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter “Service Convention”].

16. *See Brockmeyer v. May*, 383 F.3d 798, 801-02 (9th Cir. 2004); *Ackermann v. Levine*, 788 F.2d 830, 838-40 (2d Cir. 1986).

17. *See Nuovo Pignone v. Storman Asia M/V*, 310 F.3d 374, 385 (5th Cir. 2002); *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 173-74 (8th Cir. 1989).

18. 137 S. Ct. 1504, 1513 (2017).

19. *Id.*

20. *See Fed. R. Civ. P.* 4(f)(2)(C)(ii).

21. *Water Splash, Inc.*, 137 S. Ct. at 1509.

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

194 THE YEAR IN REVIEW

[VOL. 52

cases, in civil or commercial matters where there is occasion to transmit a judicial or extrajudicial document for service abroad”<sup>22</sup> to suggest that “service” means service *of process*. While the Court found support for this view in the seminal case of *Volkswagenwerk AG v. Schlunk*,<sup>23</sup> the view remains potentially problematic. The word “service” is not restricted to service of process in U.S. procedural law.<sup>24</sup> And the French text of the Convention, which the Court recognized as equally authentic,<sup>25</sup> provides that the Convention applies to the transmission of documents abroad “pour y être signifié ou notifié”—“signification” or “notification.”<sup>26</sup> Documents other than the writ of summons can be delivered by the less-formal “notification” procedure under French law.<sup>27</sup> Moreover, if the Court’s view were correct, it would be difficult to understand the Convention’s reference to service of *extrajudicial* documents, because a summons or another document that constitutes “process” in the formal sense will always be a *judicial* document.

For these reasons, the accepted international view remains that the Service Convention applies to *all* judicial documents, including “writs of summons, the defendant’s reply, decisions and judgments delivered by a member of a judicial authority, as well as witness summons (subpoenas), and requests for discovery of evidence sent to the parties.”<sup>28</sup> In practice, this point has limited importance for U.S. practitioners, because after a defendant’s counsel enters an appearance, all documents are served on the (presumably U.S.-based) lawyer.<sup>29</sup> But the point may have real importance in cases of recalcitrant foreign defendants, or defendants in default.

### III. Personal Jurisdiction

The Supreme Court delivered two important opinions in 2017 clarifying the distinct requirements for the exercise of general and specific personal jurisdiction. In *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, resident and non-resident plaintiffs filed suit in California against Bristol-Myers Squibb (BMS), asserting claims based on injuries allegedly caused by a BMS drug.<sup>30</sup> The defendant moved to dismiss the non-resident case for lack of personal jurisdiction, because the plaintiffs had not alleged that they obtained the drug through California physicians or

---

22. Service Convention, *supra* note 15 at art. 1.

23. 486 U.S. 694, 701 (1988).

24. *See, e.g.*, Fed. R. Civ. P. 5 (requiring that all pleadings, motions, etc., be “served”).

25. *Water Splash, Inc.*, 137 S. Ct. at 1511.

26. Service Convention, *supra* note 15 at art. 1 (emphasis supplied).

27. For example, once a judgment has been rendered, the judgment is delivered to the parties by notification, and the time for appeal runs from the date of the notification. *See* CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 87.

28. PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE SERVICE CONVENTION ¶¶ 76-77 (4th ed. 2016).

29. *See* Fed. R. Civ. P. 5(b)(1)-(2).

30. 137 S. Ct. 1773, 1777 (2017).

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

INTERNATIONAL LITIGATION 195

from any California source, or that they were injured by the drug or were treated for their injuries in California.<sup>31</sup> Applying the United States Supreme Court's ground-breaking *Daimler AG v. Bauman* decision,<sup>32</sup> which permits the exercise of general jurisdiction only in the forum in which a corporation is fairly regarded as "at home," the California Supreme Court held that general jurisdiction was lacking in California because BMS was incorporated and headquartered outside of California and maintained its most substantial operations outside of the state.<sup>33</sup> As to specific personal jurisdiction, the California Supreme Court applied what it called a "sliding scale approach to specific jurisdiction," under which "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."<sup>34</sup> Under the sliding scale approach, the California Supreme Court concluded that California courts could exercise specific jurisdiction because BMS had such extensive contacts with California that a less direct connection between the forum and the claims was required. The U.S. Supreme Court, however, rejected this "sliding scale approach" as unsupported by precedent and ultimately "a loose and spurious form of general jurisdiction."<sup>35</sup> (It agreed that California courts lacked general jurisdiction under *Daimler*.) The Court concluded that "what [was] needed—and what [was] missing here—[was] a connection between the forum and the specific claims at issue."<sup>36</sup> The decision illustrates the Court's fidelity to a strict interpretation of *Daimler*, both on its face (general jurisdiction) and as regards encroachment from a specific jurisdiction case where the claim-specific forum connection requirement is not well met.

