Transnationale Prozessführung in Europa und den USA – Transnational Civil Litigation in Europe and the United States

Prof. Dr. Joachim Zekoll, LL.M. (Berkeley)

Sommersemester 2024

READER

TRANSNATIONAL CIVIL LITIGATION
Joachim Zekoll
Tulane University Law School
Fall Semester 2023

TABLE OF CONTENTS

Please note: The page numbers here refer to the page numbers given on the bottom of each page.

I. JUDICIAL JURISDICTION

1. Basics 2
2. Personal Jurisdiction – Specific Jurisdiction 16
   - J. McIntyre Machinery, Ltd. v. Nicastro 19
   - Brystol-Myers SQUIBB Co. v. Superior Court 34
   - Ford Motor Co. v. Montana Eight Judicial District Court 36
3. Personal Jurisdiction – General Jurisdiction 39
   - Goodyear Dunlop Tires Operations, S.A. v. Brown 40
   - Transient Jurisdiction 50
4. Personal Jurisdiction in Europe 55
   - Shevill v. Presse Alliance SA 59
   - eDate Advertising GmbH v. X; Martinez v. MGN, Ltd. 64

II. FORUM NON CONVENIENS

1. Piper Aircraft Co. v. Reyno 69
2. Dow Chemical Company v. Castro Alearo 72
3. In Re Union Carbide Corporation Gasplant Disaster (Fed. District Court) 82
4. Laker Airways Limited v. Pan American World Airways 83
5. In Re Union Carbide Corporation Gasplant Disaster (Fed. Court of Appeals) 86

III. FORUM SELECTION AGREEMENTS

1. Kahn v. Tazwell 95
2. The Bremen v. Zapata Off-Shore Co. 96
3. Carnival Cruise Lines Inc. v. Shute 100

IV. CONCURRENT JURISDICTION – ANTISUIT INJUNCTIONS

1. Introduction 103
2. Cargill, Inc. v. Hartford Accident & Indemnity Co. 105
3. China Trade and Development Corp v. MV Choong Yong 106

V. TAKING EVIDENCE ABROAD

1. Introduction 110

2. The Hague Evidence Convention 114

- Overview 114

- The exclusivity of the Convention – Société Nationale Industrielle Aérospatiale v. U.S. District Court 118

3. U.S. Discovery and Evidence Production for Foreign and International Tribunals

- Introduction 133

- Intel Corp. v. Advanced Micro Devices, Inc. 134

V. RECOGNITION AND ENFORCEMENT OF JUDGMENTS

1. Introduction 143

2. Enforcing Foreign Judgments in the U.S. – Basic Considerations 147

- Hilton v. Guyot 147

- Introduction to Current Approaches under State Law 153

3. Foreign Judgments and the Requirement of Personal Jurisdiction 157

- Evans Cabinet Corp. v. Kitchen Int'l, Inc. 157

4. Foreign Judgments Raising Domestic (U.S.) Public Policy Concerns 165

- Southwest Livestock & Trucking Co., Inc. v. Ramon 165

- Telnikoff v. Matusevitch 170

5. U.S. Judgments and Foreign Public Policy Concerns 182

- *Re* the Enforcement of a U.S. Judgment [1] 183

- *Re* the Enforcement of a U.S. Judgment [2] 188

-Re Punitive Damages in a U.S. Judgment 192

6. Judgment Recognition under European Union Law 198

- Introduction 198

- Krombach v. Bamberski 201

APPENDIX I

- Regulation (EU) 1215/2012 – Brussels I Regulation 206

APPENDIX II

- The Hague Evidence Convention 228

Aspen Casebook Series

International Civil Litigation in United States Courts

Fifth Edition

Gary B. Born

Peter B. Rutledge
Professor of Law
University of Gerogla School of Law

Law & Business

Part One

Judicial Jurisdiction

The courts of many nations will not adjudicate civil disputes unless the parties (or their property) and their claims are subject to the forum's "judicial jurisdiction" or "jurisdiction to adjudicate." As discussed below, judicial jurisdiction includes both (a) the power of a court to render a judgment against particular persons or things, and (b) the power or competence of a court to adjudicate particular categories of claims.[1]

Judicial jurisdiction is distinguished from "legislative" or "prescriptive" jurisdiction, which refers to the authority of a state to make its laws generally applicable to persons or activities.[2] Judicial jurisdiction is also distinguished from "enforcement jurisdiction"—the authority of a state to induce or compel compliance, or punish noncompliance, with its laws.[3]

In the United States, a court cannot hear a dispute unless it possesses both "personal" jurisdiction over the parties and "subject matter" jurisdiction over their claims.[4] Subject matter and personal jurisdiction are distinct concepts under U.S. law. Subject matter jurisdiction is the power of a court to entertain specified classes of cases, such as any action between parties of differing citizenships.[5] Although subject matter and legislative jurisdiction are sometimes confused, there is a fundamental distinction under U.S. law between the two categories. Subject matter jurisdiction deals with a court's power to hear a class of disputes without necessary regard to the substantive rules that are applied.[6]

1. *Restatement (Third) Foreign Relations Law* Part IV Intro. Note & §401 (1987); *Restatement (Second) Conflict of Laws* Ch. 3, Intro. Note (1971); Akehurst, *Jurisdiction in International Law*, 46 Brit. Y.B. Int'l L. 145 (1972-1973).

2. *See infra* pp. 589-591; *Restatement (Third) Foreign Relations Law* Part IV Intro. Note & §401 (1987) ("make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court"); *Restatement (Second) Conflict of Laws* Ch. 3, Intro. Note (1971); Akehurst, *Jurisdiction in International Law*, 46 Brit. Y.B. Int'l L. 145, 179-212 (1972-1973). Chapters 7 and 8 *infra* provide a detailed examination of legislative jurisdiction in the international context.

3. *Restatement (Third) Foreign Relations Law* Part IV Intro. Note & §401 (1987). Examples of the exercise of jurisdiction to enforce include execution upon property, seizure of goods, and arrest. These materials do not directly address international law limits on national enforcement jurisdiction.

4. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982) ("The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties."); *Still v. Gottlieb*, 305 U.S. 165, 171-172 (1938).

5. *See Verlinden BV v. Central Bank of Nigeria*, 461 U.S. 480 (1983); C. Wright & A. Miller, *Federal Practice and Procedure*, 1350-1351, 3522 (2006 & Supp. 2010); *Restatement (Third) Foreign Relations Law* §401 comment c (1987).

6. For example, the federal district courts enjoy "diversity jurisdiction" and "alienage jurisdiction" over all civil actions between citizens of different states, or suits between U.S. and foreign nationals, where the amount in

In contrast, legislative jurisdiction deals with the power of a state to prescribe substantive law, without necessary regard to the forum in which that law is applied.[7]

There is also a fundamental distinction under U.S. law between subject matter jurisdiction and personal jurisdiction.[8] Personal jurisdiction involves the power of a court to adjudicate a claim against the defendant's person and to render a judgment enforceable against the defendant and any of its assets.[9] In contrast, subject matter jurisdiction refers to a court's power to hear categories of claims, without necessarily considering the relationship of the parties to particular cases to the forum.[10]

Part One considers the judicial jurisdiction of U.S. courts in international civil litigation. Chapter 1 examines the subject matter jurisdiction of federal courts in international disputes. Chapter 2 considers the personal jurisdiction of U.S. courts over parties to international litigation (and particularly non-U.S. parties). Chapter 3 explores the subject matter and personal jurisdiction of U.S. courts over foreign states and their state-related entities.[11]

All three chapters also include comparative materials, which illustrate how selected foreign states address issues of judicial jurisdiction. In particular, we consider how the European Union deals with questions of judicial jurisdiction and how these issues were recently addressed in (abortive) efforts to negotiate an international convention on jurisdiction and judgments under the auspices of the Hague Conference on Private International Law.[12]

Judicial jurisdiction has substantial practical importance in international litigation. That importance derives from the role of judicial jurisdiction in determining the forum (or forums) in which an international dispute can be litigated. As discussed below, forum selection has vital consequences for the resolution of many international disputes, thus giving jurisdictional issues a vital importance in many cases.

For a variety of reasons, the same dispute can often be resolved in significantly different ways in different forums. Procedural, substantive law, and choice of law principles vary

---

controversy exceeds $75,000. *See* 28 U.S.C. §1332(a); U.S. Const. Art. III, §2. In conferring this jurisdiction, Congress did not generally prescribe rules of substantive law, but left federal courts to apply the substantive law that would be applied by a state court in the state where the federal court sits. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *infra* pp. 10-13. Much the same approach was taken with respect to claims against foreign states. *See* Chapter 3 *infra*.

7. *See infra* pp. 589-591; *Restatement (Third) Foreign Relations Law* §401 comment c (1987). Despite this distinction, there is often an important relation in the United States between subject matter and legislative jurisdiction. In many cases, Congress's prescription of a substantive rule of law is accompanied by a grant of subject matter jurisdiction to the federal courts for cases arising under those substantive rules. The federal antitrust and securities laws are prime examples of the simultaneous exercise of prescriptive jurisdiction and grant of subject matter jurisdiction. *See infra* pp. 32, 672-673, 707, 709-711; 15 U.S.C. §§1, 2 & 15 (antitrust); 15 U.S.C. §§77(g), 77l(2), 78aa, 78j (securities).

8. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982); *Verlinden BV v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

9. *See infra* pp. 81-91; *Restatement (Second) Conflict of Laws* Ch. 3, Intro. Note (1971); *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977). U.S. law distinguishes between *in personam* (or personal) jurisdiction, *in rem* jurisdiction, and *quasi in rem* jurisdiction. *In rem* jurisdiction involves the adjudication of preexisting claims of ownership or other rights in specific property (*e.g.*, a ship or a bank deposit); although judgments rendered on the basis of *in rem* jurisdiction extend only to the specific assets that are before the court, they are binding on the interests of all persons in such property. *Quasi in rem* jurisdiction most often involves the exercise of jurisdiction on the basis of property present in the forum where personal jurisdiction over the defendant is lacking; unlike *in rem* jurisdiction, the judgment only affects the rights between persons to the property. *Restatement (Second) Conflict of Laws* Ch. 3, Intro. Note (1971); *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977).

10. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). Again, there is sometimes an important practical relation between subject matter and personal jurisdiction. As discussed below, the Foreign Sovereign Immunities Act makes federal court subject matter and personal jurisdiction coextensive. *See infra* Chapter 3 at p. 234.

11. A number of other significant means of influencing forum selection are discussed in Chapters 4, 5 & 6 below, including the *forum non conveniens* doctrine, forum selection agreements, *lis pendens*, and venue.

12. *See infra* pp. 107-108, 485-486, 1080, 1085-1086.

substantially from one forum to another.[13] The identity, character, competence, and neutrality of the tribunal that decides civil disputes can also differ materially depending upon the forum where adjudication occurs. Some forums may be unfavorable to one party to a dispute: for reasons of convenience, local bias, and otherwise, parties are sometimes particularly reluctant to litigate in the courts of their adversary. As one commentator has correctly observed, "[t]he choice of forum has become a key strategic battle fought to increase the chances of prevailing on the merits."[14]

Forum selection is especially important in the international context. Procedural, substantive, and choice of law rules differ far more significantly from country to country than they do from state to state within the United States.[15] Differences in political, economic, social, and other attitudes of courts and lawyers are more pronounced in international matters than domestic ones. Inconvenience, forum bias, and the risk of multiple proceedings will be more important factors in international than in domestic litigation.[16] Obtaining effective enforcement of judgments in foreign countries can also often be unusually difficult, as compared to enforcement issues within a single jurisdiction.[17]

Forum selection for an international dispute can be particularly important where one potential forum is the United States. This is because litigation in U.S. courts often differs dramatically from that in other countries, including with respect to its procedures, risks, expenses, and potential rewards. A number of factors contribute to make U.S. litigation unusual when compared to other countries. In general, as detailed below, these factors make the United States a particularly attractive forum for plaintiffs: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."[18]

First, by constitutional guarantee and historical precedent, civil suits in the United States are ordinarily decided by juries of lay men and women, who have very different backgrounds and sympathies from many judges, whether members of U.S. or foreign judiciaries. Although there are regional, economic, social, and other variations, U.S. juries can be remarkably pro-plaintiff, particularly in cases involving individual litigants or small businesses. That is particularly true when compared to jurisdictions where judges are government lawyers or career bureaucrats. As one eminent foreign judge has remarked, "[t]here is in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic [to plaintiffs]."[19]

Second, several procedural aspects of U.S. litigation tend to favor plaintiffs. Plaintiffs in U.S. courts can enter into contingent fee agreements, which is often forbidden or highly restricted in foreign courts. Unsuccessful U.S. litigants are also not ordinarily liable for their adversary's attorneys' fees, although they are in many foreign jurisdictions.[20] Discovery in U.S. proceedings is extremely broad, by international standards, and provides means for plaintiffs both to prove their substantive claims from the

13. *See generally* M. Glendon, M. Gordon & C. Osakwe, *Comparative Legal Traditions* (1985); G. Gloss, *Comparative Law* (1979); J. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (2d ed. 1985).

14. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. Pa. L. Rev. 781, 794-795 (1985).

15. *See* Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 25 (1987).

16. *See Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 114 (1987) (noting "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system"); Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 24-25 (1987).

17. *See infra* Chapter 12 at pp. 1085-1086.

18. *Smith Kline & French Labs. v. Block* [1983] 2 All E.R. 72, 74 (Denning, J.).

19. *Smith Kline & French Labs. v. Block* [1983] 2 All E.R. 72, 74 (Denning, J.) ("At no cost to himself, and at no risk of having to pay anything to the other side, the lawyers there will conduct the case 'on spec' as we say, or on a 'contingency fee' as they say.").

20. *See* Symposium, *Attorney Fee Shifting*, 47 Law & Contemp. Probs. 1 (1984).

defendants' own files, and to impose unrecoverable litigation costs on a defendant.[21] U.S. pleading requirements, though recently tightened by several Supreme Court decisions, still often permit fairly loosely formulated claims to be advanced, sometimes enabling plaintiffs with weak cases to survive all efforts to obtain summary disposition.[22] At the same time, plaintiffs' attorneys frequently combine litigation in traditional judicial forums with public relations, legislative and other actions directed toward the defendants. The cumulative effect of these procedural features of U.S. litigation is often to improve a plaintiff's prospects of successful recovery (including by providing substantial leverage in negotiating settlement of marginal or unwinnable suits).

Third, and at the bottom line, is the simple fact that U.S. damage awards tend to be dramatically larger than those in other countries.[23] U.S. juries are often both sympathetic and generous, at least from an injured plaintiff's perspective. U.S. substantive laws are sometimes unusually favorable: American product liability and other tort doctrines, and U.S. antitrust and securities fraud statutes often grant plaintiffs very generous avenues of recovery.[24] Moreover, many U.S. state and federal statutes provide for mandatory awards of multiple damages, while state common law often permits jury awards of punitive damages based on vague, discretionary standards.

At the same time, aspects of U.S. litigation can make it distinctly unattractive to some foreign (and domestic) plaintiffs. Few litigants welcome the prospect of participating in any proceeding, far from home, in an unfamiliar forum that may be inconvenient, parochial, or worse. In the United States, legal proceedings can be uniquely expensive and, compared to at least some foreign alternatives, relatively slow. The availability of broad discovery can be a threat to some potential foreign plaintiffs, as is the case with extensive public, press, and governmental access to U.S. judicial proceedings and discovery materials. And the possibility of large damages awards, by potentially unpredictable local lay juries, can be a disincentive to potential foreign plaintiffs where they anticipate that counterclaims are likely.

For all the foregoing reasons, it is critically important in international commercial disputes for a litigant to have its claims adjudicated in the best available forum, especially where one potential forum is the United States. Plaintiffs therefore often devote substantial effort and ingenuity to finding the most advantageous forum in which to proceed with their claims. Chief Justice Rehnquist commented on the "litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations."[25]

From a practical perspective, the issues of judicial jurisdiction discussed in Part One are vital aspects of these disputes over forum selection. At the same time, these issues of judicial jurisdiction involve basic limitations on the authority and competence of U.S. courts in international matters. For these reasons, these issues warrant careful attention at the beginning of any study of international litigation.

21. *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987); *Hickman v. Taylor*, 329 U.S. 495, 500-507 (1947). The scope of U.S. pretrial discovery is discussed below at *infra* pp. 965-968, 978-1000.

22. *See* C. Wright & A. Miller, *Federal Practice and Procedure* §§1202, 1215-1225, 1286, 1375 (2006 & Supp. 2010)

23. In one foreign judge's terse summary, "in the United States the scale of damages for injuries of the magnitude sustained by the plaintiff is something in the region of ten times what is regarded as appropriate by . . . the courts of [England]." *Castanho v. Brown & Root (U.K.) Ltd.* [1980] 1 W.L.R. 833, 859, *aff'd*, 1981 A.C. 557 (Shaw, J.).

24. *E.g.*, *British Airways Bd. v. Laker Airways* [1984] W.L.R. 413 (H.L.) (English plaintiff sues English and other European defendants in United States, to take advantage of U.S. antitrust laws, which were more favorable than applicable English law); *Virgin Atlantic Airways Ltd. v. British Airways plc*, 872 F. Supp. 52 (S.D.N.Y. 1994) (same).

25. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984).

1

Jurisdiction of U.S. Courts over Subject Matter in International Disputes

A U.S. court cannot adjudicate a case unless it has "subject matter" jurisdiction over the action. Subject matter jurisdiction (also referred to as "competence") is the power of a court to entertain specified classes of cases, such as any claim in excess of $75,000 and between parties of differing citizenships.[1] This chapter considers the subject matter jurisdiction of U.S. courts in international cases, focusing on the federal courts.

A. Introduction

1. Plenary State Subject Matter and Legislative Jurisdiction

For the most part, there are few restrictions on the subject matter jurisdiction of U.S. state courts: state trial courts ordinarily possess general jurisdiction over all but a few specialized categories of claims. Those exceptions that are of importance to international litigation are relatively scarce.[2] The same generalization is true with respect to state substantive law in the United States. States generally are subject to few significant internal limitations on their powers to exercise legislative jurisdiction.[3]

2. Limited Federal Legislative and Subject Matter Jurisdiction

a. Limited Federal Legislative Authority Under Article I. Article I of the U.S. Constitution endows Congress with only limited legislative powers; those powers not granted to Congress are expressly reserved to the several states.[4] This arrangement reflects the

1. *See Verlinden BV v. Central Bank of Nigeria*, 461 U.S. 480 (1983); C. Wright et al., *Federal Practice and Procedure* §1350 (2004 & Supp. 2010); *Restatement (Third) Foreign Relations Law* §401 comment c (1987).

2. Claims under some federal statutes, including the federal securities laws, may be brought exclusively in federal court. *See* 15 U.S.C. §§77l(2) & 78aa. Sometimes, a federal statute not only creates exclusive federal jurisdiction but designates a particular forum. *See* §408(b)(3) of the Air Transportation Safety and System Stabilization Act, 115 Stat. 230, 241 (2001) ("[t]he United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001").

3. The U.S. Constitution limits the legislative jurisdiction of the several states. *see infra* pp. 612-630, and valid federal statutes or U.S. treaties may preempt state law, *see infra* pp. 5-7, 10-13, 630-644.

4. Article I, §1, provides Congress with only the "legislative [p]owers herein granted." In addition, the Tenth Amendment provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Framers' judgment that the national government's authority should be restricted, both to prevent abuse of its powers and to avoid invading the prerogatives of the several states.

Congress's principal enumerated powers include the authority to regulate interstate and foreign commerce, to levy taxes, and to appropriate funds.[5] These powers have proved both overwhelmingly important and difficult to restrain. The Supreme Court has interpreted congressional authority expansively in the last four decades and, until recently, had abandoned meaningful judicial efforts to limit Congress's legislative powers over commercial matters.[6] There continue to be few aspects of national commercial matters that Congress cannot regulate.

Congress's powers over U.S. foreign relations are particularly extensive. Among other things, Article I of the Constitution grants Congress the power to declare war, maintain an army and navy, and define and punish piracy and violations of the law of nations,[7] while the Senate is vested with the power to advise on and consent to treaties and the appointment of ambassadors.[8] The Supreme Court has said that the "supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution . . . , and has since been given continuous recognition by this Court."[9] The Court has also repeatedly said that the states have only the most limited of roles in international relations, declaring that the Constitution prohibits any "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[10] Invoking this constitutional authority, Congress and the President have frequently pre-empted state laws in the area of foreign relations.[11]

The Constitution also provides for broad federal legislative power over international trade, conferred principally by Article I, §8's "foreign commerce" clause.[12] In the Court's words, "[f]oreign commerce is preeminently a matter of national concern."[13] The Court has held that federal power over foreign commerce is broader than that over interstate commerce, and that the "dormant" foreign commerce clause requires greater scrutiny of state restrictions on foreign commerce than for purely domestic commerce.[14]

Congress has frequently exercised its constitutional authority over foreign commerce, particularly in recent decades. Thus, federal legislation exhaustively regulates the fields of foreign sovereign immunity and international arbitration, as well as international trade

5. U.S. Const. Art. I, §8, cl. 1, 3.

6. *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *South Carolina v. Baker*, 485 U.S. 505 (1988); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), *overruling National League of Cities v. Usery*, 426 U.S. 833 (1976).

7. U.S. Const. Art. I, §8.

8. U.S. Const. Art. II, §2.

9. *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941).

10. *Zschernig v. Miller*, 389 U.S. 429, 439 (1968). *See also* Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 Colum. L. Rev. 805 (1964); Moore, *Federalism and Foreign Relations*, 1965 Duke L.J. 248. Or, as the Court remarked elsewhere, "in respect of our foreign relations generally, state lines disappear. As to such purposes the State . . . does not exist." *United States v. Belmont*, 301 U.S. 324, 331 (1937).

11. *E.g.*, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Hines v. Davidowitz*, 312 U.S. 52 (1941); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

12. *See Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447 (1979); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976); Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432 (1941). Article I also grants Congress the power to impose import and export duties and to regulate immigration. U.S. Const. Art. I, §§8 & 9.

13. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979).

14. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 & n.12 (1979) ("Although the Constitution, art. I, §8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several states' in parallel phrases, there is evidence that the founders intended the scope of the foreign commerce power to be the greater."); *see also Dep't of Revenue of Ky. v. Davis*, 552 U.S. 328, 348 n.17 (2008); *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 66-71 (1st Cir. 1999), *aff'd on other grounds sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). *See infra* pp. 630-644.

practices, international transportation and telecommunications, tariffs and customs, and export controls. Notwithstanding its broad legislative powers, there remain numerous areas in the international field where Congress has not chosen to exercise its authority. Thus, federal legislation is generally silent in the international context with respect to substantive contract and tort law, as well as with respect to rules regarding agency, damages, contribution, choice of law, and recognition of foreign judgments. In all of these fields, state law usually provides the applicable rule of decision.[15]

b. Limited Federal Judicial Authority Under Article III. Just as the Constitution granted Congress only enumerated powers, the federal judiciary was established with only limited subject matter jurisdiction.[16] A federal court generally cannot exercise subject matter jurisdiction unless both the U.S. Constitution and valid federal legislation grant such jurisdiction.[17] Article III of the U.S. Constitution defines the "judicial Power"—or subject matter jurisdiction—of the federal courts. A federal statute cannot validly confer subject matter jurisdiction on a federal court except within the limits of Article III's grants.[18] Conversely, without a federal statutory grant of jurisdiction, federal courts cannot exercise subject matter jurisdiction contemplated by Article III.[19]

Federal subject matter jurisdiction is generally a nonwaivable requirement, and cannot ordinarily be conferred by the parties' consent.[20] It is permitted—indeed, affirmatively required—for a federal court to raise the lack of subject matter jurisdiction on its own motion.[21] In both respects, subject matter jurisdiction differs from personal jurisdiction.[22]

3. Overview of Federal Subject Matter Jurisdiction in International Cases

a. Article III's Grants of Subject Matter Jurisdiction. Three of Article III's grants of judicial power are especially important for international cases. First, the federal courts are granted "federal question" (or "arising under") jurisdiction over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made

15. *See infra* pp. 468-471, 791-796, 1188-1190.

16. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982) ("Federal courts are courts of limited jurisdiction.").

17. *Verlinden BV v. Central Bank of Nigeria*, 461 U.S. 480 (1983); *Hodgson & Thompson v. Bowerbank*, 9 U.S. 303 (1809); C. Wright et al., *Federal Practice and Procedure* §3522 (2008 & Supp. 2010). One exception to this general rule may be the Supreme Court's jurisdiction. The Constitution expressly sets out the original jurisdiction of the Supreme Court over certain matters such as cases "affecting ambassadors." U.S. Const. Art. III, §2. By contrast, the Constitution does not set out the jurisdiction of the lower federal courts or, for that matter, require the creation of such inferior courts. Instead, it leaves the creation of lower courts to Congress's discretion. U.S. Const. Art. III, §1.

18. *Verlinden BV v. Central Bank of Nigeria*, 461 U.S. 480 (1983) ("Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution").

19. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982) (federal subject matter jurisdiction is "limited to those subjects encompassed within the statutory grant of jurisdiction"). Although a federal court cannot exercise subject matter jurisdiction without a statutory grant, Congress's ability to regulate federal courts' jurisdiction is probably subject to some constitutional limitations. *See* Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953).

20. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *California v. LaRue*, 409 U.S. 109 (1972).

21. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

22. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979) ("neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties").

or which shall be made, under their Authority."[23] Second, Article III grants so-called "alienage jurisdiction" over all cases "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[24] Third, federal jurisdiction extends to a variety of specialized cases that may raise international issues.[25]

It is not coincidental that Article III contains several grants of federal subject matter jurisdiction specifically applicable in international contexts. In drafting the Constitution, one of the Framers' central concerns was to ensure that the federal government would enjoy broad control over the foreign affairs and trade of the new Republic. The Founding Fathers were convinced that, in these matters, the United States must speak with a single voice. As Thomas Jefferson wrote to James Madison in 1786: "The politics of Europe rendered it indispensably necessary that with respect to everything external we be one nation firmly hooped together; interior government is what each State should keep to itself."[26] Thus, the Supreme Court has said that the Federalist Papers demonstrate the "importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field."[27]

The perceived importance of federal control over matters affecting U.S. foreign relations and commerce shaped Article III's provisions regarding the subject matter jurisdiction of the federal courts. The Framers repeatedly said that it was vital for Article III to grant federal courts jurisdiction over most international disputes. Alexander Hamilton said:

> [T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.[28]

This rationale was used by Hamilton to justify Article III's grants of admiralty jurisdiction[29] and federal question jurisdiction,[30] as well as "alienage jurisdiction."[31]

b. Statutory Grants of Federal Subject Matter Jurisdiction. Pursuant to these Article III authorizations, Congress has made numerous statutory grants of subject matter jurisdiction to the lower federal courts which are of importance in international civil litigation. Two such statutory authorizations are principally applicable in domestic cases, but are also significant in international disputes: (1) cases involving "federal

23. Art. III, §2. *See infra* pp. 30-70.

24. Art. III, §2. *See infra* pp. 21-30.

25. Article III authorizes federal jurisdiction over "all Cases affecting Ambassadors, other public ministers and Consuls," and "all cases of admiralty and maritime jurisdiction." U.S. Const. Art. III, §2. As to the former, Article III grants the Supreme Court original jurisdiction.

26. Letter dated October 1786 (quoted in C. Warren, *The Making of the Constitution* 46 (1937)).

27. *Hines v. Davidowitz*, 312 U.S. 52, 62 n.9 (1941).

28. A. Hamilton, J. Madison & J. Jay, *The Federalist Papers*, No. 80 at 476 (C. Rossiter ed., 1961).

29. Admiralty disputes typically involved foreign parties and transactions. This was cited at the Constitutional Convention as a primary reason justifying federal jurisdiction. 1 M. Farrand, *Records of the Federal Convention of 1787* 124 (1937).

30. In particular, it was thought necessary that federal courts decide cases arising under U.S. treaties. *See infra* pp. 30-31.

31. Frequent comments were made during the debates surrounding the Constitution regarding the importance of federal subject matter jurisdiction in disputes involving foreigners. *See infra* pp. 21-22, 26.

questions" arising under the U.S. Constitution, statutes, and regulations;[32] and (2) diversity of citizenship cases, between citizens of different U.S. states.[33] Several other statutory grants of federal subject matter jurisdiction are generally applicable only in international disputes. These include: (3) alienage jurisdiction, over actions between U.S. and foreign parties;[34] (4) jurisdiction under the Alien Tort Statute;[35] and (5) jurisdiction over actions against foreign states under the Foreign Sovereign Immunities Act (or "FSIA").[36]

c. Removal. If both a constitutional and statutory basis for federal subject matter jurisdiction exists, then a plaintiff can commence an action in U.S. district court.[37] When plaintiffs choose to commence litigation against foreign defendants in state court, federal law may permit the defendant to "remove" the case from state to federal court. Section 1441 of Title 28 permits removal of any action that could originally have been brought in federal court. If diversity of citizenship or alienage provides the basis for federal jurisdiction, the action ordinarily may be removed only if none of the defendants is a citizen of the state where the action was brought.[38] If federal question jurisdiction is asserted, the case is removable "without regard to the citizenship or residence of the parties."[39]

d. Practical Considerations Relevant to Federal Subject Matter Jurisdiction. Although these bases for federal jurisdiction can raise complex legal issues, discussed below, they also involve very important practical considerations. Litigation in federal court can differ in significant ways from litigation in state court, particularly for foreign parties. In some cases, these differences can be outcome-determinative, leading to vigorous disputes over the availability of federal subject matter jurisdiction.

Federal courts are frequently said to possess greater detachment from local political, economic, and social concerns than their state counterparts. Differences in perspective are attributed to the fact that federal judges are appointed with life tenure, while state judges are frequently elected for limited terms, and to the different pools from which federal and state judges and jurors are traditionally drawn.[40] In disputes between a local resident and a foreigner, this detachment may be of considerable significance. Federal judges are also sometimes more experienced in handling complex commercial disputes, particularly involving international matters.

32. 28 U.S.C. §1331. Pursuant to the Constitution's authorization for federal question jurisdiction, Congress has granted the federal courts jurisdiction to hear claims arising under a number of substantive federal statutes, including the antitrust and securities laws. *See infra* pp. 32, 672-673, 707-708, 709-711.

33. 28 U.S.C. §1332(a)(1). Diversity-of-citizenship jurisdiction encompasses disputes between parties from different states where the amount in controversy exceeds $75,000.

34. 28 U.S.C. §1332(a)(2) & (3); *infra* pp. 21-30.

35. 28 U.S.C. §1350; *infra* pp. 33-62.

36. 28 U.S.C. §1330(a); *infra* pp. 70-79 *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 236-238 (2007) (discussing relationship between FSIA and removal). A separate provision of the diversity statute provides for subject matter jurisdiction over suits brought *by* "a foreign state" (as defined in the FSIA) and *against* "citizens of a State or different states." 28 U.S.C. §1332(a)(4). *See Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 346 (S.D.N.Y. 2005).

37. As discussed below, the plaintiff will also be required to establish personal jurisdiction over the defendant, valid service of process, and proper venue. *See infra* pp. 81-91, 458-459, 867-880.

38. 18 U.S.C. §1441(b). *See Lincoln Property Co. v. Roche*, 546 U.S. 81 (2005); C. Wright et al., *Federal Practice and Procedure*, §§3723, 3731.

39. 28 U.S.C. §1441(b). Under these circumstances, the district court may exercise jurisdiction over the entire case or remand "all matters in which State law predominates." 28 U.S.C. §1441(c). *See Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862 (2009).

40. *See, e.g., Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009) (describing relationship between state supreme court justice and litigant who had contributed $3 million to justice's election campaign).

Equally important, federal courts may apply "procedural" rules that can differ materially from those in state courts.[41] These include the *forum non conveniens* doctrine, principles governing the enforceability of forum selection clauses, *lis pendens*, and discovery rules. Differences between federal and state procedural rules may be dispositive in particular cases.[42]

For these and other reasons, foreign parties facing legal action in the United States often prefer to litigate in federal courts. This preference may be generally sound, but it is wise to consider the actual differences between specific federal and state forums in particular cases. State courts, judges, and procedural rules differ significantly from state to state, and in some cases may be more hospitable to foreign litigants than a federal forum.

4. Relationship Between U.S. State and Federal Law[43]

a. The *Erie* Doctrine. The relationship between state and federal law in federal courts gives rise to complex issues in both domestic and international cases. These issues are subject to the so-called "*Erie* doctrine."

Until the 1930s, the federal courts had followed the rule of *Swift v. Tyson* and applied a general federal common law in diversity cases.[44] Under *Swift v. Tyson*, federal courts were generally free to apply a general federal common law, while state courts were at liberty to apply state common law (without preemptive effect from inconsistent federal common law decisions).[45] In *Erie Railroad Co. v. Tompkins*, however, the Supreme Court narrowly limited the federal courts' authority to fashion general common law rules.[46] Declaring that "[t]here is no federal *general* common law,"[47] the Court held that, in the absence of valid federal legislation, federal courts must ordinarily apply state substantive law, including state common law rules fashioned by state courts. The Court based its decision in large part on the perceived "mischievous results" that flowed from permitting federal courts to apply federal law, and state courts to apply state law, to the same issues:

> [*Swift v. Tyson*] made rights . . . vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.[48]

To redress these perceived defects, *Erie* established fundamentally new principles governing the relationship between state and federal law. It is, of course, fundamental under *Erie*

41. For a good recent example of how differences between state and federal procedural rules can affect the course of a case, *see Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) (holding that federal court sitting in diversity should apply federal class action standards even where state law precludes availability of class action).

42. *See infra* pp. 10-11, 453-458, 544-546, 791-796. *See especially Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *infra* pp. 378-383, and *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994), *infra* pp. 63-65.

43. *See generally* R. Fallon *et al.*, *Hart & Wechsler's The Federal Courts and the Federal System* 620-673 (5th ed. 2003); C. Wright et al., *Federal Practice and Procedure* §4504-4511 (1996 & Supp. 2010); Westen & Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 Mich. L. Rev. 311 (1980).

44. *See Swift v. Tyson*, 41 U.S. 1 (1842); Friendly, *In Praise of* Erie *— And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964); R. Fallon et al., *Hart & Wechsler's The Federal Courts and the Federal System* 620-630 (5th ed. 2003).

45. *Swift v. Tyson*, 41 U.S. 1 (1982).

46. 304 U.S. 64 (1938).

47. 304 U.S. at 78 (emphasis added).

48. 304 U.S. at 74-75.

and its progeny that a valid federal statute, treaty, or regulation preempts inconsistent state laws, and must be applied by both state courts and federal diversity and alienage courts.[49] If no valid federal substantive law applies, however, the *Erie* doctrine provides generally that "procedural" issues in federal diversity actions are governed by federal procedural law, while "substantive" issues are governed by state substantive law.[50] Federal "procedural" law applies only in federal courts, not in state courts.[51]

In areas not governed by federal statute or rule of procedure, the Court has generally been reluctant to ignore state law rules. For example, the Court has held that statutes of limitations and choice of law rules are "substantive" and therefore governed by state law.[52] Moreover, as noted earlier, state substantive law provides the basic rules of contract, tort, agency, damages, contribution, and the like.

Conversely, *Erie*'s "procedural" category is limited. It generally includes all subjects dealt with by the Federal Rules of Civil Procedure.[53] In addition, even absent an applicable Federal Rule, a few common law doctrines fashioned by the federal courts are characterized as "procedural," rather than "substantive";[54] these federal procedural rules govern in federal courts, but not in state courts, and they do not preempt state law. In defining the scope of federal procedural law, the Supreme Court has sought to avoid relying exclusively on the "substance" and "procedure" labels. Instead, the Court has categorized issues in order to further what it has described as two central purposes of the *Erie* doctrine: (1) the "discouragement of forum shopping" between state and federal courts that could result from divergent state and federal laws, and (2) "avoidance of inequitable administration of the laws."[55]

b. Substantive Federal Common Law. Although *Erie* made it clear that "there is no federal *general* common law,"[56] the Supreme Court has sanctioned the judicial development of a limited number of substantive rules of "federal common law," even in the absence of a valid federal statute, treaty, or regulation.[57] Unlike federal procedural

49. *See* U.S. Const. Art. VI, cl. 2; *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-752 (1980) ("The first question [is] whether the scope of the federal rule in fact is sufficiently broad to control the issue before the Court.").

50. *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 74 (1938); C. Wright et al., *Federal Practice and Procedure* §4508 (1996 & Supp. 2010). The same general rule applies in federal question cases, although federal substantive law will generally preempt state law in many respects. *See* C. Wright et al., *Federal Practice and Procedure* §4515 (1996 & Supp. 2010).

51. *See American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Hanna v. Plumer*, 380 U.S. 460 (1965).

52. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980).

53. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010); *Hanna v. Plumer*, 380 U.S. 460 (1965); C. Wright et al., *Federal Practice and Procedure* §4508-4510 (1996 & Supp. 2010). In unusual circumstances, a purportedly "procedural" provision of the Federal Rules of Civil Procedure might be found to exceed either the rulemaking powers delegated to the Supreme Court by the Rules Enabling Act, 28 U.S.C. §2072, or Congress's constitutional authority. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 n.14 (1980); C. Wright et al., *Federal Practice and Procedure* §4505 (1996 & Supp. 2010). While the Federal Rules apply in diversity cases regardless of state procedural law, the Supreme Court has instructed that those Rules should be interpreted "with sensitivity to important state interests and regulatory policies." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996).

54. *See American Dredging Co. v. Miller*, 510 U.S. 443 (1994) (*forum non conveniens* doctrine in domestic admiralty actions is governed by federal procedural law); *Byrd v. Blue Ridge Rural Electric Coop., Inc.*, 356 U.S. 525 (1958) (federal procedural law determines what issues are to be submitted to jury).

55. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 747 (1980); *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 (1996).

56. 304 U.S. at 78 (emphasis added).

57. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973).

rules, these federal common law rules are substantive federal law, applicable in both federal and state courts, that preempt inconsistent state law. As the Supreme Court has declared, "a few areas, involving 'uniquely federal interests' . . . are so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.' "[58]

Substantive federal common law rules will be fashioned only in "few and restricted" cases[59] and only if rigorous standards are satisfied. First, the proposed rule must arise in an area involving "uniquely federal interests."[60] Examples of such federal interests have included the division of interstate waters,[61] the conduct of U.S. foreign relations,[62] the immunity of individual government officers,[63] the design and manufacture of U.S. military equipment,[64] the civil liability of federal officials for actions taken in the course of their duty,[65] the rights and duties of the United States under its contracts,[66] and certain rules of preclusion.[67] The mere fact that the U.S. Government is involved in the litigation does not, by itself, present the "unique interests" necessary to justify the crafting of a federal common law rule.[68]

Second, even in such "uniquely federal" areas, federal common law will be fashioned only to prevent "significant conflict" between state laws and federal policies and interests.[69] If state law does not conflict with federal policies, it will not necessarily be preempted and, even if a conflict exists, preemptive federal common law will be fashioned only to the extent necessary to eliminate the conflict.[70]

Federal common law can play a potentially significant role in international litigation. International disputes frequently implicate federal interests in U.S. foreign relations and foreign commerce. As noted above, both fields fall squarely with the constitutional powers of Congress and the President, and can clearly involve uniquely federal interests.[71] Several

58. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988).

59. *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). *See Atherton v. FDIC*, 519 U.S. 213, 218 (1997) ("'Whether latent federal power should be exercised to displace state law is primarily a decision for Congress,' not the federal courts" (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) ("Against some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating conflicting rights of states or our relations with foreign nations, and admiralty cases"); *Milwaukee v. Illinois*, 451 U.S. 304, 312-313 (1981) ("The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures but by the people through their elected representatives in Congress").

60. *Danforth v. Minnesota*, 552 U.S. 264, 290 n.24 (2008); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973).

61. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

62. *Zschernig v. Miller*, 389 U.S. 429 (1968); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

63. *See Samantar v. Yousuf*, 130 S. Ct. 2278 (2010).

64. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 505-507 (1988).

65. *Westfall v. Erwin*, 484 U.S. 292 (1988); *Howard v. Lyons*, 360 U.S. 593 (1959).

66. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973); *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947).

67. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (claim-preclusive effect of dismissal of case on state statute-of-limitations grounds by federal court sitting in diversity). *See* Burbank, Semtek, *Forum Shopping, and Federal Common Law*, 77 Notre Dame L. Rev. 1027 (2002).

68. *See Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 691 (2006).

69. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87-88 (1994); *Boyle v. United Technologies Corp.*, 487 U.S. at 507-508.

70. *Boyle v. United Technologies Corp.*, 487 U.S. at 507-508.

71. *See* Bradley & Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 Harv. L. Rev. 2260 (1998); Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 Am. J. Int'l L. 740 (1939); Edwards, *The* Erie *Doctrine in Foreign Affairs Cases*, 42 N.Y.U. L. Rev. 674 (1967); Henkin, *The Foreign Affairs Powers of the Federal Courts*: Sabbatino, 64 Colum. L. Rev. 805 (1964); Hill, *The Law Making Power of the Federal Courts:*

Supreme Court decisions, fashioning rules of federal common law in international disputes, are illustrative.

In *Banco Nacional de Cuba v. Sabbatino*,[72] the Supreme Court announced a federal "act of state" doctrine that forbade U.S. courts from adjudicating the validity of certain foreign governmental acts. Relying on federal authority over foreign relations and foreign commerce, the Court declared that the act of state doctrine was a principle of federal common law that was equally binding on both state and federal courts:[73] it is plain that the problems involved are uniquely federal in nature. If federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject. Likewise, in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*[74] the Supreme Court adopted a federal common law standard governing the circumstances in which the separate legal identity of foreign state-related entities will be disregarded. Citing *Sabbatino*, the Court emphasized the need for a uniform federal standard in matters affecting U.S. relations with foreign states.[75]

To much the same effect, in *Zschernig v. Miller*, the Supreme Court held unconstitutional an Oregon statute that forbade foreign heirs or legatees from receiving property from Oregon estates if the property would be confiscated by foreign governments or if U.S. heirs or legatees could not reciprocally receive property from abroad. The Supreme Court held that this "kind of state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government"—threatens U.S. foreign relations and is unconstitutional.[76]

Finally, in *Sosa v. Alvarez-Machain*, the Supreme Court held that federal courts have a limited power to create common-law causes of action for torts that violate the "law of nations." This federal common law power, though, is not unlimited, warned the *Sosa* Court. Any such judicially created cause of action must rest on a "norm of international character accepted by the civilized world."[77] The cause of action must be "defined with a specificity" comparable to certain paradigmatic, historically accepted violations such as acts of piracy. The Court did not indicate what present-day causes of action satisfy this test. It held only that this "residual common law discretion" did not include the authority to create a claim of short-term "arbitrary" detention.

Constitutional Preemption, 67 Colum. L. Rev. 1024 (1967); Moore, *Federalism and Foreign Relations*, 1965 Duke L.J. 248.

72. 376 U.S. 398 (1964). *See infra* pp. 801-817 for a more detailed discussion.

73. 376 U.S. at 424.

74. 462 U.S. 611 (1983). *See infra* pp. 252-253, 257-261, 271-272.

75. 462 U.S. at 623 ("The principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies.").

76. 389 U.S. 429, 436 (1968). *See infra* pp. 630-633, 637-639, for a more detailed discussion.

77. 542 U.S. 692 (2004). *See infra* pp. 35-36, 38-17, 49-53.

TRANSNATIONAL CIVIL LITIGATION

By

Joachim Zekoll
University Professor
Chair of Private Law, Procedure and Comparative Law
Johann Wolfgang Goethe Universität, Frankfurt

Michael Collins
Joseph M. Hartfield Professor
University of Virginia School of Law

George Rutherglen
John Barbee Minor Distinguished Professor
University of Virginia School of Law

AMERICAN CASEBOOK SERIES®

WEST®

2013

CHAPTER 1

Personal Jurisdiction and Forum Selection

A. Introduction

Determining the proper court(s) in which a lawsuit may be brought is an initial consideration in all litigation. But it is of particular significance in international civil litigation. A court's ability to hear a dispute and enter a valid judgment is thought to consist of two elements—the ability to reach out to a defendant and enter a judgment against him that will be binding, and the ability of the court to hear the particular kind of dispute that has been brought before it. Although both are aspects of jurisdiction, the former comes under the label of personal jurisdiction, the latter, subject matter jurisdiction. Both concepts are discussed in this chapter as they relate to international civil litigation.

Choice of forum is a matter of concern to litigants and their attorneys because, in addition to questions of convenience, they perceive that the choice of decisionmaker can affect the outcome. This is particularly true in litigation that involves litigants from different countries. Outcome can be affected for example, because different courts may choose to apply different substantive law, different procedures, or because of the possible bias against the outsider and in favor of the insider who also enjoys the home-field advantage of operating in a familiar legal system. Foreign defendants sued in the United States may encounter such unfamiliar procedures such as juries, class actions, and wide-ranging discovery. See Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 Am. J. Comp. L. 203, 242 (2001) (noting that the U.S. legal system is distinctive as much for its procedural as its substantive rules, yet noting that recent U.S. procedural developments may make matters marginally less problematic for foreign defendants).

Although jurisdictional considerations tend to focus on the commencement of a lawsuit, they also have an eye toward the conclusion of litigation. As discussed in Chapter 8, only a judgment recognized as jurisdictionally valid will be enforceable, should enforcement become an issue. Within the confines of a single domestic regime such as the U.S. where the courts of different states recognize roughly similar grounds for the assertion of jurisdiction, matters are less complicated than they are in a transnational setting in which different jurisdictions may recognize different standards for the valid assertion of jurisdiction. Indeed, the difficulties are sufficiently great that international agreements and

treaties have been entered into and others remain on the drawing board that would streamline and limit the available bases for jurisdiction among signatory countries, largely for the purposes of making international judgment recognition more predictable.

Jurisdictional concerns also play a role long before any litigation occurs. Parties may wish to plan their activities and structure their operations in such a way as to be able to predict where litigation can take place if a dispute should arise from their activities. This is particularly true in a global economic setting in which commercial actors operate across borders and in different legal systems. Sometimes this planning may take the form of contractual agreements regarding the applicable forum and/or the applicable law. We address contractual forum selection in Section I, below; and we address choice of law clauses in Chapter 7. But the first parts of this chapter address the problems of personal jurisdiction when no contractual forum choice has been made.

Within the U.S., jurisdictional considerations have both a constitutional and subconstitutional dimension. Personal jurisdiction over a non resident or foreign defendant ordinarily requires statutory authorization from the relevant state in whose courts the lawsuit is brought. Such authorization generally takes the form of a "long-arm" statute permitting a judicial system to reach out to persons beyond its borders. For most litigation involving foreign parties, this means that litigants must look initially to the 50 different state long-arm statutes. Even when litigation is brought in a federal court, it is ordinarily the case that the court's reach will be limited by the long-arm statute of the state in which it sits. See Rule 4(k)(1)(A), Fed. R. Civ. P. Indeed, the state long arm is the default rule in federal court under even if the claim arises under federal law. Id. Nevertheless, for some claims governed by federal law, a federal long-arm statute may be applicable; and when it is, its reach may be broader than the state court's. See Rule 4(k)(1)(C). And it may also be possible for a plaintiff to secure statutory jurisdiction in a federal court based on the defendant's relationship with the U.S. in the aggregate under Rule 4(k)(2) for claims arising under federal law—a topic that we discuss in Section E of this chapter.

In addition, as just noted, constitutional considerations under the Fourteenth Amendment's Due Process Clause operate as an outside limit on all exercises of personal jurisdiction by state courts, even when jurisdiction is statutorily authorized. And when suit is brought in a federal court (and absent a federal long arm or the applicability of Rule 4(k)(2)), the federal court is ordinarily limited by the same due process limits that would be applicable to the state in which it sits. In sum, plaintiffs may attempt to bring suit in any U.S. forum in which these statutory and constitutional prerequisites are met, whether the plaintiff (or defendant) is domestic or foreign, and whether the events sued over occurred here or abroad.

Nevertheless, there are additional filters that further refine the proper forum choice. Within the U.S., considerations of subject matter jurisdiction may determine whether the suit can go forward in a federal as opposed to a state court, although state court subject matter jurisdiction is generally unlimited while federal court subject matter jurisdiction is not. And even within a proper court sys-

tem, state and federal venue rules may further limit the choice of courts within which suit may be brought, as noted in Chapter 2, Section D.

Satisfying personal and subject matter jurisdiction as well as venue may not be the end of the inquiry, however, since courts may sometimes exercise their discretion to decline to hear a given case, either through statutory provisions for transfer of venue to another court within the relevant jurisdiction, or through dismissal on *forum non conveniens* grounds in favor of a substantially preferable forum. As discussed below, when suit is brought in or removed to a federal court, *forum non conveniens* inevitably implicates dismissal in favor of having litigation go forward in a foreign rather than a U.S. jurisdiction. *Forum non conveniens* dismissals are briefly noted in this chapter, but they are more fully considered in Chapter 5.

B. Specific Jurisdiction

The starting point for the exercise of personal jurisdiction in American courts in the transnational setting is the same as it is in the domestic setting. The modern era of personal jurisdiction begins with International Shoe Co. v. Washington, 326 U.S. 310 (1945). There the Court declared that a state may constitutionally exercise jurisdiction over a non resident defendant provided he has "certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Id. at 316. Due process, said the Court, "does not contemplate that a state may make a binding judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." Id. at 319. In so concluding, the Court reiterated what it had first declared in Pennoyer v. Neff, 95 U.S. 714 (1877)—that a state's assertion of personal jurisdiction is limited by the Due Process Clause of the Fourteenth Amendment. Yet *International Shoe* also departed from the traditional territorialist perspective of *Pennoyer* that had focused primarily on the physical presence of the defendant within the jurisdiction, or the defendant's consent to jurisdiction, or the presence of property in the forum. As discussed below, these traditional bases of jurisdiction still survive in one form or another, as curtailed, refined, and supplemented by *International Shoe* and its progeny. But instead of deploying due process primarily as a limit on extraterritorial exertions of state power, *International Shoe* read due process as imposing a reasonableness requirement on a state's exercise of jurisdiction. The decision that follows represents one effort by the Supreme Court to apply the general principles of *International Shoe* (and its progeny) to the international civil litigation setting in a product liability case.

J. McIntyre Machinery, Ltd. v. Nicastro

Supreme Court of the United States, 2011.

131 S.Ct. 2780.

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join.

Whether a person or entity is subject to the jurisdiction of a state court despite not having been present in the State either at the time of suit or at the time of the alleged injury, and despite not having consented to the exercise of jurisdiction, is a question that arises with great frequency in the routine course of litigation. The rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in Asahi Metal Industry Co. v. Superior Court of Cal., 480 U.S. 102 (1987).

Here, the Supreme Court of New Jersey, relying in part on *Asahi,* held that New Jersey's courts can exercise jurisdiction over a foreign manufacturer of a product so long as the manufacturer "knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states." Applying that test, the court concluded that a British manufacturer of scrap metal machines was subject to jurisdiction in New Jersey, even though at no time had it advertised in, sent goods to, or in any relevant sense targeted the State.

That decision cannot be sustained. Although the New Jersey Supreme Court issued an extensive opinion with careful attention to this Court's cases and to its own precedent, the "stream of commerce" metaphor carried the decision far afield. Due process protects the defendant's right not to be coerced except by lawful judicial power. As a general rule, the exercise of judicial power is not lawful unless the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235 (1958). There may be exceptions, say, for instance, in cases involving an intentional tort. But the general rule is applicable in this products-liability case, and the so-called "stream-of-commerce" doctrine cannot displace it.

I

This case arises from a products-liability suit filed in New Jersey state court. Robert Nicastro seriously injured his hand while using a metal-shearing machine manufactured by J. McIntyre Machinery, Ltd. (J. McIntyre). The accident occurred in New Jersey, but the machine was manufactured in England, where J. McIntyre is incorporated and operates. The question here is whether the New Jersey courts have jurisdiction over J. McIntyre, notwithstanding the fact that the

company at no time either marketed goods in the State or shipped them there. Nicastro was a plaintiff in the New Jersey trial court and is the respondent here; J. McIntyre was a defendant and is now the petitioner.

At oral argument in this Court, Nicastro's counsel stressed three primary facts in defense of New Jersey's assertion of jurisdiction over J. McIntyre.

First, an independent company agreed to sell J. McIntyre's machines in the United States. J. McIntyre itself did not sell its machines to buyers in this country beyond the U.S. distributor, and there is no allegation that the distributor was under J. McIntyre's control.

Second, J. McIntyre officials attended annual conventions for the scrap recycling industry to advertise J. McIntyre's machines alongside the distributor. The conventions took place in various States, but never in New Jersey.

Third, no more than four machines (the record suggests only one), including the machine that caused the injuries that are the basis for this suit, ended up in New Jersey.

In addition to these facts emphasized by petitioner, the New Jersey Supreme Court noted that J. McIntyre held both United States and European patents on its recycling technology. It also noted that the U.S. distributor structured its advertising and sales efforts in accordance with J. McIntyre's direction and guidance whenever possible, and that at least some of the machines were sold on consignment to the distributor.

In light of these facts, the New Jersey Supreme Court concluded that New Jersey courts could exercise jurisdiction over petitioner without contravention of the Due Process Clause. Jurisdiction was proper, in that court's view, because the injury occurred in New Jersey; because petitioner knew or reasonably should have known "that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states"; and because petitioner failed to "take some reasonable step to prevent the distribution of its products in this State."

Both the New Jersey Supreme Court's holding and its account of what it called "the stream-of-commerce doctrine of jurisdiction," were incorrect, however. This Court's *Asahi* decision may be responsible in part for that court's error regarding the stream of commerce, and this case presents an opportunity to provide greater clarity.

II

The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power. This is no less true with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere. * * *

A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310 (1945). Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered

in the absence of authority into law. As a general rule, the sovereign's exercise of power requires some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson,* though in some cases, as with an intentional tort, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws. In products-liability cases like this one, it is the defendant's purposeful availment that makes jurisdiction consistent with "traditional notions of fair play and substantial justice."

A person may submit to a State's authority in a number of ways. There is, of course, explicit consent. E.g., Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée, 456 U.S. 694 (1982). Presence within a State at the time suit commences through service of process is another example. See Burnham v. Superior Court, 495 U.S. 604 (1990). Citizenship or domicile—or, by analogy, incorporation or principal place of business for corporation—also indicates general submission to a State's powers. Goodyear Dunlop Tires Operations, S.A. v. Brown [131 S.Ct. 2846 (2011)]. Each of these examples reveals circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State. Cf. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). These examples support exercise of the general jurisdiction of the State's courts and allow the State to resolve both matters that originate within the State and those based on activities and events elsewhere. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984). By contrast, those who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.

There is also a more limited form of submission to a State's authority for disputes that "arise out of or are connected with the activities within the state." *International Shoe.* Where a defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson,* it submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State. In other words, submission through contact with and activity directed at a sovereign may justify specific jurisdiction "in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros*; see also *Goodyear.*

The imprecision arising from *Asahi,* for the most part, results from its statement of the relation between jurisdiction and the "stream of commerce." The stream of commerce, like other metaphors, has its deficiencies as well as its utility. It refers to the movement of goods from manufacturers through distributors to consumers, yet beyond that descriptive purpose its meaning is far from exact. This Court has stated that a defendant's placing goods into the stream of commerce "with the expectation that they will be purchased by consumers within the forum State" may indicate purposeful availment. World-Wide Volkswagen Corp. v. Woodson, 440 U.S. 286 (1980). But that statement does not amend the general rule of personal jurisdiction. It merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itself an unexceptional proposition—as where manufacturers or distributors "seek to

serve" a given State's market. The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must "purposefully avai[l] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Sometimes a defendant does so by sending its goods rather than its agents. The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.

In *Asahi,* an opinion by Justice Brennan for four Justices outlined a different approach. It discarded the central concept of sovereign authority in favor of considerations of fairness and foreseeability. As that concurrence contended, "jurisdiction premised on the placement of a product into the stream of commerce [without more] is consistent with the Due Process Clause," for "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." It was the premise of the concurring opinion that the defendant's ability to anticipate suit renders the assertion of jurisdiction fair. In this way, the opinion made foreseeability the touchstone of jurisdiction.

The standard set forth in Justice Brennan's concurrence was rejected in an opinion written by Justice O'Connor; but the relevant part of that opinion, too, commanded the assent of only four Justices, not a majority of the Court. That opinion stated: "The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."

Since *Asahi* was decided, the courts have sought to reconcile the competing opinions. But Justice Brennan's concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power. This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment.

The conclusion that jurisdiction is in the first instance a question of authority rather than fairness explains, for example, why the principal opinion in *Burnham* "conducted no independent inquiry into the desirability or fairness" of the rule that service of process within a State suffices to establish jurisdiction over an otherwise foreign defendant. As that opinion explained, "[t]he view developed early that each State had the power to hale before its courts any individual who could be found within its borders." Furthermore, were general fairness considerations the touchstone of jurisdiction, a lack of purposeful availment might be excused where carefully crafted judicial procedures could otherwise protect the defendant's interests, or where the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum. That such considerations have not been deemed controlling is instructive. See, e.g., *World-Wide Volkswagen.*

Two principles are implicit in the foregoing. First, personal jurisdiction re-

quires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct. Personal jurisdiction, of course, restricts "judicial power not as a matter of sovereignty, but as a matter of individual liberty," for due process protects the individual's right to be subject only to lawful power. *Insurance Corp.* But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.

The second principle is a corollary of the first. Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State. This is consistent with the premises and unique genius of our Constitution. * * * For jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual State. That would be an exceptional case, however. If the defendant is a domestic domiciliary, the courts of its home State are available and can exercise general jurisdiction. And if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States. Furthermore, foreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums.

It must be remembered, however, that although this case and *Asahi* both involve foreign manufacturers, the undesirable consequences of Justice Brennan's approach are no less significant for domestic producers. The owner of a small Florida farm might sell crops to a large nearby distributor, for example, who might then distribute them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town. And the issue of foreseeability may itself be contested so that significant expenses are incurred just on the preliminary issue of jurisdiction. Jurisdictional rules should avoid these costs whenever possible.

The conclusion that the authority to subject a defendant to judgment depends on purposeful availment, consistent with Justice O'Connor's opinion in *Asahi,* does not by itself resolve many difficult questions of jurisdiction that will arise in particular cases. The defendant's conduct and the economic realities of the market the defendant seeks to serve will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle.

III

In this case, petitioner directed marketing and sales efforts at the United States. It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts. That circumstance is not presented in this case, however, and it is neither necessary nor appropriate to address here any constitutional concerns that might be attendant to that exercise of power. Nor is it necessary to determine what substantive law might apply were Congress to authorize jurisdiction in a federal

court in New Jersey. A sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts. Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is petitioner's purposeful contacts with New Jersey, not with the United States, that alone are relevant.

Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey. Recall that respondent's claim of jurisdiction centers on three facts: The distributor agreed to sell J. McIntyre's machines in the United States; J. McIntyre officials attended trade shows in several States but not in New Jersey; and up to four machines ended up in New Jersey. The British manufacturer had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State. Indeed, after discovery the trial court found that the "defendant does not have a single contact with New Jersey short of the machine in question ending up in this state." These facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.

It is notable that the New Jersey Supreme Court appears to agree, for it could "not find that J. McIntyre had a presence or minimum contacts in this State — in any jurisprudential sense — that would justify a New Jersey court to exercise jurisdiction in this case." The court nonetheless held that petitioner could be sued in New Jersey based on a "stream-of-commerce theory of jurisdiction." As discussed, however, the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures. The New Jersey Supreme Court also cited "significant policy reasons" to justify its holding, including the State's "strong interest in protecting its citizens from defective products." That interest is doubtless strong, but the Constitution commands restraint before discarding liberty in the name of expediency.

Due process protects petitioner's right to be subject only to lawful authority. At no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws. New Jersey is without power to adjudge the rights and liabilities of J. McIntyre, and its exercise of jurisdiction would violate due process. The contrary judgment of the New Jersey Supreme Court is *Reversed.*

JUSTICE BREYER, with whom JUSTICE ALITO joins, concurring in the judgment.

The Supreme Court of New Jersey adopted a broad understanding of the scope of personal jurisdiction based on its view that "[t]he increasingly fast-paced globalization of the world economy has removed national borders as barriers to trade." I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But this case does not present any of those issues. So I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.

In my view, the outcome of this case is determined by our precedents.

Based on the facts found by the New Jersey courts, respondent Robert Nicastro failed to meet his burden to demonstrate that it was constitutionally proper to exercise jurisdiction over petitioner J. McIntyre Machinery, Ltd. (British Manufacturer), a British firm that manufactures scrap-metal machines in Great Britain and sells them through an independent distributor in the United States (American Distributor). On that basis, I agree with the plurality that the contrary judgment of the Supreme Court of New Jersey should be reversed.

I

In asserting jurisdiction over the British Manufacturer, the Supreme Court of New Jersey relied most heavily on three primary facts as providing constitutionally sufficient "contacts" with New Jersey, thereby making it fundamentally fair to hale the British Manufacturer before its courts: (1) The American Distributor on one occasion sold and shipped one machine to a New Jersey customer, namely, Mr. Nicastro's employer, Mr. Curcio; (2) the British Manufacturer permitted, indeed wanted, its independent American Distributor to sell its machines to anyone in America willing to buy them; and (3) representatives of the British Manufacturer attended trade shows in "such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco." In my view, these facts do not provide contacts between the British firm and the State of New Jersey constitutionally sufficient to support New Jersey's assertion of jurisdiction in this case.

None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient. Rather, this Court's previous holdings suggest the contrary. The Court has held that a single sale to a customer who takes an accident-causing product to a different State (where the accident takes place) is not a sufficient basis for asserting jurisdiction. See *World-Wide Volkswagen.* And the Court, in separate opinions, has strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place. See *Asahi* (opinion of O'Connor, J.) (requiring "something more" than simply placing "a product into the stream of commerce," even if defendant is "awar[e]" that the stream "may or will sweep the product into the forum State"); (Brennan, J., concurring in part and concurring in judgment) (jurisdiction should lie where a sale in a State is part of "the regular and anticipated flow" of commerce into the State, but not where that sale is only an "edd[y]," *i.e.,* an isolated occurrence); (Stevens, J., concurring in part and concurring in judgment) (indicating that "the volume, the value, and the hazardous character" of a good may affect the jurisdictional inquiry and emphasizing Asahi's "regular course of dealing").

Here, the relevant facts found by the New Jersey Supreme Court show no "regular . . . flow" or "regular course" of sales in New Jersey; and there is no "something more," such as special state-related design, advertising, advice, marketing, or anything else. Mr. Nicastro, who here bears the burden of proving jurisdiction, has shown no specific effort by the British Manufacturer to sell in New Jersey. He has introduced no list of potential New Jersey customers who might, for example, have regularly attended trade shows. And he has not otherwise shown that the British Manufacturer "purposefully avail[ed] itself of the

privilege of conducting activities" within New Jersey, or that it delivered its goods in the stream of commerce "with the expectation that they will be purchased" by New Jersey users. *World-Wide Volkswagen.*

There may well have been other facts that Mr. Nicastro could have demonstrated in support of jurisdiction. And the dissent considers some of those facts (describing the size and scope of New Jersey's scrap-metal business). But the plaintiff bears the burden of establishing jurisdiction, and here I would take the facts precisely as the New Jersey Supreme Court stated them.

Accordingly, on the record present here, resolving this case requires no more than adhering to our precedents.

II

I would not go further. Because the incident at issue in this case does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.

A

The plurality seems to state strict rules that limit jurisdiction where a defendant does not "inten[d] to submit to the power of a sovereign" and cannot "be said to have targeted the forum." But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case.

B

But though I do not agree with the plurality's seemingly strict no-jurisdiction rule, I am not persuaded by the absolute approach adopted by the New Jersey Supreme Court and urged by respondent and his *amici.* Under that view, a producer is subject to jurisdiction for a products-liability action so long as it "knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states." In the context of this case, I cannot agree.

For one thing, to adopt this view would abandon the heretofore accepted inquiry of whether, focusing upon the relationship between "the defendant, the *forum,* and the litigation," it is fair, in light of the defendant's contacts *with that forum,* to subject the defendant to suit there. *Shaffer v. Heitner.* It would ordinarily rest jurisdiction instead upon no more than the occurrence of a product-based accident in the forum State. But this Court has rejected the notion that a defendant's amenability to suit "travel[s] with the chattel." *World-Wide Volkswagen.*

For another, I cannot reconcile so automatic a rule with the constitutional demand for "minimum contacts" and "purposeful availment," each of which rest upon a particular notion of defendant-focused fairness. A rule like the New Jersey Supreme Court's would permit every State to assert jurisdiction in a prod-

ucts-liability suit against any domestic manufacturer who sells its products (made anywhere in the United States) to a national distributor, no matter how large or small the manufacturer, no matter how distant the forum, and no matter how few the number of items that end up in the particular forum at issue. What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii). I know too little about the range of these or in-between possibilities to abandon in favor of the more absolute rule what has previously been this Court's less absolute approach.

Further, the fact that the defendant is a foreign, rather than a domestic, manufacturer makes the basic fairness of an absolute rule yet more uncertain. I am again less certain than is the New Jersey Supreme Court that the nature of international commerce has changed so significantly as to require a new approach to personal jurisdiction.

It may be that a larger firm can readily "alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *World-Wide Volkswagen*. But manufacturers come in many shapes and sizes. It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good. And a rule like the New Jersey Supreme Court suggests would require every product manufacturer, large or small, selling to American distributors to understand not only the tort law of every State, but also the wide variance in the way courts within different States apply that law

C

At a minimum, I would not work such a change to the law in the way either the plurality or the New Jersey Supreme Court suggests without a better understanding of the relevant contemporary commercial circumstances. Insofar as such considerations are relevant to any change in present law, they might be presented in a case (unlike the present one) in which the Solicitor General participates.

This case presents no such occasion, and so I again reiterate that I would adhere strictly to our precedents and the limited facts found by the New Jersey Supreme Court. And on those grounds, I do not think we can find jurisdiction in this case. Accordingly, though I agree with the plurality as to the outcome of this case, I concur only in the judgment of that opinion and not its reasoning.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

A foreign industrialist seeks to develop a market in the United States for

machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?

Under this Court's pathmarking precedent in *International Shoe*, and subsequent decisions, one would expect the answer to be unequivocally, "No." But instead, six Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our state courts, except perhaps in States where its products are sold in sizeable quantities. * * *

I

* * * McIntyre UK representatives attended every ISRI [Institute of Scrap Metal Industries] convention from 1990 through 2005. These annual expositions were held in diverse venues across the United States * * *. McIntyre UK exhibited its products at ISRI trade shows, the company acknowledged, hoping to reach anyone interested in the machine from anywhere in the United States. * * *

From at least 1995 until 2001, McIntyre UK retained an Ohio-based company, McIntyre Machinery America, Ltd. (McIntyre America), as its exclusive distributor for the entire United States. Though similarly named, the two companies were separate and independent entities with no commonality of ownership or management. * * *

In a November 23, 1999 letter to McIntyre America, McIntyre UK's president spoke plainly about the manufacturer's objective in authorizing the exclusive distributorship: "All we wish to do is sell our products in the [United] States—and get paid!" * * * And in correspondence with McIntyre America, McIntyre UK noted that the manufacturer had products liability insurance coverage.

Over the years, McIntyre America distributed several McIntyre UK products to U.S. customers * * *. In promoting McIntyre UK's products at conventions and demonstration sites and in trade journal advertisements, McIntyre America looked to McIntyre UK for direction and guidance. To achieve McIntyre UK's objective, the two companies were acting closely in concert with each other. McIntyre UK never instructed its distributor to avoid certain States or regions of the country; rather, as just noted, the manufacturer engaged McIntyre America to attract customers from anywhere in the United States.

In sum, McIntyre UK's regular attendance and exhibitions at ISRI conventions was surely a purposeful step to reach customers for its products anywhere in the United States. At least as purposeful was McIntyre UK's engagement of McIntyre America as the conduit for sales of McIntyre UK's machines to buyers throughout the United States. Given McIntyre UK's endeavors to reach and profit from the United States market as a whole, Nicastro's suit, I would hold,

has been brought in a forum entirely appropriate for the adjudication of his claim. He alleges that McIntyre UK's shear machine was defectively designed or manufactured and, as a result, caused injury to him at his workplace. The machine arrived in Nicastro's New Jersey workplace not randomly or fortuitously, but as a result of the U.S. connections and distribution system that McIntyre UK deliberately arranged. On what sensible view of the allocation of adjudicatory authority could the place of Nicastro's injury within the United States be deemed off limits for his products liability claim against a foreign manufacturer who targeted the United States (including all the States that constitute the Nation) as the territory it sought to develop?

II

* * *

Whatever the state of academic debate over the role of consent in modern jurisdictional doctrines, the plurality's notion that consent is the animating concept draws no support from controlling decisions of this Court. Quite the contrary, the Court has explained, a forum can exercise jurisdiction when its contacts with the controversy are sufficient; invocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful. *See, e.g., Burger King Corp.* (Due Process Clause permits "forum . . . to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there").[5]

III

This case is illustrative of marketing arrangements for sales in the United States common in today's commercial world.[6] A foreign-country manufacturer engages a U.S. company to promote and distribute the manufacturer's products, not in any particular State, but anywhere and everywhere in the United States the distributor can attract purchasers. The product proves defective and injures a user in the State where the user lives or works. Often, as here, the manufacturer will have liability insurance covering personal injuries caused by its products.

When industrial accidents happen, a long-arm statute in the State where the injury occurs generally permits assertion of jurisdiction, upon giving proper notice, over the foreign manufacturer. For example, the State's statute might provide, as does New York's long-arm statute, for the "exercise [of] personal jurisdiction over any non-domiciliary . . . who . . . "commits a tortious act without the state causing injury to person or property within the state, . . . if he . . . expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." * * * Or, the State might simply provide, as New Jersey does, for the exercise of jurisdiction "consistent with due process of law." * * *

The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe,* gave prime place to reason and fairness.

---

[5] * * * The plurality's notion that jurisdiction over foreign corporations depends upon the defendant's "submission," seems scarcely different from the long-discredited fiction of implied consent. It bears emphasis that a majority of this Court's members do not share the plurality's view.

[6] New Jersey is the fourth-largest destination for manufactured commodities imported into the United States, after California, Texas, and New York.

Is it not fair and reasonable, given the mode of trading of which this case is an example, to require the international seller to defend at the place its products cause injury?[9] Do not litigational convenience and choice-of-law considerations point in that direction? On what measure of reason and fairness can it be considered undue to require McIntyre UK to defend in New Jersey as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States? Is not the burden on McIntyre UK to defend in New Jersey fair, *i.e.*, a reasonable cost of transacting business internationally, in comparison to the burden on Nicastro to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey?

McIntyre UK dealt with the United States as a single market. Like most foreign manufacturers, it was concerned not with the prospect of suit in State X as opposed to State Y, but rather with its subjection to suit anywhere in the United States. * * * If McIntyre UK is answerable in the United States at all, is it not perfectly appropriate to permit the exercise of that jurisdiction at the place of injury?

In sum, McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, "purposefully availed itself" of the United States market nationwide, not a market in a single State or a discrete collection of States. McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor. "Th[e] 'purposeful availment' requirement," this Court has explained, simply "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Burger King*. Adjudicatory authority is appropriately exercised where "actions by the defendant *himself*" give rise to the affiliation with the forum. *Ibid.* How could McIntyre UK not have intended, by its actions targeting a national market, to sell products in the fourth largest destination for imports among all States of the United States and the largest scrap metal market? * * *

IV

A

While this Court has not considered in any prior case the now-prevalent pattern presented here—a foreign-country manufacturer enlisting a U.S. distributor to develop a market in the United States for the manufacturer's products—none of the Court's decisions tug against the judgment made by the New Jersey Supreme Court. McIntyre contends otherwise, citing *World-Wide Volkswagen* and *Asahi*.

* * *

The decision [in *Asahi*] was not a close call. The Court had before it a foreign plaintiff, the Taiwanese manufacturer, and a foreign defendant, the Japa-

---

[9] The plurality objects to a jurisdictional approach "divorced from traditional practice." But "the fundamental transformation of our national economy," this Court has recognized, warrants enlargement of "the permissible scope of state jurisdiction over foreign corporations and other nonresidents." McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

nese valve-assembly maker, and the indemnification dispute concerned a transaction between those parties that occurred abroad. All agreed on the bottom line: The Japanese valve-assembly manufacturer was not reasonably brought into the California courts to litigate a dispute with another foreign party over a transaction that took place outside the United States.

Given the confines of the controversy, the dueling opinions of Justice Brennan and Justice O'Connor were hardly necessary. How the Court would have "estimate[d] . . . the inconveniences," see *International Shoe,* had the injured Californian originally sued Asahi is a debatable question. Would this Court have given the same weight to the burdens on the foreign defendant had those been counterbalanced by the burdens litigating in Japan imposed on the local California plaintiff?

In any event, Asahi, unlike McIntyre UK, did not itself seek out customers in the United States, it engaged no distributor to promote its wares here, it appeared at no tradeshows in the United States, and, of course, it had no Web site advertising its products to the world. Moreover, Asahi was a component-part manufacturer with little control over the final destination of its products once they were delivered into the stream of commerce. It was important to the Court in *Asahi* that "those who use Asahi components in their final products, and sell those products in California, [would be] subject to the application of California tort law." To hold that *Asahi* controls this case would, to put it bluntly, be dead wrong.

B

The Court's judgment also puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world. Of particular note, within the European Union, in which the United Kingdom is a participant, the jurisdiction New Jersey would have exercised is not at all exceptional. The European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments provides for the exercise of specific jurisdiction "in matters relating to tort . . . in the courts for the place where the harmful event occurred." Council Reg. 44/2001, Art. 5, 2001 O.J. (L.12) 4. The European Court of Justice has interpreted this prescription to authorize jurisdiction either where the harmful act occurred or at the place of injury. See Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S. A., 1976 E.C.R. 1735, 1748–1749.

* * *

For the reasons stated, I would hold McIntyre UK answerable in New Jersey for the harm Nicastro suffered at his workplace in that State using McIntyre UK's shearing machine. While I dissent from the Court's judgment, I take heart that the plurality opinion does not speak for the Court, for that opinion would take a giant step away from the "notions of fair play and substantial justice" underlying *International Shoe*.

NOTES AND QUESTIONS FOR DISCUSSION

1. One might have supposed that the Court would take and resolve a case that would clear up the uncertainty generated by *Asahi*. What is the point of taking a

case such as *Nicastro,* or—having taken the case and come to an impasse—going ahead and deciding it? Are litigants any better off now than they were after *Asahi,* a quarter century earlier? Do any of the *Asahi* formulations of the stream-of-commerce analysis have continuing force?

2. Justice Kennedy's plurality opinion arguably echoes Justice O'Connor's in *Asahi* in demanding something more than placement of a product in the stream of commerce with awareness of its ultimate destination. But what is one to make of his repeated reference to sovereignty concerns and his suggestion that the jurisdictional focus should be on the defendant's "submission" to state power? Are these, as Justice Ginsberg suggests in her dissent, a return to pre-*International Shoe* ways of thinking? Justice Ginsburg, by contrast, seems to focus on the contacts of McIntyre UK with the U.S. as a whole, rather than with a specific state, at least when it has dealt with a U.S. distributor and sells to any willing buyer in any of the states. Does her approach make more sense than the plurality's, at least when dealing with a foreign manufacturer like McIntyre UK? The concurring opinion of Justices Breyer and Alito is the narrower of the two opinions upholding jurisdiction, and is thus pivotal. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." Marks v. United States, 430 U.S. 188, 993 (1977) (internal quotation omitted). But what precisely is the nature of their criticism of the plurality's opinion that this case does not involve "modern-day consequences"? For early commentary on *Nicastro*, see the collection of articles (mostly critical) by various authors in the Symposium, *Personal Jurisdiction for the Twenty-First Century: The Implications of* McIntyre *and* Goodyear Dunlop Tires, 63 S.C. L. Rev. 463-766 (2011).

3. *Nicastro,* like *Asahi,* involved an example of "specific jurisdiction"—where the purposefully directed activities of the defendant give rise to, or are sufficiently related to, the plaintiff's claim for relief. Given the variety of opinions generated by the two cases, how predictable will the minimum contacts inquiry now be, especially from the perspective of international actors? Note that because the concurring opinion would purport to leave matters as they were, and because theirs is arguably the controlling opinion, see Note 2, some courts have simply reverted to their post-*Asahi* precedents regarding personal jurisdiction. See, e.g., *In re* Chinese Manufactured Drywall Products Liability Litigation, 2012 U.S. Dist. LEXIS 124903 (E.D. La. Sept. 4, 2012) (reverting to controlling pre-*Nicastro* circuit court precedent).

Commercial actors—particularly international actors—want to be able to predict where they will have to defend litigation and are presumably willing to shape their behavior to achieve such predictability. At one level, there is uncertainty over the applicable state long-arm statute insofar as different states have approached the question of jurisdiction over nonresident defendants differently. And as *Asahi* and *Nicastro* show, there is also uncertainty at the constitutional level given the imprecision with which the minimum contacts inquiry has been stated and applied.

The uncertainty surrounding minimum contacts, however, is compounded still further by the considerably greater uncertainty regarding the reasonableness or fairness calculus—although the fairness inquiry tends to aid, not hurt nonresidents. See Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 Cornell L. Rev. 89, 105-106 (1999). (And note that the minimum contacts analysis in *Nicastro* does not appear to take account of the defendants' foreignness, unlike the reasonableness analysis applied in *Asahi*.) To be sure, fairness issues were not paramount in *Nicastro*, presumably because a majority found minimum contacts to be absent. On the other hand, Justice Ginsberg—who found minimum contacts—did not separately analyze the fairness factors, although (the absence of) fairness concerns are mentioned in the course of her dissent. Nevertheless, fairness issues and the uncertainty that surrounds them remain particularly significant in light of international comity concerns, since it remains unclear how such comity concerns ought to "count" in the fairness analysis. Much of the confusion undoubtedly resulted from the statement in *Asahi* that "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115. Given the absence of any real guidance beyond *Asahi* on the reasonableness inquiry, however, lower courts will continue to wrestle with such language.

4. As discussed at length in the materials at Section G, below, and as noted by Justice Ginsburg in her *Nicastro* dissent, the approach to personal jurisdiction of most European countries, and reflected in conventions and in regulations of the European Union, tends to be much more categorical than it is in the U.S. As such, it is thought to provide greater certainty and predictability regarding where suit can be brought than does the combination of long arm statutes and due process. The place of the injury, for example, is a standard basis for jurisdiction in the E.U. When you read those materials, consider whether the more categorical approach is also the more certain one. And consider as well Justice Ginsburg's suggestion that plaintiffs in the U.S. are disadvantaged compared to plaintiffs in Europe. Is the jurisdictional disadvantage for U.S. parties (if there is one) a more difficult burden than the substantive disadvantage that foreign defendants might face in the U.S.?

5. Note finally that, unless the Supreme Court makes fundamental changes in its approach to due process, or abandons the enterprise altogether in the personal jurisdiction setting, some uncertainty seems inevitable even in the domestic (all-U.S.) setting. Is there any argument that Congress (or the Court) should alter the current approach to jurisdiction over foreign defendants, but perhaps not domestic defendants? See Silberman, 63 S.C. L. Rev. at 592, 604-06 (suggesting that a national contacts focus might be appropriate for exercises of specific jurisdiction). If the U.S. should be able to agree with other nations as to acceptable bases of jurisdiction, uncertainty could at least be reduced at the transnational level. Such a treaty would be binding on state and federal courts alike and would impact not just the resolution of jurisdictional questions in the first instance, but would provide a basis for recognition and enforcement of judgments that satisfied the treaty requirements.

POST-*NICASTRO* DEVELOPMENTS

BRISTOL-MYERS SQUIBB CO. v. SUPERIOR COURT, 137 S.Ct. 1733 (2017): Six-hundred plaintiffs filed a class-action in a California state court, alleging that Bristol-Myers Squibb Co. (BMS) had violated CA state law when plaintiffs were harmed by the BMS drug Plavix—a blood thinner. BMS is a pharmaceutical company that is incorporated in Delaware, has its corporate headquarters in the state of New York, and has substantial business operations in New York and New Jersey (which is where Plavix was manufactured, labeled and processed). The trial court determined that although over 50% of BMS's employees were employed in New York and New Jersey, BMS had 160 lab employees, and 250 sales representatives in the state of California. The trial court also found that BMS had sold 187 million pills in the State over a six-year period, and received $900 million from those sales (which annually amounted to about 1% of their nationwide revenue). The class consisted of 86 residents of California, and 592 residents from 33 other states. The nonresidents did not attempt to show that they acquired Plavix from any source in California, nor did they try to prove that they were injured by Plavix in California or treated for their injuries in California.

Over the objections of BMS, the California Supreme Court upheld specific jurisdiction over BMS as to all claims, not just those of the CA plaintiffs. The state court applied a "sliding scale" approach to specific jurisdiction. "Under this approach, 'the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim.'" Based upon this sliding scale approach, it was determined that the overall number of contacts that BMS had with California (even if most of them were not ones directly giving rise to the suit) allowed for specific jurisdiction to be met as to even the *non*resident plaintiffs' claims when it might not otherwise be met. This was based upon a theory that the nonresident plaintiffs and the California resident plaintiffs were bringing claims over the same defective product and same misleading marketing, and because of BMS's history of conducting (Plavix unrelated) research in California.

In an 8-1 decision, the U.S. Supreme Court reversed. "In order for a court to exercise specific jurisdiction over a claim, there must be an 'affiliation between the forum and the underlying controversy.'" (quoting *Goodyear,* 562 U.S., at 919). The Court also invoked *Goodyear* to show that even regularly occurring sales of a product in a state cannot alone establish specific jurisdiction. The state courts' sliding scale approach which upheld jurisdiction over the nonresidents' claims, ran afoul of Due Process by relaxing the connection between the forum state and the claim(s), even though the defendant had extensive (albeit unrelated) contacts with the forum state. The Court viewed this a being an ill-disguised attempt to exercise general jurisdiction over unrelated claims by labeling it specific jurisdiction. Nonresident plaintiffs should not be allowed to assert jurisdiction over BMS when their claims had no connection with the state, just because California resident plaintiffs suffered similar harms in the state.

(Somewhat oddly, the Court's opinion began by stating that courts must focus on the interests of the forum state and the plaintiff(s), as well as the burden on the defendant. But those concerns, of course, are only triggered when the minimum-contacts/purposeful availment analysis is satisfied. Here, it was not.)

Justice Sotomayor dissented. She argued that California could exercise specific jurisdiction over nonresidents' claims for three primary reasons. First, BMS personally availed itself of California law when it contracted with McKesson Co., which marketed and sold Plavix in California; second, the fact that BMS's conduct in California was "materially identical" to its conduct in other states respecting Plavix; and finally, there would be no harm to BMS by having to defend against these claims because of their identical nature to in-state resident's claims.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FORD MOTOR CO. *v.* MONTANA EIGHTH JUDICIAL DISTRICT COURT ET AL.

CERTIORARI TO THE SUPREME COURT OF MONTANA

No. 19–368. Argued October 7, 2020—Decided March 25, 2021* Ford Motor

Company is a global auto company, incorporated in Delaware and headquartered in Michigan. Ford markets, sells, and services its products across the United States and overseas. The company also encourages a resale market for its vehicles. In each of these two cases, a state court exercised jurisdiction over Ford in a products-liability suit stemming from a car accident that injured a resident in the State. The first suit alleged that a 1996 Ford Explorer had malfunctioned, killing Markkaya Gullett near her home in Montana. In the second suit, Adam Bandemer claimed that he was injured in a collision on a Min- nesota road involving a defective 1994 Crown Victoria. Ford moved to dismiss both suits for lack of personal jurisdiction. It argued that each state court had jurisdiction only if the company's conduct in the State had given rise to the plaintiff's claims. And that causal link existed, according to Ford, only if the company had designed, manufactured, or sold in the State the particular vehicle involved in the accident. In neither suit could the plaintiff make that showing. The vehicles were designed and manufactured elsewhere, and the company had origi- nally sold the cars at issue outside the forum States. Only later resales and relocations by consumers had brought the vehicles to Montana and Minnesota. Both States' supreme courts rejected Ford's argument. Each held that the company's activities in the State had the needed connection to the plaintiff's allegations that a defective Ford caused in-state injury.