In a second important decision, the Supreme Court rejected a Montana court's exercise of general personal jurisdiction, reiterating the *Daimler* principle that "doing business" in a state was, alone, an insufficient basis upon which to exert personal jurisdiction. *BNSF Railway Co. v. Tyrrell* involved two lawsuits brought in a Montana state court, by plaintiffs who were not Montana residents and who were not injured in Montana, under the Federal Employers' Liability Act (FELA), a statute which permits railway employees to sue their employer.<sup>37</sup> Based on a venue provision in the FELA permitting suit in a district where the defendant was "doing business" and, alternatively, Montana's Rule of Civil Procedure 4(b)(1), which authorizes jurisdiction over "persons found" in Montana, the Montana Supreme Court found that Montana courts could properly exercise general jurisdiction. The Montana Supreme Court distinguished *Daimler* on the ground that it was not "a FELA claim or a railroad defendant."<sup>38</sup> The

---

31. *Id.* at 1778.

32. 134 S. Ct. 746, 769 (2014).

33. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1777–78.

34. *Id.* at 1778.

35. *Id.* at 1781.

36. *Id.*

37. 137 S. Ct. 1549, 1553 (2017).

38. *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 6, *cert. granted*, 137 S. Ct. 810 (2017).

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

196 THE YEAR IN REVIEW

[VOL. 52]

Supreme Court reversed, holding that while “the business BNSF does in Montana is sufficient to subject the railroad to specific personal jurisdiction in that State on claims related to the business it does in Montana,” the same “in-state business, [as] clarified in *Daimler* and *Goodyear*, does not suffice to permit the assertion of general jurisdiction over claims . . . that are unrelated to any activity occurring in Montana.”<sup>39</sup>

#### **IV. The Act of State Doctrine**

The act of state doctrine is a prudential limitation on the exercise of judicial review, requiring U.S. courts to deem acts of foreign sovereigns taken within their own jurisdictions as valid.<sup>40</sup>

##### **A. SCOPE**

Courts continue to struggle to identify the acts that are subject to the doctrine. In *Geophysical Serv., Inc. v. TGS-NOPEC Geophysical Co.*, a U.S. company was sued for alleged copyright infringement based upon its importing of proprietary data released to it by a Canadian government agency.<sup>41</sup> The district court dismissed the claim based on the act of state doctrine, but the Fifth Circuit disagreed, finding that the claim turned on the defendant’s importation, which the court could adjudicate without the need to inquire into the legal validity of the Canadian agency’s release of the data.<sup>42</sup> The Second Circuit addressed the issue in the context of jurisdictional discovery in *Funk v. Belneftekhim*, holding that while the court may not challenge the validity of the foreign laws that defendants claimed established their sovereign immunity, the court could require discovery to determine the completeness of the record on which the defendants relied and evaluate whether it supported their claim.<sup>43</sup>

This approach was echoed by federal district courts as well. In *Integrated Commc’ns & Techs. v. Hewlett-Packard Fin. Servs. Co.*, the court declined to dismiss claims arising from the Chinese government’s seizure of allegedly counterfeit equipment and related criminal charges, because the U.S. plaintiffs were seeking damages from private parties who supplied the goods, the resolution of which would not require the U.S. court to challenge the

---

39. *BNSF*, 137 S. Ct. at 1559. The plaintiff in *BNSF* had also argued in the lower courts that BNSF consented to jurisdiction by registering to do business in Montana. However, the Supreme Court declined to reach the issue because the Montana Supreme Court had not addressed it. *Id.* This is unfortunate because lower courts remain split on the question of whether a defendant who is not “at home” in a forum state may nonetheless “consent” to general jurisdiction by complying with that state’s business registration statute. Compare *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016) with *Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d 755, 769 (Fed. Cir. 2016) (O’Malley, J., concurring).