Held: The connection between the plaintiffs' claims and Ford's activities

———

*Together with No. 19–369, *Ford Motor Co.* v. *Bandemer*, on certiorari to the Supreme Court of Minnesota.

in the forum States is close enough to support specific jurisdiction. Pp. 4–18.

(a) The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant. The canonical decision in this area remains *International Shoe Co.* v. *Washington,* 326 U. S. 310. There, the Court held that a tribunal's authority de- pends on the defendant's having such "contacts" with the forum State that "the maintenance of the suit" is "reasonable" and "does not offend traditional notions of fair play and substantial justice." *Id.,* at 316–
317. In applying that formulation, the Court has long focused on the nature and extent of "the defendant's relationship to the forum State." *Bristol-Myers Squibb Co.* v. *Superior Court of Cal., San Francisco Cty.*, 582 U. S. , . That focus has led to the recognition of two types of personal jurisdiction: general and specific jurisdiction. A state court may exercise general jurisdiction only when a defendant is "essentially at home" in the State. *Goodyear Dunlop Tires Operations, S. A* v. *Brown*, 564 U. S 915, 919. Specific jurisdiction covers defendants less intimately connected with a State, but only as to a narrower class of claims. To be subject to that kind of jurisdiction, the defendant must take "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." *Hanson* v. *Denckla,* 357 U. S. 235, 253. And the plaintiff's claims "must arise out of or relate to the defendant's contacts" with the forum. *Bristol-Myers*, 582 U. S., at . Pp.4–7.

(b) Ford admits that it has "purposefully avail[ed] itself of the privi- lege of conducting activities" in both States. *Hanson,* 357 U. S., at 253. The company's claim is instead that those activities are insufficiently connected to the suits. In Ford's view, due process requires a causal link locating jurisdiction only in the State where Ford sold the car in question, or the States where Ford designed and manufactured the ve- hicle. And because none of these things occurred in Montana or Min- nesota, those States' courts have no power over these cases.

Ford's causation-only approach finds no support in this Court's re- quirement of a "connection" between a plaintiff's suit and a defendant's activities. *Bristol-Myers*, 582 U. S., at_. The most common formu- lation of that rule demands that the suit "arise out of or relate to the defendant's contacts with the forum." *Id.*, at
. The second half of that formulation, following the word "or," extends beyond causality. So the inquiry is not over if a causal test would put jurisdiction else- where. Another State's courts may yet have jurisdiction, because of a non-causal "affiliation between the forum and the underlying contro- versy, principally, [an] activity or an occurrence involving the defend- ant that takes place within the State's borders." *Id.,* at_–_.

And this Court has stated that specific jurisdiction attaches in cases

identical to this one—when a company cultivates a market for a prod- uct in the forum State and the product malfunctions there. See *World- Wide Volkswagen Corp.* v. *Woodson,* 444 U. S. 286. Here, Ford adver- tises and markets its vehicles in Montana and Minnesota, including the two models that allegedly malfunctioned in those States. Apart from sales, the company works hard to foster ongoing connections to its cars' owners. All this Montana- and Minnesota-based conduct re- lates to the claims in these cases, brought by state residents in the States' courts. Put slightly differently, because Ford had systemati- cally served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States, there is a strong "relationship among the defendant, the forum, and the litigation"—the "essential foundation" of specific jurisdiction. *Helicopteros Nacionales de Colombia, S. A.* v. *Hall,* 466 U. S. 408, 414. Allowing jurisdiction in these circumstances both treats Ford fairly and serves principles of "interstate federalism." *World-Wide Volkswagen*, 444 U. S., 293. Pp. 8–15.

(c) *Bristol-Myers* and *Walden* v. *Fiore,* 571 U. S. 277, reinforce all that the Court has said about why Montana's and Minnesota's courts may decide these cases. In *Bristol-Myers*, the Court found jurisdiction improper because the forum State, and the defendant's activities there, lacked any connection to the plaintiffs' claims. 582 U. S., at . That is not true of these cases, where the plaintiffs are residents of the forum States, used the allegedly defective products in the forum States, and suffered injuries when those products malfunctioned there. And *Walden* does not show, as Ford claims, that a plaintiff's residence and place of injury can never support jurisdiction. The de- fendant in *Walden* had never formed any contact with the forum State. Ford, by contrast, has a host of forum connections. The place of a plain- tiff's injury and residence may be relevant in assessing the link be- tween those connections and the plaintiff's suit. Pp. 15–18.

No. 19–368, 395 Mont. 478, 443 P. 3d 407, and No. 19–369, 931 N. W. 2d 744, affirmed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, SOTOMAYOR, and KAVANAUGH, JJ., joined. ALITO, J., filed an opinion concurring in the judgment. GORSUCH, J., filed an opinion con- curring in the judgment, in which THOMAS, J., joined. BARRETT, J., took no part in the consideration or decision of the cases.

C. GENERAL JURISDICTION

Consider the possibility that a plaintiff might attempt to assert jurisdiction based on a foreign defendant's contacts with a state, but when it cannot be readily argued that the contacts in question were ones that gave rise to the lawsuit. When there is little or no nexus between the contacts and the underlying litigation, consider what sort of showing the plaintiff should have to make as a precondition to the successful assertion of jurisdiction. Must they be pervasive—in the way that a resident of a state could be said to have pervasive contacts with it, or a corporation in its principal place of business? Or could a lesser showing suffice?

Goodyear Dunlop Tires Operations, S.A. v. Brown

Supreme Court of the United States, 2011.

131 S.Ct. 2846.

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the jurisdiction of state courts over corporations organized and operating abroad. We address, in particular, this question: Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?

A bus accident outside Paris that took the lives of two 13–year–old boys from North Carolina gave rise to the litigation we here consider. Attributing the accident to a defective tire manufactured in Turkey at the plant of a foreign subsidiary of The Goodyear Tire and Rubber Company (Goodyear USA), the boys' parents commenced an action for damages in a North Carolina state court; they named as defendants Goodyear USA, an Ohio corporation, and three of its subsidiaries, organized and operating, respectively, in Turkey, France, and Luxembourg. Goodyear USA, which had plants in North Carolina and regularly engaged in commercial activity there, did not contest the North Carolina court's jurisdiction over it; Goodyear USA's foreign subsidiaries, however, maintained that North Carolina lacked adjudicatory authority over them.

A state court's assertion of jurisdiction exposes defendants to the State's coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause. International Shoe Co. v. Washington, 326 U.S. 310 (1945) (assertion of jurisdiction over out-of-state corporation must comply with "traditional notions of fair play and substantial justice"). Opinions in the wake of the pathmarking *International Shoe* decision have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 nn. 8-9 (1984).

A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State. See *International Shoe*. Specific jurisdiction, on the other hand, depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation. In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction

Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy. The North Carolina Court of Appeals so acknowledged. Were the foreign subsidiaries nonetheless amenable to general jurisdiction in North Carolina courts? Confusing or blending general and specific jurisdictional inquiries, the North Carolina courts answered yes. Some of the tires made abroad by Goodyear's

foreign subsidiaries, the North Carolina Court of Appeals stressed, had reached North Carolina through the stream of commerce; that connection, the Court of Appeals believed, gave North Carolina courts the handle needed for the exercise of general jurisdiction over the foreign corporations.

A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction. Such a connection does not establish the "continuous and systematic" affiliation necessary to empower North Carolina courts to entertain claims unrelated to the foreign corporation's contacts with the State.

I

* * *

Goodyear Luxembourg Tires, SA (Goodyear Luxembourg), Goodyear Lastikleri T.A.S. (Goodyear Turkey), and Goodyear Dunlop Tires France, SA (Goodyear France), petitioners here, were named as defendants. Incorporated in Luxembourg, Turkey, and France, respectively, petitioners are indirect subsidiaries of Goodyear USA, an Ohio corporation also named as a defendant in the suit. Petitioners manufacture tires primarily for sale in European and Asian markets. Their tires differ in size and construction from tires ordinarily sold in the United States. They are designed to carry significantly heavier loads, and to serve under road conditions and speed limits in the manufacturers' primary markets.

In contrast to the parent company, Goodyear USA, which does not contest the North Carolina courts' personal jurisdiction over it, petitioners are not registered to do business in North Carolina. They have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers. Even so, a small percentage of petitioners' tires (tens of thousands out of tens of millions manufactured between 2004 and 2007) were distributed within North Carolina by other Goodyear USA affiliates. These tires were typically custom ordered to equip specialized vehicles such as cement mixers, waste haulers, and boat and horse trailers. Petitioners state, and respondents do not here deny, that the type of tire involved in the accident, a Goodyear Regional RHS tire manufactured by Goodyear Turkey, was never distributed in North Carolina.

Petitioners moved to dismiss the claims against them for want of personal jurisdiction. The trial court denied the motion, and the North Carolina Court of Appeals affirmed. Acknowledging that the claims neither related to, nor arose from, petitioners' contacts with North Carolina, the Court of Appeals confined its analysis to "general rather than specific jurisdiction," which the court recognized required a "higher threshold" showing: A defendant must have "continuous and systematic contacts" with the forum. That threshold was crossed, the court determined, when petitioners placed their tires "in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina."

Nothing in the record, the court observed, indicated that petitioners "took any affirmative action to cause tires which they had manufactured to be shipped

into North Carolina." The court found, however, that tires made by petitioners reached North Carolina as a consequence of a "highly-organized distribution process" involving other Goodyear USA subsidiaries. Petitioners, the court noted, made no attempt to keep these tires from reaching the North Carolina market. Indeed, the very tire involved in the accident, the court observed, conformed to tire standards established by the U.S. Department of Transportation and bore markings required for sale in the United States.[1] As further support, the court invoked North Carolina's interest in providing a forum in which its citizens are able to seek redress for their injuries, and noted the hardship North Carolina plaintiffs would experience were they required to litigate their claims in France, a country to which they have no ties. The North Carolina Supreme Court denied discretionary review.

We granted certiorari to decide whether the general jurisdiction the North Carolina courts asserted over petitioners is consistent with the Due Process Clause of the Fourteenth Amendment.

II

A

The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant. Shaffer v. Heitner, 433 U.S. 186, 207 (1977). The canonical opinion in this area remains *International Shoe*, in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

Endeavoring to give specific content to the "fair play and substantial justice" concept, the Court in International Shoe classified cases involving out-of-state corporate defendants. First, as in *International Shoe* itself, jurisdiction unquestionably could be asserted where the corporation's in-state activity is continuous and systematic and that activity gave rise to the episode-in-suit. Further, the Court observed, the commission of certain "single or occasional acts" in a State may be sufficient to render a corporation answerable in that State with respect to those acts, though not with respect to matters unrelated to the forum connections. The heading courts today use to encompass these two *International Shoe* categories is "specific jurisdiction." Adjudicatory authority is "specific" when the suit "aris[es] out of or relate[s] to the defendant's contacts with the forum." *Helicopteros*.

International Shoe distinguished from cases that fit within the "specific jurisdiction" categories, "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." Adjudicatory authority so grounded is today called "general jurisdiction." *Heli-*

---

[1] Such markings do not necessarily show that any of the tires were destined for sale in the United States. To facilitate trade, the Solicitor General explained, the United States encourages other countries to treat compliance with Department of Transportation standards, including through use of DOT markings, as evidence that the products are safely manufactured.

copteros. For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.

Since *International Shoe*, this Court's decisions have elaborated primarily on circumstances that warrant the exercise of specific jurisdiction, particularly in cases involving "single or occasional acts" occurring or having their impact within the forum State. As a rule in these cases, this Court has inquired whether there was "some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958). See, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287 (1980) (Oklahoma court may not exercise personal jurisdiction "over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma"); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-75 (1985) (franchisor headquartered in Florida may maintain breach-of-contract action in Florida against Michigan franchisees, where agreement contemplated on-going interactions between franchisees and franchisor's headquarters); Asahi Metal Industry Co. v. Superior Court of Cal., 480 U.S. 102, 105 (1987) (Taiwanese tire manufacturer settled product liability action brought in California and sought indemnification there from Japanese valve assembly manufacturer; Japanese company's "mere awareness . . . that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce" held insufficient to permit California court's adjudication of Taiwanese company's cross-complaint) (opinion of O'CONNOR, J.).

In only two decisions postdating *International Shoe*, has this Court considered whether an out-of-state corporate defendant's in-state contacts were sufficiently "continuous and systematic" to justify the exercise of general jurisdiction over claims unrelated to those contacts: Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952) (general jurisdiction appropriately exercised over Philippine corporation sued in Ohio, where the company's affairs were overseen during World War II); and *Helicopteros* (helicopter owned by Colombian corporation crashed in Peru; survivors of U.S. citizens who died in the crash, the Court held, could not maintain wrongful-death actions against the Colombian corporation in Texas, for the corporation's helicopter purchases and purchase-linked activity in Texas were insufficient to subject it to Texas court's general jurisdiction).

B

To justify the exercise of general jurisdiction over petitioners, the North Carolina courts relied on the petitioners' placement of their tires in the stream of commerce. The stream-of-commerce metaphor has been invoked frequently in lower court decisions permitting jurisdiction in products liability cases in which the product has traveled through an extensive chain of distribution before reaching the ultimate consumer. Typically, in such cases, a nonresident defendant, acting outside the forum, places in the stream of commerce a product that ultimately causes harm inside the forum.

Many States have enacted long-arm statutes authorizing courts to exercise specific jurisdiction over manufacturers when the events in suit, or some of them, occurred within the forum state. For example, the "Local Injury; Foreign Act" subsection of North Carolina's long-arm statute authorizes North Carolina courts to exercise personal jurisdiction in "any action claiming injury to person or property within this State arising out of [the defendant's] act or omission outside this State," if, "in addition, at or about the time of the injury, products manufactured by the defendant were used or consumed, within this State in the ordinary course of trade." As the North Carolina Court of Appeals recognized, this provision of the State's long-arm statute "does not apply to this case," for both the act alleged to have caused injury (the fabrication of the allegedly defective tire) and its impact (the accident) occurred outside the forum.[4]

The North Carolina court's stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction. Flow of a manufacturer's products into the forum, we have explained, may bolster an affiliation germane to specific jurisdiction. See, e.g., *World-Wide Volkswagen* (where "the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve . . . the market for its product in [several] States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise *has there been the source of injury to its owner or to others*") (emphasis added). But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant.

A corporation's "continuous activity of some sorts within a state," *International Shoe* instructed, "is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." Our 1952 decision in *Perkins v. Benguet* remains "[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum."

Sued in Ohio, the defendant in Perkins was a Philippine mining corporation that had ceased activities in the Philippines during World War II. To the extent that the company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio: the corporation's president maintained his office there, kept the company files in that office, and supervised from the Ohio office the necessarily limited wartime activities of the company. Although the claim-in-suit did not arise in Ohio, this Court ruled that it would not violate due process for Ohio to adjudicate the controversy.

We next addressed the exercise of general jurisdiction over an out-of-state corporation over three decades later, in *Helicopteros*. In that case, survivors of United States citizens who died in a helicopter crash in Peru instituted wrongful-death actions in a Texas state court against the owner and operator of the heli-

---

[4] The court instead relied on N.C. Gen.Stat. Ann. § 1–75.4(1)(d), which provides for jurisdiction "whether the claim arises within or without [the] State," when the defendant "[i]s engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." This provision, the North Carolina Supreme Court has held, was "intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process." Dillon v. Numismatic Funding Corp., 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977).

copter, a Colombian corporation. The Colombian corporation had no place of business in Texas and was not licensed to do business there. "Basically, [the company's] contacts with Texas consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from [a Texas enterprise] for substantial sums; and sending personnel to [Texas] for training." [*Id.*] These links to Texas, we determined, did not "constitute the kind of continuous and systematic general business contacts . . . found to exist in *Perkins*," and were insufficient to support the exercise of jurisdiction over a claim that neither "arose out of nor related to" the defendant's activities in Texas.

Helicopteros concluded that "mere purchases [made in the forum State], even if occurring at regular intervals, are not enough to warrant a State's assertion of [general] jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." We see no reason to differentiate from the ties to Texas held insufficient in *Helicopteros*, the sales of petitioners' tires sporadically made in North Carolina through intermediaries. Under the sprawling view of general jurisdiction urged by respondents and embraced by the North Carolina Court of Appeals, any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed. But cf. *World-Wide Volkswagen* (every seller of chattels does not, by virtue of the sale, "appoint the chattel his agent for service of process").

Measured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction. Unlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina. Their attenuated connections to the State fall far short of the "the continuous and systematic general business contacts" necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State. *Helicopteros*.[5]

Respondents belatedly assert a "single enterprise" theory, asking us to consolidate petitioners' ties to North Carolina with those of Goodyear USA and other Goodyear entities. In effect, respondents would have us pierce Goodyear corporate veils, at least for jurisdictional purposes. Neither below nor in their brief in opposition to the petition for certiorari did respondents urge disregard of petitioners' discrete status as subsidiaries and treatment of all Goodyear entities as a "unitary business," so that jurisdiction over the parent would draw in the subsidiaries as well.[6] Respondents have therefore forfeited this contention, and we do

[5] [T]he North Carolina Court of Appeals invoked the State's "well-recognized interest in providing a forum in which its citizens are able to seek redress for injuries that they have sustained." But general jurisdiction to adjudicate has in United States practice never been based on the plaintiff's relationship to the forum. There is nothing in our law comparable to article 14 of the Civil Code of France (1804) under which the French nationality of the plaintiff is a sufficient ground for jurisdiction. When a defendant's act outside the forum causes injury in the forum, by contrast, a plaintiff's residence in the forum may strengthen the case for the exercise of specific jurisdiction. See Calder v. Jones, 465 U.S. 783 (1984).

[6] In the brief they filed in the North Carolina Court of Appeals, respondents stated that petitioners

not address it. [Reversed.]

NOTES AND QUESTIONS FOR DISCUSSION

1. Does the *Goodyear* opinion suggest that only those corporations that are either incorporated in, or have their principal place of business in, the forum state, will be sufficiently "at home" to be subject to general jurisdiction? See Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. Rev. 527, 531-32 (2012) (stating that this is "the clear implication" of the decision). Note that Justice Kennedy's *Nicastro* plurality appears to reads *Goodyear* in a similar manner, stating that a corporation's state of incorporation and principal place of business "indicates general submission to [that] State's powers." If that is a fair reading of *Goodyear*, then when—if ever—will it be possible to secure general jurisdiction in the U.S. over a foreign corporation?

2. The classic example of an exercise of general jurisdiction in reference to an individual would be a suit brought in defendant's domicile. In the individual context, domicile is established by physical presence coupled with the intent to remain for the indefinite future. See Restatement (Second) of Conflict of Laws §§ 11-20 (1971). As the Court once stated, "Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment[.]" Milliken v. Meyer, 311 U.S. 457, 462 (1940) (upholding jurisdiction over domiciliary of forum state, even though defendant was served outside of state). See also Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 667-70 (1988).

3. In the corporate context, general jurisdiction might be premised on the corporation's principal place of business or its headquarters, or its place(s) of incorporation. In Perkins v. Benguet Mining, 342 U.S. 437 (1952) (discussed in *Goodyear*), Ohio had all but become the wartime domicile of a Philippine corporation. It is hardly unfair that a defendant should be suable in its own corporate backyard, even if the events giving rise to the lawsuit may have occurred elsewhere. By contrast, simple registration to do business in a state should, by itself, be insufficient. See, e.g., Washington Equip. Mfg. Co. v. Concrete Placing Co., 931 P.2d 170 (Wash. Ct. App. 1997); see also Ratliff v. Cooper Labs., Inc. 444 F.2d 745, 748 (4th Cir.), cert. denied, 404 U.S. 948 (1971) (stating that being qualified to do business in a state is "of no special weight" in determining general personal jurisdiction over a corporation). In addition, constitutional problems might attend a state's insistence as a condition of doing business that an agent for service of process be appointed for anything other than lawsuits arising from in-state-related activities. See Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888 (1988) (striking down, on dormant commerce clause grounds, state statute that required corporation's submission to general jurisdic-

---

were part of an "integrated world-wide efforts to design, manufacture, market and sell their tires in the United States, including in North Carolina." Read in context, that assertion was offered in support of a narrower proposition: The distribution of petitioners' tires in North Carolina, respondents maintained, demonstrated petitioners' own "calculated and deliberate efforts to take advantage of the North Carolina market." As already explained, even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.

tion of state as precondition to securing benefits of a local statute of limitations and avoid tolling). By use of the "at home" metaphor, has the *Goodyear* Court substituted for the older notion of "presence," a notion of domicile? See Steven B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?* 33 U. Pa. J. Int'l L. 663, 670 (2012). Should anything *less* than a showing akin to that of an individual's domicile suffice for corporate general jurisdiction, given the far-ranging consequences associated with it? See "Note on 'Doing Business' as a Basis for General Jurisdiction," below.

4. *Goodyear* relied heavily on the Court's prior decision in the area of general jurisdiction in **HELICOPTEROS NACIONALES DE COLUMBIA, S.A. v. HALL, 466, U.S. 408 (1984).** In *Helicopteros*, suit was brought in Texas state courts by a widow suing for the wrongful death of her husband who died in a helicopter crash in Peru. At the time of his death, the decedent (a U.S. national) was working on the construction of a pipeline in South America. She sued three defendants. (1) Bell Helicopters, a Ft. Worth, Texas based corporation that made the helicopter that crashed and that trained the pilots; (2) WSH, the joint venture consisting of Texas citizens, that was doing the work on the pipeline; and (3) Helicol (Helicopteros Nacionales de Columbia), a Columbian corporation that provided the pilots and air taxi service for the project.

Plaintiff won a million dollar verdict against Helicol whose jurisdictional objections were rejected by the Texas courts, and Helicol appealed to the U.S. Supreme Court. Curiously, the plaintiff argued only that Helicol's contacts with Texas were sufficiently great that it could be sued there even if the claim did *not* arise out of or relate to Helicol's activities in Texas. Although the *Helicopteros* Court and the *Goodyear* Court both minimized Helicol's contacts with Texas, they were hardly inconsiderable.

- Helicol had purchased substantially all of its helicopter fleet in Ft. Worth, Texas.
- Helicol did a total of approximately $4,000,000 worth of business in Ft. Worth continuously from 1970 through 1976 as a purchaser not only of the helicopters, but of equipment parts and services (i.e., approximately $50,000/month over a seven year period).
- Helicol's CEO went to Houtston, Texas to negotiate with WSH, which resulted in the contract to provide helicopter service in question. In that contract, Helicol agreed to obtain liability insurance payable in U.S> dollars to cover a claim such as this.
- Helicol sent pilots to Fort Worth during the 1970-76 period to pick up helicopters and fly them back to Columbia. Helicol sent maintenance personnel as well as pilots to Fort Worth to be trained, and thus had employees in Texas continuously during that same six-year period.
- Helicol recived roughly $5,000,000 from WSH for their services which payments were made from a bank in Houston and deposited to Helicol's bank in New York.

- Helicol also directed a Houston Bank to make payments to Rocky Mountain Helicopters to lease a large helicopter capable of moving heavier loads for WSH.

The Supreme Court was unimpressed with the plaintiff's showing. It characterized the contacts as follows:

> * * * Basically, Helicol's contacts with Texas consisted of sending its chief executive officer to Houston for a contract-negotiation session, accepting into its New York bank account checks drawn on a Houston bank, purchasing helicopters, equipment, and training services from Bell Helicopter for substantial sums, and sending personnel to Bell's facilities in Fort Worth for training.
>
> The one trip to Houston by Helicol's chief executive officer for the purpose of negotiating the transportation-services contract with Consorcio/WSH cannot be described or regarded as a contact of a "continuous and systematic" nature, as *Perkins* described it, and thus cannot support an assertion of in personam jurisdiction over Helicol by a Texas court. Similarly, Helicol's acceptance from Consorcio/WSH of checks drawn on a Texas bank is of negligible significance for purposes of determining whether Helicol had sufficient contacts in Texas. * * *
>
> The Texas Supreme Court focused on the purchases and the related training trips in finding contacts sufficient to support an assertion of jurisdiction. We do not agree with that assessment, for the Court's opinion in Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923) (Brandeis, J., for a unanimous tribunal), makes clear that purchases and related trips, standing alone, are not a sufficient basis for a State's assertion of jurisdiction. * * *
>
> In accordance with *Rosenberg*, we hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions. Nor can we conclude that the fact that Helicol sent personnel into Texas for training in connection with the purchase of helicopters and equipment in that State in any way enhanced the nature of Helicol's contacts with Texas. The training was a part of the package of goods and services purchased by Helicol from Bell Helicopter. The brief presence of Helicol employees in Texas for the purpose of attending the training sessions is no more a significant contact than were the trips to New York made by the buyer for the retail store in *Rosenberg*.

Helicopteros, 466 U.S. at 416-18.

5. Is the Court's characterization of Helicol's contacts with Texas fair to the facts? And isn't *Helicopteros* a far more difficult case than *Goodyear*? Understand the consequences of a finding of general jurisdiction. If contacts such as these in *Helicopteros* were enough to allow for the exercise of general jurisdiction in Texas over Helicol, then they would be sufficient to allow for personal jurisdiction in Texas over Helicol for any lawsuit against it arising anywhere in the world over anything. Indeed, that is what *general* jurisdiction is all about.

Perhaps these dramatic consequences were what led the Court in *Goodyear* to clarify that such jurisdiction could only be upheld in a forum in which the corporation was effectively "at home."

6. The Court in *Helicopteros* proceeds on the assumption that the defendant had argued only for "general" jurisdiction over Helicol in Texas, rather than "specific" jurisdiction. Would the outcome have been different had the plaintiff argued for specific jurisdiction? Suppose that the underlying suit had been brought against Helicol by Bell Helicopters for failure to pay for aircraft delivered by Bell pursuant to their contractual agreement. Would specific jurisdiction in Texas be any easier an argument at this point? Why?

D. TRANSIENT JURISDICTION

A time-honored form of acquiring general jurisdiction over a nonresident defendant in English and U.S. courts has been personal service of process on the defendant within the jurisdiction in which suit has been filed. Despite the cloud of constitutional uncertainty that may have hovered over such exercise of judicial power after the Supreme Court's decision in Shaffer v. Heitner, 433 U.S. 186 (1977)—with its admonition that "all" exercises of jurisdiction should be tested by the minimum contacts standard—it survived more or less intact in **BURNHAM v. SUPERIOR COURT, 495 U.S. 604 (1990)**. Although there were differing constitutional rationales offered in *Burnham* for the propriety of such "tag" jurisdiction, it remains an option for securing personal jurisdiction over a foreign defendant in the U.S. Unfortunately, there was no majority opinion for upholding the particular exercise of transient jurisdiction.

Justice Scalia sought to reconcile tag jurisdiction with due process by focusing on the fact that such a means of acquiring jurisdiction would have been due process at the time of the ratification of the Fourteenth Amendment in 1868.

> Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State. The view developed early that each State had the power to hale before its courts any individual who could be found within its borders, and that once having acquired jurisdiction over such a person by properly serving him with process, the State could retain jurisdiction to enter judgment against him, no matter how fleeting his visit. See, e. g., Potter v. Allin, 2 Root 63, 67 (Conn. 1793); Barrell v. Benjamin, 15 Mass. 354 (1819). That view had antecedents in English common-law practice, which sometimes allowed "transitory" actions, arising out of events outside the country, to be maintained against seemingly nonresident defendants who were present in England. See, e.g., Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (K.B. 1774); Cartwright v. Pettus, 22 Eng. Rep. 916 (Ch. 1675).

Justice Story believed the principle, which he traced to Roman origins, to be firmly grounded in English tradition: "[B]y the common law[,] personal actions, being transitory, may be brought in any place, where the party defendant may be found," for "every nation may * * * rightfully exercise jurisdiction over all persons within its domains." J. Story, Commentaries on the Conflict of Laws 554, 543 (1846). See also id., 530-538; Picquet v. Swan, supra, at 611-612 (Story, J.) ("Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced, on such process, against him").

Recent scholarship has suggested that English tradition was not as clear as Story thought, * * * Accurate or not, however, judging by the evidence of contemporaneous or near-contemporaneous decisions, one must conclude that Story's understanding was shared by American courts at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted. * * *

Despite this formidable body of precedent, petitioner contends, in reliance on our decisions applying the *International Shoe* standard, that in the absence of "continuous and systematic" contacts with the forum, a nonresident defendant can be subjected to judgment only as to matters that arise out of or relate to his contacts with the forum. This argument rests on a thorough misunderstanding of our cases. * * *

Nothing in *International Shoe* or the cases that have followed it, * * * offers support for the very different proposition petitioner seeks to establish today: that a defendant's presence in the forum is not only unnecessary to validate novel, nontraditional assertions of jurisdiction, but is itself no longer sufficient to establish jurisdiction. That proposition is unfaithful to both elementary logic and the foundations of our due process jurisprudence. The distinction between what is needed to support novel procedures and what is needed to sustain traditional ones is fundamental, as we observed over a century ago:

> "[A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. * * * [That which], in substance, has been immemorially the actual law of the land * * * therefor[e] is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians." Hurtado v. California, 110 U.S. 516, 528-529 (1884).

The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of "traditional notions of fair play and substantial justice." That

> standard was developed by analogy to "physical presence," and it would be perverse to say it could now be turned against that touchstone of jurisdiction.

Burnham, 495 U.S. at 610-19.

Justice Brennan sought to distance himself from Justice Scalia's opinion in *Burnham*, and was not prepared to conclude, as Justice Scalia seemed to be, that tag jurisdiction would always comport with due process. Instead, he concluded that, in the circumstances of the case before the Court, the exercise of tag jurisdiction comported with the reasonableness and fundamental fairness requirements of due process as contemporarily understood.

> I agree * * * that the Due Process Clause of the Fourteenth Amendment generally permits a state court to exercise jurisdiction over a defendant if he is served with process while voluntarily present in the forum State. I do not perceive the need, however, to decide that a jurisdictional rule that "'has been immemorially the actual law of the land,'" automatically comports with due process simply by virtue of its "pedigree." Although I agree that history is an important factor in establishing whether a jurisdictional rule satisfies due process requirements, I cannot agree that it is the only factor such that all traditional rules of jurisdiction are, ipso facto, forever constitutional. Unlike JUSTICE SCALIA, I would undertake an "independent inquiry into the * * * fairness of the prevailing in-state service rule." I therefore concur only in the judgment.
>
> I believe that the approach adopted by JUSTICE SCALIA's opinion today—reliance solely on historical pedigree—is foreclosed by our decisions in International Shoe Co. v. Washington, 326 U.S. 310 (1945), and Shaffer v. Heitner, 433 U.S. 186 (1977). In *International Shoe*, we held that a state court's assertion of personal jurisdiction does not violate the Due Process Clause if it is consistent with "'traditional notions of fair play and substantial justice.'" 326 U.S., at 316, quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940). In *Shaffer*, we stated that "*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." 433 U.S., at 212 (emphasis added). The critical insight of *Shaffer* is that all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process. No longer were we content to limit our jurisdictional analysis to pronouncements that "[t]he foundation of jurisdiction is physical power," McDonald v. Mabee, 243 U.S. 90, 91 (1917), and that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." Pennoyer v. Neff, 95 U.S. 714, 722 (1878). While acknowledging that "history must be considered as supporting the proposition that jurisdiction based solely on the presence of property satisfied[d] the demands of due process," we found that this factor could not be "decisive." 433 U.S. at 211-12. We recognized that "'[t]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." Id., at 212 (citations omitted).

Id. at 628-30 (Brennan, J., concurring in the judgment).

The defendant's contacts with the relevant forum in *Burnham*, however, were few and far between, consisting only of a three day visit to see his estranged family. Nevertheless, Justice Brennan was prepared to uphold—as consistent with his understanding of contemporary notions of due process—the exercise of general jurisdiction over the defendant, thus leaving open the question of whether anything less would have sufficed.

NOTES AND QUESTIONS FOR DISCUSSION

1. Within the U.S., the main contemporary issue raised by transient (or tag) jurisdiction has had to do with the use of force and coercion to lure a party into a particular jurisdiction for purposes of service. See, e.g., Voice Systems Marketing Co. v. Appropriate Technology Corp., 153 F.R.D. 117, 119-20 (E.D. Mich. 1994) (quashing service when defendant was tricked into staying within the jurisdiction for an extra day, primarily so that plaintiff's attorney could arrange for service of newly filed complaint). And, of course, there are some colorful examples of applications of transient jurisdiction. See, e.g., Amusement Equipment, Inc. v. Mordelt, 779 F.2d 264 (5th Cir. 1985) (upholding tag jurisdiction in Louisiana in a suit brought by Florida corporation against a German defendant over a contract regarding a shipment of goods from Germany to Florida; German defendant was served with process while attending convention in New Orleans); Grace v. McArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (upholding service in airplane over Arkansas airspace). There is doubt, however, whether corporations, as opposed to natural persons, are amenable to tag jurisdiction at all. See Siemer v. Learjet Acquisition Corp., 966 F.2d 179 (5th Cir. 1992), cert. denied, 506 U.S. 1080 (1993) (citing relevant authorities and stating: "To assert, as plainitffs do, that mere service on a corporate agent automatically confers general jurisdiction displays a fundamental misconception of corporate jurisdictional principles.").

2. One of the primary transnational uses of transient jurisdiction in U.S. courts today is in connection with human rights litigation. See, e.g., Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), in which the court upheld personal service in New York on a Serbian leader who was outside the Russian Embassy while visiting the United Nations. (We address the topic of civil litigation under the Alien Tort Statute and related provisions is taken up in Chapter 2.) Because the successful invocation of "tag" jurisdiction is a form of general jurisdiction, there need not be any relationship between the defendants contacts with the state in which he is tagged and the underlying action.

3. When general jurisdiction via tag is found to exist in an American jurisdiction, it might still be possible for the defendant to have the forum changed to another forum through assertion of transfer of venue in the proper case or *forum non conveniens*. See Chapter 5. Would such largely discretionary devices take care of any fairness problems associated with the broad assertion of general jurisdiction associated with tag? Should it matter whether the forum jurisdiction rarely or never applied *forum non conveniens* principles? Note that at least one country (France) has traditionally allowed for a kind of reverse general jurisdiction based on *the plaintiff's* French domicile, no matter what

relationship the lawsuit or the defendant has to France (apart from the existence of a French plaintiff). See Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 Brook. J. Int'l L. 111, 115 (1998) (noting the practice but questioning its impact). Is this sort of jurisdiction any worse than transient jurisdiction sanctioned by *Burnham*?

A COMPARATIVE NOTE ON TRANSIENT JURISDICTION

Interestingly, tag jurisdiction is not well received by many countries outside the U.S., most of which do not permit it as a matter of their own law. See Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 Alb. L. Rev. 1283, 1296-97 (1998); Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction,* 22 Rutgers L.J. 611, 613-16 (1991); see also Restatement (Third) of Foreign Relations Law of the United States §421 & Reporters' Note 5 (1987) (declaring that transitory jurisdiction "is no longer acceptable under international law if that is the only basis for jurisdiction and the action in question is unrelated to that state"). Moreover, U.S. judgments based on tag or transent jurisdiction do not travel well across borders for purposes of recognition and enforcement. See Chapter 8. What do you suppose is the basis for the hostility to this sort of exercise of jurisdiction? The general unfairness associated with the potential "surprise" nature of such assertions of jurisdiction—particularly over foreign defendants? The possible unrelatedness of the forum to the underlying dispute? Its intellectual heritage in eroded notions of "territoriality"? See Juenger, *supra* (Note 3) at 160-161 & n.130 (noting that "tag jurisdiction was among the exorbitant exercises of jurisdiction that many would place on the proverbial 'blacklist'"); Clermont & Palmer, 58 Me. L. Rev. at 480-81.

G. Personal Jurisdiction in Europe—The Brussels Convention and Regulation

In this subsection we discuss the application of jurisdictional rules in cross-border litigation within the European Union. For over thirty years, these rules were embodied in the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention). See Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L. 299) 32, reprinted in 8 I.L.M. 299 (1969), as amended by 1990 O.J. (C 189) 1, reprinted as amended in 29 I.L.M. 1413 (1990). It was only in 2002 that a so-called Council Regulation replaced the Convention. See Council Regulation 44/2001 on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters. O.J. (L 12) 1 (Jan. 16, 2001). The Regulation, called Brussel I Regulation, did not introduce major changes, however, meaning that the existing case law under the Convention continued to provide important guidance in future disputes. On December 6, 2012, the Council of the EU Justice Ministers adopted a recast version of the Brussels I Regulation. (Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). Official Journal, OJ 20 December 2012, L 351/1)), reprinted in Appendix A. This most recent revision of jurisdictional/judgment recognition rules for EU-cross-border disputes within the EU has applied since January 2015. It also draws heavily on preexisting case law that emerged under the two preceding regulatory regimes, i. e., under the Brussels Convention and the Brussels I Regulation

In order better to understand the make-up and operation of this body of law, one must first realize that the driving force behind the original instrument, the 1968 Convention, was the desire to advance the goal of market integration in

Europe. The European Economic Community (EEC) Treaty aimed at the creation of a common market and, for that purpose, contained explicit rules for the free movement of persons, goods, services and capital. Market integration requires more, however. Among other things, it requires the free movement of judgments—that is, the ability of market participants involved in commercial disputes to seek redress before the courts of one member state and to swiftly enforce the resultant judgment in another. Although the EEC Treaty did not contain directly applicable rules facilitating judgment recognition throughout the Community, the drafters recognized that need by calling on Member States to enter into negotiations with a view towards that end. In 1968, these negotiations resulted in the Brussels Convention, a body of law that not only established the rules for the cross-border recognition of judgments in civil or commercial litigation but also set out a limited number of circumstances in which courts may exercise personal jurisdiction over defendants domiciled in contracting states. Twenty years later, in 1988, the EC member states and the members of the European Free Trade Association (then: Austria, Finland, Iceland, Norway, Sweden Switzerland) entered into the so-called Lugano Convention which contains, for the most part, provisions that are identical with those of the Brussels Convention. See Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, reprinted in 28 I.L.M. 620 (1989) (Add newest version)

The adoption of an exclusive set of jurisdictional rules proved crucial for the success of the Convention and its successors The community-wide consensus over when the exercise of personal jurisdiction is appropriate effectively removed a major obstacle in international judgment recognition proceedings. Courts faced with a judgment rendered under these rules need not (and, in principle, must not) review the jurisdictional findings of the first tribunal. Note that the following summary draws on the jurisdictional rules of the most recent regulation, the recast Brussels Regulation, applicable as of January 2015:

The system is premised on the general jurisdictional principle that defendants domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. See Art. 4.1. Persons domiciled in a Member State may be sued in the courts of another Member State only if one of the special jurisdiction rules of the Regulation so permits. See Art. 5.1. This "white list" of permissible jurisdictional bases provides, for example, that in matters relating to contract the plaintiff may sue at the place of performance, Art. 7.1), with Article 7 providing further details aimed at identifying this place. In matters of torts, the suit may be brought where the harmful event occurred or may occur (Art. 7.3), and with respect to disputes arising out of operation of a branch agency or other establishment, the litigation may proceed in the courts in which the branch, agency or other establishment is located. The exhaustive list of permissible jurisdictional bases also includes specific rules protecting non-commercial parties who are considered systemically weaker, such as insurance policy holders (Arts. 10-16)) and consumers (Arts. 17-19), from having to litigate in foreign courts. These parties may sue and must be sued in the courts of the Contracting State in which they are domiciled.

For the most part, this white list provides a degree of certainty that does not come at the expense of procedural fairness. Courts that exercise jurisdiction under the rules of the Regulation do not engage in any due process analysis that is so familiar to U.S. litigants. They do not inquire as to whether the defendant maintained minimum contacts with the forum. And they do not examine whether the defendant purposefully availed itself of the benefits and protections of the forum. Just as in purely domestic litigation, European courts limit themselves to applying the text of the Regulation's rules to the facts. Unencumbered by a layer of constitutional inquiry that often results in lengthy and expensive pretrial litigation before U.S. courts with unpredictable outcome, jurisdictional questions in Europe are quickly and, for the most part, predictably resolved.

Furthermore, jurisdiction based on unrelated assets, mandatory personal jurisdiction based on nationality, and other jurisdictional oddities still embedded in old domestic laws of some Member States , cannot threaten those defendants domiciled in one of the other Member States. These and other rules form a non-exhaustive black list of jurisdictional bases which are considered unacceptable in cross-border litigation within the European Union.. See Art. 5.2.

However, third country domiciliaries cannot avail themselves of this protection. In fact, the Regulation is explicit in making these blacklisted exorbitant jurisdictional bases applicable to those parties who are not domiciled in a contracting state. See Art. 6. 2 For example, as noted by Justice Ginsburg in her *Nicastro* dissent (footnote 5), Article 14 of the French Civil Code has been read to provide that a French national may sue a foreigner in French courts without regard to any connection between the cause of action and the French forum. Thus, Article 14 could be applied against a party domiciled in the U.S. For example, a U.S. citizen involved in a vehicular accident in the U.S. with a French national could be sued in France, consistent with Article 14. While the judgment would not likely be enforceable in the U.S., the exercise of such jurisdiction would not prevent the enforcement of the judgment in the courts of another Contracting State—in which the defendant might have assets—unless that state had entered into an agreement with the U.S. (or another third country) not to recognize such judgments. See Art. 72 referring to Art. 59 of the Brussels Convention; see also Burbank & Palmer, *supra* (Section D), 48 Me. L. Rev. at 482-503 (discussing history and scope of Article 14).

Although the jurisdictional rules of the Brussels Convention/Regulation have, overall, produced the degree of legal certainty and outcomes that are considered fair for purposes of intra-community litigation, there have nevertheless been numerous cases in which the application of these rules to particular facts was not an easy exercise. In these instances, domestic courts, uncertain about the application of a Brussels Regulation provision, stay the proceedings before them and refer the question to the European Court of Justice. See Art. 267 of the Treaty on the Functioning of the European Union. The case law emanating from the European Court of Justice ("Court of Justice of the European Communities") (ECJ) has significantly improved the even-handed application of the Brussels Convention and its successors, the Brussels Regulations. We will take a closer look at some of these cases to illustrate how the ECJ has addressed such problems. The first case (*Johann Gruber*) involves special jurisdictional rules de-

signed to protect consumers who are seen under the Convention/Regulation as systemically weaker parties in need of such protection. The next two decisions address personal jurisdiction issues in cross-border tort (defamation) cases involving damages inflicted in more than one forum. While the first tort case (*Shevill*) was still decided on the basis of Art. 5 (3) of the Brussels *Convention*, the decisions in the second and third case (eDate Advertising and Bolagsupplysningen) were rendered by applying, respectively, Art. 5 (3) of the Brussels I *Regulation* and Art. 7 (2) of its successor, the recast Brussels *Regulation*. Note that despite the change in numbering (from Art. 5 (3) to Art. 7 (2)), the text of the pertinent provision has remained unchanged enabling the ECJ to rely on previous case law and to maintain and evenhanded continuity in developing this area of the law. Such continuity is likewise present in the other fields covered by the Convention/Regulations.

Shevill v. Presse Alliance SA

Court of Justice of the European Communities, 1995.
Case C-68/93; 1995 E.C.R. I-415.

* * *

JUDGMENT: * * *

3. According to the documents before the Court, on 23 September 1989 Presse Alliance SA, which publishes the newspaper France-Soir, published an article about an operation which drug squad officers of the French police had carried out at one of the bureaux de change operated in Paris by Chequepoint SARL. That article, based on information provided by the agency France Presse, mentioned the company "Chequepoint" and "a young woman by the name of Fiona Shevill-Avril".

4. Chequepoint SARL, a company incorporated under French law whose registered office is in Paris, has operated bureaux de change in France since 1988. It is not alleged to carry on business in England or Wales.

5. Fiona Shevill was temporarily employed for three months in the summer of 1989 by Chequepoint SARL in Paris. She returned to England on 26 September 1989.

6. Ixora Trading Inc., which is not a company incorporated under the law of England and Wales, has since 1974 operated bureaux de change in England under the name "Chequepoint".

7. Chequepoint International Ltd, a holding company incorporated under Belgian law whose registered office is in Brussels, controls Chequepoint SARL and Ixora Trading Inc.

8. Miss Shevill, Chequepoint SARL, Ixora Trading Inc. and Chequepoint International Ltd considered that the abovementioned article was defamatory in that it suggested that they were part of a drug-trafficking network for which they had laundered money. On 17 October 1989 they issued a writ in the High Court of England and Wales claiming damages for libel from Presse Alliance SA in respect of the copies of France-Soir distributed in France and the other European countries including those sold in England and Wales. The plaintiffs subsequently amended their pleadings, deleting all references to the copies sold outside England and Wales. Since under English law there is a presumption of damage in libel cases, the plaintiffs did not have to adduce evidence of damage arising from the publication of the article in question.

9. It is common ground that France-Soir is mainly distributed in France and that the newspaper has a very small circulation in the United Kingdom, effected through independent distributors. It is estimated that more than 237,000 copies of the issue of France-Soir in question were sold in France and approximately 15,500 copies distributed in the other European countries, of which 230 were sold in England and Wales (5 in Yorkshire).

10. On 23 November 1989 France-Soir published an apology stating that it had not intended to allege that either the owners of Chequepoint bureaux de

change or Miss Shevill had been involved in drug trafficking or money laundering.

11. On 7 December 1989 Presse Alliance SA issued a summons disputing the jurisdiction of the High Court of England and Wales on the ground that no harmful event within the meaning of Article 5(3) of the Convention had occurred in England.

12. That application * * * was dismissed by order of 10 April 1990. The appeal brought against that decision was dismissed by order of 14 May 1990.

13. On 12 March 1991 the Court of Appeal dismissed the appeal brought by Presse Alliance SA against that decision and stayed the action brought by Chequepoint International Limited.

14. Presse Alliance SA appealed against that decision to the House of Lords pursuant to leave to appeal granted by the latter.

15. Presse Alliance SA argued essentially that under Article 2 of the Convention the French courts had jurisdiction in this dispute and that the English courts did not have jurisdiction under Article 5(3) of the Convention since the "place where the harmful event occurred" within the meaning of that provision was in France and no harmful event had occurred in England.

16. Considering that the proceedings raised problems of interpretation of the Convention, the House of Lords by order of 1 March 1993 decided to stay the proceedings pending a preliminary ruling by the Court of Justice on the following questions:

> "1. In a case of libel by a newspaper article, do the words 'the place where the harmful event occurred' in Article 5(3) of the Convention mean:
>
> (a) the place where the newspaper was printed and put into circulation; or
>
> (b) the place or places where the newspaper was read by particular individuals; or
>
> (c) the place or places where the plaintiff has a significant reputation?
>
> 2. If and so far as the answer to the first question is (b), is 'the harmful event' dependent upon there being a reader or readers who knew (or knew of) the plaintiff and understood those words to refer to him?
>
> 3. If and in so far as harm is suffered in more than one country (because copies of the newspaper were distributed in at least one Member State other than the Member State where it was printed and put into circulation), does a separate harmful event or harmful events take place in each Member State where the newspaper was distributed, in respect of which such Member State has separate jurisdiction under Article 5(3), and if so, how harmful must the event be, or what proportion of the total harm must it represent?
>
> * * *
>
> 6. If, in a defamation case, the local court concludes that there has been an actionable publication (or communication) of material, as a result of which at least some damage to reputation would be presumed, is it relevant to the acceptance of jurisdiction that other Member States might come to a differ-

ent conclusion in respect of similar material published within their respective jurisdictions? * * * "

The first, second, third and sixth questions

17. The national court's first, second, third and sixth questions, which should be considered together, essentially seek guidance from the Court as to the interpretation of the concept "the place where the harmful event occurred" used in Article 5(3) of the Convention, with a view to establishing which courts have jurisdiction to hear an action for damages for harm caused to the victim following distribution of a defamatory newspaper article in several Contracting States.

18. In order to answer those questions, reference should first be made to Article 5(3) of the Convention, which, by way of derogation from the general principle in the first paragraph of Article 2 of the Convention that the courts of the Contracting State of the defendant' s domicile have jurisdiction, provides:

> "A person domiciled in a Contracting State may, in another Contracting State, be sued: . . .
>
> (3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred; . . . "

19. It is settled case-law (see Case 21/76 Bier v. Mines de Potasse d'Alsace 1976 ECR 1735, paragraph 11, and Case C-220/88 Dumez France and Tracoba v. Hessische Landesbank (Helaba) and Others 1990 ECR I-49, paragraph 17) that that rule of special jurisdiction, the choice of which is a matter for the plaintiff, is based on the existence of a particularly close connecting factor between the dispute and courts other than those of the State of the defendant's domicile which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.

20. It must also be emphasized that in *Mines de Potasse d'Alsace* the Court held (at paragraphs 24 and 25) that, where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression "place where the harmful event occurred" in Article 5(3) of the Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage.

21. In that judgment, the Court stated (at paragraphs 15 and 17) that the place of the event giving rise to the damage no less than the place where the damage occurred could constitute a significant connecting factor from the point of view of jurisdiction, since each of them could, depending on the circumstances, be particularly helpful in relation to the evidence and the conduct of the proceedings.

22. The Court added (at paragraph 20) that to decide in favour only of the place of the event giving rise to the damage would, in an appreciable number of cases, cause confusion between the heads of jurisdiction laid down by Articles 2

and 5(3) of the Convention, so that the latter provision would, to that extent, lose its effectiveness.

23. Those observations, made in relation to physical or pecuniary loss or damage, must equally apply, for the same reasons, in the case of loss or damage other than physical or pecuniary, in particular injury to the reputation and good name of a natural or legal person due to a defamatory publication.

24. In the case of a libel by a newspaper article distributed in several Contracting States, the place of the event giving rise to the damage, within the meaning of those judgments, can only be the place where the publisher of the newspaper in question is established, since that is the place where the harmful event originated and from which the libel was issued and put into circulation.

25. The court of the place where the publisher of the defamatory publication is established must therefore have jurisdiction to hear the action for damages for all the harm caused by the unlawful act.

26. However, that forum will generally coincide with the head of jurisdiction set out in the first paragraph of Article 2 of the Convention.

27. As the Court held in *Mines de Potasse d'Alsace*, the plaintiff must consequently have the option to bring proceedings also in the place where the damage occurred, since otherwise Article 5(3) of the Convention would be rendered meaningless.

28. The place where the damage occurred is the place where the event giving rise to the damage, entailing tortious, delictual or quasi-delictual liability, produced its harmful effects upon the victim.

29. In the case of an international libel through the press, the injury caused by a defamatory publication to the honour, reputation and good name of a natural or legal person occurs in the places where the publication is distributed, when the victim is known in those places.

30. It follows that the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation have jurisdiction to rule on the injury caused in that State to the victim's reputation.

31. In accordance with the requirement of the sound administration of justice, the basis of the rule of special jurisdiction in Article 5(3), the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation are territorially the best placed to assess the libel committed in that State and to determine the extent of the corresponding damage.

32. Although there are admittedly disadvantages to having different courts ruling on various aspects of the same dispute, the plaintiff always has the option of bringing his entire claim before the courts either of the defendant's domicile or of the place where the publisher of the defamatory publication is established.

33. In light of the foregoing, the answer to the first, second, third and sixth questions referred by the House of Lords must be that, on a proper construction of the expression "place where the harmful event occurred" in Article 5(3) of the Convention, the victim of a libel by a newspaper article distributed in several

Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised. * * *

On those grounds, **THE COURT**, in answer to the questions referred to it by the House of Lords, by order of 1 March 1993, hereby rules:

1. On a proper construction of the expression "place where the harmful event occurred" in Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and by the Convention of 25 October 1982 on the accession of the Hellenic Republic, the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised. * * *

NOTES AND QUESTIONS FOR DISCUSSION

1. According to Article 5.3 of the Brussels Convention (now: Article 7(2) of the recast Brussels Regulation No. 1215/2012), a court adjudicating a tort claim has jurisdiction at "the place where the harmful event occurred." The ECJ interprets this language to refer to two places: the place where the event which gave rise to tort liability occurred; and the place where that event results in damage. Would there necessarily be "minimum contacts" in the U.S. sense between the defendant and the places referred to by the court? The question could be relevant in the event of judgment enforcement in the U.S. See Chapter 8. Do characterization problems such as "where the event occurred" present a less serious problem of jurisdictional uncertainty than U.S. constitutional questions?

2. Assume that Ms. Shevill's reputation has suffered damages to varying degrees in five different countries. Could she therefore sue for defamation in any one of them? If so, may she sue for damages that occurred in any or all of them? Or only to the extent of the damages she incurred in any given member state ("the mosaic approach")? Consider whether it makes sense that the plaintiff might be able choose to bring multiple lawsuits over the same event.

3. American courts generally adhere to the so-called "single publication rule." See Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984). Under this rule, plaintiffs are entitled to recover all damages to their reputation—those that occurred in the forum as well as those suffered elsewhere. Is this the better approach? Note, however, that there may be territorial limits on the ability of a

state to award punitive damages based on activities outside the forum. See State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408 (2003).

4. Does *Shevill* apply beyond print media and to the Internet? In two cases, which follow, the ECJ offered answers to such questions in the setting of internet infringements of personality rights of both natural (eDate Advertising) and legal persons (Bolagsupplysningen OÜ).

eDate Advertising GmbH v. X, *and* Martinez v. MGN, Ltd.

Court of Justice of the European Communities, 2011.
Joined Cases C-509/09 and C-161/10; CELEX: 62009CJ0509.

[In the first case, the Plaintiff (X), a German national, sued eDate Advertising, an Austrian company that ran a dating website, over information that it made available through its website about the plaintiff in connection with a past criminal conviction of his which was still pending on appeal. (The website provided access to the report of the German case and did so in a way that disclosed the full name of X.) Suit was brought in a German court seeking to enjoin eDate from using his full name when reporting about him in connection with the crime. The main contention of eDate was that the German courts had no jurisdiction in the matter. Plaintiff was successful in the lower courts, and on appeal to the German high court (Bundesgerichtshof), the court stayed its proceedings and referred the jurisdictional (and other) questions to the ECJ.

In the second case, a French actor—Oliver Martinez—brought suit in France against the UK Sunday Mirror over interference with his private life when it stated on its website that "Kylie Minogue is back with Oliver Martinez," and added certain details of a meeting between them. The defendant, Mirror Group Newspapers (MGN) argued that the French court lacked jurisdiction.

The ECJ addressed the jurisdictional questions as follows:]

Interpretation of Article 5(3) of the Regulation

37. By the first two questions in Case C-509/09 and the single question in Case C-161/10, which it is appropriate to examine together, the national courts ask the Court, in essence, how the expression 'the place where the harmful event occurred or may occur', used in Article 5(3) of the Regulation, is to be interpreted in the case of an alleged infringement of personality rights by means of content placed online on an internet website.

38. In order to answer those questions, it should be borne in mind, first, that, according to settled case-law, the provisions of the Regulation must be interpreted independently, by reference to its scheme and purpose.

* * *

40. It is settled case-law that the rule of special jurisdiction laid down, by way of derogation from the principle of jurisdiction of the courts of the place of domicile of the defendant, in Article 5(3) of the Regulation is based on the existence of a particularly close connecting factor between the dispute and the courts

of the place where the harmful event occurred, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings * * *.

41. It must also be borne in mind that the expression 'place where the harmful event occurred' is intended to cover both the place where the damage occurred and the place of the event giving rise to it. Those two places could constitute a significant connecting factor from the point of view of jurisdiction, since each of them could, depending on the circumstances, be particularly helpful in relation to the evidence and the conduct of the proceedings (see Case C-68/93 *Shevill and Others* [1995] ECR I-415, paragraphs 20 and 21).

42. In relation to the application of those two connecting criteria to actions seeking reparation for non-material damage allegedly caused by a defamatory publication, the Court has held that, in the case of defamation by means of a newspaper article distributed in several Contracting States, the victim may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all of the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised (*Shevill and Others*, paragraph 33).

43. In that regard, the Court has also stated that, while it is true that the limitation of the jurisdiction of the courts in the State of distribution solely to damage caused in that State presents disadvantages, the plaintiff always has the option of bringing his entire claim before the courts either of the defendant's domicile or of the place where the publisher of the defamatory publication is established (*Shevill and Others*, paragraph 32).

* * *

45. However, as has been submitted both by the referring courts and by the majority of the parties and interested parties which have submitted observations to the Court, the placing online of content on a website is to be distinguished from the regional distribution of media such as printed matter in that it is intended, in principle, to ensure the ubiquity of that content. That content may be consulted instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person's Member State of establishment and outside of that person's control.

46. It thus appears that the internet reduces the usefulness of the criterion relating to distribution, in so far as the scope of the distribution of content placed online is in principle universal. Moreover, it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State.

47. The difficulties in giving effect, within the context of the internet, to the criterion relating to the occurrence of damage which is derived from *Shevill and Others* contrasts, as the Advocate General noted at point 56 of his Opinion, with

the serious nature of the harm which may be suffered by the holder of a personality right who establishes that information injurious to that right is available on a world-wide basis.

48. The connecting criteria referred to in paragraph 42 of the present judgment must therefore be adapted in such a way that a person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all of the damage caused, depending on the place in which the damage caused in the European Union by that infringement occurred. Given that the impact which material placed online is liable to have on an individual's personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests, the attribution of jurisdiction to that court corresponds to the objective of the sound administration of justice, referred to in paragraph 40 above.

49. The place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.

50. The jurisdiction of the court of the place where the alleged victim has the centre of his interests is in accordance with the aim of predictability of the rules governing jurisdiction (see Case C-144/10 *BVG* [2011] ECR I-0000, paragraph 33) also with regard to the defendant, given that the publisher of harmful content is, at the time at which that content is placed online, in a position to know the centres of interests of the persons who are the subject of that content. The view must therefore be taken that the centre-of-interests criterion allows both the applicant easily to identify the court in which he may sue and the defendant reasonably to foresee before which court he may be sued.* * *

51. Moreover, instead of an action for liability in respect of all of the damage, the criterion of the place where the damage occurred, derived from *Shevill and Others*, confers jurisdiction on courts in each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.

52. Consequently, the answer to the first two questions in Case C-509/09 and the single question in Case C-161/10 is that Article 5(3) of the Regulation must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised. * * *

NOTES AND QUESTIONS FOR DISCUSSION

1. Consider in what respect(s) the court in *eDate Advertising* may have interpreted Article 5(3) differently than it did in *Shevill*. Given that many if not most print newspapers are also published as an online edition, would it be fair to say that, as a practical matter, the ECJ has overruled *Shevill* with this decision? In *eDate*, the ECJ added the "centre of interests" of the plaintiff as a valid forum where the plaintiff can bring an action regarding the entire damages caused. Given that the centre of interests generally corresponds with the habitual residence of the plaintiff (paragraph 49), would it be realistic to believe that any plaintiff would resort to the alternative of suing in the courts of other Member State which have jurisdiction only in respect of the damage caused in every such Member State (paragraph 52)?

4. The scope of Internet jurisdiction within the U.S. is not fully settled. problem is associated with the difficulty of localizing Internet activities—a difficulty that makes it hard to know whether a defendant has purposely availed itself of the benefits and protections of a particular forum, or whether it has directed its activity towards that forum. Should the basic principles of minimum contacts and fairness apply in this setting just like any other? See A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. Ill. L. Rev. 71 (2006) (so arguing). Early decisions seemed to want to focus on the "level of interactivity and commercial nature" of the website. See, e.g., Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). But more recent decisions have arguably reverted to more familiar, post-*International Shoe* approaches in which boundaries remain relevant, and in which the focus is on more traditional contacts, such as points of sale or product delivery. See generally Jack Goldsmith & Tim Wu, Who Controls the Internet?: Illusions of a Borderless World (2006). We consider a particularly aggressive example of Internet jurisdiction (and cross-border judgment enforcement) in Chapter 8 (discussing Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), reversed, 433 F.3d 1199 (9th Cir. 2006) (en banc)).

5. Consider one example of the application of traditional rules in the domestic setting. In Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002), the websites of the defendants, two Connecticut newspapers, contained articles that allegedly defamed the plaintiff in Virginia. The Fourth Circuit held that the Virginia courts had no personal jurisdiction over the defendants because they did not direct their website content to a Virginia audience. The decision was based on due process grounds. Does the analysis make sense? How else might courts (or legislatures) seek to limit the otherwise limitless reach of the Internet in a meaningful way for jurisdictional purposes?

International Civil Litigation in United States Courts

Commentary & Materials

THIRD EDITION

Gary B. Born

B. The Modern Forum Non Conveniens Doctrine: Basic Principles

For 34 years following *Gulf Oil* and *Koster*, the Court did not revisit the subject of forum non conveniens. During the interim, the doctrine won substantial (but not universal) following in state courts,[56] and was the subject of considerable case law in the federal courts. In 1981, the Supreme Court decided *Piper Aircraft Co. v. Reyno*.[57] Its opinion is the leading contemporary statement of the forum non conveniens doctrine.

A substantial majority of U.S. states have adopted some variation of the forum non conveniens doctrine. A dozen or so states have statutorily codified the doctrine, generally in a form based upon the Uniform Interstate and International Procedure Act. Section 1.05 of the Act states the doctrine as follows:

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just.

Another 30 or so states have, by common law decision, recognized the forum non conveniens doctrine is some fashion. These decisions have generally done so as a matter of state law — not in express deference to what they regard as federal common law.[58] Nevertheless, they have virtually unanimously cited *Gulf Oil* or *Piper Aircraft* as persuasive authority; in many cases, these decisions have been the only authorities relied upon in adopting forum non conveniens as a matter of state law.

Only a minority of states has either rejected the forum non conveniens doctrine or remained uncommitted. States that have declined to adopt the forum non conveniens doctrine include Georgia,[59] Louisiana,[60] Mississippi,[61] North Dakota,[62] and Texas.[63]

---

56. *See* Robertson & Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 Tex. L. Rev. 937, 948-53 (1990); Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 Tex. Int'l L. J. 501, 518-25 (1993).

57. 454 U.S. 235 (1981) (excerpted below at pp. 299-305).

58. *E.g., Satkowiak v. Chesapeake & Ohio Ry.*, 478 N.E.2d 370 (Ill. 1985); *Torrijas v. Midwest Steel Erection Co.*, 474 N.E.2d 1250 (Ill. App. 1984); *Blais v. Deyo*, 468 N.Y.S.2d 91 (1983); *Hamann v. American Motors Corp.*, 345 N.W.2d 699 (Mich. App. 1983); *McCracken v. Eli Lilly & Co.*, 494 N.E.2d 1289 (Ind. Ct. App. 1986) (in interpreting state forum non conveniens statute, relying on federal decisions because of "sufficient similarity of spirit of the state and federal rules as they relate to the doctrine of forum non conveniens in the context of international litigation").

59. *Smith v. Board of Regents*, 302 S.E.2d 124, 126 (Ga. App. 1983) (forum non conveniens has "never been expressly sanctioned in Georgia's courts").

60. *Fox v. Board of Supervisors*, 576 So.2d 978 (La. 1991) (relying on state statute); *Kassapas v. Arkon Shipping Agency, Inc.*, 485 So.2d 565 (La. Ct. App.), *writ denied*, 488 So.2d 208 (La.), *cert. denied*, 107 S.Ct. 422 (1986); *Trahan v. Phoenix Insurance Co.*, 200 So.2d 118, 122 (La. Ct. App.), *cert. denied*, 202 So.2d 657 (La. 1967) ("the doctrine of forum non conveniens is foreign to our jurisprudence and contrary to express legislative declaration").

61. *Vick v. Cochran*, 316 So.2d 242 (Miss. 1975).

62. *Kristensen v. Strinden*, 343 N.W.2d 67, 71 (N.D. 1983) ("Our Constitution does not permit State courts any discretion in determining whether or not to entertain actions properly brought before them.").

63. *Dow Chemical Company v. Castro Alfaro* 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S.Ct. 671 (1991) (excerpted below at pp. 305-13). The Texas legislature has since enacted legislation adopting the forum non conveniens doctrine in limited circumstances. Texas Civil Practice and Remedies Code §71.051 (1993).

Selected materials illustrating the basic principles of the forum non conveniens doctrine are excerpted below. The Supreme Court's opinion in *Piper Aircraft Co. v. Reyno*, excerpted below, remains the leading contemporary statement of the doctrine. The Texas Supreme Court's opinions in *Dow Chemical Co. v. Castro Alfaro* reflect the controversy that the forum non conveniens doctrine has generated.

PIPER AIRCRAFT CO. v. REYNO

454 U.S. 235 (1981)

JUSTICE MARSHALL. These cases arise out of an air crash that took place in Scotland. Respondent, acting as representative of the estates of several Scottish citizens killed in the accident, brought wrongful-death actions against petitioners. ... Petitioners moved to dismiss on the ground of *forum non conveniens*. After noting that an alternative forum existed in Scotland, the District Court granted their motions. The United States Court of Appeals for the Third Circuit reversed. The Court of Appeals based its decision, at least in part, on the ground that dismissal is automatically barred where the law of the alternative forum is less favorable to the plaintiff than the law of the forum chosen by the plaintiff. Because we conclude that the possibility of an unfavorable change in law should not, by itself, bar dismissal, and because we conclude that the District Court did not otherwise abuse its discretion, we reverse.

In July 1976, a small commercial aircraft crashed in the Scottish highlands during the course of a charter flight from Blackpool to Perth. The pilot and five passengers were killed instantly. The decedents were all Scottish subjects and residents, as are their heirs and next of kin. There were no eyewitnesses to the accident. At the time of the crash the plane was subject to Scottish air traffic control. The aircraft, a twin-engine Piper Aztec, was manufactured in Pennsylvania by petitioner Piper Aircraft Co. ("Piper"). The propellers were manufactured in Ohio by petitioner Hartzell Propeller, Inc. ("Hartzell"). At the time of the crash the aircraft was registered in Great Britain and was owned and maintained by Air Navigation and Trading Co., Ltd. ("Air Navigation"). It was operated by McDonald Aviation, Ltd. ("McDonald"), a Scottish air taxi service. Both Air Navigation and McDonald were organized in the United Kingdom. The wreckage of the plane is now in a hangar in Farnborough, England.

The British Department of Trade investigated the accident shortly after it occurred. A preliminary report found that the plane crashed after developing a spin, and suggested that mechanical failure in the plane or the propeller was responsible. At Hartzell's request, this report was reviewed by a three-member Review Board, which held a 9-day adversary hearing attended by all interested parties. The Review Board found no evidence of defective equipment and indicated that pilot error may have contributed to the accident. ...

In July 1977, a California probate court appointed respondent Gaynell Reyno

administratrix of the estates of the five passengers. Reyno is not related to and does not know any of the decedents or other survivors; she was a legal secretary to the attorney who filed this lawsuit. Several days after her appointment, Reyno commenced separate wrongful-death actions against Piper and Hartzell in the Superior Court of California, claiming negligence and strict liability. ... Reyno candidly admits that the action against Piper and Hartzell was filed in the United States because its laws regarding liability, capacity to sue and damages are more favorable to her position than are those of Scotland. Scottish law does not recognize strict liability in tort. Moreover, it permits wrongful-death actions only when brought by a decedent's relatives. The relatives may sue only for "loss of support and society."

On petitioners' motion, the suit was removed to the United States District Court for the Central District of California, [and later transferred] to the United States District Court for the Middle District of Pennsylvania, pursuant to 28 U.S.C. §1404(a). ... [B]oth Hartzell and Piper moved to dismiss the action on the ground of *forum non conveniens*. The District Court granted these motions. ... It relied on the balancing test set forth by this Court in *Gulf Oil Corp. v. Gilbert*, and its companion case, *Koster v. Lumbermens Mut. Cas. Co.* In those decisions, the Court stated that a plaintiff's choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would "establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience," or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems" the court may, in the exercise of its sound discretion, dismiss the case. To guide trial court discretion, the Court provided a list of "private interest factors" affecting the convenience ... of the forum. ...

On the appeal, the United States Court of Appeals for the Third Circuit reversed and remanded for trial. The decision to reverse appears to be based on two alternative grounds. First, the Court held that the District Court abused its discretion in conducting the *Gilbert* analysis. Second, the Court held that dismissal is never appropriate where the law of the alternative forum is less favorable to the plaintiff. ...

The Court of Appeals erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.

We expressly rejected the position adopted by the Court of Appeals in our decision in *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413 (1932). That case arose out of a collision between two vessels in American waters. The Canadian owners of cargo lost in the accident sued the Canadian owners of one of the vessels in Federal District Court. The cargo owners chose an American court in large part because the relevant American liability rules were more favorable than the Canadian

rules. The District Court dismissed on grounds of *forum non conveniens*. The plaintiffs argued that dismissal was inappropriate because Canadian laws were less favorable to them. This Court nonetheless affirmed:

> We have no occasion to enquire by what law the rights of the parties are governed, as we are of the opinion that, under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy. ... "[T]he court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum." ...

It is true that *Canada Malting* was decided before *Gilbert*, and that the doctrine of *forum non conveniens* was not fully crystallized until our decision in that case.[64] However, *Gilbert* in no way affects the validity of *Canada Malting*. Indeed, by holding that the central focus of the *forum non conveniens* inquiry is convenience, *Gilbert* implicitly recognized that dismissal may not be barred solely because of the possibility of an unfavorable change in law. Under *Gilbert*, dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.[65] If substantial weight were given to the possibility of an unfavorable change in law, however, dismissal might be barred even where trial in the chosen forum was plainly inconvenient.

The Court of Appeals' decision is inconsistent with this Court's earlier *forum non conveniens* decisions in another respect. Those decisions have repeatedly emphasized the need to retain flexibility. ... If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable. In fact, if conclusive or substantial weight were given to the possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless. Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the *forum non conveniens* inquiry, dismissal would rarely be proper. ...

---

64. The doctrine of *forum non conveniens* has a long history. It originated in Scotland, *see* Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 909-911 (1947), and became part of the common law of many States, *see id.* at 911-912; Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1 (1929). The doctrine was also frequently applied in federal admiralty actions. *See, e.g., Canada Malting Co. v. Paterson Steamships, Ltd.* ... In previous *forum non conveniens* decisions, the Court has left unresolved the question whether under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), state or federal law of *forum non conveniens* applies in diversity cases. The Court did not decide this issue because the same result would have been reached in each case under federal or state law. The lower courts in these cases reached the same conclusion: Pennsylvania and California law on *forum non conveniens* dismissals are virtually identical to federal law. Thus, here also, we need not resolve the *Erie* question.

65. In other words, *Gilbert* held that dismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to harass the defendant or take advantage of favorable law. This is precisely the situation in which the Court of Appeals' rule would bar dismissal.

The Court of Appeals' approach is not only inconsistent with the purpose of the *forum non conveniens* doctrine, but also poses substantial practical problems. If the possibility of a change in law were given substantial weight, deciding motions to dismiss on the ground of *forum non conveniens* would become quite difficult. Choice-of-law analysis would become extremely important, and the court would frequently be required to interpret the law of foreign jurisdictions. ... The doctrine of *forum non conveniens*, however, is designed in part to help courts avoid conducting complex exercises in comparative law. As we stated in *Gilbert*, the public interest factors point towards dismissal where the court would be required to "untangle problems in conflict of laws, and in law foreign to itself."

Upholding the decision of the Court of Appeals would result in other practical problems. At least where the foreign plaintiff named an American manufacturer as defendant,[66] a court could not dismiss the case on grounds of *forum non conveniens* where dismissal might lead to an unfavorable change in law. The American courts, which are already extremely attractive to foreign plaintiffs,[67] would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts. ...

We do not hold that the possibility of an unfavorable change in law should *never* be a relevant consideration in a *forum non conveniens* inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interest of jus-

66. In fact, the defendant might not even have to be American. A foreign plaintiff seeking damages for an accident [that] had occurred abroad might be able to obtain service of process on a foreign defendant who does business in the United States. Under the Court of Appeals' holding, dismissal would be barred if the law in the alternative forum were less favorable to the plaintiff — even though none of the parties are American, and even though there is absolutely no nexus between the subject matter of the litigation and the United States.

67. First, all but 6 of the 50 American States - Delaware, Massachusetts, Michigan, North Carolina, Virginia, and Wyoming - offer strict liability. 1 CCH Prod. Liability Rep. §4016 (1981). Rules roughly equivalent to American strict liability are effective in France, Belgium, and Luxembourg. West Germany and Japan have a strict liability statute for pharmaceuticals. However, strict liability remains primarily an American innovation. Second, the tort plaintiff may choose, at least potentially, from among 50 jurisdictions if he decides to file suit in the United States. Each of these jurisdictions applies its own set of malleable choice-of-law rules. Third, jury trials are almost always available in the United States, while they are never provided in civil law jurisdictions. G. Gloss, *Comparative Law* 12 (1979); J. Merryman, *The Civil Law Tradition* 121 (1969). Even in the United Kingdom, most civil actions are not tried before a jury. 1 G. Keeton, *The United Kingdom: The Development of its Laws and Constitutions* 309 (1955). Fourth, unlike most foreign jurisdictions, American courts allow contingent attorney's fees, and do not tax losing parties with their opponents' attorney's fees. R. Schlesinger, *Comparative Law: Cases, Text, Materials* 275-277 (3d ed. 1970): Orban, *Product Liability: A Comparative Legal Restatement - Foreign National Law and the EEC Directive*, 8 Ga. J. Int'l & Comp. L. 342, 393 (1978). Fifth, discovery is more extensive in American than in foreign courts. R. Schlesinger, *supra*, at 307, 310 and n. 33.

tice.[68] In these cases, however, the remedies that would be provided by the Scottish courts do not fall within this category. Although the relatives of the decedents may not be able to rely on a strict liability theory, and although their potential damages award may be smaller, there is no danger that they will be deprived of any remedy or treated unfairly.

The Court of Appeals also erred in rejecting the District Court's *Gilbert* analysis. The Court of Appeals stated that more weight should have been given to the plaintiff's choice of forum, and criticized the District Court's analysis of the private and public interests. However, the District Court's decision regarding the deference due plaintiff's choice of forum was appropriate. Furthermore, we do not believe that the District Court abused its discretion in weighing the private and public interests.

The District Court acknowledged that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum. It held, however, that the presumption applies with less force when the plaintiff or real parties in interest are foreign. The District Court's distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified. In *Koster*, the Court indicated that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. 330 U.S. at 524.[69] When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only where there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference. Here, the Court of Appeals expressly acknowledged that the standard of

68. At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirements may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute. *Cf. Phoenix Canada Oil Co. Ltd. v. Texaco Inc.*, 78 F.R.D. 445 (Del. 1978) (court refuses to dismiss, where alternative forum is Ecuador, it is unclear whether Ecuadorean tribunal will hear the case, and there is no generally codified Ecuadorean legal remedy for the unjust enrichment and tort claims asserted).

69. In *Koster*, we stated that "[i]n any balancing of conveniences, a real showing of convenience by a plaintiff who had sued in his home forum will normally outweigh the inconvenience the defendant may have shown." 330 U.S. at 524. *See also Swift & Co. Packers v. Compania Colombiana del Caribe*, 339 U.S. 684, 697 (1950) ("suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners"); *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. at 421 ("[t]he rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower federal courts"). ...

review was one of abuse of discretion. In examining the District Court's analysis of the public and private interests, however, the Court of Appeals seems to have lost sight of this rule, and substituted its own judgment for that of the District Court.

In analyzing the private interest factors, the District Court stated that the connections with Scotland are "overwhelming." This characterization may be somewhat exaggerated. Particularly with respect to the question of relative ease of access to sources of proof, the private interests point in both directions. As respondent emphasized, records concerning the design, manufacture, and testing of the propeller and plane are located in the United States. She would have greater access to sources of proof relevant to her strict liability and negligence theories if trial were held here.[70] However, the District Court did not act unreasonably in concluding that fewer evidentiary problems would be posed if the trial were held in Scotland. A large proportion of the relevant evidence is located in Great Britain.

The Court of Appeals found that the problems of proof could not be given any weight because Piper and Hartzell failed to describe with specificity the evidence they would not be able to obtain if trial were held in the United States. It suggested that defendants seeking *forum non conveniens* dismissal must submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum. Such detail is not necessary. Piper and Hartzell have moved for dismissal precisely because many crucial witnesses are located beyond the reach of compulsory process, and thus are difficult to identify or interview. Requiring extensive investigation would defeat the purpose of their motion. Of course, defendants must provide enough information to enable the District Court to balance the parties' interests. Our examination of the record convinces us that sufficient information was provided here. Both Piper and Hartzell submitted affidavits describing the evidentiary problems they would face if the trial were held in the United States.

The District Court correctly concluded that the problems posed by the inability to implead potential third-party defendants clearly supported holding the trial in Scotland. Joinder of the pilot's estate, Air Navigation, and McDonald is crucial to the presentation of petitioners' defense. If Piper and Hartzell can show that the accident was caused not by a design defect, but rather by the negligence of the pilot, the plane's owners, or the charter company, they will be relieved of all liability. It is true, of course, that if Hartzell and Piper were found liable after a trial in the United States, they could institute an action for indemnity or contribution against these parties in Scotland. It would be far more convenient, however, to resolve all claims in one trial. The Court of Appeals rejected this argument. Forcing petitioners to rely on actions for indemnity or contribution would be "burdensome" but not "unfair." Finding that trial in the plaintiff's chosen forum would be burdensome, however, is sufficient to support dismissal on grounds of *forum non conveniens.*

70. In the future, where similar problems are presented, district courts might dismiss subject to the condition that defendant corporations agree to provide the records relevant to the plaintiff's claims.

The District Court's review of the factors relating to the public interest was also reasonable. On the basis of its choice-of-law analysis, it concluded that if the case were tried in the Middle District of Pennsylvania, Pennsylvania law would apply to Piper and Scottish law to Hartzell. It stated that a trial involving two sets of laws would be confusing to the jury. It also noted its own lack of familiarity with Scottish law. Consideration of these problems was clearly appropriate under *Gilbert*; in that case we explicitly held that the need to apply foreign law pointed towards dismissal.[71] The Court of Appeals found that the District Court's choice-of-law analysis was incorrect, and that American law would apply to both Hartzell and Piper. Thus, lack of familiarity with foreign law would not be a problem. Even if the Court of Appeals' conclusion is correct, however, all other public interest factors favored trial in Scotland.

Scotland has a very strong interest in this litigation. The accident occurred in its airspace. All of the decedents were Scottish. Apart from Piper and Hartzell, all potential plaintiffs and defendants are either Scottish or English. As we stated in *Gilbert,* there is "a local interest in having localized controversies decided at home." Respondent argues that American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products, and that additional deterrence might be obtained if Piper and Hartzell were tried in the United States, where they could be sued on the basis of both negligence and strict liability. However, the incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant. The American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here.

The Court of Appeals erred in holding that the possibility of an unfavorable change in law bars dismissal on the ground of *forum non conveniens.* It also erred in rejecting the District Court's *Gilbert* analysis. The District Court properly decided that the presumption in favor of the respondent's forum choice applied with less than maximum force because the real parties in interest are foreign. It did not act unreasonably in deciding that the private interests pointed towards trial in Scotland. Nor did it act unreasonably in deciding that the public interests favored trial in Scotland. Thus, the judgment of the Court of Appeals is reversed.

DOW CHEMICAL COMPANY v. CASTRO ALFARO

786 S.W.2d 674 (Supreme Court of Texas 1990)

RAY, JUSTICE. At issue in this cause is whether the statutory right to enforce a personal injury or wrongful death claim in the Texas courts precludes a trial court from dismissing the claim on the ground of forum non conveniens. ... [W]e conclude

71. Many *forum non conveniens* decisions have held that the need to apply foreign law favors dismissal. ... Of course, this factor alone is not sufficient to warrant dismissal when a balancing of all relevant factors shows that the plaintiff's chosen forum is appropriate. ...

that the legislature has statutorily abolished the doctrine of forum non conveniens in suits brought under §71.031 of the Texas Civil Practice and Remedies Code. ...

Domingo Castro Alfaro, a Costa Rican resident and employee of the Standard Fruit Company ("Standard Fruit"), and eighty-one other Costa Rican employees and their wives brought suit against Dow Chemical Company ("Dow") and Shell Oil Company ("Shell"). The employees claim that they suffered personal injuries as a result of exposure to dibromochloropropane ("DBCP"), a pesticide manufactured by Dow and Shell, which was allegedly furnished to Standard Fruit. [The Environmental Protection Agency issued ... an order suspending registrations of pesticides containing DBCP on November 3, 1977. Before and after the E.P.A.'s ban of DBCP in the United States; Shell and Dow allegedly shipped several hundred thousand gallons of the pesticide to Costa Rica for use by Standard Fruit.] The employees exposed to DBCP allegedly suffered several medical problems, including sterility.

Alfaro sued Dow and Shell in Harris County district court in April 1984. The amended petition alleged that the court had jurisdiction under article 4678 of the Revised Statutes. Following an unsuccessful attempt to remove the suit to federal court, Dow and Shell contested the jurisdiction of the trial court ... and contended in the alternative that the case should be dismissed under the doctrine of forum non conveniens. ... [T]he trial court dismissed the case on the ground of forum non conveniens.

Section 71.031 of the [Texas] Civil Practice and Remedies Code provides:

> (a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if: (1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury; (2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and (3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.[72] ... Tex. Civ. Prac. & Rem. Code Ann. §71.031 (Vernon 1986).

72. The United States and Costa Rica agreed to the following:

> The citizens of the high contracting parties shall reciprocally receive and enjoy full and perfect protection for their persons and property, and shall have free and open access to the courts of justice in the said countries respectively, for the prosecution and defense of their just rights; and they shall be at liberty to employ, in all cases, the advocates, attorneys, or agents of whatever description, whom they may think proper, and they shall enjoy in this respect the same rights and privileges therein as native citizens. Treaty of Friendship, Commerce, and Navigation, July 10, 1851 United States-Costa Rica, Art. VII, para. 2, 10 Stat. 916, 920, T.S. No. 62.

Subsection (a)(3) requires the existence of similar treaty provisions before an action by a citizen of a foreign country may be maintained under §71.031.

At issue is whether the language "may be enforced in the courts of this state" of §71.031(a) permits a trial court to relinquish jurisdiction under the doctrine of forum non conveniens.

The statutory predecessors of §71.031 have existed since 1913. ... Texas courts applied the doctrine of forum non conveniens in several cases prior to the enactment of article 4678 in 1913. In 1890, this court in dicta recognized the power of a court to refuse to exercise jurisdiction on grounds essentially the same as those of forum non conveniens. *See Morris v. Missouri Pac. Ry.*, 14 S.W. 228, 230 (1890). In *Morris*, we stated:

> We do not think the facts alleged show the action to be transitory. But, if so, it has been held in such actions, where the parties were non-residents and the cause of action originated beyond the limits of the state, these facts would justify the court in refusing to entertain jurisdiction. Jurisdiction is entertained in such cases only upon principles of comity, and not as a matter of right. ...

We ... must determine whether the legislature in 1913 statutorily abolished the doctrine of forum non conveniens in suits brought under article 4678 [now §71.031]. Our interpretation of §71.031 is controlled by this court's refusal of writ of error in *Allen v. Bass*, 47 S.W.2d 426 (Tex. Civ. App. 1932). In *Allen* the Court of Civil Appeals held that old article 4678 conferred an absolute right to maintain a properly brought suit in Texas courts. The suit in *Allen* involved a New Mexico plaintiff and defendant arising out of an accident occurring in New Mexico. The court of appeals reversed a dismissal granted by the trial court on grounds similar to those of forum non conveniens, holding that "article 4678 opens the courts of this state to citizens of a neighboring state and gives to them an *absolute right* to maintain a transitory action of the present nature and to try their cases in the courts of this state." (emphasis added). ... [Like the court in *Allen*,] we conclude that the legislature has statutorily abolished the doctrine of forum non conveniens in suits brought under §71.031. ...

DOGGETT, JUSTICE, concurring. ... I write separately ... to respond to the dissenters. ... In their zeal to implement their own preferred social policy that Texas corporations not be held responsible at home for harm caused abroad, these dissenters refuse to be restrained by either express statutory language or the compelling precedent ... holding that forum non conveniens does not apply in Texas. To accomplish the desired social engineering, they must invoke yet another legal fiction with a fancy name to shield alleged wrongdoers, the so-called doctrine of forum non conveniens. ...