40. See, e.g., *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Intl.*, 493 U.S. 400, 403–04 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

41. 850 F.3d 785, 789 (5th Cir. 2017).

42. *Id.* at 796–97.

43. *Funk*, 861 F.3d at 367–68.

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

INTERNATIONAL LITIGATION 197

validity of the Chinese government's actions.<sup>44</sup> In *United States v. Sum of \$70,990,605*, a district court similarly declined to apply the act of state doctrine in a civil forfeiture action concerning funds in a U.S. bank account that were allegedly derived from accounts in Afghanistan.<sup>45</sup> The court held that while various Afghan governmental bodies had expressed views as to the provenance of the funds in the Afghan accounts, none purported to adjudicate the precise issues before the U.S. court, and that a foreign government does not "act" when "it merely declares its position on an issue that reaches beyond its borders and over which it lacks the power to dictate any actual consequences."<sup>46</sup> As further reason to deny application of the doctrine, the court stated that the doctrine "should have little or no purchase in litigation brought by the Executive Branch," particularly where the underlying statute left discretion to the Executive Branch both whether to commence the action and whether to suspend or terminate it in the national interest.<sup>47</sup>

**B. COMMERCIAL ACTIVITY EXCEPTION**

At least two court decisions examined whether the doctrine applies to "commercial activity" of foreign states. In dicta commentary (after finding that the case was barred by the FSIA and the statute of limitations and that plaintiff failed to state a claim based on alleged failure to pay on a bearer bond), a New York district court noted that it was doubtful that the doctrine would "apply to the purely commercial conduct of a foreign sovereign" and that it would not apply when the conduct occurred outside of the foreign state.<sup>48</sup> In contrast, in *Nnaka v. Federal Republic of Nigeria*, the court found that although claims stemming from Nigeria's alleged breach of a lawyer's retention agreement fell within the commercial activities exception of the FSIA, the act of state doctrine precluded the court from challenging the propriety of two acts at the heart of the claim: (1) the Nigerian Attorney General's referral of the plaintiff for criminal investigation in Nigeria, and (2) his letter to the U.S. Department of Justice denying that plaintiff was authorized to represent Nigeria in the subject matter of the alleged retention agreement.<sup>49</sup> Once those acts were presumed to be valid, as required by the doctrine, the bulk of the claims had to be dismissed for failure to state a claim.<sup>50</sup>

---

44. 2017 WL 354847, at \*19 (D. Mass. Jan. 24, 2017).

45. 234 F. Supp. 3d 212, 216 (D.D.C. 2017).

46. *Id.* at 242.

47. *Id.* at 243.

48. *MMA Consultants 1, Inc. v. Republic of Peru*, 245 F. Supp. 3d 486, 520 (S.D.N.Y. 2017).

49. 238 F. Supp. 3d 17, 32-33 (D.D.C. 2017).

50. *Id.* at 33.

## V. International Discovery

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

In 2017, U.S. courts continued to address whether the availability of discovery under 28 U.S.C. § 1782(a) for use in a foreign proceeding applies when the proceeding is a private commercial arbitration.<sup>51</sup> Previously, the United States Courts of Appeals for the Second Circuit and the Fifth Circuit held that it does not, citing the statute’s legislative history and concerns that “[o]pening the door to the type of discovery” permitted by § 1782 in private arbitrations would undermine their speed and cost-effectiveness.<sup>52</sup> But, in late 2016 and 2017, three district courts ruled that proceedings governed by the London Maritime Arbitration Association (LMAA), a private arbitration institution, fall within the statute’s scope.<sup>53</sup> In support, each cited the Supreme Court’s conclusion in *Intel Corp. v. Advanced Micro Devices, Inc.*, that European Commission investigatory proceedings are covered by the statute.<sup>54</sup> In one such case, a district court of the Southern District of New York concluded that the Second Circuit’s contrary holding that private arbitrations should *not* be within the scope of § 1782 was issued before *Intel* and had not been revisited by the Circuit.<sup>55</sup>

In other notable § 1782 decisions, the Second Circuit held that to satisfy the statute’s “for use” requirement, an applicant need only establish the “practical ability to inject the requested information” into the foreign proceeding.<sup>56</sup> And a court of the Southern District of New York examined personal jurisdiction under the statute, and found that a corporate entity must be subject to the court’s jurisdiction under *Daimler AG v. Bauman* to “reside” or be “found” in a district for purposes of § 1782.<sup>57</sup>