The dissenters are insistent that a jury of Texans be denied the opportunity to evaluate the conduct of a Texas corporation concerning decisions it made in Texas because the only ones allegedly hurt are foreigners. Fortunately Texans are not so provincial and narrow-minded as these dissenters presume. Our citizenry recognizes that a wrong does not fade away because its immediate consequences are first felt far

away rather than close to home. Never have we been required to forfeit our membership in the human race in order to maintain our proud heritage as citizens of Texas.

The dissenters argue that it is inconvenient and unfair for farmworkers allegedly suffering permanent physical and mental injuries, including irreversible sterility, to seek redress by suing a multinational corporation in a court three blocks away from its world headquarters and another corporation, which operates in Texas this country's largest chemical plant. Because the "doctrine" they advocate has nothing to do with fairness and convenience and everything to do with immunizing multinational corporations from accountability for their alleged torts causing injury abroad, I write separately. ...

Shell is a multinational corporation with its world headquarters in Houston, Texas. Dow, though headquartered in Midland, Michigan, conducts extensive operations from its Dow Chemical USA building located in Houston. Dow operates this country's largest chemical manufacturing plant within 60 miles of Houston in Freeport, Texas. The district court where this lawsuit was filed is three blocks away from Shell's world headquarters, One Shell Plaza in downtown Houston. ...

The banana plantation workers allegedly injured by DBCP were employed by an American company on American-owned land and grew Dole bananas for export solely to American tables. The chemical allegedly rendering the workers sterile was researched, formulated, tested, manufactured, labeled and shipped by an American company in the United States to another American company. The decision to manufacture DBCP for distribution and use in the third world was made by these two American companies in their corporate offices in the United States. Yet now Shell and Dow argue that the one part of this equation that should not be American is the legal consequences of their actions.

... Both as a matter of law and of public policy, the doctrine of forum non conveniens is without justification. The proffered foundations for it are "considerations of fundamental fairness and sensible and effective judicial administration." In fact, the doctrine is favored by multinational defendants because a forum non conveniens dismissal is often outcome-determinative, effectively defeating the claim and denying the plaintiff recovery. ... A forum non conveniens dismissal is often, in reality, a complete victory for the defendant... . Empirical data available demonstrate that less than four percent of cases dismissed under the doctrine of forum non conveniens ever reach trial in a foreign court.[73] A forum non conveniens dismissal usually will end

73. Professor David Robertson of the University of Texas School of Law attempted to discover the subsequent history of each reported transnational case dismissed under forum non conveniens from *Gulf Oil v. Gilbert*, to the end of 1984. Data was received on 55 personal injury cases and 30 commercial cases. Of the 55 personal injury cases, only one was actually tried in a foreign court. Only two of the 30 commercial cases reached trial.

the litigation altogether, effectively excusing any liability of the defendant. The plaintiffs leave the courtroom without having had their case resolved on the merits.[74] ...

Advances in transportation and communications technology have rendered the private [*Gulf Oil*] factors largely irrelevant: A forum is not necessarily inconvenient because of its distance from pertinent parties or places if it is readily accessible in a few hours of air travel. It will often be quicker and less expensive to transfer a witness or a document than to transfer a lawsuit. Jet travel and satellite communications have significantly altered the meaning of "non conveniens." ... In sum, the private factors are no longer a predominant consideration — fairness and convenience to the parties have been thrust out of the forum non conveniens equation. As the "doctrine" is now applied, the term "forum non conveniens" has clearly become a misnomer. ...

[In addressing the public interest factors, the] dissenting members of the court falsely attempt to paint a picture of Texas becoming an "irresistible forum for all mass disaster lawsuits," and for "personal injury cases from around the world." They suggest that our citizens will be forced to hear cases in which "[t]he interest of Texas in these disputes is likely to be ... slight." Although these suppositions undoubtedly will serve to stir public debate, they have little basis in fact. ... [A] state's power to assert its jurisdiction is limited by the due process clause of the U.S. Constitution. ... The personal jurisdiction-due process analysis will ensure that Texas has a sufficient interest in each case entertained in our state's courts.[75]...

As stated previously, this suit has been filed against Shell, a corporation with its world headquarters in Texas, doing extensive business in Texas and manufacturing chemicals in Texas. The suit arose out of alleged acts occurring in Texas and alleged decisions made in Texas. The suit also has been filed against Dow, a corporation with its headquarters in Michigan, but apparently having substantial contacts with Texas. Dow operates the country's largest chemical plant in Texas, manufacturing chemicals within sixty miles of the largest population center in Texas, where millions of

74. Such a result in the name of "convenience" would undoubtedly follow a dismissal under forum non conveniens in the case at bar. The plaintiffs, who earn approximately one dollar per hour working at the banana plantation, clearly cannot compete financially with Shell and Dow in carrying on the litigation. More importantly, the cost of just one trip to Houston to review the documents produced by Shell would exceed the estimated maximum possible recovery in Costa Rica. In an unchallenged affidavit, a senior Costa Rican labor judge stated that the maximum possible recovery in Costa Rica would approximate 100,000 colones, just over $1,080 at current exchange rates. ... Further, Costa Rica permits neither jury trials nor depositions of nonparty witnesses. Attempting to depose a Dow representative concerning the company's knowledge of DBCP hazards will prove to be an impossible task as Dow is not required to produce that person in Costa Rica. It is not unlikely that Shell and Dow seek a forum non conveniens dismissal not in pursuit of fairness and convenience, but rather as a shield against the litigation itself. If successful, Shell and Dow, like many American multinational corporations before them, would have secured a largely impenetrable shield against meaningful lawsuits for their alleged torts causing injury abroad.

75. Justice Cook seems to suggest that it may violate due process for Shell to be sued in Houston. It is an extremely novel holding, unprecedented in American constitutional law, that a corporation could be denied due process by being sued in its hometown. ...

Texans reside. Shell and Dow cannot now seek to avoid the Texas civil justice system and a jury of Texans.

The next justification offered by the dissenters for invoking the legal fiction of "inconvenience" is that judges will be overworked. Not only will foreigners take our jobs, as we are told in the popular press; now they will have our courts. The xenophobic suggestion that foreigners will take over our courts "forcing our residents to wait in the corridors of our courthouses while foreign causes of action are tried," is both misleading and false. It is the height of deception to suggest that docket backlogs in our state's urban centers are caused by so-called "foreign litigation."... Ten states, including Texas, have not recognized the [forum non conveniens] doctrine. Within these states, there is no evidence that the docket congestion predicted by the dissenters has actually occurred. ...

Comity — deference shown to the interests of the foreign forum — is a consideration best achieved by rejecting forum non conveniens. Comity is not achieved when the United States allows its multinational corporations to adhere to a double standard when operating abroad and subsequently refuses to hold them accountable for those actions. As S. Jacob Scherr, Senior Project Attorney for the Natural Resources Defense Counsel, has noted "There is a sense of outrage on the part of many poor countries where citizens are the most vulnerable to exports of hazardous drugs, pesticides and food products." ... Comity is best achieved by "avoiding the possibility of 'incurring the wrath and distrust of the Third World as it increasingly recognizes that it is being used as the industrial world's garbage can.'" Note, *Hazardous Exports From A Human Rights Perspective*, 14 Sw. U. L. Rev. 81, 101 (1983).

The factors announced in *Gulf Oil* fail to achieve fairness and convenience. The public interest factors are designed to favor dismissal and do little to promote the efficient administration of justice. It is clear that the application of forum non conveniens would produce muddled and unpredictable case law, and would be used by defendants to terminate litigation before a consideration of the merits ever occurs.

The abolition of forum non conveniens will further important public policy considerations by providing a check on the conduct of multinational corporations. The misconduct of even a few multinational corporations can affect untold millions around the world. For example, after the United States imposed a domestic ban on the sale of cancer-producing TRIS-treated children's sleepwear, American companies exported approximately 2.4 million pieces to Africa, Asia and South America. A similar pattern occurred when a ban was proposed for baby pacifiers that had been linked to choking deaths in infants. These examples of indifference by some corporations towards children abroad are not unusual. ...

Some U.S. multinational corporations will undoubtedly continue to endanger human life and the environment with such activities until the economic consequences of these actions are such that it becomes unprofitable to operate in this manner. At present, the tort laws of many third world countries are not yet developed. Industrialization "is occurring faster than the development of domestic infrastructures necessary to deal with the problems associated with industry." When a court dismisses a case against a United States multinational corporation, it often removes the most effective restraint on corporate misconduct.

The doctrine of forum non conveniens is obsolete in a world in which markets are global and in which ecologists have documented the delicate balance of all life on this planet. The parochial perspective embodied in the doctrine of forum non conveniens enables corporations to evade legal control merely because they are transnational. This perspective ignores the reality that actions of our corporations affecting those abroad will also affect Texans. Although DBCP is banned from use within the United States, it and other similarly banned chemicals have been consumed by Texans eating foods imported from Costa Rica and elsewhere. In the absence of meaningful tort liability in the United States for their actions, some multinational corporations will continue to operate without adequate regard for the human and environmental costs of their actions. This result cannot be allowed to repeat itself for decades to come.

GONZALEZ, JUSTICE, dissenting. ... This decision makes us one of the few states in the Union without ... a procedural tool [like forum non conveniens], and if the legislature fails to reinstate this doctrine, Texas will become an irresistible forum for all mass disaster lawsuits. "Bhopal"-type litigation, with little or no connection to Texas will add to our already crowded dockets, forcing our residents to wait in the corridors of our courthouses while foreign causes of action are tried.[76] ...

COOK, JUSTICE, dissenting. Like turn-of-the-century wildcatters, the plaintiffs in this case searched all across the nation for a place to make their claims. Through three courts they moved, filing their lawsuits on one coast and then on the other. By each of those courts the plaintiffs were rejected, and so they continued their search for a more willing forum. Their efforts are finally rewarded. Today they hit pay dirt in Texas.

No reason exists, in law or in policy, to support their presence in this state. The legislature adopted within the statute the phrase "may be enforced" to permit plaintiffs to sue in Texas, irrespective of where they live or where the cause of action arose. The legislature did not adopt this statute, however, to remove from our courts all discretion to dismiss. To use the statute to sweep away, completely and finally, a common law doctrine painstakingly developed over the years is to infuse the statute with a power not contained in the words. Properly read, the statute is asymmetrical. Although it confers upon the plaintiffs an absolute right to bring claims in our

76. For example, in July 1988, there was an oil rig disaster in Scotland. A Texas lawyer went to Scotland, held a press conference, and wrote letters to victims or their families. He advised them that they had a good chance of trying their cases in Texas where awards would be much higher than elsewhere. Houston Post, July 18, 1988, at 13A, col. 1; The Times (London), July 18, 1988, at 20A, col. 1; Texas Lawyer, Sept. 26, 1988 at 3.

courts, it does not impose upon our courts an absolute responsibility to entertain those claims.

Even if the statute supported the court's interpretation, however, I would remain unwilling to join in the opinion. The decision places too great a burden on defendants who are citizens of our state because, by abolishing forum non conveniens, the decision exposes our citizens to the claims of any plaintiff, no matter how distant from Texas is that plaintiff's home or cause of action. The interest of Texas in these disputes is likely to be as slight as the relationship of the plaintiffs to Texas. The interest of other nations, on the other hand, is likely to be substantial. For these reasons, I fear the decision allows assertions of jurisdiction by Texas courts that are so unfair and unreasonable as to violate the due process clause of the federal constitution. ...

... [W]e are inviting into our courts disputes that may involve more substantial connections to foreign countries than to our own. Should we not stop to consider, as the *Asahi* court did, the possible effects of extending our laws beyond the shores of the United States? *See generally* Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1 (1987). ... There are in this case unresolved choice of law questions that, once resolved, may diminish the interest of this state in this litigation. ... There is a strong possibility that a choice of law analysis will result in the application of Costa Rican law. If so, what then is Texas' interest in adjudicating a foreign claim by foreign plaintiffs? ...

HECHT, JUSTICE, dissenting. Today the Court decrees that citizens of a foreign nation, Costa Rica, who claim to have been injured in their own country have an absolute right to sue for money damages in Texas courts. ... [This] inflicts a blow upon the people of Texas, its employers and taxpayers, that is contrary to sound policy.

The United States does not give aliens unlimited access to its courts. Indeed, one federal district court in California and two in Florida have already dismissed essentially this same lawsuit which the Court now welcomes to Texas. No state has ever given aliens such unlimited admission to its courts. The U.S. Supreme Court, the District of Columbia, and forty states have all recognized what has come to be called the rule of forum non conveniens. ... Until now, no state has ever rejected this rule. ...

The dearth of authority for the Court's unprecedented holding is disturbing. Far more disconcerting, however, is the Court's silence as to why the rule of forum non conveniens should be abolished in personal injury and death cases, either by the Legislature or by the Court. ... The benefit to the plaintiffs in suing in Texas should be obvious: more money, as counsel was candid enough to admit in oral argument.[77]

77. It is equally plain to me that defendants want to be sued in Costa Rica rather than Texas because they expect that their exposure will be less there than here. However, it also seems plain to me that the Legislature would want to protect the citizens of this state, its constituents, from greater exposure to liability than they would face in the country in which the alleged wrong was committed. This would be incentive for the Legislature not to abolish the rule of forum non conveniens.

... But what purpose beneficial to the people of Texas is served by clogging the already burdened dockets of the state's courts with cases which arose around the world and which have nothing to do with this state except that the defendant can be served with citation here? Why, most of all, should Texas be the only state in the country, perhaps the only jurisdiction on earth, possibly the only one in history, to offer to try personal injury cases from around the world? Do Texas taxpayers want to pay extra for judges and clerks and courthouses and personnel to handle foreign litigation? If they do not mind the expense, do they not care that these foreign cases will delay their own cases being heard? As the courthouse for the world, will Texas entice employers to move here, or people to do business here, or even anyone to visit? ... Who gains? A few lawyers, obviously. But who else? If the Court has good answers to these questions, why does it not say so in its opinion? If there are no good answers, then what the Court does today is very pernicious for the state.[78]

Notes on Piper and Castro Alfaro

1. ***Judicial authority to adopt the forum non conveniens doctrine.*** The district court in *Piper* was granted personal jurisdiction over the defendants by Rule 4 of the Federal Rules of Civil Procedure and a borrowed state long-arm statute. Similarly, statutory venue requirements were satisfied. Nonetheless, the Supreme Court held that the forum non conveniens doctrine permitted the trial court to decline jurisdiction on the grounds that it would have been an unduly "inconvenient" forum. *Piper* cited no statutory or constitutional basis for the forum non conveniens doctrine.

Is *Piper's* judicial abstention appropriate? Justice Black, dissenting in *Gulf Oil*, challenged what he characterized as an "abdication" of jurisdiction as violating the obligation of U.S. courts to exercise jurisdiction that Congress confers on them: "the courts of the United States are bound to proceed to judgment ... in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 515 (1947) (citing *Hyde v. Stone*, 61 U.S. 170, 175 (1858)). The *Gulf Oil* majority responded that "[o]bviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. ... Courts of equity and law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." 330 U.S. at 504 (quoting *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413, 422-23 (1932)).

78. Justice Doggett's concurring opinion undertakes to answer these questions that the Court ignores. It suggests that there are essentially two policy reasons to abolish the rule of forum non conveniens: to assure that injured plaintiffs can recover fully, and to assure that American corporations will be fully punished for their misdeeds abroad. Neither reason is sufficient. If the defendants in this case were Costa Rican corporations which plaintiffs could sue only in Costa Rica, plaintiffs would be limited to whatever recovery they could obtain in Costa Rican courts. The concurring opinion has not explained why Costa Rican plaintiffs who claim to have been injured by American corporations are unjustly treated if they are required to sue in their own country where they could only sue if they had been injured by Costa Rican corporations. In other words, why are Costa Ricans injured by an American defendant entitled to any greater recovery than Costa Ricans injured by a Costa Rican defendant, or a Libyan defendant, or an Iranian defendant? Moreover, the concurring opinion does not explain why the American justice system should undertake to punish American corporations more severely for their actions in a foreign country than that country does. If the alleged conduct of the defendants in this case is so egregious, why has Costa Rica not chosen to afford its own citizens the recovery they seek in Texas? One wonders how receptive Costa Rican courts would be to the pleas of American plaintiffs against Costa Rican citizens for recovery of all the damages that might be available in Texas, or anywhere else for that matter.

Is it appropriate for federal courts to abstain from exercising jurisdiction that Congress has granted them? From where is the authority to do so derived? Should federal courts have inherent power to control their dockets, notwithstanding Congress's jurisdictional statutes?

2. *Rationale for forum non conveniens doctrine.* What reasons are advanced in *Piper* to justify dismissal of a plaintiff's claims, wholly without legislative authorization? What values are served by the forum non conveniens doctrine?

(a) *Local judicial convenience.* Consider the following excerpt from an early decision foreshadowing the forum non conveniens doctrine:

> [I]f it appears upon the face of the pleadings that both of the litigant parties are foreigners and a foreign contract, we ought not to interpose. By the nature of all governments, courts were constituted to administer justice in relation to their own citizens; and not to do the business of citizens or subjects of other states. The judges of their own state are employed, and paid for that purpose. To encourage the resort of foreigners to our courts would be doing injustice to our own citizens who have business here to be attended to. *Avery v. Holland,* 2 Tenn. 71 (1806).

Similarly:

> To hold that two foreigners may import, bodily, a cause of action, and insist, as a matter of right, that taxpayers, citizens, and residents shall await the lagging steps of justice in the anteroom while the court hears and decides the foreign controversy, seems, on the face of it, to be unreasonable, if not absurd.

Disconto-Gesellschaft v. Umbreit, 106 N.W. 821, 823 (Wis. 1906), *aff'd,* 208 U.S. 570 (1908). Are these legitimate concerns, or mere xenophobia? Do not foreigners have a right of access to U.S. courts? *See supra* pp. 64-65. Even if they are legitimate concerns, are these adequate justifications for the forum non conveniens doctrine? What would Justice Doggett say?

(b) *Handling private litigation efficiently.* To what extent does the forum non conveniens doctrine concern issues of convenience and trial management? Note Justice Marshall's statement in *Piper* that "the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient." Consider the discussion in *Piper* of the "private interest" factors, such as the location of documents and witnesses, the availability of compulsory process, and the location of related litigation. Even if these factors indicate that the plaintiff's chosen forum is significantly less convenient than an alternative forum, is this a valid justification for a forum non conveniens dismissal? Note Justice Doggett's argument that modern communications and transport have made it easy and cheap to bring foreign evidence to the forum. Moreover, why should considerations of private convenience be permitted to override a plaintiff's substantive legal rights in a U.S. forum? Could a federal court, for example, decline to hear Title VII or antitrust claims on the grounds that the parties' disputes could be more expeditiously resolved in state court?

(c) *Foreign regulatory interests and comity.* Can the forum non conveniens doctrine be justified as a way to prevent U.S. courts from interfering with foreign states' sovereignty and regulatory regimes? Recall that 19th century admiralty courts invoked considerations of international comity and respect for foreign sovereignty in declining to decide certain types of disputes. *See supra* pp. 290-91. Consider *Piper's* discussion of the relative "public interests" of the United States and the United Kingdom. According to Justice Marshall, what were the respective U.S. and U.K. interests? Note Justice Doggett's views about the usefulness of the forum non conveniens doctrine in preventing interference with foreign sovereignty. Are his views persuasive? How do you think the U.K. government would have wanted *Piper* to have been decided? How would Costa Rica have wanted *Alfaro* decided? Recall *Sequihua v. Texaco, Inc.,* excerpted *supra* pp. 50-56. What was Ecuador's position there?

(d) *Treating U.S. defendants fairly.* Does the forum non conveniens doctrine reflect concerns over the unjustified imposition of tort liability on American companies that do business abroad? Consider the Court's concern in *Piper* that, if the Third Circuit's analysis had been accepted, "where the foreign plaintiff named an American manufacturer as defendant, a court could not dismiss the case on grounds of *forum non conveniens* where dismissal might lead to an unfavorable change in law." Justice Hecht's dissent in *Alfaro* is more direct: "[W]hy [should] the American justice system ... undertake to punish American corporations more severely for their actions in a foreign country than that country does?" "[W]hy are Costa Ricans injured by an American defendant entitled to any greater recovery than Costa Ricans injured by a Costa Rican defendant, or a Libyan defendant, or an Iranian defendant?" What are the answers? Can the

forum non conveniens doctrine be justified as a device for fostering more equal treatment — from an international perspective — of like cases? Why should Mr. Alfaro (and his Texas lawyers) recover one hundred times more from Dow and Shell than Mr. Alfaro's neighbors could recover from a Costa Rican or Japanese company, guilty of exactly the same conduct as their U.S. counterparts? What would Justice Doggett say?

3. *Wisdom of forum non conveniens doctrine.* Was the Supreme Court wise in *Gulf Oil* and *Piper* to adopt the forum non conveniens doctrine? Consider the scathing remarks by Justice Doggett in *Alfaro,* and the equally vigorous comments by Justices Gonzalez and Hecht. Rhetoric aside, does the forum non conveniens doctrine serve useful objectives? What are they?

4. *Relationship between judicial jurisdiction and forum non conveniens.* The historical development of the forum non conveniens doctrine between 1925 and 1985 was closely related to the evolution of concepts of judicial jurisdiction. As described above, the due process clause was interpreted as imposing strict territorial restrictions on the judicial jurisdiction of U.S. courts during the 19th and early 20th centuries. *See supra* pp. 70-73; *Pennoyer v. Neff,* 95 U.S. 714 (1878). During this era, the forum non conveniens doctrine was primarily confined in the United States to admiralty cases — where the attachment of foreign vessels provided jurisdiction over foreign defendants and disputes that generally did not exist in non-admiralty cases. *See supra* pp. 289-91. Aside from anything else, the existence of strict territorial limits on judicial jurisdiction made principles of forum non conveniens largely irrelevant, because foreign defendants and disputes would generally not find their ways into local courts.

Pennoyer's territorial limits were gradually eroded during this century. *See supra* pp. 73-77. This culminated in the Supreme Court's 1945 formulation of the "minimum contacts" test in *International Shoe Co. See supra* pp. 73-74. Under *International Shoe,* plaintiffs enjoyed a new and substantially wider choice of courts in which to commence litigation. This was especially true as to general jurisdiction, which granted U.S. courts personal jurisdiction over defendants with respect to claims that had no connection with the forum. *See supra* pp. 77-78. Inevitably, the new jurisdictional regime meant that courts could adjudicate cases even if they were disproportionately burdensome to the defendant or would have very unusual or favorable choice of law and substantive rules. On occasion, plaintiffs would select a forum to commence litigation precisely because it had these attributes — engaging in "forum-shopping" for a court that would provide it with the maximum practical and legal advantages.

U.S. judicial acceptance of the doctrine of forum non conveniens occurred at precisely the same time that U.S. principles of judicial jurisdiction were being transformed. As *Pennoyer's* strict territoriality rules were eroded during the 1920's and 1930's, academic commentary suggested the forum non conveniens doctrine and other devices specifically to moderate newly-expanded jurisdictional powers. (Paxton Blair's article on forum non conveniens was published in 1929. Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law,* 29 Colum. L. Rev. 1 (1929). *See supra* pp. 292-93.) Likewise, *Gulf Oil* expressly adopted the forum non conveniens doctrine in 1946 — one year after the minimum contacts formula was articulated in *International Shoe.* And *Piper Aircraft* was decided in 1981, at the same time that *World-Wide Volkswagen* and similar decisions further expanded the reach of U.S. judicial jurisdiction. *See supra* pp. 73-77.

Is the forum non conveniens doctrine an appropriate means of moderating the expansion of contemporary judicial jurisdiction? Would it be wiser to articulate more precise jurisdictional rules?

5. *What does forum non conveniens really mean?* Perhaps because it is a catchy neo-Latin phrase, the forum non conveniens doctrine appears deceptively easy to comprehend. It is, surely, just a common sense question of determining whether the forum is inconvenient, isn't it? Consider:

> The general inference to be drawn from the Latin phrase is that jurisdiction should be declined when the forum is inconvenient. But inconvenient to whom? The court? The plaintiff? The defendant? Even if we have the answers to these questions, is it enough that the scale is weighted more heavily on the side of inconvenience to the defendant when the plaintiff has acted in good faith? In other words, must there be an element of abuse of court process before jurisdiction is declined? Perhaps, the search should be a broader one for that forum in which the ends of justice will best be served. Obviously, these questions must be answered before we know anything of the meaning of the doctrine of forum non conveniens.

Barrett, *The Doctrine of Forum Non Conveniens,* 35 Calif. L. Rev. 380, 404 (1947). In addition to these questions, which concern only issues of "convenience," the forum non conveniens doctrine also involves "public interest" factors and allocations of regulatory competence. *See supra* pp. 294-96. What precisely is the legal rule established by the forum non conveniens doctrine? What objectives does the doctrine really serve?

6. *Unexamined substantive assumptions of forum non conveniens doctrine.* Although it purports to concern "convenience," the forum non conveniens doctrine rests on unarticulated and unexamined substantive assumptions. Compare the excerpt from *Piper*, expressing concern about subjecting U.S. manufacturers to "liberal" U.S. substantive and procedural rules, with Justice Doggett's condemnation of perfidious multinationals engaged in world-wide depredations of the environment and developing nations. Who is correct — Justice Marshall or Justice Doggett? *Compare* the differing views in *Castro Alfaro* concerning international comity and foreign sovereignty. Is there any principled basis for a court to decide between these views without legislative guidance?

7. *Effect of unfavorable change in law on forum non conveniens analysis under* Piper. *Piper* held that the possibility of an unfavorable change in substantive law for the plaintiff is not to be "given conclusive or even substantial weight" in federal forum non conveniens analysis. Given the broad range of public and private interest factors that are relevant to forum non conveniens analysis, why should the vitally important question of substantive law changes be disregarded?

In answering this question, *Piper* emphasizes the central role of "convenience" in forum non conveniens analysis. Is this persuasive? The "public interest" factors relevant to forum non conveniens analysis have little to do with convenience. Moreover, defendants seldom seek forum non conveniens dismissals to obtain a more convenient forum; instead, they often want to avoid the substantive, procedural, and other characteristics of the original forum — for exactly the reasons that the plaintiff chose the forum. *See Bewers v. American Home Prods. Corp.*, 459 N.Y.S.2d 666, 668 (Sup. Ct. 1982) ("Plaintiff's choice of forum is being vigorously contested, probably not so much because defendants are unaccustomed to international travel, but because as both sides know, the outcome of this procedural motion may well be dispositive of plaintiffs' claims."). Given the strong substantive character of forum non conveniens analysis, is it appropriate to ignore changes in substantive law? In answering this question, what weight should be given to the fact that "changes" in substantive law result from the plaintiff's ability unilaterally to select the forum for its claims?

8. *Foreign forum that provides "no remedy at all."* Under *Piper*, are unfavorable changes of law entitled to *any* weight? *Piper* held that "the unfavorable change of law may be given substantial weight," if the "remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." Why must such drastic, all-or-nothing consequences be established before a trial court can take changes in substantive law into account? If it is appropriate for a U.S. court to consider the fact that a plaintiff may not be able to assert a $15,000 claim, why is it apparently inappropriate to consider the fact that a plaintiff's $15 million claim is reduced to $15,000? If other factors are not dispositive, can a court then give weight (including decisive weight) to unfavorable changes in law?

Note that even where a plaintiff would have "no remedy at all" abroad, *Piper* apparently suggests that a trial court "may" give this factor "substantial weight." "Must" the trial court do so? Even if it must, what other factors might counterbalance the "substantial weight" accorded to the unfavorable change in law? Notwithstanding the Court's language in *Piper*, lower courts generally have held that the lack of any adequate remedy abroad precludes forum non conveniens dismissal. *See infra* pp. 341-57.

9. *Presumptive validity of U.S. plaintiff's choice of U.S. forum.* *Piper* reaffirmed *Gulf Oil's* holding that a U.S. plaintiff's choice of forum should rarely be disturbed. The Court also said that U.S. citizens do not have any absolute right to protection from dismissal of their claims on forum non conveniens grounds. Given the wide range of forums that existing rules of personal jurisdiction allow plaintiffs — and the practical advantages this entails — should the forum selections of U.S. plaintiffs generally receive an automatic presumption of validity? What justifies this deference? Why should people be rewarded for suing first? Recall that, for purposes of due process limitations on judicial jurisdiction, the *plaintiff's* contacts with the forum are relatively unimportant. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984) ("[W]e have not to date required a plaintiff to have "minimum contacts" with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant. On the contrary, we have upheld the assertion of jurisdiction where such contacts were entirely lacking.").

10. *Reduced deference to a foreign plaintiff's choice of U.S. forum under* Piper. *Piper* also held that a *foreign* plaintiff's choice of a U.S. forum will not receive the "strong presumption" of validity that courts accord to a U.S. plaintiff's choice of a U.S. forum. As *Piper* noted, there are powerful reasons (such as favorable substantive laws, large jury verdicts, contingency fee arrangements, discovery opportunities, and the minimal chance of attorneys' fees being awarded against the losing side) that may entice foreign plaintiffs into U.S. courts without regard to convenience. *See supra* pp. 3-7. The Court justified differential treatment of U.S. and foreign plaintiffs on the grounds that it can be assumed that a U.S. plaintiff will choose a U.S. forum because it is convenient. The Court did not think that this assumption applied to a

foreign plaintiff's choice of a U.S. forum, reasoning that foreigners were likely attracted by U.S. damage awards. *Smith Kline & French Labs. v. Bloch* [1983] 2 All E.R. 72, 74 ("[a]s a moth is drawn to the light, so is a litigant drawn to the United States"). Is a plaintiff's U.S. nationality a reasonable proxy for the convenience of a U.S. forum? Does a party's nationality have any real relation to the convenience of different forums for a particular dispute? Won't many foreigners sue in U.S. courts because they are convenient?

11. *Degree of inconvenience required to warrant forum non conveniens dismissal.* *Piper* reaffirmed the demanding *Gulf Oil* standard for a forum non conveniens dismissals. If "trial in the chosen forum would 'establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems,'" then dismissal is permissible. Moreover, "dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." Why is this the appropriate standard of proof? Why should it be necessary to show inconvenience to the defendant "out of all proportion" to the plaintiff's convenience? Why ought it not be enough to show "materially greater inconvenience" to the defendant? or simply that, on balance, another forum would permit a somewhat cheaper proceeding?

12. *Trial judge's discretion in applying forum non conveniens doctrine and standard of appellate review.* *Piper* reemphasized the role of the trial court's discretion in balancing private and public interests: "The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion." Why are trial court decisions in the forum non conveniens context accorded such deference? Is it because the weighing of multiple factors is an inherently fact-dependent exercise, poorly suited to appellate review? Note, however, that in *Piper* many of the facts relevant to the forum non conveniens decision were based on documentary evidence that appellate courts could readily review.

13. *Wisdom of* Piper *and* Alfaro. Was *Piper* correctly decided? Is it a desirable result? Compare the result in *Alfaro* to that in *Sequihua v. Texaco, Inc.*, 847 F.Supp. 61 (S.D. Tex. 1994) (excerpted above at pp. 51-52). Which result is wiser? Is the defendant's desire in *Sequihua* to be in federal court more comprehensible in the light of *Alfaro*?

14. *Unpredictability of forum non conveniens decisions.* Recall Justice Black's warning in *Gulf Oil* that the "broad and indefinite discretion" granted by the forum non conveniens doctrine "will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible." *See supra* pp. 295-96, 330 U.S. at 516. That may well be correct. *See infra* pp. 317-18. But suppose there were no forum non conveniens doctrine. Would it be any easier to make an "accurate prediction" of the "proper forum"? Wouldn't there be inevitable races to the courthouse and parallel proceedings in multiple forums? *See infra* pp. 459-60. Isn't the uncertainty that Justice Black derides a result of expansive rules of judicial jurisdiction, and not the forum non conveniens doctrine?

15. *Criticism of forum non conveniens standard of review.* Commentators have vigorously criticized *Piper's* deferential standard of review for forum non conveniens decisions. One writer has remarked that it has produced a "crazy quilt of ad hoc, capricious, and inconsistent decisions." Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. Pa. L. Rev. 781, 785 (1985). Another has said that the forum non conveniens doctrine is "notoriously complex and uncertain," Currie, *Change of Venue and the Conflict of Laws*, 22 U. Chi. L. Rev. 405, 416 (1955), while a third has referred to the "chaos of forum non conveniens." A. Ehrenzweig, *The Conflict of Laws* 150 (1959). The late Judge Henry Friendly devoted an article — *Indiscretion About Discretion* — to criticizing *Piper's* reliance on trial courts' discretion. Friendly, *Indiscretion About Discretion*, 31 Emory L. J. 747 (1982).

The Supreme Court has not yet taken the opportunity to respond to such criticism. On the contrary, the Court has displayed little interest in the doctrine's practical effects on private litigation. Indeed, Justice Scalia made the following comments in *American Dredging Co. v. Miller*, purportedly to justify the Court's refusal to adopt a substantive federal common law rule of forum non conveniens in domestic admiralty cases:

> [T]o tell the truth, forum non conveniens cannot really be *relied* upon in making decisions about secondary conduct — in deciding, for example, where to sue or where one is subject to being sued. The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application ... make uniformity and predictability of outcome almost impossible. 114 S.Ct. at 989.

Is it unusual for the Supreme Court to say this about a common law doctrine that *it* created, wholly without statutory basis, for the purposes of facilitating the administration of justice?

16. *Appellate decisions seeking greater predictability in forum non conveniens decisions.* Several courts of appeals have shown greater attention to the predictability of forum non conveniens decisions than the Supreme Court. These courts have emphasized that a trial court's discretion in deciding forum non conveniens motions is not unlimited. Forum non conveniens determinations "represent exercises of structured discretion by trial judges appraising the practical inconveniences posed to the litigants and to the court should a particular action be litigated in one forum rather than another. *Pain v. United Technologies Corp.*, 637 F.2d 775, 781 (D.C. Cir. 1981). In order to permit meaningful analysis and appellate review, these courts have insisted that trial judges consider and evaluate each of the relevant *Gulf Oil* factors and articulate the basis for their decisions. *E.g., In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147 (5th Cir. 1987) ("a district court abuses its discretion when it summarily denies or grants a motion to dismiss without either written or oral explanation ... [or] when it fails to address and balance the relevant principles and factors of the doctrine of forum non conveniens"); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38 (3d Cir. 1988). Is this wise? Is it consistent with *Piper*?

17. *Proposals for substantially broader power to dismiss on forum non conveniens grounds.* Some commentators have suggested that courts should radically reformulate the forum non conveniens doctrine and instead consider what forum would be the most convenient for litigation, without regard to the place that the plaintiff commenced litigation. *See* Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U.L. Rev. 1112 (1981); Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. Pa. L. Rev. 781, 844 (1985). In effect, trial courts (rather than plaintiffs) would be authorized to choose the most appropriate forum for litigating multi-jurisdictional disputes. What are the advantages of such an approach? What would authorize district courts to override the forum selections of plaintiffs?

18. *International law and due process limits on judicial competence.* As discussed above, international law arguably imposes limits on the competence of a nation's courts to adjudicate disputes having no connection to the forum — even when judicial jurisdiction exists and restrictions on legislative jurisdiction are observed. *See supra* pp. 32 & 49. Consider Justice Cook's dissent, arguing that due process imposes limits on a state court's power to adjudicate certain claims against "our citizens" — *e.g.*, Texas corporations or other entities ordinarily subject to general jurisdiction. In Justice Cook's view, the due process clause should not "expose[] our citizens to the claims of any plaintiff, no matter how distant from Texas is that plaintiff's home or cause of action." Is this view consistent with orthodox understandings of general jurisdiction? *See supra* pp. 95-123. Consider Justice Doggett's response to it. Why *shouldn't* international law and due process restrict a state court's power to hear claims that have *nothing* to do with it? Consider again the arguments advanced for general jurisdiction.

19. *Proposals to abolish forum non conveniens doctrine.* Justice Doggett's concurring opinion in *Castro Alfaro* characterizes the forum non conveniens doctrine as "a legal monstrosity" and argues strongly that it is unacceptable on policy grounds. Are Justice Doggett's arguments well-taken? Why?

20. *Effect of modern technology on forum non conveniens doctrine.* Modern communications and transportation have eliminated much of the "inconvenience" that the forum non conveniens doctrine sought to prevent. Documents can be faxed or couriered around the world in seconds; telephone and video conferences are easy and cheap; witnesses and lawyers can travel easily for hearings. In *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 456 (2d Cir. 1975) (Oakes, J., dissenting), *cert. denied*, 423 U.S. 1052 (1976), Judge Oakes urged that "the entire doctrine of *forum non conveniens* should be reexamined in the light of the transportation revolution that has occurred" in the last 40 years and the "dispersion of corporate authority ... by the use of multinational subsidiaries to conduct international business." Judge Oakes went on to suggest abandoning the doctrine in favor of general acceptance of a plaintiff's choice of forum. Is this a sensible course to take? What effect do modern technological developments have on the forum non conveniens doctrine?

21. *Practical importance of forum non conveniens doctrine.* The passion that marks both Justice Doggett's and Justice Hecht's opinions reflects the underlying significance of a forum non conveniens dismissal to the litigants in many cases. This is because of the enormous differences between different national forums, and the likely judgments they will produce. In many cases, the forum non conveniens decision is dispositive, as a practical matter, of the parties' dispute. If the case is dismissed, the plaintiff will effectively capitulate, while the defendant will often settle on generous terms (by international standards) if the case is not dismissed.

D. The Adequate Alternative Forum Requirement and Public Policy Restrictions

1. Adequate Alternative Forum Requirement

A vital part of any forum non conveniens analysis is the so-called "adequate alternative forum" requirement. *Piper* said that "[a]t the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum."[81] Similarly, *Gulf Oil* held that the forum non conveniens doctrine "presupposes at least two forums in which the defendant is amenable to process."[82] Other authorities concur.[83]

There is no precise definition in *Piper*, or elsewhere, of an "inadequate" foreign forum. U.S. courts have considered a number of arguments that particular foreign courts would provide inadequate forums. In summary, these include cases where: (a) the foreign forum would lack jurisdiction over the subject matter of the dispute; (b) the plaintiff would not enjoy access to the foreign forum; (c) the defendant would not be subject to personal jurisdiction in the foreign forum; (d) the foreign forum would be biased or corrupt; or (e) the foreign forum would apply unfavorable substantive or procedural rules.

Most U.S. courts have required that the party seeking a forum non conveniens dismissal bear the burden of proving that none of these circumstances renders the proposed alternative forum inadequate.[84] In general, U.S. courts are disinclined to hold that foreign courts are inadequate forums. *Piper* said "[o]rdinarily, th[e] adequate alternative forum requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction."[85] Nevertheless, as discussed below, U.S. courts have denied forum non conveniens dismissals in a number of cases based upon failure to satisfy the adequate alternative forum requirement.

2. Public Policy as a Basis for Denying Forum Non Conveniens Dismissals

Related to the adequate alternative forum requirement is the less-common argument that the forum's public policy forbids forum non conveniens dismissal of certain claims. Neither *Piper* nor the *Restatement (Second) Conflict of Laws* alludes to the

---

81. 454 U.S. at 254 n.22.

82. 330 U.S. at 507.

83. *Restatement (Second) Conflict of Laws* §84 (1971); *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419 (1st Cir. 1991); *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1165 (5th Cir. 1987).

84. *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419 (1st Cir. 1991) ("it remains the moving defendant's burden to establish that an adequate alternative forum exists"); *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1549-50 (5th Cir. 1991); *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1146, 1149 (9th Cir. 1990); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43-44 (3d Cir. 1988); *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1164 (5th Cir. 1987); *Canadian Overseas Ores v. Compania de Acero del Pacifico, SA*, 528 F. Supp. 1337 (S.D.N.Y. 1982), *aff'd on other grounds*, 727 F.2d 1274 (2d Cir. 1984); *Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir. 1983); *Schertenleib v. Traum*, 589 F.2d 1156, 1160 (2d Cir. 1978).

85. 454 U.S. at 254-55 n.22.

existence of a public policy defense to a forum non conveniens motion. It is clear, however, from both principle and lower court precedent that such a defense exists.

In most jurisdictions, the forum non conveniens doctrine is a common law principle of judicial abstention, or a generalized statutory codification of this principle.[86] Although seldom discussed in these terms, this general forum non conveniens principle must give way to specific forum public policies in particular cases. This result is analogous to public policy rules applicable to forum selection agreements, choice of law clauses, choice of law doctrine, and foreign judgments.[87]

As in other contexts, the public policy inquiry in the forum non conveniens context is an uncertain and unpredictable one.[88] The most clear-cut example is where a forum statute forbids forum non conveniens dismissals in particular kinds of cases, or requires that particular types of claims be litigated only in the forum.[89] In few cases, however, do U.S statutes expressly address the applicability of the forum non conveniens doctrine, and U.S. courts have rejected most arguments that particular statutes impliedly forbid forum non conveniens dismissals.[90]

Absent statutory guidance, the existence of a public policy precluding forum non conveniens dismissals must generally be implied from statutory and common law evidence that does not directly address the point. These arguments are most common where a plaintiff asserts claims under a regulatory statute in the forum state — such as antitrust, securities regulation, environmental, or employment laws. The basic argument is that in providing specific statutory protections, the legislature must have intended to override the common law forum non conveniens doctrine.

A few U.S. courts have refused to apply the forum non conveniens defense to particular U.S. statutory claims.[91] Most notably, lower courts have generally concluded that forum non conveniens is not available in federal antitrust actions.[92] In contrast, courts have almost always concluded that other federal statutory claims are subject to forum non conveniens dismissals. Claims under both the Carriage of Goods by Sea Act and the Jones Act have generally been held subject to forum non

86. *See supra* pp. 298-300.

87. *See infra* pp. 414-30, 486-88, 624-31, 655-56 & 974-86.

88. *See infra* pp. 354-56.

89. *E.g., Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990) (relying on Tex. Civ. Prac. & Rem. Code §71.031).

90. *E.g., Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944 (1st Cir. 1991) (rejecting argument that "special venue" provision of federal securities laws forbids forum non conveniens dismissals).

91. *E.g., Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1486 (9th Cir. 1987) (Jones Act); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983) (Jones Act); *Szumlicz v. Norwegian American Line*, 698 F.2d 1192, 1195 (11th Cir. 1983) (Jones Act); *Lawford v. New York Life Ins. Co.*, 739 F.Supp. 906 (S.D.N.Y. 1990) (ERISA); *Galon v. M/V Hira II*, 1990 A.M.C. 342 (W.D. Wash. Oct. 27, 1989) (46 U.S.C. §10313); *First Pacific Corp. v. Sociedade de Empreendimentos e Construcoes, Ltda.*, 566 So.2d 3 (Fla. App. 1990) (Florida statutes).

92. *E.g., Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 890 (5th Cir.), *vacated on other grounds*, 460 U.S. 1007 (1983); *Laker Airways v. Pan American World Airways*, 568 F. Supp. 811, 817-18 (D.D.C. 1983); *El Cid, Ltd. v. New Jersey Zinc Co.*, 444 F. Supp. 845, 846 n.1 (S.D.N.Y. 1977).

conveniens dismissal.[93] Similarly, lower courts have held that federal securities, RICO, and ERISA claims are subject to *forum non conveniens* dismissal.[94]

3. Conditions on Dismissals

Conditions are frequently imposed as a requirement for granting forum non conveniens dismissals.[95] These conditions are typically imposed in order to meet a plaintiff's contentions that a proffered foreign alternative forum would be inadequate. It is particularly common to condition forum non conveniens dismissal on: (1) the defendant's consent to suit and service of process in the alternative forum; (2) the defendant's agreement to produce documents or witnesses in the plaintiff's foreign action; (3) the defendant's waiver of any statute of limitation defense in the foreign action; and (4) the defendant's consent to pay any foreign judgment obtained by plaintiffs. If the defendant fails to abide by the U.S. court's conditions, the U.S. action may be restored to the trial court's docket.[96]

4. Selected Materials on Adequate Alternative Forums, Public Policy, and Conditions

Excerpted below are various materials on the alternative forum requirement and the imposition of conditions on forum non conveniens dismissals. The *Bhopal* decision considers the significance of differences in procedural rules. The opinions in *Howe* and *Laker* explore the role of public policy limits in application of the forum non conveniens doctrine. Finally, both the *Wyeth* and *Bhopal* decisions illustrate the role of conditions on forum non conveniens dismissals.

93. *E.g., Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446 (9th Cir. 1990) (COGSA, with court indicating that foreign court might apply COGSA); *Ikospentakis v. Thalassic Steamship Agency*, 915 F.2d 176 (5th Cir. 1990) (Jones Act and maritime claims); *Monsanto Int'l Sales Co. v. Hanjin Container Lines, Ltd.*, 770 F. Supp. 832 (S.D.N.Y. 1991) (COGSA); *Gazis v. John S. Latsis, Inc.*, 729 F. Supp. 979 (S.D.N.Y. 1990) (Jones Act).

94. *E.g., Daley v. NHL*, 987 F.2d 172 (3d Cir. 1993) (ERISA); *Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944 (1st Cir. 1991); *Kempe v. Ocean Drilling and Exploration Co.*, 876 F.2d 1138 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 279 (1989) (dismissing suit by foreign plaintiffs, where RICO claim was only one of numerous claims for relief; all parties conceded that alternative forum would not entertain RICO claim); *Transunion Corp. v. Pepsico*, 811 F.2d 127 (2d Cir. 1987) (RICO); *Schoenbaum v. Firstbrook*, 405 F.2d 200, *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969) (dicta suggesting forum non conveniens is available if foreign law also provides a cause of action); *The Scandinavia Co. v. Nordbanken Group*, 1992 U.S. Dist. Lexis 15330 (E.D. Pa. 1992) (forum non conveniens dismissal of RICO claims). *But see General Environmental Science Corp. v. Horsfall*, 753 F. Supp. 664 (N.D. Ohio 1990) (refusing to grant *forum non conveniens* dismissal of RICO claims); *Pioneer Properties, Inc. v. Martin*, 557 F. Supp. 1354, 1362 (D. Kan. 1983), *appeal dismissed*, 776 F.2d 888 (10th Cir. 1985).

95. *E.g., Ali v. Offshore Co.*, 753 F.2d 1327, 1334 n.16 (5th Cir. 1985); *Vaz Borralho v. Keydril Co.*, 696 F.2d 379 (5th Cir. 1983); *Calavo Growers v. Belgium*, 632 F.2d 963 (2d Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981); *Fitzgerald v. Texaco*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976).

96. *Cesar v. United Technology*, 562 N.Y.S.2d 903 (S.Ct. 1990); *Sigalas v. Lido Maritime*, 776 F.2d 1512, 1516 (11th Cir. 1985) (if conditions are not fulfilled "the adverse party may return to the original forum and maintain his action"); *Chiazer v. Transworld Drilling Co.*, 648 F.2d 1015 (5th Cir. 1981).

IN RE UNION CARBIDE CORPORATION GAS PLANT DISASTER AT BHOPAL, INDIA IN DECEMBER, 1984

634 F. Supp. 842 (S.D.N.Y. 1986)
aff'd, 809 F.2d 195 (2d Cir.), cert. denied, 484 U.S. 871 (1987)

KEENAN, DISTRICT JUDGE. On the night of December 2-3, 1984 the most tragic industrial disaster in history occurred in the city of Bhopal, state of Madhya Pradesh, Union of India. Located there was a chemical plant owned and operated by Union Carbide India Limited ("UCIL"). ... UCIL manufactured the pesticides Sevin and Temik at the Bhopal plant at the request of, and with the approval of, the Government of India. UCIL was incorporated under Indian law in 1934, 50.9% of its stock is owned by the defendant, Union Carbide Corporation, a New York corporation. Methyl isocanate ("MIC"), a highly toxic gas, is an ingredient in the production of both Sevin and Temik. On the night of the tragedy MIC leaked from the plant in substantial quantities for reasons not yet determined. The prevailing winds ... blew the deadly gas into the overpopulated hutments adjacent to the plant and into the most densely occupied parts of the city. The results were horrendous. Estimates of deaths directly attributable to the leak range as high as 2,100. No one is sure exactly how many perished. Over 200,000 people suffered injuries ...

On December 7, 1984 the first lawsuit was filed by American lawyers in the United States on behalf of thousands of Indians. Since then 144 additional actions have been commenced in federal courts in the United States. ... The Indian Government on March 29, 1985 enacted legislation, the Bhopal Gas Leak Disaster (Processing of Claims) Act (21 of 1985) ("Bhopal Act"), providing that the Government of India has the exclusive right to represent Indian plaintiffs in India and elsewhere in connection with the tragedy. Pursuant to the Bhopal Act, the Union of India, on April 8, 1985, filed a complaint with this Court setting forth claims for relief similar to those in the consolidated complaint of June 28, 1985. By order of April 25, 1985 this Court established a Plaintiffs' Executive Committee, comprised of [lawyers], who represent individual plaintiffs and [lawyers who represent] the Union of India. ...

Before this Court is a motion by the defendant Union Carbide Corporation ("Union Carbide") to dismiss the consolidated action on the grounds of forum non conveniens. ... "At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum." *Piper*, at 254, n.22. ... [T]he *Piper* Court delved into the relevance of the substantive and procedural difference in law which would be applied in the event a case was transferred on the grounds of forum non conveniens. The *Piper* Court determined that it was theoretically inconsistent with the underlying doctrine of forum non conveniens, as well as grossly impractical, to consider the impact of the putative transfer forum's law on the plaintiff in this decision on a forum non conveniens motion: "[I]f conclusive or substantial weight were given to the possibility of a change in law, the forum non conveniens doctrine would become virtually useless." ...

[T]he plaintiffs in this case argue that Indian courts do not offer an adequate forum for this litigation by virtue of the relative "procedural and discovery deficiencies [which] would thwart the victims' quest for" justice. ... Plaintiffs' preliminary concern, regarding defendant's amenability to process in the alternative forum, is more than sufficiently met in the instant case. Union Carbide has unequivocally acknowledged that it is subject to the jurisdiction of the courts of India. ...

Beyond this initial test, plaintiffs ... argue that the Indian legal system is inadequate to handle the Bhopal litigation. [Plaintiffs submitted expert witness testimony on the Indian legal system from a U.S. law professor, not admitted to practice in India; defendants submitted testimony from two senior members of the Indian bar] ... According to [plaintiff's expert], India's legal system "was imposed on it" during the period of colonial rule. [He] argues that "Indian legal institutions still reflect their colonial origins," in terms of the lack of broad based legislative activity, inaccessibility of legal information and legal services, burdensome court filing fees and limited innovativeness with reference to legal practice and education. ... Mr. Palkhivala responds with numerous examples of novel treatment of complex legal issues by the Indian Judiciary. ... The examples cited by defendant's experts suggest a developed and independent judiciary. ...

[Plaintiff's expert] discusses the problems of delay and backlog in Indian courts. Indeed, it appears that India has approximately one-tenth the number of judges, per citizen, as the United States and that postponements and high caseloads are widespread. [Plaintiff's expert] urges that the backlog is a result of Indian procedural law, which allows for adjournments in mid-hearing, and for multiple interlocutory and final appeals. ... This Court acknowledges that delays and backlog exist in Indian courts, but United States courts are subject to delays and backlog, too. ...

Plaintiffs contend that the Indian legal system lacks the wherewithal to allow it "to deal effectively and expeditiously" with the issues raised in this lawsuit. Plaintiffs urge that Indian practitioners emphasize oral skills rather than written briefs. They allegedly lack specialization, practical investigative techniques and coordination into partnership. These factors, it is argued, limit the Indian bar's ability to handle the Bhopal litigation. ... While Indian attorneys may not customarily join into large law firms, and as Mr. Palkhivala states, are limited by present Indian law to partnerships of no more than twenty, this ... does not establish the inadequacy of the Indian legal system. ... [T]his court is not convinced that the size of a law firm has that much to do with the quality of legal service provided. ... Many small firms in this country perform work at least on a par with the largest firms. Bigger is not necessarily better. ...

[Plaintiff's expert] asserts that India lacks codified tort law [and] has little reported case law in the tort field. ... Mr. Dadachanji responds that tort law is sparsely reported in India due to frequent settlement of such cases, lack of appeal to higher courts, and the publication of tort cases in specialized journals other than the All-India Reports. In addition, tort law has been codified in numerous Indian statutes. ...

Plaintiffs next assert that India lacks certain procedural devices which are essen-

tial to the adjudication of complex cases, the absence of which prevent India from providing an adequate alternative forum. They urge that Indian pre-trial discovery is inadequate and that therefore India is an inadequate alternative forum. [Plaintiff's expert] states that the only forms of discovery available in India are written interrogatories, inspection of documents, and requests for admissions. Parties alone are subject to discovery. Third-party witnesses need not submit to discovery. Discovery may be directed to admissible evidence only, not material likely to lead to relevant or admissible material, as in the courts of the United States. ... These limits on discovery are adopted from the British system. Similar discovery tools are used in Great Britain today. This Court finds that their application would perhaps, however, limit the victims' access to sources of proof. Therefore, pursuant to its equitable powers, the Court directs that the defendant consent to submit to the broad discovery afforded by the United States Federal Rules of Civil Procedure if or when an Indian court sits in judgment or presides over pretrial proceedings in the Bhopal litigation. ...

Final points regarding the asserted inadequacies of Indian procedure involve unavailability of juries or contingent fee arrangements in India. ... They are easily disposed of. The absence of juries in civil cases is a feature of many civil law jurisdictions, and of the United Kingdom. Furthermore, contingency fees are not found in most foreign jurisdictions. In any event, the lack of contingency fees is not an insurmountable barrier to filing claims in India, as demonstrated by the fact that more than 4,000 suits have been filed by victims of the Bhopal gas leak in India already. ...

Plaintiffs' final contention [is that they would have difficulty enforcing an Indian judgment.] The possibility of non-enforcement of a foreign judgment by courts of either country leads this Court to conclude that issue must be addressed at this time. Since it is defendant Union Carbide which, perhaps ironically, argues for the sophistication of the Indian legal system in seeking a dismissal on grounds of forum non conveniens, and plaintiffs, including the Indian Government, which state a strong preference for the American legal system, it would appear that both parties have indicated a willingness to abide by a judgment of the foreign nation whose forum each seeks to visit. Thus, this Court conditions the grant of a dismissal on forum non conveniens grounds on Union Carbide's agreement to be bound by the judgment of its preferred tribunal, located in India, and to satisfy any judgment rendered by the Indian court, and affirmed on appeal in India. ...

HOWE v. GOLDCORP INVESTMENTS, LTD.

946 F.2d 944 (1st Cir. 1991) [excerpted above at pp. 321-26]

LAKER AIRWAYS LIMITED v. PAN AMERICAN WORLD AIRWAYS

568 F.Supp. 811 (D.D.C. 1983)

HAROLD H. GREENE, DISTRICT JUDGE. ... [The plaintiff, Laker Airways Limited, was a budget air carrier based in the United Kingdom, that provided cheap transatlantic passenger air service between the United States and Europe (principally the United Kingdom). The defendants were Pan American World Airways and TWA (both U.S. air carriers), McDonnell Douglas Corporation, and British Airways, British Caledonia Airways, Lufthansa, Swissair, KLM, and Sabena (all European air carriers).] Briefly, the complaint alleges that the defendants, who in the main are American and foreign air carriers, engaged in a scheme to destroy plaintiff's low cost air service on the transatlantic routes between the United States and Europe. The scheme was allegedly perfected in part through the medium of the International Air Transport Association ("IATA"), including through IATA meetings in Florida and in Switzerland.

When a court considers the issue of forum non conveniens, the plaintiff's choice of forum is, of course, given significant weight and should rarely be disturbed.[97] In view of that general principle, the burden is on those who challenge plaintiff's choice to demonstrate that some other forum is more convenient. ... [T]he defendants contend that, since most of the defendants are airlines anchored in Europe,[98] it may be assumed that the convenience of the witnesses would be served and the documents would more easily be available if the Court were to defer to [an English court, before which was pending actions brought against Laker Airways by various of the defendants seeking antisuit injunctions to halt the U.S. action].

Defendants' argument based on the convenience of witnesses has little validity when advanced in the context of a lawsuit involving transatlantic air passenger carriers. The Court takes judicial notice of the fact that these carriers provide frequent flights between the continents; that the time involved and the expense of transporting witnesses would be minimal; and that all the defendants maintain extensive business establishments in the United States. ... Beyond that, there is the key fact of the configuration of the alleged conspiracy. If there was a conspiracy, the United States was its hub and the various countries in Europe were its spokes. Insofar as transatlantic traffic is concerned — the focus of the complaint — each of the non-American air carriers provides service between a particular European country and the United States. On that basis, a court in the United States is a far more logical forum than a tribunal elsewhere, for it is here that all the strands, or spokes, come together.[99]

---

97. Although that weight is somewhat less when the plaintiff is a foreign resident this does not mean, and the *Piper Aircraft* Court did not say in that case, that plaintiff's choice is not at least presumptively valid. It should also be noted that in *Piper Aircraft*, unlike here, the relationship of the action to the United States was minimal, and that the Supreme Court there did not overturn but upheld a district court's exercise of discretion.

98. Four defendants (Pan American, TWA, McDonnell Douglas Corporation, and McDonnell Douglas Finance Corporation) are American, two defendants (British Airways and British Caledonian Airways) are British, and four defendants (Swissair, Lufthansa, KLM, and Sabena) are incorporated on the European continent. ...

99. We are not concerned here with [air] service between Switzerland and Great Britain, or between Belgium and Germany, or between the Netherlands and Switzerland; we are concerned with [air] service between these countries, on the one hand, and the United States, on the other.

These considerations have direct applicability to the controversy regarding the appropriateness of this Court as a forum versus that of the British tribunal. In the final analysis, what reason is there to ascribe to a British court the responsibility to hear and decide this matter? Only two of the ten defendants are British. Two of the American defendants (the two McDonnell Douglas companies) are firmly located in the United States. The airlines anchored on the European continent (KLM, Sabena, Lufthansa, and Swissair) operate for purposes of this case between the United States and the Netherlands, Belgium, West Germany, and Switzerland, bypassing Great Britain. ...

For these reasons, absent specific and persuasive evidence to the contrary, a court in the United States must be deemed to be a more convenient forum than a British court or any tribunal in the individual "spoke" countries. To be sure, a trial here will require the movement of witnesses and documents, but certainly the "hub" of the alleged conspiracy is a far more logical place even in that respect, for wherever the trial will be held witnesses and documents will have to be transported. ... When, finally, to these considerations is added the fact that two of the air carrier defendants and the only two non-air carrier defendants are U.S. corporations based in the United States, the logic of a trial in this country, when compared to any other place that has been suggested, appears overwhelming. ...

Justice is blind; but courts nevertheless do see what there is clearly to be seen. What is apparent is that the defendants, secure in the knowledge that no liability attaches to their activities under the laws of Great Britain, are seeking to have the matter decided in the British tribunal rather than in an American court.[100] But a United States court, bound to enforce the Sherman Act with respect to those who are resident in or are doing business in the United States, would not be justified in regarding defendants' desire to litigate in Britain — because they expect there to be exonerated — as a search for a more convenient forum. That is not what the doctrine of forum non conveniens is all about. ...

In *Piper*, the Supreme Court ... reject[ed] the court of appeals' view that a plaintiff may defeat a motion to dismiss on forum non conveniens grounds merely by showing that the substantive law which would be applied in the alternative forum is less favorable to him than that of the present forum. Such a rule, said the Court, would render forum non conveniens decisions unduly difficult of application for they would require the courts to engage preliminarily in complex exercises in comparative law. The Court then went on to state, however, that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy

100. Laker, too, may well have considered the effects of the American antitrust laws. It is nevertheless true that for perfectly neutral reasons the United States represents a more legitimate forum for the plaintiff than any other place, for it is doubtful that some of the participants in the alleged conspiracy could have been reached anywhere but in the United States. Moreover, had plaintiff not brought its action in the conspiracy's "hub," it would no doubt have been met with challenges to its choice far more serious and substantive than those which are being raised here.

at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice." ... [T]hat is precisely the situation in this case. British courts could not and would not[101] enforce the American antitrust laws. As for British substantive law, it fails entirely, for a number of reasons, to recognize liability for the acts which the defendants are alleged to have committed. That being so, this case is precisely within that group of cases which the Supreme Court in *Piper* said should not be dismissed.

It is difficult to see how it could be otherwise. It would be a cruel hoax on the plaintiff to oust it from a court where its allegations, if proved, would entitle it to recovery, and to relegate it instead, in the name of "convenience," to a tribunal which, on the facts alleged, would not be justified under its own laws in entering judgment in plaintiff's favor. Moreover, what is involved here in not an obscure, technical law in the enforcement of which the American courts could be said to have no significant interest. What is in jeopardy is the enforcement of the Sherman Act with respect to a market — travel between the United States and Europe — in which this nation has the highest interest.[102] The Sherman Act, as has often been observed, is our charter of economic liberty, comparable to the importance of the Bill of Rights with respect to personal freedom, and there is thus the highest kind of public interest in preventing the Act from being emasculated in this important area by use of an essentially logistical rule.[103]

In view of these considerations, it is not surprising that it has flatly been held that the doctrine of forum non conveniens does not apply to antitrust actions. *See Industrial Investment Development Corp. v. Mitsui Co.*, 671 F.2d 876 (5th Cir. 1982), where the Court of Appeals for the Fifth Circuit, confronted with an appeal from a decision that Indonesia was a more convenient forum, held that in view of the venue provisions of the antitrust laws (15 U.S.C. §22) and the fact that the Sherman Act is a quasi-penal statute, an antitrust action may never be dismissed on forum non conveniens grounds. ... The Court fully agrees with *Mitsui*.

Antitrust cases are unlike litigation involving contracts, torts, or other matters recognized in some form in every nation. A plaintiff who seeks relief by means of one of these types of actions may appropriately be sent to the courts of another nation where presumably he will be granted, at least approximately, what he is due. But the antitrust laws of the United States embody a specific congressional purpose to

101. *See, e.g., British Nylon Spinners Ltd. v. Imperial Chemical Industries, Inc.* [1953] 1 Ch. 19 (Court of Appeal 1952).

102. Although it is difficult to quantify such matters, it would appear that the United States has an economic and social interest in travel from this country to all of Europe outweighing the interest of any individual European nation in travel from it to the United States.

103. For that reason, too, it is hardly fair to condemn these United States courts which insist upon application of the Sherman Act to those doing business in this country as being engaged in "social jingoism" [citing Respondents' pleadings]. If the jingoism label is to be used at all, it would seem more appropriately to fit those who maintain that fair results may be achieved only under British procedure, and that American courts cannot be trusted, under American law, to do justice.

encourage the bringing of private claims in the American courts in order that the national policy against monopoly may be vindicated To relegate a plaintiff to the courts of a nation which does not recognize the antitrust principles would be to defeat this congressional direction by means of a wholly inappropriate procedural device. That is an action which the Court cannot and will not take.

In re UNION CARBIDE CORPORATION GAS PLANT DISASTER AT BHOPAL, INDIA IN DECEMBER, 1984.

The PLAINTIFFS IN ALL CASES WHICH HAVE BEEN CONSOLIDATED INTO THIS PROCEEDING BY ORDER OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

v.

UNION CARBIDE CORPORATION, Defendant-Appellee, Cross-Appellant.

Nos. 301, 383 and 496, Docket 86-7517, 86-7589 and 86-7637.

United States Court of Appeals, Second Circuit.

Argued Nov. 24, 1986.

Decided Jan. 14, 1987.

MANSFIELD, Circuit Judge:*

This appeal raises the question of whether thousands of claims by citizens of India and the Government of India arising out of the most devastating industrial disaster in history—the deaths of over 2,000 persons and injuries of over 200,000 caused by lethal gas known as methyl isocyanate which was released from a chemical plant operated by Union Carbide India Limited (UCIL) in Bhopal, India—should be tried in the United States or in India. The Southern District of New York, John F. Keenan, *Judge*, granted the motion of Union Carbide Corporation (UCC), a defendant in some 145 actions commenced in federal courts in the United States, to dismiss these actions on grounds of *forum non conveniens* so that the claims may be tried in India, subject to certain conditions. The individual plaintiffs appeal from the order and the court's denial of their motion for a fairness hearing on a proposed settlement. UCC and the Union of India (UOI), a plaintiff, cross-appeal. We eliminate two of the conditions imposed by the district court and in all other respects affirm that court's orders.

The accident occurred on the night of December 2-3, 1984, when winds blew the deadly gas from the plant operated by UCIL into densely occupied parts of the city of Bhopal. UCIL is incorporated under the laws of India. Fifty and nine-tenths percent of its stock is owned by UCC, 22% is owned or controlled by the government of India, and the balance is held by approximately 23,500 Indian citizens. The stock is publicly traded on the Bombay Stock Exchange. The company is engaged in the manufacture of a variety of products, including chemicals, plastics, fertilizers and insecticides, at 14 plants in India and employs over 9,000 Indian citizens. It is managed and operated entirely by Indians in India.

Four days after the Bhopal accident, on December 7, 1984, the first of some 145 purported class actions in federal district courts in the United States was commenced on behalf of victims of the disaster. On January 2, 1985, the Judicial Panel on Multidistrict Litigation assigned the actions to the Southern District of New York where they became the subject of a consolidated complaint filed on June 28, 1985.

In the meantime, on March 29, 1985, India enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, granting to its government, the UOI, the exclusive right to represent the victims in India or elsewhere. Thereupon the UOI, purporting to act in the capacity of *parens patriae*, and with retainers executed by many of the victims, on April 8, 1985, filed a complaint in the Southern District of New York

on behalf of all victims of the Bhopal disaster, similar to the purported class action complaints already filed by individuals in the United States. The UOI's decision to bring suit in the United States was attributed to the fact that, although numerous lawsuits (by now, some 6,500) had been instituted by victims in India against UCIL, the Indian courts did not have jurisdiction over UCC, the parent company, which is a defendant in the United States actions. The actions in India asserted claims not only against UCIL but also against the UOI, the State of Madhya Pradesh, and the Municipality of Bhopal, and were consolidated in the District Court of Bhopal.

By order dated April 25, 1985, Judge Keenan appointed a three-person Executive Committee to represent all plaintiffs in the pre-trial proceedings. It consisted of two lawyers representing the individual plaintiffs and one representing the UOI. On July 31, 1985, UCC moved to dismiss the complaints on grounds of *forum non conveniens*, the plaintiffs' lack of standing to bring the actions in the United States, and their purported attorneys' lack of authority to represent them. After several months of discovery related to *forum non conveniens*,[1] the individual plaintiffs and the UOI opposed UCC's motion. After hearing argument on January 3, 1986, the district court, on May 12, 1986, 634 F.Supp. 842, in a thoroughly reasoned 63-page opinion granted the motion, dismissing the lawsuits before it on condition that UCC:

(1) consent to the jurisdiction of the courts of India and continue to waive defenses based on the statute of limitations,

(2) agree to satisfy any judgment rendered by an Indian court against it and upheld on appeal, provided the judgment and affirmance "comport with the minimal requirements of due process," and

(3) be subject to discovery under the Federal Rules of Civil Procedure of the United States. ***

As the district court found, the record shows that the private interests of the respective parties weigh heavily in favor of dismissal on grounds of *forum non conveniens*. The many witnesses and sources of

proof are almost entirely located in India, where the accident occurred, and could not be compelled to appear for trial in the United States. The Bhopal plant at the time of the accident was operated by some 193 Indian nationals, including the managers of seven operating units employed by the Agricultural Products Division of UCIL, who reported to Indian Works Managers in Bhopal. The plant was maintained by seven functional departments employing over 200 more Indian nationals. UCIL kept at the plant daily, weekly and monthly records of plant operations and records of maintenance as well as records of the plant's Quality Control, Purchasing and Stores branches, all operated by Indian employees. The great majority of documents bearing on the design, safety, start-up and operation of the plant, as well as the safety training of the plant's employees, is located in India.[2] Proof to be offered at trial would be derived from interviews of these witnesses in India and study of the records located there to determine whether the accident was caused by negligence on the part of the management or employees in the operation of the plant, by fault in its design, or by sabotage. In short, India has greater ease of access to the proof than does the United States.

The plaintiffs seek to prove that the accident was caused by negligence on the part of UCC in originally contributing to the design of the plant and its provision for storage of excessive amounts of the gas at the plant. As Judge Keenan found, however, UCC's participation was limited and its involvement in plant operations terminated long before the accident. Under 1973 agreements negotiated at arm's-length with UCIL, UCC did provide a summary "process design package" for construction of the plant and the services of some of its technicians to monitor the progress of UCIL in detailing the design and erecting the plant. However, the UOI controlled the terms of the agreements and precluded UCC from exercising any authority to "detail design, erect and commission the plant," which was done independently over the period from 1972 to 1980 by UCIL process design engineers who supervised, among many others, some 55 to 60 Indian engineers employed by the Bombay engineering firm of Humphreys and Glasgow. The preliminary process design information furnished by UCC could not have been used to construct the plant. Construction required the detailed process design and engineering data prepared by hundreds of Indian engineers, process designers and sub-contractors. During the ten years spent constructing the plant, its design and configuration underwent many changes.

The vital parts of the Bhopal plant, including its storage tank, monitoring instrumentation, and vent gas scrubber, were manufactured by Indians in India. Although some 40 UCIL employees were given some safety training at UCC's plant in West Virginia, they represented a small fraction of the Bhopal plant's employees. The vast majority of plant employees were selected and trained by UCIL in Bhopal. The manual for start-up of the Bhopal plant was prepared by Indians employed by UCIL.

In short, the plant has been constructed and managed by Indians in India. No Americans were employed at the plant at the time of the accident. In the five years from 1980 to 1984, although more than 1,000 Indians were employed at the plant, only one American was employed there and he left in 1982. No Americans visited the plant for more than one year prior to the accident, and during the 5-year period before the accident the communications between the plant and the United States were almost non-existent.

2. At oral argument UOI's counsel stated that UCC refused UOI's offer to furnish copies of some of the documents to UCC in the United States. The district court, on the other hand, found that following the disaster India's Central Bureau of Investigation seized, among other documents, daily, weekly and monthly records of the Bhopal plant operations. UCC states that of the 78,000 pages of documents seized, some 36,000 are plant operation records, of which 1,700 pages relate to plant maintenance in 1983 and 1984.

The vast majority of material witnesses and documentary proof bearing on causation of and liability for the accident is located in India, not the United States, and would be more accessible to an Indian court than to a United States court. The records are almost entirely in Hindi or other Indian languages, understandable to an Indian court without translation. The witnesses for the most part do not speak English but Indian languages understood by an Indian court but not by an American court. These witnesses could be required to appear in an Indian court but not in a court of the United States. Although witnesses in the United States could not be subpoenaed to appear in India, they are comparatively few in number and most are employed by UCC which, as a party, would produce them in India, with lower overall transportation costs than if the parties were to attempt to bring hundreds of Indian witnesses to the United States. Lastly, Judge Keenan properly concluded that an Indian court would be in a better position to direct and supervise a viewing of the Bhopal plant, which was sealed after the accident. Such a viewing could be of help to a court in determining liability issues.

After a thorough review, the district court concluded that the public interest concerns, like the private ones, also weigh heavily in favor of India as the situs for trial and disposition of the cases. The accident and all relevant events occurred in India. The victims, over 200,000 in number, are citizens of India and located there. The witnesses are almost entirely Indian citizens. The Union of India has a greater interest than does the United States in facilitating the trial and adjudication of the victims' claims. Despite the contentions of plaintiffs and amici that it would be in the public interest to avoid a "double standard" by requiring an American parent corporation (UCC) to submit to the jurisdiction of American courts, India has a stronger countervailing interest in adjudicating the claims in its courts according to its standards rather than having American values and standards of care imposed upon it.

India's interest is increased by the fact that it has for years treated UCIL as an Indian national, subjecting it to intensive regulations and governmental supervision of the construction, development and operation of the Bhopal plant, its emissions, water and air pollution, and safety precautions. Numerous Indian government officials have regularly conducted on-site inspections of the plant and approved its machinery and equipment, including its facilities for storage of the lethal methyl isocyanate gas that escaped and caused the disaster giving rise to the claims. Thus India has considered the plant to be an Indian one and the disaster to be an Indian problem. It therefore has a deep interest in ensuring compliance with its safety standards. Moreover, plaintiffs have conceded that in view of India's strong interest and its greater contacts with the plant, its operations, its employees, and the victims of the accident, the law of India, as the place where the tort occurred, will undoubtedly govern. In contrast, the American interests are relatively minor. Indeed, a long trial of the 145 cases here would unduly burden an already overburdened court, involving both jury hardship and heavy expense. It would face the court with numerous practical difficulties, including the almost impossible task of attempting to understand extensive relevant Indian regulations published in a foreign language and the slow process of receiving testimony of scores of witnesses through interpreters.

Having made the foregoing findings, Judge Keenan dismissed the actions against UCC on grounds of *forum non conveniens* upon the conditions indicated above, after obtaining UCC's consent to those conditions subject to its right to appeal the order. After the plaintiffs filed their notice of appeal, UCC and the Union of India filed cross appeals.

Upon these appeals, the plaintiffs continue to oppose the dismissal. The Union of India, however, has changed its position and now supports the district court's order. UCC, as it did in the district court, opposes as unfair the condition that it submit to discovery pursuant to the Federal Rules of

Civil Procedure without reciprocally obligating the plaintiffs and Union of India to be subject to discovery on the same basis so that both sides might be treated equally, giving each the same access to the facts in the others' possession.

Upon argument of the appeal, UCC also took the position that the district court's order requiring it to satisfy any Indian court judgment was unfair unless some method were provided, such as continued availability of the district court as a forum, to ensure that any denial of due process by the Indian courts could be remedied promptly by the federal court here rather than delay resolution of the issue until termination of the Indian court proceedings and appeal, which might take several years. UCC's argument in this respect was based on the sudden issuance by the Indian court in Bhopal of a temporary order freezing all of UCC's assets, which could have caused it irreparable injury if it had been continued indefinitely,[3] and by the conflict of interest posed by the UOI's position in the Indian courts where, since the UOI would appear both as a plaintiff and a defendant, it might as a plaintiff voluntarily dismiss its claims against itself as a defendant or, as a co-defendant with UCC, be tempted to shed all blame upon UCC even though the UOI had in fact been responsible for supervision, regulation and safety of UCIL's Bhopal plant.

DISCUSSION

The standard to be applied in reviewing the district court's *forum non conveniens* dismissal was clearly expressed by the Supreme Court in *Piper Aircraft Co. v. Reyno, supra*, 454 U.S. at 257, 102 S.Ct. at 266, as follows:

> The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.

[1] Having reviewed Judge Keenan's detailed decision, in which he thoroughly considered the comparative adequacy of the forums and the public and private interests involved, we are satisfied that there was no abuse of discretion in his granting dismissal of the action. On the contrary, it might reasonably be concluded that it would have been an abuse of discretion to deny a *forum non conveniens* dismissal. *See Schertenleib v. Traum*, 589 F.2d 1156, 1164 (2d Cir.1978); *De Oliveira v. Delta Marine Drilling Co.*, 707 F.2d 843 (5th Cir.1983) (per curiam). Practically all relevant factors demonstrate that transfer of the cases to India for trial and adjudication is both fair and just to the parties.

Plaintiffs' principal contentions in favor of retention of the cases by the district court are that deference to the plaintiffs' choice of forum has been inadequate, that the Indian courts are insufficiently equipped for the task, that UCC has its principal place of business here, that the most probative evidence regarding negligence and causation is to be found here, that federal courts are much better equipped through experience and procedures to handle such complex actions efficiently than are Indian courts, and that a transfer of the cases to India will jeopardize a $350 million settlement being negotiated by plaintiffs' counsel. All of these arguments, however, must be rejected.

[2] Little or no deference can be paid to the plaintiffs' choice of a United States forum when all but a few of the 200,000 plaintiffs are Indian citizens located in India who, according to the UOI, have revoked the authorizations of American counsel to represent them here and have substituted the UOI, which now prefers Indian courts. The finding of our district court, after exhaustive analysis of the evidence, that the Indian courts provide a reasonably adequate alternative forum cannot be la-

3. The Indian court's temporary restraining order has since been dissolved upon UCC's agreement to maintain sufficient assets to satisfy a judgment rendered against it in India.

belled clearly erroneous or an abuse of discretion.

[3] The emphasis placed by plaintiffs on UCC's having its domicile here, where personal jurisdiction over it exists, is robbed of significance by its consent to Indian jurisdiction. Plaintiffs' contention that the most crucial and probative evidence is located in the United States is simply not in accord with the record or the district court's findings. Although basic design programs were prepared in the United States and some assistance furnished to UCIL at the outset of the 10-year period during which the Bhopal plant was constructed, the proof bearing on the issues to be tried is almost entirely located in India. This includes the principal witnesses and documents bearing on the development and construction of the plant, the detailed designs, the implementation of plans, the operation and regulation of the plant, its safety precautions, the facts with respect to the accident itself, and the deaths and injuries attributable to the accident.

[4] Although the plaintiffs' American counsel may at one time have been close to reaching a $350 million settlement of the cases, no such settlement was ever finalized. No draft joint stipulation in writing or settlement agreement appears to have been prepared, much less approved by the parties. No petition for certification of a settlement class under Fed.R.Civ.P. 23 has ever been presented. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir.1982), *cert. denied*, 464 U.S. 818, 104 S.Ct. 77, 78 L.Ed.2d 89 (1983). Most important, the UOI, which is itself a plaintiff and states that it now represents the Indian plaintiffs formerly represented by American counsel, is firmly opposed to the $350 million "settlement" as inadequate. Under these circumstances, to order a Rule 23 "fairness" hearing would be futile. The district court's denial of the American counsels' motion for such a hearing must accordingly be affirmed.

[5, 6] The conditions imposed by the district court upon its *forum non conveniens* dismissal stand on a different footing. Plaintiffs and the UOI, however, contend that UCC, having been granted the *forum non conveniens* dismissal that it sought and having consented to the district court's order, has waived its right to appellate review of these conditions. We disagree. UCC expressly reserved its right to appeal Judge Keenan's order. Moreover, it has made a sufficient showing of prejudice from the second and third conditions of the court's order to entitle it to seek appellate review. UCC's position is comparable to that of a prevailing party which, upon being granted injunctive relief, is permitted to challenge by appeal conditions attaching to the injunction that are found to be objectionable. *United States v. Bedford Assocs.*, 618 F.2d 904, 913-16 (2d Cir.1980). Similarly, conditions imposed by the court upon dismissals without prejudice under Fed.R.Civ.P. 41(a)(2) may be appealed by the plaintiff when they prejudice the plaintiff. *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir.1976).

All three conditions of the dismissal are reviewable since plaintiffs have appealed the district court's order and UCC has cross-appealed "from each judgment and order appealed in whole or part by any plaintiff." We therefore have jurisdiction over the entire case and may in the interests of justice modify the district court's order. *Cf. In re Barnett*, 124 F.2d 1005, 1009 (2d Cir.1942) ("We are clear that we have the power to order a reversal as to [parties in interest] even though they did not appeal."); *Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 476 (8th Cir.1977) ("Once a timely notice of appeal has been filed from a judgment, it gives us jurisdiction to review the entire judgment; rules requiring separate appeals by other parties are rules of practice, which may be waived in the interest of justice where circumstances so require.") (citing *In re Barnett*, *supra*).

The first condition, that UCC consent to the Indian court's personal jurisdiction over it and waive the statute of limitations as a defense, are not unusual and have been imposed in numerous cases where the for-

eign court would not provide an adequate alternative in the absence of such a condition. *See, e.g., Schertenleib, supra,* 589 F.2d at 1166; *Bailey v. Dolphin Int'l, Inc.,* 697 F.2d 1268, 1280 (5th Cir.1983). The remaining two conditions, however, pose problems.

[7] In requiring that UCC consent to enforceability of an Indian judgment against it, the district court proceeded at least in part on the erroneous assumption that, absent such a requirement, the plaintiffs, if they should succeed in obtaining an Indian judgment against UCC, might not be able to enforce it against UCC in the United States. The law, however, is to the contrary. Under New York law, which governs actions brought in New York to enforce foreign judgments, *see Island Territory of Curacao v. Solitron Devices, Inc.,* 489 F.2d 1313, 1318 (2d Cir.1973), *cert. denied,* 416 U.S. 986, 94 S.Ct. 2389, 40 L.Ed.2d 763 (1974), a foreign-country judgment that is final, conclusive and enforceable where rendered must be recognized and will be enforced as "conclusive between the parties to the extent that it grants or denies recovery of a sum of money" except that it is not deemed to be conclusive if:

1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

2. the foreign court did not have personal jurisdiction over the defendant.

Art. 53, Recognition of Foreign Country Money Judgments, 7B N.Y.Civ.Prac.L. & R. §§ 5301–09 (McKinney 1978). Although § 5304 further provides that under certain specified conditions a foreign country judgment need not be recognized,[4] none of these conditions would apply to the present cases except for the possibility of failure to provide UCC with sufficient notice of proceedings or the existence of fraud in obtaining the judgment, which do not presently exist but conceivably could occur in the future.[5]

[8] UCC contends that Indian courts, while providing an adequate alternative forum, do not observe due process standards that would be required as a matter of course in this country. As evidence of this apprehension it points to the haste with which the Indian court in Bhopal issued a temporary order freezing its assets throughout the world and the possibility of serious prejudice to it if the UOI is permitted to have the double and conflicting status of both plaintiff and co-defendant in the Indian court proceedings. It argues that

4. Section 5304 provides in pertinent part:

(b) Other grounds for non-recognition. A foreign country judgment need not be recognized if:

1. the foreign court did not have jurisdiction over the subject matter;

2. the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

3. the judgment was obtained by fraud;

4. the cause of action on which the judgment is based is repugnant to the public policy of this state;

5. the judgment conflicts with another final and conclusive judgment;

6. the proceeding in the foreign court 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; or

7. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

5. New York's article 53 is based upon the Uniform Foreign Money-Judgments Recognition Act, *see* 13 U.L.A. 263 (1962), which has been adopted by 15 states in addition to New York. In states that have not adopted the Uniform Foreign Money-Judgments Recognition Act, foreign judgments may be recognized according to principles of comity. *See Hilton v. Guyot,* 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895).

UCC, as a New York business corporation, would be subject to personal jurisdiction in a court sitting in New York. An Indian money judgment could be enforced against UCC in New York by means of either an action on the judgment or a motion for summary judgment in lieu of complaint. *See* 7B N.Y.Civ.Prac.L. & R. § 5303. In either case, once converted into a New York judgment, the judgment would be enforceable as a New York judgment, and thus entitled to the full faith and credit of New York's sister states.

we should protect it against such denial of due process by authorizing Judge Keenan to retain the authority, after *forum non conveniens* dismissal of the cases here, to monitor the Indian court proceedings and be available on call to rectify in some undefined way any abuses of UCC's right to due process as they might occur in India.

UCC's proposed remedy is not only impractical but evidences an abysmal ignorance of basic jurisdictional principles, so much so that it borders on the frivolous. The district court's jurisdiction is limited to proceedings before it in this country. Once it dismisses those proceedings on grounds of *forum non conveniens* it ceases to have any further jurisdiction over the matter unless and until a proceeding may some day be brought to enforce here a final and conclusive Indian money judgment. Nor could we, even if we attempted to retain some sort of supervisory jurisdiction, impose our due process requirements upon Indian courts, which are governed by their laws, not ours. The concept of shared jurisdictions is both illusory and unrealistic. The parties cannot simultaneously submit to both jurisdictions the resolution of the pre-trial and trial issues when there is only one consolidated case pending in one court. Any denial by the Indian courts of due process can be raised by UCC as a defense to the plaintiffs' later attempt to enforce a resulting judgment against UCC in this country.

[9] We are concerned, however, that as it is written the district court's requirement that UCC consent to the enforcement of a final Indian judgment, which was imposed on the erroneous assumption that such a judgment might not otherwise be enforceable in the United States, may create misunderstandings and problems of construction. Although the order's provision that the judgment "comport with the *minimal* requirements of due process" (emphasis supplied) probably is intended to refer to "due process" as used in the New York Foreign Country Money Judgments Law and others like it, there is the risk that it may also be interpreted as providing for a lesser standard than we would otherwise require. Since the court's condition with respect to enforceability of any final Indian judgment is predicated on an erroneous legal assumption and its "due process" language is ambiguous, and since the district court's purpose is fully served by New York's statute providing for recognition of foreign-country money judgments, it was error to impose this condition upon the parties.