---

51. While most courts agree that § 1782 applies to investment treaty arbitrations, there is no consensus that it covers purely private arbitrations. *Compare In re Winning* (HK) Shipping Co. Ltd., No. 09-22659, 2010 WL 1796579, at \*8–10 (S.D. Fla. Apr. 30, 2010) *with In re Grupo Unidos Por El Canal, S.A.*, No. 14-mc-00226-MSK-KMT, 2015 WL 1810135, at \*7–8 (D. Colo. Apr. 17, 2015).

52. *Nat’l Broad. Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 191–92 (2d Cir. 1999); *see also Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 883 (5th Cir. 1999). Among Courts of Appeals, only the Eleventh Circuit has held that § 1782 *does* apply to private arbitrations, although it later issued a superseding opinion in which it disclaimed that holding. *In re Cosorcio Ecuatoriano de Telecomunicaciones S.A.*, 685 F.3d 987, 996–97 (11th Cir. 2012), *superseded by* 747 F.3d 1262, 1270 n.4 (11th Cir. 2014).

53. *In re Pola Maritime, Ltd.*, No. CV 416-333, 2017 WL 3714032 at \*10 (S.D. Ga. Aug. 29, 2017); *In re Kleimar N.V.*, No. 17-cv-01287, 2017 WL 3386115 (N.D. Ill. Aug. 7, 2017); *In re Kleimar N.V.*, 220 F. Supp. 3d 517 (S.D.N.Y. 2016).

54. 542 U.S. 241, 257–58 (2004).

55. *In re Kleimar*, 220 F. Supp. 3d at 521. The Fifth Circuit, post-*Intel*, *has* affirmed its earlier view that § 1782 does not apply to private arbitrations, albeit in a non-precedential opinion. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App’x 31, 33–34 (5th Cir. 2009).

56. *In re Accent Delight Int’l Ltd.*, 869 F.3d 121, 132 (2d Cir. 2017).

57. *In re Sargeant*, No. 17mc374, 2017 WL 4512366, at \*9 (S.D.N.Y. Oct. 10, 2017).



**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

INTERNATIONAL LITIGATION 199

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

U.S. courts consider whether to order discovery abroad for use in U.S. proceedings pursuant to the discretionary factors outlined in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*.<sup>58</sup> A particular concern is the impact of a foreign jurisdiction's "blocking statute" (purporting to bar discovery compliance by its nationals) as part of the comity analysis. In *Republic Technologies (NA), LLC v. BBK Tobacco & Foods, LLP*, the federal district court for the Northern District of Illinois ordered the production of documents located in France despite a blocking statute that sought to prohibit such production, reasoning that France did not typically enforce the statute, which, the Court speculated, might have been enacted merely to frustrate U.S. discovery practice.<sup>59</sup> A federal district court in California reached a similar result in *Connex Railroad LLC v. AXA Corporate Solutions Assurance*.<sup>60</sup>

**VI. Extraterritorial Application of United States Law**

**A. STORED COMMUNICATIONS ACT**

In October 2017, the U.S. Supreme Court granted *certiorari* on whether the warrant provisions of the Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2712, apply extraterritorially to data stored at Microsoft's datacenter in Ireland.<sup>61</sup> In 2016, the Second Circuit reversed a lower court order refusing to quash a subpoena, and held that the presumption against extraterritoriality barred application of the SCA to data stored abroad even if controlled by a U.S. entity.<sup>62</sup> In seeking *certiorari*, the Solicitor General argued that the Second Circuit "seriously misinterpreted" the SCA, and that its decision conflicts with "the unanimous holdings of courts that a domestic recipient of a subpoena is required to produce specified materials within the recipient's control, even if the recipient stores the materials abroad."<sup>63</sup>

**B. INTELLECTUAL PROPERTY**

In *Life Technologies Corp. v. Promega Corp.*, the Supreme Court reversed a decision of the Federal Circuit and held that supplying a single component

---

58. 482 U.S. 522, n.28 (1987).