[10] We also believe that the district court erred in requiring UCC to consent (which UCC did under protest and subject to its right of appeal) to broad discovery of it by the plaintiffs under the Federal Rules of Civil Procedure when UCC is confined to the more limited discovery authorized under Indian law. We recognize that under some circumstances, such as when a moving defendant unconditionally consents thereto or no undiscovered evidence of consequence is believed to be under the control of a plaintiff or co-defendant, it may be appropriate to condition a *forum non conveniens* dismissal on the moving defendant's submission to discovery under the Federal Rules without requiring reciprocal discovery by it of the plaintiff. *See, e.g., Piper Aircraft v. Reyno, supra,* 454 U.S. at 257 n. 25, 102 S.Ct. at 267 n. 25 (suggesting that district courts can condition dismissal upon a defendant's agreeing to provide all relevant records); *Ali v. Offshore Co.,* 753 F.2d 1327, 1334 n. 16 (5th Cir.1985) (same); *Boskoff v. Transportes Aereos Portugueses,* 17 Av. Cas. (CCH) 18,613, at 18,616 (N.D.Ill.1983) (accepting defendant's voluntary commitment to provide discovery in foreign forum according to Federal Rules). Basic justice dictates that both sides be treated equally, with each having equal access to the evidence in the possession or under the control of the other. Application of this fundamental principle in the present case is especially appropriate since the UOI, as the sovereign government of India, is expected to be a party to the Indian litigation, possibly on both sides.

For these reasons we direct that the condition with respect to the discovery of UCC

under the Federal Rules of Civil Procedure be deleted without prejudice to the right of the parties to have reciprocal discovery of each other on equal terms under the Federal Rules, subject to such approval as may be required of the Indian court in which the case will be pending. If, for instance, Indian authorities will permit mutual discovery pursuant to the Federal Rules, the district court's order, as modified in accordance with this opinion, should not be construed to bar such procedure. In the absence of such a court-sanctioned agreement, however, the parties will be limited by the applicable discovery rules of the Indian court in which the claims will be pending.

As so modified the district court's order is affirmed.

6. Selected Materials on Approaches to the Enforceability of Forum Selection Agreements

Excerpted below are cases and statutory materials that illustrate various approaches to the enforceability of forum clauses. The Oregon Supreme Court's 1928 decision in *Kahn v. Tazwell*[61] refused to enforce an agreement designating Karlsruhe, Germany as the exclusive contractual forum, citing traditional public policy prohibitions. Reflecting the same attitude, §28-2-708 of the Montana Code invalidates contractual restraints on a plaintiff's choice of forum (both domestic or foreign). Also excerpted below are the Model Choice of Forum Act, and *Bremen v. Zapata Off-Shore Co.*, the Supreme Court's landmark decision recognizing the enforceability of forum clauses. Finally, the California Supreme Court's opinion, in *Smith, Valentino, & Smith, Inc. v. Superior Court*,[62] illustrates the forum non conveniens approach of some contemporary decisions to the enforceability of forum clauses.

KAHN v. TAZWELL

266 P. 238 (Oregon Supreme Court 1928)

BEAN, JUDGE. This is [a] proceeding ... to require the defendant, Hon. George Tazwell, judge of the circuit court for Multnomah County, to entertain jurisdiction of an action commenced by the relator, Adolf Kahn, against the New York Life Insurance Company, a New York corporation, on an insurance policy. ... The appli-

58. Solimine, *Forum Selection Clauses and the Privatization of Procedure*, 25 Cornell Int'l L. J. 51, 78 (1992) ("*Carnival* seems to lay to rest the notion that *The Bremen* authorized a free-wheeling balancing-of-interests test to govern the enforceability of choice-of-forum clauses.").

59. N.Y. Gen. Oblig. Law §5-1402 (McKinney 1989).

60. Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice of Law Problem*, 37 Kansas L. Rev. 471 (1989); Rashkover, *Title 14, New York Choice of Law Rule for Contractual Disputes: Avoiding the Unreasonable Results*, 71 Cornell L. Rev. 227 (1985).

61. 266 P. 238 (Ore. 1928).

62. 551 P.2d 1206 (Calif. 1976).

cation for the policy was made by the plaintiff in Germany, signed by the president and secretary of the New York Life Insurance Company at its main office, New York City, and was signed by the general secretary of the company for Europe at the [New York Life] office in Paris, France.

[New York Life] is authorized to conduct life insurance business anywhere. Prior to the declaration by the United States of war against Germany, this corporation was transacting life insurance business in Germany. This company, as one of the requirements essential to the right to transact its business in the state of Oregon, on February 16, 1923, executed and filed with the insurance commission, as required by §6327, Or. L., a power of attorney appointing R. A. Durham, a citizen of Oregon, residing at Portland, its attorney in fact, upon whom "lawful and valid service may be made of all writs, processes and summons in any case, suit or proceeding commenced by or against any such company or association in any court mentioned in this section and necessary to give such court complete jurisdiction thereof."

The action mentioned was commenced October 3, 1927, and summons and complaint was served by delivery to the said R. A. Durham, as such attorney in fact. The defendant appeared specially and filed a motion to quash the service of the summons, for the reason that the service was not authorized by law; and that the court could not obtain jurisdiction over the person of the defendant [New York Life] in that plaintiff was and is a resident and citizen of the republic, formerly empire, of Germany, and has not been a resident, inhabitant, or citizen of the state of Oregon, and was not at the time of the commencement of the action, and is not now, within the state of Oregon, as shown by affidavit. ... [The defendant also relied upon the following forum selection clause, contained in the insurance policy that it issued to Mr. Kahn:]

> For the fulfillment of this contract only the courts of Karlsruhe are competent; as the legal domicile of the company is agreed upon its office at Karlsruhe and for the insured or his legal successor the place mentioned in the application of insurance. ...

The further question arises whether the court has jurisdiction of a cause of action and of the parties. ... A corporation which goes into a foreign jurisdiction and there prosecutes its corporate affairs impliedly consents to be sued there. ... Under this theory, it has been held that process may be served on an actual agent or upon an agent designated by statute. ... The great weight of authority [holds that] the mere fact that the cause of action arose, or the transaction giving rise to it occurred, beyond the territorial limits of the state of suit, does not prevent effective service of process upon an actual agent of a foreign corporation, if the conditions of service are otherwise satisfied. [New York Life] qualified to do business in this state, and voluntarily, in a formal manner, appointed an agent upon whom service of process might be served in an action against the corporation. ... The court obtained jurisdiction of the corporation ... notwithstanding the fact that the contract of insurance was executed outside the state, and notwithstanding the fact that the plaintiff is a nonresident of the state of Oregon.

It is contended by the company that the clause in the policy, quoted above, in regard to domicile, restricts the jurisdiction, and limits the jurisdiction to enforce the conditions of the policy to the "courts of Karlsruhe." In *Sudbury v Ambi Verwaltung, etc.,* 210 N.Y.S. 164, 166, the court stated: "The federal rule is well settled that contracts by which parties attempt to confer exclusive jurisdiction upon a particular court, foreign or domestic, are contrary to public policy and void." The stipulation of the parties contained in the contract of insurance is contrary to public policy and void. The law prescribes the jurisdiction of our courts, and it cannot be diminished or increased by the convention of the parties. The stipulation is in effect a legal opinion of the parties that only "the courts of Karlsruhe" are competent for the fulfillment of the contracts. In *Kent v. Universal Film Manufacturing Co.,* 193 N.Y.S. 838, Mr. Justice Laughlin said: "The federal court regards contracts by which parties attempt to confer exclusive jurisdiction over a particular court, foreign or domestic, as contrary to public policy and void." ...

MONTANA CODE ANNOTATED

§28-2-708

Restraints upon legal proceedings void. Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void.

THE BREMEN v. ZAPATA OFF-SHORE CO.

407 U.S. 1 (1972)

CHIEF JUSTICE BURGER. We granted certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit declining to enforce a forum-selection clause governing disputes arising under an international towage contract between petitioners and respondent. ... For the reasons stated hereafter, we vacate the judgment of the Court of Appeals.

In November 1967, respondent Zapata, a Houston-based American corporation, contracted with petitioner Unterweser, a German corporation, to tow Zapata's ocean-going, self-elevating drilling rig *Chaparral* from Louisiana to a point off Ravenna, Italy, in the Adriatic Sea, where Zapata had agreed to drill certain wells. ... The contract submitted by Unterweser contained the following provision, which is at issue in this case: "Any dispute arising must be treated before the London Court of Justice." In addition, the contract contained two clauses purporting to exculpate Unterweser from liability for damages to the towed barge.

After reviewing the contract and making several changes, but without any alteration in the forum-selection or exculpatory clauses, a Zapata vice president executed

the contract and forwarded it to Unterweser in Germany, where Unterweser accepted the changes, and the contract became effective. ... Unterweser's deep sea tug *Bremen* departed Venice, Louisiana, with the *Chaparral* in tow bound for Italy. ... [W]hile the flotilla was in international waters in the middle of the Gulf of Mexico, a severe storm arose. The sharp roll of the *Chaparral* in Gulf waters caused its elevator legs, which had been raised for the voyage, to break off and fall into the sea, seriously damaging the *Chaparral*. In this emergency situation Zapata instructed the *Bremen* to tow its damaged rig to Tampa, Florida, the nearest port of refuge.

On January 12, Zapata, ignoring its contract promise to litigate "any dispute arising" in the English courts, commenced a suit in admiralty in the United States District Court at Tampa, seeking $3,500,000 damages against Unterweser *in personam* and the *Bremen in rem*, alleging negligent towage and breach of contract. Unterweser responded by invoking the forum clause of the towage contract, and moved to dismiss for lack of jurisdiction or on *forum non conveniens* grounds, or in the alternative to stay the action pending submission of the dispute to the "London Court of Justice." Shortly thereafter, in February, before the District Court had ruled on its motion to stay or dismiss the United States action, Unterweser commenced an action against Zapata seeking damages for breach of the towage contract in the High Court of Justice in London, as the contract provided. Zapata appeared in that court to contest jurisdiction, but its challenge was rejected, the English courts holding that the contractual forum provision conferred jurisdiction. ...

[T]he District Court denied Unterweser's January motion to dismiss or stay Zapata's initial action ... reiterating the traditional view of many American courts that "agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced."... [T]he District Court gave the forum-selection clause little, if any, weight. Instead, the court treated the motion to dismiss under normal *forum non conveniens* doctrine applicable in the absence of such a clause. ... Under that doctrine "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." ... The District Court concluded: "The balance of conveniences here is not strongly in favor of [Unterweser] and [Zapata's] choice of forum should not be disturbed."

[The Court of Appeals affirmed.] It noted that (1) the flotilla never "escaped the Fifth Circuit's mare nostrum, and the casualty occurred in close proximity to the district court"; (2) a considerable number of potential witnesses, including Zapata crewmen, resided in the Gulf Coast area; (3) preparation for the voyage and inspection and repair work had been performed in the Gulf area; (4) the testimony of the *Bremen* crew was available by way of deposition; (5) England had no interest in or contact with the controversy other than the forum-selection clause. The Court of Appeals majority further noted that Zapata was a United States citizen and "[t]he discretion of the district court to remand the case to a foreign forum was consequently limited" — especially since it appeared likely that the English courts would enforce the exculpatory clauses. In the Court of Appeals' view, enforcement of such

clauses would be contrary to public policy in American courts under *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), and *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 679 (1963). Therefore, "[t]he district court was entitled to consider that remanding Zapata to a foreign forum, with no practical contact with the controversy, could raise a bar to recovery by a United States citizen which its own convenient courts would not countenance."

We hold ... that far too little weight and effect were given to the forum clause in resolving this controversy. For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. Here we see an American company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. Absent a contract forum, the considerations relied on by the Court of Appeals would be persuasive reasons for holding an American forum convenient in the traditional sense, but in an era of expanding world trade and commerce, the absolute aspects of the doctrine [followed by the Court of Appeals] have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were "contrary to public policy," or that their effect was to "oust the jurisdiction" of the court. Although this view apparently still has considerable acceptance, other courts are tending to adopt a more hospitable attitude toward forum-selection clauses. This view, advanced in the well-reasoned dissenting opinion in the instant case, is that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances. We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty. It is merely the other side of the proposition recognized by this Court in *National Equipment Rental, Ltd. v. Szukhent*, holding that in federal courts a party may validly consent to be sued in a jurisdiction where he cannot be found for service of process through contractual designation of an "agent" for receipt of process in that jurisdiction. In so holding, the Court stated: "[I]t is settled ... that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." ...

This approach is substantially that followed in other common-law countries including England. It is the view advanced by noted scholars and that adopted by the *Restatement [(Second)] Conflict of Laws*. It accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American con-

tractors who seek business in all parts of the world. Not surprisingly, foreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter. Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation. The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen; and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.

...

There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect. In this case, for example, we are concerned with a far from routine transaction between companies of two different nations contemplating the tow of an extremely costly piece of equipment from Louisiana across the Gulf of Mexico and the Atlantic Ocean, through the Mediterranean Sea to its final destination in the Adriatic Sea. In the course of its voyage, it was to traverse the waters of many jurisdictions. The *Chaparral* could have been damaged at any point along the route, and there were countless possible ports of refuge. That the accident occurred in the Gulf of Mexico and the barge was towed to Tampa in an emergency were mere fortuities. It cannot be doubted for a moment that the parties sought to provide for a neutral forum for the resolution of any disputes arising during the tow. Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen or Unterweser might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting. There is strong evidence that the forum clause was a vital part of the [Zapata/Unterweser] agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations. ...

Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside. Although their opinions are not altogether explicit, it seems reasonably clear that the District Court and the Court of Appeals placed the burden on Unterweser to show that London would be a more convenient forum than Tampa, although the contract expressly resolved that issue. The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. Accordingly, the case must be remanded for reconsideration.

We note, however, that there is nothing in the record presently before us that would support a refusal to enforce the forum clause. [The Court discussed and

rejected an argument that enforcement of the forum selection clause would violate a U.S. public policy against certain types of contractual exculpatory clauses.] Courts have ... suggested that a forum clause, even though it is freely bargained for and contravenes no important public policy of the forum, may nevertheless be "unreasonable" and unenforceable if the chosen forum is *seriously* inconvenient for the trial of the action. Of course, where it can be said with reasonable assurance that at the time they entered the contract, the parties to a freely negotiated private international commercial agreement contemplated the claimed inconvenience, it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable. We are not here dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum. In such a case, the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause. The remoteness of the forum might suggest that the agreement was an adhesive one, or that the parties did not have the particular controversy in mind when they made their agreement; yet even there the party claiming should bear a heavy burden of proof.[63] Similarly, selection of a remote forum to apply differing foreign law to an essentially American controversy might contravene an important public policy of the forum. For example, so long as *Bisso* governs American courts with respect to the towage business in American waters, it would quite arguably be improper to permit an American tower to avoid that policy by providing a foreign forum for resolution of his disputes with an American towee.

This case, however, involves a freely negotiated international commercial transaction between a German and an American corporation for towage of a vessel from the Gulf of Mexico to the Adriatic Sea. As noted, selection of a London forum was clearly a reasonable effort to bring vital certainty to this international transaction and to provide a neutral forum experienced and capable in the resolution of admiralty litigation. Whatever "inconvenience" Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

In the course of its ruling on Unterweser's second motion to stay the proceedings in Tampa, the District Court did make a conclusory finding that the balance of

63. *See, e.g.,* Model Choice of Forum Act §3(3), comment: "On rare occasions, the state of the forum may be a substantially more convenient place for the trial of a particular controversy than the chosen state. If so, the present clause would permit the action to proceed. This result will presumably be in accord with the desires of the parties. It can be assumed that they did not have the particular controversy in mind when they made the choice-of-forum agreement since they would not consciously have agreed to have the action brought in an inconvenient place.

convenience was "strongly" in favor of litigation in Tampa. However, as previously noted, in making that finding the court erroneously placed the burden of proof on Unterweser to show that the balance of convenience was strongly in its favor. Moreover, the finding falls far short of a conclusion that Zapata would be effectively deprived of its day in court should it be forced to litigate in London. Indeed, it cannot even be assumed that it would be placed to the expense of transporting its witnesses to London. It is not unusual for important issues in international admiralty cases to be dealt with by deposition. Both the District Court and the Court of Appeals majority appeared satisfied that Unterweser could receive a fair hearing in Tampa by using deposition testimony of its witnesses from distant places, and there is no reason to conclude that Zapata could not use deposition testimony to equal advantage if forced to litigate in London as it bound itself to do. Nevertheless, to allow Zapata an opportunity to carry its heavy burden of showing not only that the balance of convenience is strongly in favor of trial in Tampa (that is, that it will be far more inconvenient for Zapata to litigate in London than it will be for Unterweser to litigate in Tampa), but also that a London trial will be so manifestly and gravely inconvenient to Zapata that it will be effectively deprived of a meaningful day in court, we remand for further proceedings.

CARNIVAL CRUISE LINES, INC. v. SHUTE

499 U.S. 585 (1991)

JUSTICE BLACKMUN. In this admiralty case we primarily consider whether the United States Court of Appeals for the Ninth Circuit correctly refused to enforce a forum-selection clause contained in tickets issued by petitioner Carnival Cruise Lines, Inc., to respondents Eulala and Russel Shute. The Shutes, through an Arlington, Washington, travel agent, purchased passage for a 7-day cruise on petitioner's ship, the TROPICALE. Respondents paid the fare to the agent who forwarded the payment to petitioner's headquarters in Miami, Florida. Petitioner then prepared the tickets and sent them to respondents [at their home] in the State of Washington. The face of each ticket, at its left-hand lower corner, contained this admonition:

> SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT — ON LAST PAGES 1,2,3

The following appeared on "contract page 1" of each ticket:

> TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET
>
> 3.(a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket.
>
> 8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country. ...

Respondents boarded the TROPICALE in Los Angeles, California. The ship sailed to Puerto Vallarta, Mexico, and then returned to Los Angeles. While the ship

was in international waters off the Mexican coast, respondent Eulala Shute was injured when she slipped on a deck mat during a guided tour of the ship's galley. Respondents filed suit against petitioner in the United States District Court for the Western District of Washington, claiming that Mrs. Shute's injuries had been caused by the negligence of Carnival Cruise Lines and its employées.

Petitioner moved for summary judgement, contending that the forum clause in respondents' tickets required the Shutes to bring their suit ... in the State of Florida. The District Court granted the motion. ... The Court of Appeals reversed. [T]he Court of Appeals acknowledged that a court concerned with the enforceability of such a clause must begin its analysis with *Bremen v. Zapata Off-Shore Co.*, [but] concluded that the forum clause should not be enforced because it "was not freely bargained for." As an "independent justification" for refusing to enforce the clause, the Court of Appeals noted that there was evidence in the record to indicate that "the Shutes are physically and financially incapable of pursuing this litigation in Florida" and that the enforcement of the clause would operate to deprive them of their day in court. ...

We begin by noting the boundaries of our inquiry. First, this is a case in admiralty, and federal law governs the enforceability of the forum-selection clause we scrutinize. Second, we do not address the question whether respondents had sufficient notice of the forum clause before entering the contract for passage. Respondents essentially have conceded that they had notice of the forum-selection provision. ... Within this context, respondents urge that the forum clause should not be enforced because, contrary to.... *Bremen*, the clause was not the product of negotiation, and enforcement effectively would deprive respondents of their day in court. ... Both petitioner and respondents argue vigorously that the Court's opinion in *Bremen* governs this case, and each side purports to find ample support for its position in that opinion's broad-ranging language. This seeming paradox derives in large part from key factual differences between this case and *Bremen*, differences that preclude an automatic and simple application of *Bremen's* general principles to the facts here. ...

[In *Bremen*, this Court held that, in general, "freely negotiated private international agreement[s]," should be given full effect, except where doing so would be "unreasonable."] The Court did not define precisely the circumstances that would make it unreasonable for a court to enforce a forum clause. Instead, the Court discussed a number of factors that made it reasonable to enforce the clause at issue in *Bremen* and that, presumably, would be pertinent in any determination whether to enforce a similar clause. ... In applying *Bremen*, the Court of Appeals in the present litigation took note of the foregoing "reasonableness" factors and rather automatically decided that the forum-selection clause was unenforceable because, unlike the parties in *Bremen*, respondents are not business persons and did not negotiate the terms of the clause with petitioner. Alternatively, the Court of Appeals ruled that the clause should not be enforced because enforcement effectively would deprive respondents of an opportunity to litigate their claim against petitioner.

Bremen concerned a "far from routine transaction between companies of two different nations contemplating the tow of an extremely costly piece of equipment from Louisiana across the Gulf of Mexico and the Atlantic Ocean, through the Mediterranean Sea to its final destination in the Adriatic Sea." These facts suggest that, even apart from the evidence of negotiation regarding the forum clause, it was entirely reasonable for the Court in *Bremen* to have expected Unterweser and Zapata to have negotiated with care in selecting a forum for the resolution of disputes arising from their special towing contract. In contrast, respondents' passage contract was purely routine and doubtless nearly identical to every commercial passage contract issued by petitioner and most other cruise lines. In this context, it would be entirely unreasonable for us to assume that respondents — or any other cruise passenger — would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line. But by ignoring the crucial differences in the business contexts in which the respective contracts were executed, the Court of Appeals' analysis seems to us to have distorted somewhat this Court's holding in *Bremen*.

In evaluating the reasonableness of the forum clause at issue in this case, we must refine the analysis of *Bremen* to account for the realities of form passage contracts. As an initial matter, we do not adopt the Court of Appeals' determination that a non-negotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining. Including a reasonable forum clause in a form contract of this kind well may be permissible for several reasons: First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. Additionally, a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum, and conserving judicial resources that otherwise would be devoted to deciding those motions. Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.

We also do not accept the Court of Appeals' "independent justification" for its conclusion that *Bremen* dictates that the clause should not be enforced because "[t]here is evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida." We do not defer to the Court of Appeals' findings of fact. ... [T]he District Court made no finding regarding the physical and financial impediments to the Shutes' pursuing their case in Florida. The Court of Appeals' conclusory reference to the record provides no basis for this Court

to validate the finding of inconvenience. Furthermore, the Court of Appeals did not place in proper context this Court's statement in *Bremen* that "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause." The Court made this statement in evaluating a hypothetical "agreement between two Americans to resolve their essentially local disputes in a remote alien forum." In the present case, Florida is not a "remote alien forum," nor — given the fact that Mrs. Shute's accident occurred off the coast of Mexico — is this dispute an essentially local one inherently more suited to resolution in the State of Washington than in Florida. In light of these distinctions, and because respondents do not claim lack of notice of the forum clause, we conclude that they have not satisfied the "heavy burden of proof," required to set aside the clause on grounds of inconvenience.

It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness. In this case, there is no indication that petitioner set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims. Any suggestion of such a bad-faith motive is belied by two facts: petitioner has its principal place of business in Florida, and many of its cruises depart from and return to Florida ports. Similarly, there is no evidence that petitioner obtained respondents' accession to the forum clause by fraud or overreaching. Finally, respondents have conceded that they were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity. In the case before us, therefore, we conclude that the Court of Appeals erred in refusing to enforce the forum-selection clause. ...

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting. ... I begin my dissent by noting that only the most meticulous passenger is likely to become aware of the forum selection provision. ... [Indeed, even a] careful reader [would] find the forum-selection clause [only] in the eighth of the twenty-five numbered paragraphs. Of course, many passengers, like the respondents in this case, will not have an opportunity to read paragraph 8 until they have actually purchased their tickets. By this point, the passengers will already have accepted the condition set forth in paragraph 16(a), which provides that "[t]he Carrier shall not be liable to make any refund to passengers in respect of ... tickets wholly or partly not used by a passenger." Not knowing whether or not that provision is legally enforceable, I assume that the average passenger would accept the risk of having to file suit in Florida in the event of an injury, rather than cancelling — without a refund — a planned vacation at the last minute. The fact that the cruise line can reduce its litigation costs, and therefore its liability insurance premiums, by forcing this choice on its passengers does not, in my opinion, suffice to render the provision reasonable. ...

Forum-selection clauses in passenger tickets involve the intersection of two strands of traditional contract law that qualify the general rule that courts will enforce the terms of a contract as written. Pursuant to the first strand, courts traditionally have reviewed with heightened scrutiny the terms of contracts of adhesion, form contracts offered on a take-it-of-leave basis by a party with stronger bargaining power to a party with weaker power. ... The second doctrinal principle implicated by forum-selection clauses is the traditional rule that "contractual provisions which seek to limit the place or court in which an action may ... be brought, are invalid as contrary to public policy." ... Although adherence to this general rule has declined in recent years, particularly following our decision in [*Bremen*], the prevailing rule is still that forum-selection clauses are not enforceable if they were not freely bargained for, create additional expense for one party, or deny one party a remedy. ...

C. Antisuit Injunctions

1. Introduction

Lis pendens concerns a U.S. court's decision to stay its own proceedings, just as forum non conveniens concerns a U.S. court's decision to dismiss proceedings before it. It is also possible for courts to issue "antisuit injunctions" — orders forbidding a party from initiating or participating in judicial proceedings in foreign forums.[31] An antisuit injunction is sometimes an attractive option in international disputes: it can be sought from a local, convenient, and perhaps sympathetic tribunal as a means of foreclosing litigation in a potentially inconvenient or hostile foreign forum.

Antisuit injunctions are sought in several situations.[32] First, a party to proceedings in a U.S. forum can seek an injunction against litigation by its adversary of the same dispute in a pending or threatened action in a foreign forum.[33] Second, if related but not identical claims are pursued in two forums, an antisuit injunction may be sought to consolidate litigation in the moving party's preferred forum.[34] Third, the prevailing party in *completed* U.S. litigation can seek an injunction preventing the unsuccessful party from relitigating the parties' dispute in a foreign forum.[35] Finally, a court may issue a "counter-injunction," or "anti-antisuit injunction," designed to foreclose a party from obtaining an antisuit injunction in a foreign forum against litigation in the issuing court.[36]

2. Standards Governing Antisuit Injunctions in U.S. Courts

There is no statutory provision in federal law (nor in most state codes) granting federal courts the power to issue antisuit injunctions. Nevertheless, U.S. courts have long asserted the power to issue antisuit injunctions, regarding such orders as a corollary of a court's general equitable power over parties subject to its jurisdic-

31. Antisuit injunctions are one example of the power of courts to order persons subject to their personal jurisdiction to perform (or not to perform) specified acts outside of the forum. *E.g., United States v. First Nat'l City Bank*, 379 U.S. 378 (1965); *Restatement (Second) Conflict Of Laws* §53 (1971); Messner, *The Jurisdiction of a Court of Equity Over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State*, 14 Minn. L. Rev. 494 (1930). *See also infra* pp. 856-60 (extraterritorial discovery orders).

32. It appears that antisuit injunctions were in use at common law at least as early as applications of the forum non conveniens doctrine. *See supra* pp. 289-91.

33. *E.g., Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am.*, 651 F.2d 877 (3d Cir. 1981), *aff'd on other grounds*, 456 U.S. 644 (1982); *Timberland Co. v. Sanchez*, 129 F.R.D. 382 (D.D.C. 1990); *Cargill, Inc. v. Hartford Accident & Indem. Co.*, 531 F.Supp. 710 (D. Minn. 1982); *Medtronic Inc. v. Catalyst Research Corp.*, 518 F.Supp. 946 (D. Minn. 1981), *aff'd*, 664 F.2d 660 (8th Cir. 1981); *Western Elec. Co. v. Milgo Elec. Corp.*, 450 F.Supp. 835 (S.D. Fla. 1978).

34. *E.g., Seattle Totems Hockey Club v. National Hockey League*, 652 F.2d 852 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982).

35. *E.g., Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939); *Wood v. Santa Barbara Chamber of Commerce*, 705 F.2d 1515 (9th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984); *Bethell v. Peace*, 441 F.2d 495 (5th Cir. 1971); *Scott v. Hunt Oil Co.*, 398 F.2d 810 (5th Cir. 1968).

36. *E.g., Owens-Illinois, Inc. v. Webb*, 809 S.W.2d 899 (Ct. App. Tex. 1991); *Laker Airways v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984); *James v. Grand Trunk W. R.R.*, 152 N.E.2d 858 (Ill.), *cert. denied*, 358 U.S. 915 (1958).

tion.[37] Most federal courts also appear to agree (albeit without analysis) that the standards governing the issuance of an antisuit injunction in federal court are governed by federal law.[38]

There is, however, disagreement over the standards that should govern a U.S. court's grant of an antisuit injunction. Most U.S. courts express caution about the issuance of such orders.[39] This caution arises from the fact that, while antisuit injunctions are not issued directly against foreign tribunals, most courts acknowledge that such orders "effectively restrict the foreign court's ability to exercise its jurisdiction."[40] Nevertheless, while all lower courts have exercised "caution" in issuing antisuit injunctions, few lower courts have agreed on what standards this caution requires.

CARGILL, INC. v. HARTFORD ACCIDENT & INDEMNITY CO.

531 F.Supp. 710 (D. Minn. 1982)

MURPHY, DISTRICT JUDGE. Plaintiff Cargill, Incorporated ("Cargill") brings this action against defendants Hartford Accident and Indemnity Company ("Hartford") and Federal Insurance Company ("Federal") seeking recovery under two separate policies of insurance. Cargill alleges it is entitled to recovery under two separate policies of insurance. Cargill alleges it is entitled to recovery under both policies on the basis of losses incurred by Tradax Financial & Leasing, Ltd. ("TFL"), an English affiliate of Cargill, as a result of certain acts of Ronald Graham and Arthur Thompson, employees of TFL. Cargill seeks judgment of $5,000,000 under each of the policies. Jurisdiction is based on diversity of citizenship.

Federal has filed motions to ... dismiss the action on the ground of *forum non conveniens* ... [and/or] stay this action pending outcome of litigation against Cargill filed by Federal in England. ... Cargill has filed motions to (1) preliminarily enjoin Federal from proceeding with the English litigation against Cargill and (2) further enjoin Federal from instituting any other proceedings in any other court with regard to the issues which are the subject matter of the complaint.

The facts relevant for purposes of this motion appear to be as follows. At different times Cargill took out insurance policies with Hartford and Federal [against losses incurred through fraudulent or dishonest acts of Cargill employees.] ... Both policies were negotiated and agreed to by Cargill in Minnesota and were delivered to Cargill in Minnesota. Cargill alleges that TFL sustained losses due to employee dishonesty occurring primarily in England between 1973 and April, 1979, and has submitted claims to both Hartford and Federal. It appears that Cargill has a majority interest in TFL's stock. ... [Federal and Hartford denied liability on Cargill's policy and negotiations between the insurers and Cargill ensued. The negotiations were unsuccessful and] approximately five days before the contractual period to sue expired, the parties filed almost simultaneous lawsuits related to coverage under the Federal policy. Federal filed a declaratory judgment suit against Cargill and TFL in the High Court of Justice in London, England, on September 25, 1981. On the same day Cargill brought the action now before the court. There is evidence that Hartford is not subject to the jurisdiction of the English court.

In a ruling on a motion to dismiss for *forum non conveniens*, the court first must determine whether there is an alternative forum and, if so, whether the presumption in favor of plaintiff's choice of forum has been overcome by the private and public interest factors presented. In the situation before the court there exists another forum in which two of the parties here are present. However, since Hartford cannot be joined there, and it is important to Cargill to have a forum in which all parties can

be joined... it could be argued that no adequate alternative forum exists. Whether these facts meet the test of those rare circumstances where the other forum is so inadequate as not to present an alternative need not be decided since an analysis of the private and public interest factors leads to the conclusion that the motion to dismiss must be denied. ...

Certain factors of private interest favor Federal, but not to the extent that Cargill's choice of forum should be disturbed. The relative ease of access to proof does not weigh heavily for either party. The contracts of insurance were negotiated and signed by Cargill in Minnesota and delivered here. Although Federal alleges that much documentary proof may remain in England, a great volume of Cargill's documents are located in the United States. It appears that Federal may not be able to produce TFL employees to testify before this court; however, at this stage it is unclear who will actually be called to testify. Moreover, English law provides a means similar to deposition for securing testimony. Federal has pointed to a large number of potential witnesses, many of whom reside in England, but has avoided stating to the court that it intends to rely on any particular testimony in presenting its case. It is not clear, in fact, whether Federal intends to base any substantial portion of its case on evidence of the events taking place in England. On the other hand, Cargill has designated six witnesses, five of whom reside in the United States. ...

There are a number of other factors indicating that the balance of convenience weighs in Cargill's favor. Cargill's American counsel has spent considerable time gaining familiarity with the case and could represent them here, but not in the English action. More importantly, it is only in this forum that Cargill's claims against both Hartford and Federal may be joined in one action. The claims against both companies are likely to have many of the same operative facts, including when Cargill discovered the alleged loss, and the coverage of each of the policies. It is clearly more convenient for Cargill to be able to present these facts once in this forum than both here and in England. Moreover, Cargill would face the risk of inconsistent results if it were required to present its claims against Federal in England and its claims against Hartford here. It is possible, for example, that the English court could find certain losses covered by Hartford and that Federal was not liable to the extent of Hartford's coverage. Such a decision would not be binding on Hartford because it is not subject to the jurisdiction of the English court; despite such a decision by the English court, the jury in this court could find Hartford not liable. The possibility of such an inconsistency would be highly prejudicial to Cargill.

The public interest factors do not balance in Federal's favor. Federal argues that because the acts of the employees at issue under its policy occurred in England, England has the closest relationship to the matter. As noted, however, Cargill, a Minnesota citizen, negotiated and agreed to the policy in Minnesota, and the policy was delivered to it here. The issues in this litigation deal with whether there is coverage under the respective insurance policies, and Minnesota has a very strong interest in the litigation. ...

It is not clear whether English law will apply to any issues in the case, [and] it has not been disputed that Minnesota law will apply to interpretation of the policies. At this stage it is unclear what issues Federal will actually raise or that English law would be used to define theft, for example. Judicial efficiency will be served by having the trial of this matter in this court where both defendant insurance companies can be joined since it appears that some of the proof in these matters will overlap. Discovery and trial of these issues can take place in this forum, rather than requiring two forums to litigate the same issues.

Cargill has filed a motion to preliminarily enjoin Federal from proceeding with the English action and to further enjoin Federal from instituting proceedings in any other court with regard to the issues which are the subject matter of the complaint in this action. A federal court may, in the exercise of its discretion, control its own proceedings by enjoining parties from bringing proceedings in other courts, including courts of foreign jurisdictions, although this power should be used sparingly. The threshold question is whether the parties are the same in both actions, the issues are the same, and resolution of the first action will be dispositive of the action to be enjoined. A foreign action should then be enjoined when it would (1) frustrate a policy of the forum issuing the injunction, (2) be vexatious or oppressive, (3) threaten the issuing court's in rem or quasi-in-rem jurisdiction, or (4) where the proceedings prejudice other equitable considerations. An injunction is in order when adjudication of the same issue in two separate actions will result in unnecessary delay, substantial inconvenience and expense to the parties and witnesses, and where separate adjudications could result in inconsistent rulings or a race to judgment.

The threshold considerations for enjoining Federal's English action have been met. Both Cargill and Federal are involved in that action, the issue in both is coverage under the policy, and disposition of this action will resolve the issue in that action. For the reasons stated in the discussion of *forum non conveniens*, the convenience of the parties, as well as the interest of judicial economy, weigh in favor of the issuance of the injunction. It would be vexatious to Cargill and a waste of judicial resources to require adjudication of Federal's liability in two separate forums. Separate adjudications could further prejudice Cargill by the risk of inconsistent results and a possible race to judgment. Accordingly, Federal should be enjoined from pursuing its English action.

CHINA TRADE AND DEVELOPMENT CORP. v. MV CHOONG YONG

837 F.2d 33 (2d Cir. 1987)

GEORGE C. PRATT, CIRCUIT JUDGE. Following oral argument this court reversed an order of the U.S. District Court for the Southern District of New York and vacated the injunction which had permanently enjoined Ssangyong Shipping Co., Ltd. ("Ssangyong") from proceeding in the courts of Korea with its action against China Trade & Development Corp., Chung Hua Trade & Development Corp. and Soybean Importers Joint Committee of the Republic of China (collectively, "China Trade").

The District Court had granted the injunction because it found that (1) the parties in the Korean action are the same as the parties in this action; (2) the issue of liability raised by Ssangyong in the Korean court is the same as the issue of liability raised here; (3) the Korean litigation would be vexatious to the plaintiffs in the United States action, which was commenced first; and (4) allowing the Korean litigation to proceed would result in a race to judgment. Because no important policy of the forum would be frustrated by allowing the Korean action to proceed, and because the Korean action poses no threat to the jurisdiction of the District Court, we conclude that the interests of comity are not overbalanced by equitable factors favoring an injunction, and we hold that the district court abused its discretion when it enjoined Ssangyong, a Korean corporation, from proceeding in the courts of Korea. ...

In 1984 China Trade sought to import 25,000 metric tons of soybeans into the Republic of China from the United States. Ssangyong, a Republic of Korea corporation, agreed to transport the soybeans on its ship the M.V. CHOONG YONG. The vessel ran aground, however, and as China Trade contends, the soybeans, contaminated by seawater, became virtually valueless. The litigation leading to this appeal began in 1985 when attorneys for China Trade attached the M.V. BOO YONG, another vessel owned by Ssangyong, which was then located in ... California. To release the vessel, the parties agreed that China Trade would lift the attachment and discontinue the California action and, in exchange, Ssangyong would provide security in the amount of $1,800,000, the approximate value of the attached vessel, and would appear in an action to be commenced by China Trade in the Southern District of New York and waive any right to dismissal of the new action on the ground of forum non conveniens.

China Trade then commenced this action in the Southern District seeking $7,500,000 in damages from Ssangyong for failure to deliver the soybeans. Both parties proceeded to prepare the case for trial through extensive discovery that has included both depositions and document production that required trips to Korea and to the Republic of China. Trial was scheduled to begin in September 1987. On April 22, 1987, while discovery was still progressing, Ssangyong's Korean attorneys filed a pleading in the District Court of Pusan, commencing an action, similar to our declaratory judgment action, which seeks confirmation that Ssangyong is not liable for China Trade's loss. Nearly two months later Ssangyong's New York counsel forwarded a copy of this pleading to counsel for China Trade. Immediately, and before taking any action in the district court of Pusan, China Trade moved by order to show cause in this action for an injunction against further prosecution of the Korean action.

To determine whether to enjoin the foreign litigation, the district court

employed a test that has been adopted by some judges in the Southern District. In *American Home Assurance Corp. v. Insurance Corp. of Ireland, Ltd.*, 603 F.Supp. 636, 643 (S.D.N.Y. 1984), the court articulated two threshold requirements for such an injunction: (1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined.

> When these threshold requirements are met, five factors are suggested in determining whether the forgoing action should be enjoined: (1) frustration of a policy in the enjoining forum; (2) the foreign action would be vexatious; (3) a threat to the issuing court's in rem or quasi in rem jurisdiction; (4) the proceedings in the other forum prejudice other equitable considerations; or (5) adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment.

American Home Assurance, 603 F.Supp. at 643. Judge Motley found after a hearing that the two threshold requirements were met, since in both actions the parties and the issues of liability are the same. She then considered the additional five factors and found that the Korean litigation in this case would (1) be vexatious to the plaintiffs and (2) result in expense and a race to judgment. Considering these findings sufficient, the District Court permanently enjoined Ssangyong's prosecution of the Korean action. This appeal followed. ...

The power of federal courts to enjoin foreign suits by persons subject to their jurisdiction is well-established. The fact that the injunction operates only against the parties, and not directly against the foreign court, does not eliminate the need for due regard to principles of international comity, *Peck v. Jenness*, 48 U.S. 612, 625 (1849), because such an order effectively restricts the jurisdiction of the court of a foreign sovereign. Therefore, an anti-foreign-suit injunction should be "used sparingly," and should be granted "only with case and great restraint." *Canadian Filters (Harwich) v. Lear-Siegler*, 412 F.2d 577, 578 (1st Cir. 1969).

Concurrent jurisdiction in two courts does not necessarily result in a conflict. When two sovereigns have concurrent in personam jurisdiction one court will ordinarily not interfere with or try to restrain proceedings before the other. "[P]arallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other," *Laker*, 731 F.2d at 926-27, citing *Colorado River*, ... Since parallel proceedings are ordinarily tolerable, the initiation before a foreign court of a suit concerning the same parties and issues as a suit already pending in a U.S. court does not, without more, justify enjoining a party from proceeding in the foreign forum.

In general, we agree with the approach taken by Judge Motley. She began by inquiring (1) whether the parties to both suits are the same and (2) whether resolution of the case before the enjoining court would be dispositive of the enjoined action. She apparently found that both of these prerequisites were met here. While there is some question as to whether the Korean courts would recognize a judgment of the Southern District, it is not necessary to determine that question of Korean law

because the injunction is deficient for another reason. Judge Motley found the necessary additional justification for this injunction in two of the five factors suggested in *American Home Assurance*: "vexatiousness" of the parallel proceeding to China Trade and a "race to judgment" causing additional expense. However, since these factors are likely to be present whenever parallel actions are proceeding concurrently, an antisuit injunction grounded on these additional factors alone would tend to undermine the policy that allows parallel proceedings to continue and disfavors anti-suit injunctions. Having due regard to the interest of comity, we think that in the circumstances of this case two of the other factors suggested in *American Home Assurance* take on much greater significance in determining whether Ssangyong should be enjoined from proceeding in its Korean action: (a) whether the foreign action threatens the jurisdiction of the enjoining forum, and (b) whether strong public policies of the enjoining forum are threatened by the foreign action.

A long-standing exception to the usual rule tolerating concurrent proceedings has been recognized for proceedings in rem or quasi in rem, because of the threat a second action poses to the first court's basis for jurisdiction. When a proceeding is in rem, and res judicata alone will not protect the jurisdiction of the first court, an anti-suit injunction may be appropriate. Even in personam proceedings, if a foreign court is not merely proceeding in parallel but is attempting to carve out exclusive jurisdiction over the action, an injunction may also be necessary to protect the enjoining court's jurisdiction. In the *Laker* litigation, for example, when the English Court of Appeal enjoined Laker's litigation of its claims against British defendants in a U.S. court under U.S. law, the U.S. district court, in order to protect its own jurisdiction, enjoined other defendants in the *Laker* action from seeking similar injunctions from the English Court of Appeal. *Laker*, 731 F.2d at 917-21. In the present case, however, there does not appear to be any threat to the district court's jurisdiction. While the Korean court may determine the same liability issue as that before the Southern District, the Korean court has not attempted to enjoin the proceedings in New York. Neither the Korean court nor Ssangyong has sought to prevent the Southern District from exercising its jurisdiction over this case.