59. No. 16 C 3401, 2017 WL 4287205, at \*4-5 (N.D. Ill. Sept. 27, 2017).

60. No. CV-16-02368, 2017 WL3433542, at \*16 (C.D. Cal. Feb. 22, 2017) (holding that France's interest in upholding its blocking statute does not outweigh the U.S. interest in obtaining discovery).

61. *United States v. Microsoft Corp.*, No. 17-2, 2017 WL 2869958, at \*1 (U.S. Oct. 16, 2017).

62. *Microsoft Corp. v. United States*, 829 F.3d 197 (2d Cir. 2016) (analyzed in last year's Year in Review).

63. Pet. for a Writ of Certiorari, *United States v. Microsoft Corp.*, No. 17-2, at 11-12 (U.S. June 23, 2017).

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

200 THE YEAR IN REVIEW

[VOL. 52

of a multi-component patented invention for assembly outside of the United States does not constitute patent infringement.<sup>64</sup> Promega had sublicensed a patented kit for genetic testing to Life Technologies for use in certain applications.<sup>65</sup> Life Technologies manufactured one of five parts of a kit in the United States and exported it to the U.K., where the components were assembled to perform the tests. When Life Technologies began selling outside the licensed field of use, Promega sued for patent infringement under section 271(f)(1) of the Patent Act, 35 U.S.C. § 271(f)(1), which prohibits the supply from the United States of “all or a substantial portion of the components of a [patented] invention” for combination abroad.<sup>66</sup> The Supreme Court held that a single component “does not constitute all or a substantial portion” of a multi-component invention” under section 271(f)(1). The Court noted that “the effect of this provision was to fill a gap in the enforceability of patent rights by reaching components that are manufactured in the United States but assembled overseas and that were beyond the reach of the statute in its prior formulation.”<sup>67</sup>

In *Geophysical Services, Inc. v. TGS-NOPEC Geophysical Co.*, the Fifth Circuit held that the Copyright Act, 17 U.S.C. § 101 *et seq.*, does not apply to extraterritorial conduct, and therefore bars a contributory infringement claim when it is based on the domestic authorization of entirely extraterritorial conduct.<sup>68</sup> Aligning itself with the Ninth Circuit’s decision in *Subafilms, Ltd. v. MGM-Pathe Communications Co.*,<sup>69</sup> the court held that the Copyright Act does not permit a contributory infringement claim predicated on direct infringement that occurred entirely extraterritorially.<sup>70</sup>

C. FOURTH AND FIFTH AMENDMENTS

The Supreme Court vacated the Fifth Circuit’s dismissal of a claim brought under the Fourth and Fifth Amendments in *Hernandez v. Mesa*, a case where a U.S. Border Patrol agent standing on the U.S. side of the border shot and killed a Mexican teenager standing on the Mexican side.<sup>71</sup> Declining to rule on the merits of the extraterritoriality question, the Supreme Court remanded the case with instructions to address the predicate question of whether *Bivens v. Six Unknown Federal Narcotics Agents*,<sup>72</sup> which recognized an implied right of action for damages alleged to have violated a citizen’s constitutional rights, would even permit such a claim.<sup>73</sup> The Court

---

64. 137 S. Ct. 734, 739 (2017).

65. *Id.* at 738.

66. *Id.*

67. *Id.* at 743.

68. 850 F.3d 785, 789 (5th Cir. 2017)

69. 24 F.3d 1088 (9th Cir. 1994) (en banc).

70. *Geographical Serv.*, 850 F.3d at 799.

71. 137 S. Ct. 2003, 2004 (2017) (grant of certiorari analyzed in last year’s Year-in-Review).

72. 403 U.S. 388, 389 (1971).

73. *Hernandez*, 137 S. Ct. at 2006.

observed that its recent decision in *Ziglar v. Abbasi*,<sup>74</sup> which clarified the “special factors” a court should evaluate before permitting a *Bivens* action to proceed, could bear upon *Hernandez*.<sup>75</sup>

Justice Thomas dissented. He would have held that *Bivens* does not apply in these circumstances.<sup>76</sup> In a separate dissent, Justice Breyer countered that Hernandez was protected by the Fourth Amendment because, based on an objective assessment, the patrol agent did not know whether he was shooting at an American citizen or whether the bullet would land in the United States or Mexican territory.<sup>77</sup> In Justice Breyer’s view, not applying the Fourth Amendment based solely on the location of the injury relative to the borderline would create anomalous precedent.<sup>78</sup>

## VII. Recognition and Enforcement of Foreign Judgments

In U.S. courts, the U.N. Convention on the Recognition and Enforcement of Foreign Arbitration Awards, otherwise known as the “New York Convention,” governs the recognition and enforcement of most foreign arbitral awards.<sup>79</sup> State law, however, governs the recognition and enforcement of foreign court judgments.

### A. FOREIGN ARBITRAL AWARDS

In *CBF Indústria De Gusa S/A v. AMCI Holdings, Inc.*, the Second Circuit held that the New York Convention and FAA Chapter two do not require that petitioners first seek confirmation of a foreign arbitral award before that award can be recognized and enforced in U.S. federal court.<sup>80</sup> Instead, the court explained, recognition and enforcement is a single-step process, as the New York Convention eliminated the Geneva Convention’s requirement that a petitioner first confirm a foreign award at the arbitration’s seat before the award can be enforced elsewhere.<sup>81</sup>

---

74. 137 S. Ct. 1843, 1849-50 (2017).

75. *Hernandez*, 137 S. Ct. at 2006-07.

76. *Id.* at 2008 (Thomas, J., dissenting).

77. *Id.* at 2009 (Breyer, J., dissenting).

78. *Id.* at 2010.

79. 21 U.S.T. 2517. The Convention is implemented in U.S. law through Chapter 2 of the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 201-08 (2013). The Inter-American Convention on International Commercial Arbitration governs the recognition and enforcement of awards if a majority of the parties to an arbitration agreement are citizens of states that have ratified it. The Inter-American Convention is implemented in Chapter 3 of the FAA.

80. *CBF Indústria De Gusa S/A, et al. v. AMCI Holdings, Inc., et al.*, 850 F.3d 58, 62 (2d Cir. 2017).

81. *Id.* at 72-73. By contrast, a “nondomestic arbitral award” – one rendered in the United States, but under foreign law or involving foreign parties or property – must first be “confirmed” by a U.S. court, becoming a court judgment that is then entitled to full faith and credit in any other U.S. court. *Id.* at 73-74. In practical terms, this yields the same result as recognition of a foreign award – an enforceable U.S. court judgment.

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

202 THE YEAR IN REVIEW

[VOL. 52

In *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, the Second Circuit considered, as a matter of national first impression, the interplay between the FSIA and the International Centre for Settlement of Investment Disputes (ICSID) Convention, ultimately concluding that the FSIA is the sole basis for jurisdiction (subject matter and personal) over actions to enforce ICSID awards against foreign states, and that the FSIA's service and venue requirements must be satisfied before an ICSID award can be enforced.<sup>82</sup> The court found that the ICSID Convention cannot be read to independently confer subject matter jurisdiction over a sovereign, and that, even if it could, Congress had made clear by subsequently enacting the FSIA that ICSID enforcement actions are subject to the FSIA's sovereign immunity protections and related rules.<sup>83</sup>

In *Thai-Lao Lignite (Thailand) Co. Ltd. v. Gov't of the Lao People's Democratic Republic*, the Second Circuit reaffirmed that U.S. courts sitting as a secondary jurisdiction should only enforce an arbitral award annulled at the seat of the arbitration in rare circumstances, such as if the annulment decision itself is contrary to U.S. public policy.<sup>84</sup> The court clarified that this principle is applicable equally to an enforcement action as a proceeding under Federal Rule of Civil Procedure 60(b)(5) seeking to vacate a judgment enforcing an arbitral award on the basis of the award's subsequent annulment at the seat. In such a vacatur case, the court explained, "the full range of Rule 60(b) considerations" should be considered,<sup>85</sup> and the fact that an award has been annulled at the seat should be "given significant weight."<sup>86</sup>

## B. FOREIGN COURT JUDGMENTS

In *Iraq Middle Market Development v. Mohammad Harmoosh*, the Fourth Circuit held as a matter of first impression that the Maryland Uniform Foreign Money-Judgments Recognition Act's arbitration clause exception does not apply to prevent a judgment creditor from enforcing a judgment when the judgment debtor waived its contractual right to arbitrate by litigating its dispute in foreign courts.<sup>87</sup> The court based its reasoning on the fact that adopting the opposite interpretation would lead to the inconsistent result that "parties' decision to forego arbitration and litigate in domestic courts would bind them, while a similar decision to litigate in a foreign court would not."<sup>88</sup>

---

82. 863 F.3d 96, 99 (2d Cir. 2017).

83. *Id.* at 112.

84. 864 F.3d 172, 176 (2d Cir. 2017).

85. *Id.* at 176.

86. *Id.* at 186.

87. 848 F.3d 235, 240 (4th Cir. 2017).

88. *Id.* at 240.

### VIII. Forum Non Conveniens

United States courts applying *forum non conveniens* struggled with the question of whether the analysis should compare the foreign forum with the United States generally, or specifically the individual state chosen by the plaintiff. United States courts also struggled with questions regarding the deference afforded to the plaintiff's choice of forum. In fact, in cases decided just weeks apart, the Ninth Circuit alone took diametrically opposite approaches on these questions. In *Cooper v. Tokyo Electric Power Company, Inc.*, plaintiff members of the U.S. Navy, many but not all of whom were California residents, brought a class action suit against Tokyo Electric Power Company, Inc. (TEPCO), alleging that their exposure to radiation while providing aid related to the tsunami that damaged the Fukushima nuclear power plant was due to TEPCO's negligence.<sup>89</sup>

On TEPCO's motion dismiss on *forum non conveniens* and other grounds, the U.S. District Court for the Southern District of California agreed that most of the witnesses and documents were in Japan and that it would be difficult for plaintiffs to obtain testimony from non-party witnesses in the United States. The court nonetheless concluded that these considerations did not "outweigh Plaintiffs' interests in suing at home."<sup>90</sup> In denying the motion, the court concluded that the public interest factors were neutral because while Japan had an interest in centralizing litigation relating to the incident, the United States had an interest in compensating service members, and that the litigation would be burdensome on either country's courts.<sup>91</sup> On interlocutory appeal, the Ninth Circuit affirmed, noting that "[p]laintiffs are U.S. citizens, and their decision to sue in the United States must be respected."<sup>92</sup> While the plaintiffs sued in California, rather than compare suit in Japan with suit in California, the *Cooper* court weighed the convenience of suit in Japan with suit in the United States generally. It afforded deference because the plaintiffs were U.S. citizens, without noting that only some were citizens of California.

Two weeks later, in *Ayco Farms, Inc. v. Ochoa*, the Ninth Circuit issued a *forum non conveniens* decision in a lawsuit brought in California by a U.S. citizen, this time affirming the lower court's motion to dismiss.<sup>93</sup> Plaintiff Ayco, a Florida corporation, entered into a partnership with two citizens of Mexico to create AFM, which would buy or grow produce that Ayco would then market or sell worldwide.<sup>94</sup> The Mexican defendants were also officers in an importing agency with whom Ayco had an exclusivity agreement, and allegedly breached that agreement by diverting produce.<sup>95</sup> The U.S. District

---

89. 860 F.3d 1193, 1197 (9th Cir. 2017).

90. *Id.* at 1211.

91. *Id.*

92. *Id.*

93. 862 F.3d 945, 947 (9th Cir. 2017).

94. *Id.* at 947-48.

95. *Id.* at 948

Court for the Central District of California granted the defendants' motion to dismiss for *forum non conveniens* because Mexico was an adequate forum and because Ayco lacked contacts specifically with California.<sup>96</sup>

On appeal, Ayco argued that the district court had improperly weighed the benefits and burdens of litigation in Mexico versus California specifically, rather than the United States as a whole, and that the district court had afforded inadequate deference to its choice to litigate in California.<sup>97</sup> In apparent contrast with its *Cooper* analysis, the Ninth Circuit affirmed the dismissal, holding that it was not improper for the district court to have focused specifically on California and, in any event, "it is not clear how a convenience comparison between a foreign forum and the United States as a whole could be carried out in most cases."<sup>98</sup> It also determined that while a plaintiff is usually entitled to deference for his choice of forum, "[a] U.S. citizen plaintiff is entitled to less deference in his choice of forum if he does not reside in that forum."<sup>99</sup>

## **IX. Parallel Proceedings**

### **A. INTERNATIONAL ABSTENTION**

Under *Colorado River Water Conservation District v. United States*, a federal court may stay or dismiss a lawsuit in light of a concurrent legal or parallel proceeding only if the court first determines that the actions in question are indeed parallel, and then that there are exceptional circumstances such that abstention would promote "wise judicial administration."<sup>100</sup> Federal courts apply the *Colorado River* doctrine in deciding whether to abstain in light of parallel foreign litigation.

In *Deb v. SIRVA Inc.*, the U.S. District Court for the Southern District of Indiana rejected a defense motion to dismiss in light of pending litigation in Canada because, even though the lawsuits involved the same plaintiff and the same alleged failure to perform contractual services, the defendants had "not presented any evidence establishing the relationship between themselves and . . . the defendant in the Canadian action."<sup>101</sup> The court also rejected as legally unsupported the defendants' argument that the plaintiff's failure to join the defendants in the Canadian action was a relevant factor under *Colorado River*.<sup>102</sup> The court further found that the resolution of the Canadian lawsuit would not have any impact on the issue presented in the case before the U.S. court because the two issues involve institutional relationships (namely, a joint venture) between different parties.<sup>103</sup>

---

<sup>96.</sup> *Id.*

<sup>97.</sup> *Id.* at 948-49.

<sup>98.</sup> *Id.* at 949-950.

<sup>99.</sup> *Id.* at 950.

<sup>100.</sup> 424 U.S. 800, 818 (1976).

<sup>101.</sup> No. 13-cv-01245, 2017 WL 3980574, at \*9-10 (S.D. Ind. Sept. 11, 2017).

<sup>102.</sup> *Id.*

<sup>103.</sup> *Id.* at \*10.

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

INTERNATIONAL LITIGATION 205

In *Global Tech Indus. Group, Inc. v. Go Fun Group Holdings*, the federal district court for the Southern District of New York denied a defendant's motion to dismiss in light of parallel litigation in Hong Kong because, it stated, its task under *Colorado River* was "not to articulate a justification for the exercise of jurisdiction, but rather to determine whether exceptional circumstances exist that justify the surrender of that jurisdiction."<sup>104</sup> After balancing the relevant factors under the *Colorado River* test, the court found no "exceptional circumstances" to justify abstention, noting that commercial litigation involving foreign parties and foreign assets is not unusual in federal courts.<sup>105</sup> The court also noted that although the Hong Kong action was filed first, that action sought only "declaratory relief in response to a direct threat of litigation," and therefore the general preference of deferring to the first-filed action did not apply.<sup>106</sup>

**B. ANTI-SUIT INJUNCTIONS**

In *Ist Source Bank v. Neto*, the Seventh Circuit affirmed a district court's refusal to enter an anti-suit injunction despite the fact that the parties and issues in parallel Indiana and Brazil lawsuits, each seeking recovery on the same debt arising from the same transaction, were the same. The Seventh Circuit reasoned that it was not "vexatious or oppressive" for the plaintiff to have filed a lawsuit in Brazil after minimal discovery proceedings in the United States.<sup>107</sup> The Seventh Circuit agreed with other federal courts of appeals that the "standard for antisuit injunctive relief differs . . . from the traditional preliminary injunction standard in that the anti-suit injunction test "does not rely on a showing of likelihood of success on the merits."<sup>108</sup> Rather, "factors specific to the propriety of an antisuit injunction" focus on whether (1) "the parties and the issues are the same" and (2) "the first action is dispositive of the action to be enjoined."<sup>109</sup> If both factors are met, the court must then consider whether allowing two lawsuits to proceed would be "gratuitously duplicative" or "vexatious and oppressive."<sup>110</sup> The Circuit observed that "a district court should issue an international antisuit injunction only when the interest in avoiding vexatious litigation outweighs the international-comity concerns inherent in enjoining a party from pursuing claims in a foreign court."<sup>111</sup>

---

104. 2017 U.S. Dist. LEXIS 182019, at \*7 (S.D.N.Y. Nov. 2, 2017).

105. *Id.* at \*11.

106. *Id.* at \*13.

107. 861 F.3d 607, 614 (7th Cir. 2017).

108. *Id.* at 613 (citing *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 991 (9th Cir. 2006)).

109. *Id.* (internal quotation marks omitted).

110. *Id.* (internal quotation marks and citation omitted).

111. *Id.* (citing *Rosenbloom v. Barclays Bank PLC*, No. 13-CV-04087, 2014 U.S. Dist. LEXIS 81396 (N.D. Ill. June 16, 2014)).

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**