An antisuit injunction may also be appropriate when a party seeks to evade important policies of the forum by litigating before a foreign court. While an injunction may be appropriate when a party attempts to evade compliance with a statute of the forum that effectuates important public policies, an injunction is not appropriate merely to prevent a party from seeking "slight advantages in the substantive or procedural law to be applied in a foreign court," *Laker*, 731 F.2d at 931, n.73.

The possibility that a U.S. judgment might be unenforceable in Korea is no more than speculation about the race to judgment that may ensue whenever courts have concurrent jurisdiction. Moreover, we cannot determine at this point whether a judgment of the U.S. court in an amount exceeding the $1.8 million bond would be enforceable in Korea even if the Korean action were now enjoined. Should plaintiffs prevail, enforcement of any excess amount against Ssangyong in Korea may well

require relitigation in the Korean courts of the issue of liability. In these circumstances, we are not persuaded that Ssangyong, the party seeking to litigate in the foreign tribunal, is attempting to evade any important policy of this forum.

The equitable factors relied upon by the District Court in granting the antisuit injunction are not sufficient to overcome the restraint and caution required by international comity. Because the Korean litigation poses no threat to the jurisdiction of the District Court or to any important public policy of this forum, we conclude that the District Court abused its discretion by issuing the injunction.

BRIGHT, SENIOR CIRCUIT JUDGE, DISSENTING. I dissent ... [The District Court found that:]

> [t]he defendant agreed to appear in this action in the Southern District of New York and post security in the amount of $1,800,000 in return for the release of the M.V. BOO YONG. Discovery for the case proceeded and was completed. Trial was scheduled by this court, without objection, for September 21, 1987. Ssangyong, however, some 2 1/2 years after [the accident and 1 1/2 years after] this action was begun, then proceeded to file a suit in Pusan Court of the Republic of Korea, naming the same parties to the action, as well as the same issues. Plaintiffs herein move to enjoin the defendant from proceeding with that action. The court finds as facts that the parties to the two actions are the same and that resolution of the action before this court would be dispositive of the Korean action. The court also finds that the Korean action would be vexatious to plaintiffs, and that the Korean action could potentially frustrate the proceedings before this court.

Those facts receive ample support from the record, and I accept them as true for the purposes of this appeal. ... It seems to me that in this day of exceedingly high costs of litigation, where no comity principles between nations are at stake in resolving a piece of commercial litigation, courts have an affirmative duty to prevent a litigant from hopping halfway around the world to a foreign court as a means of confusing, obfuscating and complicating litigation already pending for trial in a court in this country. This is especially true when that court has been processing the case for almost two years and has acquired personal jurisdiction over the parties and subject matter jurisdiction over the claim.

TRANSNATIONAL CIVIL LITIGATION

By

Joachim Zekoll
University Professor
Chair of Private Law, Procedure and Comparative Law
Johann Wolfgang Goethe Universität, Frankfurt

Michael Collins
Joseph M. Hartfield Professor
University of Virginia School of Law

George Rutherglen
John Barbee Minor Distinguished Professor
University of Virginia School of Law

AMERICAN CASEBOOK SERIES®

WEST®

2013

CHAPTER 6

Taking Evidence Abroad

A. Introduction

1. An Overview of Discovery in American Courts

Civil litigation in the United States builds on the principle that parties to an action are generally entitled to obtain all relevant, but unprivileged, information that other parties or non-parties possess or control. This principle manifests itself in liberal discovery procedures aimed at the full disclosure of facts. This is particularly true in the federal courts and is often true in the state courts. Indeed, no other civil procedural system grants litigants more access to evidence held by the opponent or non-parties, than do American discovery rules. Whether based on state or federal law, these rules enable plaintiffs to press claims that initially may have only modest evidentiary support, and that would not give rise to litigation in systems with less access to information held by the opposing party or witnesses. The threat of plaintiff's finding a "smoking gun" through the discovery process may induce settlement of the case. Actual discovery of such evidence expedites the settlement process and may lead to jury verdicts that would be inconceivable absent such devices.

Contrary to most other legal systems, the American discovery rules leave it largely to the parties and their lawyers, rather than judges, actively to engage in sometimes far-reaching fact-finding with little or no immediate judicial supervision. Parties subject to overly intrusive discovery requests can move the court to obtain a protective order that may curtail or avoid particular requests. See Rule 26(c), Fed. R. Civ. P. (We will make reference to the Federal Rules of Civil Procedure because they serve as model for many of the state discovery rules.) But given that the system is geared towards providing broad access to information held by others, most discovery requests will survive such challenges.

If the target of discovery resists it, the party seeking discovery can move for a court order compelling the target to disclose the requested information and to be subjected to sanctions if the court finds that there was no reason to withhold the information. Rule 37, Fed. R. Civ. P. Because discovery is a costly tool, and because either party must generally bear its own expenses, there are potential downsides to this type of fact development. For example, the resources expended by the defendant in complying with evidentiary requests, and in pursuing his own, may not be worth the ultimate possibility of success and may force him to settle for the nuisance value of the suit. Conversely, this sometimes expensive tool is often unavailable to plaintiffs with small or even medium-sized

claims. Because the prospective verdict might not even cover the costs needed to engage in meaningful discovery, and absent a general provision for fee shifting (which is the standard practice in U.S. courts—although there are exceptions), plaintiffs may be prevented from pursuing meritorious claims. However, when parties command sufficient resources and the stakes are high, discovery can entail many months of pretrial work involving scores of lawyers on either side.

In keeping with its primary goals—enabling parties to substantiate their claims with evidence held by others and avoiding uncorrectable surprises at trial—the scope of discovery is quite broad. Fed. R. Civ. P. 26(b)(1) provides that nonprivileged information is discoverable if it is relevant to a party's claim or defense, and for good cause, the court may order discovery of any nonprivileged matter relevant to the subject matter involved in the action. In addition, "relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Id. Thus, except in matters of privilege, evidence law canons do not play a controlling role in the field of discovery.

Under the current Federal Rules, the discovery process begins very early in the litigation process with a planning conference. See Rule 26(f), Fed. R. Civ. P. Some discovery is mandatory, requiring disclosures by the parties. See Rule 26(a), Fed. R. Civ. P. Initial disclosures required of each party include (1) names and addresses of those likely to have discoverable information relevant to the pleadings, (2) a listing of relevant documents or property in the control of the parties, (3) damage computations and their basis, and (4) insurance documentation. Once this meeting has been concluded, discovery begins. There are also provisions for disclosure of the identity of expert witnesses that a party may use at trial. Other pretrial disclosures include the names of those witnesses whom a party expects to call or may call at trial, as well the documents and exhibits a party expects to offer or may offer.

Among a variety of fact-gathering tools, three methods are most frequently employed. These are written interrogatories, depositions, and production of documents and things (as well as inspection of land). See Rules 28, 30, 33, 34, Fed. R. Civ. P. Interrogatories are written questions to be answered under oath, and may be directed only to the parties involved in the litigation. But through such a device, for example, plaintiffs in products liability litigation may be able to force defendants to reveal the identity of all individuals participating in the design of the product.

Once this information is available, plaintiffs may depose these individuals to obtain additional information. Such depositions are typically taken in the offices of law firms rather than courtrooms, and they are conducted by the attorneys for the parties. Private companies, commissioned by the court, provide reporters who transcribe everything that has been said during deposition into a verbatim transcript. The lawyer "defending" the deponent will register objections to questions that would lead to the revelation of privileged information. In the extreme, the lawyer will instruct the deponent not to answer a question, which could lead to requests for a court order aimed at compelling the witness to

respond. But more often than not, the deponents will respond during deposition and the ultimate admissibility of their responses will be decided only at trial.

Requests for production of documents is another cornerstone in pretrial discovery proceedings. Taking again the products liability example, plaintiffs will regularly request—and ordinarily obtain—design, engineering, and manufacturing drawings of the product at issue. Plaintiffs in this type of litigation will also have access to documents concerning allegations, reports, or complaints of previous injuries associated with the product.

Depositions and requests for documents may be addressed to both parties and non-party witnesses. While uncooperative non-party witnesses can only be compelled to provide evidence in their control through a subpoena, subpoenas will generally issue as a matter of course if asked for and can even be issued by the attorney as an officer of the court in which the attorney is authorized to practice. See Rule 45(a), Fed. R. Civ. P.

2. Foreign Methods of Obtaining Evidence

The rules governing civil procedure outside the U.S. differ from one system to another. This observation remains accurate despite strong recent trends towards greater regional, particularly European, harmonization of these rules, and it continues to apply to the means and methods of obtaining evidence in foreign civil litigation systems. (For a comprehensive account of European developments see Helen E. Hartnell, *EUstitia: Institutionalizing Justice in the European Union*, 23 Nw. J. Int'l L. & Bus. 65 (2002).) These differences notwithstanding, foreign rules, even those in other common law jurisdictions, have two things in common that put them in stark contrast with their American counterparts. First, access to information is significantly more restricted in other procedural systems, so much so that it would be seriously misleading in most instances to call these procedures "discovery." Second, foreign procedures for actually obtaining evidence are widely seen as an exercise of judiciary powers that are strictly controlled by judges rather than private litigants. In short, U.S. attorneys request and routinely receive information in U.S. litigation to an extent inconceivable to most of their colleagues abroad.

A short account of the German approach to developing a case in civil litigation illustrates the fact-finding approach in civil law jurisdictions. In the German judicial system, the suit is formally instituted after the court to which the plaintiff has submitted the complaint has effectuated service of process on the defendant. The initial brief is considerably more specific than corresponding pleadings in American litigation. Each averment for which the plaintiff carries the burden of proof must be quite detailed and accompanied by a concrete offer of proof. The court asks the defendant to submit a response to the allegations in the complaint and often schedules an early initial hearing that, particularly in more complex cases, is only the first of several conferences. Instead of an initial hearing, the court may require the parties to submit further written information before the first conference is held. In either event, trial is not a single continuous event, but consists of a series of meetings and written exchanges between the judge and the attorneys. This sequence is designed to streamline the proceedings in accordance with the particular needs of the individual case. Such conferences

are largely dominated by the presiding judge, who continuously develops the case by screening the proffered evidence and signaling what further evidence is needed (and what is dispensable or irrelevant), establishing deadlines for submitting evidence, and by ruling on the manner of presentation. In short, the judge commands much control over the development of the case and, upon a finding that the matter is ripe for a decision on the merits, will render the judgment without a jury.

Despite this strong position of the judge, the German and other European rules are embedded in a genuinely adversarial rather than inquisitorial system of civil procedure, because judges are bound to rest their decisions only on facts alleged by the parties. Lawyers in this type of adversary system are by no means passive bystanders. They have the opportunity, and obligation, to represent their clients' interests vigorously, in factual and legal respects, during court hearings and through written submissions. However, there is little room for courtroom drama, given the role of judges as powerful case managers and fact finders without jury input, and considering the restraint of access to information held by others, as well as the lack of an all-decisive single-event trial. Not surprisingly, many procedural features familiar to American litigants are unknown in foreign jurisdictions. There is little or no witness preparation. Lawyers may ask witnesses questions during court hearings, in addition to judges asking questions, but such questioning does not amount to an American-style cross-examination. Verbatim transcripts are unusual, experts are typically appointed by the court rather than hired by the parties, and, most importantly for present purposes, most systems do not permit pretrial discovery conducted by private litigants. For a fuller account, see Joachim Zekoll, *Recognition and Enforcement of American Products Liability Awards in the Federal Republic of Germany*, 37 Am. J. Comp. L. 301, 331 (1989).

3. *American Discovery and Foreign Perceptions*

The stark contrast between American discovery proceedings and foreign methods of obtaining evidence is a source of constant tension in transnational litigation settings. What is considered normal for litigants before American courts—to substantiate their legal claims by employing potentially far-reaching discovery methods—is regularly perceived as an unacceptable fishing expedition elsewhere. To vest private parties with the power largely to control the fact gathering process (as opposed to having fact gathering done by governmental personnel) further exacerbates the tensions between the U.S. and non-U.S. judicial systems. The view that the American discovery process is incompatible with basic notions of procedural fairness is not only held in civil law systems, but also is shared widely by other common law systems as well. While they do allow for some discovery, they provide for much less disclosure than American procedures and require far more specific requests. These limitations pose problems to plaintiffs with cases pending before U.S. courts whose claims depend on access to evidence located abroad. Conversely, those who are the target of American discovery requests perceive them as an encroachment on sovereign interests and privacy rights. For a comparative perspective of U.S.

versus foreign methods of discovery, and the possible reasons for the divergence, see Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?* 52 DePaul L. Rev. 299 (2002).

B. THE HAGUE EVIDENCE CONVENTION

To increase international judicial assistance on mutually acceptable terms, the U.S. initiated negotiations at the Hague Conference on Private International Law. In 1968, the Hague Conference presented the final text of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters ("Evidence Convention" or "Convention"). In 1972, it entered into force in the U.S., which was one of the original contracting states. The Convention attempts to bridge the gap between the U.S. and other legal systems. It provides a set of rules and procedures that does not impinge upon the sovereignty of the state in which the evidence is located, while yielding evidence that can be used in the country requesting discovery. The Convention is set out in Appendix B.

1. Overview of the Hague Evidence Convention Procedures

The principal mechanisms designed to achieve the Evidence Convention's goals are (1) the Letter of Request procedure and (2) the creation of a so-called Central Authority in every contracting state. The Convention requires every contracting state to designate a Central Authority that will receive Letters of Request coming from a judicial authority of another contracting state. The Central Authority will forward that request to the court in the receiving state that is competent to execute it (Art. 2). After execution the evidence obtained will be sent back to the issuing authority of the requesting state (Art. 13). The Convention is rather specific about the content of the Letter of Request (Art. 3) and failure to comply with these requirements may result in the rejection of, or delay in, the execution of the request (Art. 5). On the other hand, a Letter of Request that meets these formal requirements must, in principle, be executed (Art. 12) expeditiously (Art. 9, III). Two narrow exceptions apply, in cases in which the execution does not fall within the functions of the judiciary in the requested state or when that state considers that the execution would violate its sovereign or security interests. (As to the sovereign or security interests exception, see Section B.3, below). In executing the request, the requested authority must employ the same measure of compulsion to uncooperative witnesses as it would in a domestic case (Art. 10) and it will ordinarily apply its own law as to the methods and procedures (Art. 9, I). Special methods and procedures may be used, unless they are incompatible with the internal law of the State of execution or are impossible or impracticable to perform in light of the internal practice and procedure of that state (Art. 9, II). For example, cross-examination of witnesses and verbatim transcripts (which are basic features of the U.S. litigation process) are unknown in most civil-law systems, and would be considered special methods and procedures. Given that civil law courts are not accustomed to performing such functions, Article 9 may not be of much help from the U.S. perspective.

Two further procedures complement the Letter of Request approach: A diplomatic officer or consular agent of a contracting state may, without compulsion, take evidence in the territory of another contracting state (Arts. 15-16); evidence may also be obtained, without compulsion, through a "commissioner," appointed by the requesting state, in the territory of the requested state (Art.17). The latter option is particularly attractive for U.S. litigants because attorneys well acquainted with U.S. discovery proceedings can serve as commissioners. However, the lack of compulsion and other strict limitations render these methods less effective than they appear at first sight. In particular, a contracting state has the right to declare that it will not permit the taking of evidence by these alternative methods (Art. 33). For example, Germany has made a reservation with respect to the taking of evidence by diplomatic officers or consular agents and has declared that the taking of evidence by private commissioners requires prior approval of the German Central Authority.

2. *Privileges Against Testifying Under the Convention*

An important limitation for the party seeking evidence under the Convention has to do with the privileges on which a witness may rely. Reluctant witnesses may either invoke the privileges and duties to refuse to give evidence under the law of the state of execution *or* under the law of the requesting state (Art. 11). The right of witnesses to rely on privileges under the law where the evidence is located can severely hamper the attempt to conduct discovery. For example, Germany has broad testimonial privileges, such as the refusal to testify under §§ 383 and 384 of the German Code of Civil Procedure ("ZPO"):

§ 383. [Refusal to testify]

(1) The following are entitled to refuse to testify:

1. the person engaged to be married to a party;
2. the spouse of a party, even when the marriage no longer subsists;
3. those who are or were related in the direct line to a party or related by marriage, collaterally related to the third degree;
4. clergymen with respect to matters entrusted to them in the exercise of their pastoral duties;
5. persons who collaborate in the preparation, production or distribution of periodicals or broadcasts in their professional capacity, or did so in the past, concerning the person of the editor, contributor or source of contribution with regard to contributions and documents, as well as concerning information related to them with regard to their activities, insofar as it deals with contributions, documents and information for the editorial part;
6. persons to whom matters are entrusted by virtue of their office, profession or trade, which are to be kept secret due to their nature or by law, with respect to the facts to which the duty of secrecy pertains.

(2) The persons indicated in nos. 2 and 3 above shall be informed of their right to refuse to testify before they are examined.

(3) The examination of persons, indicated in nos. 4 to 6 above shall, also when testifying is not refused, not be directed to facts with regard to which it is apparent that evidence cannot be given without the violation of the duty of secrecy.

§ 384. [Refusal to answer certain questions]

Testimony may be refused:

1. concerning questions, the answering of which would result for the witness or a person related to him in the manner indicated in § 383 nos. 1 to 3 a direct financial loss;
2. concerning questions, the answer to which would disgrace the witness or a person related to him in the manner indicated in § 383 nos. 1 to 3 or would involve the jeopardy of his prosecution for a crime or infraction;
3. concerning questions which the witness could not answer without disclosing an act or trade secret.

According to Article 11 of the Convention, these domestic legal privileges will prevail. And notably, the German concept of trade secret in ZPO § 384 no.3 has been interpreted particularly broadly by the courts. It encompasses all economically relevant facts to the operation of a business such as sources of product purchases, product purchase prices, price calculation, and customers. Given this broad protective scope, many requests emanating from the U.S., whether based on depositions, interrogatories, or document discovery, would be rejected.

3. *Subject Matter Scope of the Hague Evidence Convention*

The Evidence Convention applies only to "civil or commercial matters" (Art. 1). As in older Hague Conventions (The Hague Conventions on Civil Procedure of 1905 and 1952 and the Hague Service Convention of 1964), these terms are not defined and give rise to divergent interpretations. Although all contracting states agree that purely criminal matters fall outside the scope of the Convention, there are conflicting views on other areas. There is disagreement, for example, on whether matters of administrative law qualify as "civil or commercial." The U.S. delegate to a Special Commission, which was set up to study the scope of the Convention in 1978, indicated that the U.S. Central Authority would honor requests for evidence to be used in foreign administrative proceedings, including fiscal matters. Conversely, civil law jurisdictions like France and Germany would not be likely to honor a request for evidence to be used before an administrative court or agency.

It is likewise unclear under the Hague Evidence Convention whether bankruptcy proceedings are "civil or commercial matters." There is also some doubt as to whether certain types of damages available under American law qualify. With respect to antitrust treble damages, for example, a German court has held that such claims must be considered a civil or commercial matter and

must be dealt with under the Hague Evidence Convention. See Decision of the Munich Court of Appeals, November 27, 1980 reprinted in translation in 20 Int'l Legal Materials [I.L.M.] 1025, 1031-1032 (1981). Even though such damages are unknown in German civil proceedings, the court focused, among other things, on the fact that the claim was made by a private party in American civil proceedings. In interpreting the identical scope of application of the Hague Service Convention, a German court held that American punitive damages constitute a civil or commercial matter, despite their underlying purpose to punish the defendant for the wrongdoing he committed. See Decision of the Munich Court of Appeals, May 9, 1989, reprinted in translation in 29 I.L.M. 1570 (1989).

In a later decision, the German Federal Constitutional Court held that a party cannot resist service of punitive damages claims on public policy grounds. Specifically, the Court held that the sovereign and security interest exceptions of the Service Convention (Article 13), cannot be invoked against service of punitive damages claims under the Hague Service Convention. See Decision of the Federal Constitutional Court, December 7, 1994, reprinted in translation in 34 I.L.M. 975 (1995). See Chapter 4, Section E. One of the reasons advanced for this holding is that "such a restriction on the flow of judicial assistance is fundamentally all the less necessary insofar as the outcome of the proceedings is, at the time of service, still completely open." Id. at 991. Given that the sovereign and security interest exceptions contained in Article 12 of the Evidence Convention are identical, public policy objections to requests to take evidence under the Convention would likely fail as well. Note, however, that if such damages become part of an American judgment, they will probably not be enforced in Germany. See Chapter 8.

4. *The Exclusion of Pretrial Discovery Documents*

The single most important limitation of the Convention, from the American perspective, is the right of "contracting states" to declare that they will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents (Art. 23). All but three states (Czechoslovakia, Israel, and the U.S.) have made use of this option, which was adopted on the initiative of the British delegation. In exercising this option, however, contracting states have adopted different approaches. Some states have declared that they will decline to execute any request for pretrial discovery of documents,* while others permit execution, provided the requests meet strict specificity and relevancy standards.

* Upon signing the treaty, Germany declared "that it will not, in its territory, execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." See Bekanntmachung über das Inkrafttreten des Haager Übereinkommens über die Beweisaufnahme im Ausland in Zivil- und Handelssachen (Promulgation of the Entering into Force of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters) at B.5., BGBl II S. 780 (Federal Gazette Vol. 2, p. 780).

Switzerland's declaration is an example of the latter category. In issuing a reservation under Article 23, Switzerland declared that it will not execute requests for pretrial discovery of documents if:

1. The request has no direct and necessary link with the proceedings;
2. A person is required to indicate what documents were in his possession or at his disposal;
3. A person is required to produce documents other than those mentioned in the request; or
4. Interests worthy of protection of concerned persons are endangered.

Even though Switzerland's declaration does not amount to a blanket denial of document discovery, it falls far short of what is permissible and customary under American procedural rules. Compare Rule 26, Fed. R. Civ. P. Article 23 thus affects one of the core methods of the American discovery system, and calls into question the usefulness of the Evidence Convention for evidence-seeking litigants with cases pending before American courts.

5. The Exclusivity of the Hague Evidence Convention

Given the exclusion or limitations of document discovery and other strictures of the Evidence Convention, parties suing in American courts have shown little interest in seeking resort to the sort of judicial assistance offered by the Convention. Instead, plaintiffs in international civil litigation pending before American courts regularly attempt to bypass the Convention and to avail themselves of the far-reaching discovery methods employed in ordinary domestic litigation. American courts faced with the question of whether these plaintiffs *must* use the Convention procedures initially arrived at conflicting conclusions. Some held that the Convention did not preempt American rules and considered it a merely optional device, while others required that the party seeking evidence resort to American law only *after* having first tried unsuccessfully to obtain evidence through the Convention procedures. See, e.g., Philadelphia Gear Corp. v. American Pfauter Corp. 100 F.R.D. 58, 60 n.3 (E.D. Pa 1983) (holding that a party seeking evidence abroad must first attempt to obtain it pursuant to the Hague Evidence Convention, rather than by way of the Federal Rules of Civil Procedure); cf. Wilson v. Lufthansa German Airlines, 489 N.Y.S.2d 575 (N.Y. App. Div. 1985) (holding that resort to the procedures outlined in the Hague Evidence Convention was not mandated in the instant case); but see Umana v. SCM S.p.A., 737 N.Y.S.2d 556 (N.Y. App. Div. 2002) (holding that the trial court order to use the Convention as a first instance of securing evidence was a provident use of discretion). In 1987, the U.S. Supreme had the opportunity finally to decide this question:

June 21 1979. Denmark, Finland, France, Luxembourg, Norway, Portugal and Sweden also have issued declaration unequivocally rejecting document discovery requests.

Société Nationale Industrielle Aérospatiale v. U.S. District Court

Supreme Court of the United States, 1987.

482 U.S. 522.

JUSTICE STEVENS delivered the opinion of the Court.

The question presented in this case concerns the extent to which a federal district court must employ the procedures set forth in the [Hague Evidence] Convention when litigants seek answers to interrogatories, the production of documents, and admissions from a French adversary over whom the court has personal jurisdiction.

I

The two petitioners are corporations owned by the Republic of France. They are engaged in the business of designing, manufacturing, and marketing aircraft. One of their planes, the "Rallye," was allegedly advertised in American aviation publications as "the World's safest and most economical STOL [short takeoff and landing] plane." On August 19, 1980, a Rallye crashed in Iowa, injuring the pilot and a passenger. Dennis Jones, John George, and Rosa George brought separate suits based upon this accident in the United States District Court for the Southern District of Iowa, alleging that petitioners had manufactured and sold a defective plane and that they were guilty of negligence and breach of warranty. Petitioners answered the complaints, apparently without questioning the jurisdiction of the District Court. With the parties' consent, the cases were consolidated and referred to a Magistrate. See 28 U.S.C. § 636(c)(1).

Initial discovery was conducted by both sides pursuant to the Federal Rules of Civil Procedure without objection. [Subsequently], however, petitioners filed a motion for a protective order. The motion alleged that because petitioners are "French corporations, and the discovery sought can only be found in a foreign state, namely France," the Hague Convention dictated the exclusive procedures that must be followed for pretrial discovery. In addition, the motion stated that under French penal law, the petitioners could not respond to discovery requests that did not comply with the Convention.[6] [The trial court denied the defendants' motion and, agreeing with that decision, the Court of Appeals for the Eighth Circuit held that] "when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and

[6] Article 1A of the French "blocking statute," French Penal Code Law No. 80-538, provides: "Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith." * * *

information sought may physically be located within the territory of a foreign signatory to the Convention." The Court of Appeals disagreed with petitioners' argument that this construction would render the entire Hague Convention "meaningless," noting that it would still serve the purpose of providing an improved procedure for obtaining evidence from nonparties. * * *

* * *

III

In arguing their entitlement to a protective order, petitioners correctly assert that both the discovery rules set forth in the Federal Rules of Civil Procedure and the Hague Convention are the law of the United States. This observation, however, does not dispose of the question before us; we must analyze the interaction between these two bodies of federal law. Initially, we note that at least four different interpretations of the relationship between the federal discovery rules and the Hague Convention are possible. Two of these interpretations assume that the Hague Convention by its terms dictates the extent to which it supplants normal discovery rules. First, the Hague Convention might be read as requiring its use to the exclusion of any other discovery procedures whenever evidence located abroad is sought for use in an American court. Second, the Hague Convention might be interpreted to require first, but not exclusive, use of its procedures. Two other interpretations assume that international comity, rather than the obligations created by the treaty, should guide judicial resort to the Hague Convention. Third, then, the Convention might be viewed as establishing a supplemental set of discovery procedures, strictly optional under treaty law, to which concerns of comity nevertheless require first resort by American courts in all cases. Fourth, the treaty may be viewed as an undertaking among sovereigns to facilitate discovery to which an American court should resort when it deems that course of action appropriate, after considering the situations of the parties before it as well as the interests of the concerned foreign state.

In interpreting an international treaty, we are mindful that it is "in the nature of a contract between nations," Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984), to which "[g]eneral rules of construction apply." We therefore begin "with the text of the treaty and the context in which the written words are used." Air France v. Saks, 470 U.S. 392, 397 (1985). The treaty's history, "'the negotiations, and the practical construction adopted by the parties'" may also be relevant. We reject the first two of the possible interpretations as inconsistent with the language and negotiating history of the Hague Convention. The preamble of the Convention specifies its purpose "to facilitate the transmission and execution of Letters of Request" and to "improve mutual judicial co-operation in civil or commercial matters." The preamble does not speak in mandatory terms which would purport to describe the procedures for all permissible transnational discovery and exclude all other existing practices. The text of the Evidence Convention itself does not modify the law of

any contracting state, require any contracting state to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting state to change its own evidence-gathering procedures.[16]

The Convention contains three chapters. Chapter I, entitled "Letters of Requests," and chapter II, entitled "Taking of Evidence by Diplomatic Officers, Consular Agents and Commissioners," both use permissive rather than mandatory language. Thus, Article 1 provides that a judicial authority in one contracting state "may" forward a letter of request to the competent authority in another contracting state for the purpose of obtaining evidence. Similarly, Articles 15, 16, and 17 provide that diplomatic officers, consular agents, and commissioners "may . . . without compulsion," take evidence under certain conditions. The absence of any command that a contracting state must use Convention procedures when they are not needed is conspicuous.

Two of the Articles in chapter III, entitled "General Clauses," buttress our conclusion that the Convention was intended as a permissive supplement, not a pre-emptive replacement, for other means of obtaining evidence located abroad. Article 23 expressly authorizes a contracting state to declare that it will not execute any letter of request in aid of pretrial discovery of documents in a common-law country. Surely, if the Convention had been intended to replace completely the broad discovery powers that the common-law courts in the United States previously exercised over foreign litigants subject to their jurisdiction, it would have been most anomalous for the common-law contracting parties to agree to Article 23, which enables a contracting party to revoke its consent to the treaty's procedures for pretrial discovery. In the absence of explicit textual support, we are unable to accept the hypothesis that the common-law contracting states abjured recourse to all pre-existing discovery procedures at the same time that they accepted the possibility that a contracting party could unilaterally abrogate even the Convention's procedures. Moreover, Article 27 plainly states that the Convention does not prevent a contracting state from using more liberal methods of rendering evidence than those authorized by the Convention. Thus, the text of the Evidence Convention, as well as the history of its proposal and ratification by the United States, unambiguously supports the conclusion that it was intended to establish optional procedures that would facilitate the taking of evidence abroad. * * *

---

[16] The Hague Conference on Private International Law's omission of mandatory language in the preamble is particularly significant in light of the same body's use of mandatory language in the preamble to the Hague Service Convention [.] Article 1 of the Service Convention provides: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extra judicial document for service abroad." * * * [T]he Service Convention was drafted before the Evidence Convention, and its language provided a model exclusivity provision that the drafters of the Evidence Convention could easily have followed had they been so inclined. * * *

We conclude accordingly that the Hague Convention did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation.

IV

While the Hague Convention does not divest the District Court of jurisdiction to order discovery under the Federal Rules of Civil Procedure, the optional character of the Convention procedures sheds light on one aspect of the Court of Appeals' opinion that we consider erroneous. That court concluded that the Convention simply "does not apply" to discovery sought from a foreign litigant that is subject to the jurisdiction of an American court. Plaintiffs argue that this conclusion is supported by two considerations. First, the Federal Rules of Civil Procedure provide ample means for obtaining discovery from parties who are subject to the court's jurisdiction, while before the Convention was ratified it was often extremely difficult, if not impossible, to obtain evidence from nonparty witnesses abroad. Plaintiffs contend that it is appropriate to construe the Convention as applying only in the area in which improvement was badly needed. Second, when a litigant is subject to the jurisdiction of the district court, arguably the evidence it is required to produce is not "abroad" within the meaning of the Convention, even though it is in fact located in a foreign country at the time of the discovery request and even though it will have to be gathered or otherwise prepared abroad.

Nevertheless, the text of the Convention draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves; nor does it purport to draw any sharp line between evidence that is "abroad" and evidence that is within the control of a party subject to the jurisdiction of the requesting court. Thus, it appears clear to us that the optional Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention. Although these procedures are not mandatory, the Hague Convention does "apply" to the production of evidence in a litigant's possession in the sense that it is one method of seeking evidence that a court may elect to employ.

V

Petitioners contend that even if the Hague Convention's procedures are not mandatory, this Court should adopt a rule requiring that American litigants first resort to those procedures before initiating any discovery pursuant to the normal methods of the Federal Rules of Civil Procedure. The Court of Appeals rejected this argument because it was convinced that an American court's order ultimately requiring discovery that a foreign court had refused under Convention procedures would constitute "the greatest insult" to the sovereignty of that tribunal. We disagree with the Court of Appeals' view. It is well known that the scope of American discovery is often significantly broader than is permitted in other jurisdictions, and we are satisfied that foreign tribunals will recognize that the final decision on the evidence to be used in litigation conducted in American courts must be made by those courts. We therefore do not believe that an American court should refuse to make use of Convention procedures because

of a concern that it may ultimately find it necessary to order the production of evidence that a foreign tribunal permitted a party to withhold.

Nevertheless, we cannot accept petitioners' invitation to announce a new rule of law that would require first resort to Convention procedures whenever discovery is sought from a foreign litigant. Assuming, without deciding, that we have the lawmaking power to do so, we are convinced that such a general rule would be unwise. In many situations the Letter of Request procedure authorized by the Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules. A rule of first resort in all cases would therefore be inconsistent with the overriding interest in the "just, speedy, and inexpensive determination" of litigation in our courts. See Fed. Rule Civ. Proc. 1.

Petitioners argue that a rule of first resort is necessary to accord respect to the sovereignty of states in which evidence is located. It is true that the process of obtaining evidence in a civil-law jurisdiction is normally conducted by a judicial officer rather than by private attorneys. Petitioners contend that if performed on French soil, for example, by an unauthorized person, such evidence-gathering might violate the "judicial sovereignty" of the host nation. Because it is only through the Convention that civil-law nations have given their consent to evidence-gathering activities within their borders, petitioners argue, we have a duty to employ those procedures whenever they are available. We find that argument unpersuasive. If such a duty were to be inferred from the adoption of the Convention itself, we believe it would have been described in the text of that document. Moreover, the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation than petitioners' proposed general rule would generate.[28] We therefore decline to hold as a blanket matter that comity requires resort to Hague Evidence Convention procedures without prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.

---

[28] The nature of the concerns that guide a comity analysis is suggested by the Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986) (approved May 14, 1986) (Restatement). While we recognize that § 437 [now § 442—eds.] of the Restatement may not represent a consensus of international views on the scope of the district court's power to order foreign discovery in the face of objections by foreign states, these factors are relevant to any comity analysis:

> "(1) the importance to the . . . litigation of the documents or other information requested;
>
> "(2) the degree of specificity of the request;
>
> "(3) whether the information originated in the United States;
>
> "(4) the availability of alternative means of securing the information; and
>
> "(5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." Ibid.

Some discovery procedures are much more "intrusive" than others. In this case, for example, an interrogatory asking petitioners to identify the pilots who flew flight tests in the Rallye before it was certified for flight by the Federal Aviation Administration, or a request to admit that petitioners authorized certain advertising in a particular magazine, is certainly less intrusive than a request to produce all of the "design specifications, line drawings and engineering plans and all engineering change orders and plans and all drawings concerning the leading edge slats for the Rallye type aircraft manufactured by the Defendants." Even if a court might be persuaded that a particular document request was too burdensome or too "intrusive" to be granted in full, with or without an appropriate protective order, it might well refuse to insist upon the use of Convention procedures before requiring responses to simple interrogatories or requests for admissions. The exact line between reasonableness and unreasonableness in each case must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke.

American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses. For example, the additional cost of transportation of documents or witnesses to or from foreign locations may increase the danger that discovery may be sought for the improper purpose of motivating settlement, rather than finding relevant and probative evidence. Objections to "abusive" discovery that foreign litigants advance should therefore receive the most careful consideration. In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state. We do not articulate specific rules to guide this delicate task of adjudication.

VI

In the case before us, the Magistrate and the Court of Appeals correctly refused to grant the broad protective order that petitioners requested. The Court of Appeals erred, however, in stating that the Evidence Convention does not apply to the pending discovery demands. This holding may be read as indicating that the Convention procedures are not even an option that is open to the District Court. It must be recalled, however, that the Convention's specification of duties in executing states creates corresponding rights in requesting states; holding that the Convention does not apply in this situation would deprive domestic litigants of access to evidence through treaty procedures to which the contracting states have assented. Moreover, such a rule would deny the foreign litigant a full and

fair opportunity to demonstrate appropriate reasons for employing Convention procedures in the first instance, for some aspects of the discovery process.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE O'CONNOR join, concurring in part and dissenting in part.

Some might well regard the Court's decision in this case as an affront to the nations that have joined the United States in ratifying the Hague Convention. * * * The Court ignores the importance of the Convention by relegating it to an "optional" status, without acknowledging the significant achievement in accommodating divergent interests that the Convention represents. Experience to date indicates that there is a large risk that the case-by-case comity analysis now to be permitted by the Court will be performed inadequately and that the somewhat unfamiliar procedures of the Convention will be invoked infrequently. I fear the Court's decision means that courts will resort unnecessarily to issuing discovery orders under the Federal Rules of Civil Procedure in a raw exercise of their jurisdictional power to the detriment of the United States' national and international interests. The Court's view of this country's international obligations is particularly unfortunate in a world in which regular commercial and legal channels loom ever more crucial.

I do agree with the Court's repudiation of the positions at both extremes of the spectrum with regard to the use of the Convention. Its rejection of the view that the Convention is not "applicable" at all to this case is surely correct: the Convention clearly applies to litigants as well as to third parties, and to requests for evidence located abroad, no matter where that evidence is actually "produced." The Court also correctly rejects the far opposite position that the Convention provides the exclusive means for discovery involving signatory countries. I dissent, however, because I cannot endorse the Court's case-by-case inquiry for determining whether to use Convention procedures and its failure to provide lower courts with any meaningful guidance for carrying out that inquiry. In my view, the Convention provides effective discovery procedures that largely eliminate the conflicts between United States and foreign law on evidence gathering. I therefore would apply a general presumption that, in most cases, courts should resort first to the Convention procedures. An individualized analysis of the circumstances of a particular case is appropriate only when it appears that it would be futile to employ the Convention or when its procedures prove to be unhelpful.

I

Even though the Convention does not expressly require discovery of materials in foreign countries to proceed exclusively according to its procedures, it cannot be viewed as merely advisory. The differences between discovery practices in the United States and those in other countries are significant, and "[n]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States." Restatement of Foreign Relations Law of the United States (Revised) § 437, Reporters' Note 1, p. 35 (Tent. Draft No. 7, Apr. 10, 1986). Of particular import

is the fact that discovery conducted by the parties, as is common in the United States, is alien to the legal systems of civil-law nations, which typically regard evidence gathering as a judicial function.

The Convention furthers important United States interests by providing channels for discovery abroad that would not be available otherwise. * * *

The Convention also serves the long-term interests of the United States in helping to further and to maintain the climate of cooperation and goodwill necessary to the functioning of the international legal and commercial systems. It is not at all satisfactory to view the Convention as nothing more than an optional supplement to the Federal Rules of Civil Procedure, useful as a means to "facilitate discovery" when a court "deems that course of action appropriate." Unless they had expected the Convention to provide the normal channels for discovery, other parties to the Convention would have had no incentive to agree to its terms. * * *

II

By viewing the Convention as merely optional and leaving the decision whether to apply it to the court in each individual case, the majority ignores the policies established by the political branches when they negotiated and ratified the treaty. The result will be a duplicative analysis for which courts are not well designed. The discovery process usually concerns discrete interests that a court is well equipped to accommodate—the interests of the parties before the court coupled with the interest of the judicial system in resolving the conflict on the basis of the best available information. When a lawsuit requires discovery of materials located in a foreign nation, however, foreign legal systems and foreign interests are implicated as well. The presence of these interests creates a tension between the broad discretion our courts normally exercise in managing pretrial discovery and the discretion usually allotted to the Executive in foreign matters.

It is the Executive that normally decides when a course of action is important enough to risk affronting a foreign nation or placing a strain on foreign commerce. It is the Executive, as well, that is best equipped to determine how to accommodate foreign interests along with our own. * * *

Not only is the question of foreign discovery more appropriately considered by the Executive and Congress, but in addition, courts are generally ill equipped to assume the role of balancing the interests of foreign nations with that of our own. Although transnational litigation is increasing, relatively few judges are experienced in the area and the procedures of foreign legal systems are often poorly understood. As this Court recently stated, it has "little competence in determining precisely when foreign nations will be offended by particular acts." Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983). A pro-forum bias is likely to creep into the supposedly neutral balancing process and courts not surprisingly often will turn to the more familiar procedures established by their local rules. In addition, it simply is not reasonable to expect the Federal Government or the foreign state in which the discovery will take place to participate in every individual case in order to articulate the broader international and foreign interests that are relevant to the decision whether to use the Convention. Indeed, the opportunities for such participation are limited.

Exacerbating these shortcomings is the limited appellate review of interlocutory discovery decisions, which prevents any effective case-by-case correction of erroneous discovery decisions.

III

* * * In most cases in which a discovery request concerns a nation that has ratified the Convention there is no need to resort to comity principles; the conflicts they are designed to resolve already have been eliminated by the agreements expressed in the treaty. The analysis set forth in the Restatement (Revised) of Foreign Relations Law of the United States is perfectly appropriate for courts to use when no treaty has been negotiated to accommodate the different legal systems. It would also be appropriate if the Convention failed to resolve the conflict in a particular case. The Court, however, adds an additional layer of so-called comity analysis by holding that courts should determine on a case-by-case basis whether resort to the Convention is desirable. Although this analysis is unnecessary in the absence of any conflicts, it should lead courts to the use of the Convention if they recognize that the Convention already has largely accommodated all three categories of interests relevant to a comity analysis—foreign interests, domestic interests, and the interest in a well-functioning international order.

A

* * * [T]he Court's view of the Convention rests on an incomplete analysis of the sovereign interests of foreign states. The Court acknowledges that evidence is normally obtained in civil-law countries by a judicial officer, but it fails to recognize the significance of that practice. Under the classic view of territorial sovereignty, each state has a monopoly on the exercise of governmental power within its borders and no state may perform an act in the territory of a foreign state without consent.[13] * * *

Some countries also believe that the need to protect certain underlying substantive rights requires judicial control of the taking of evidence. * * *

The United States recently recognized the importance of these sovereignty principles by taking the broad position that the Convention "must be interpreted to preclude an evidence taking proceeding in the territory of a foreign state party if the Convention does not authorize it and the host country does not otherwise permit it." Brief for United States as Amicus Curiae in Volkswagenwerk Aktiengesellschaft v. Falzon, O.T. 1983, No. 82-1888, p. 6. Now, however, it appears to take a narrower view of what constitutes an "evidence taking procedure," merely stating that "oral depositions on foreign soil . . . are improper without the consent of the foreign nation." I am at a loss to understand why gathering documents or information in a foreign country, even if for ultimate production in the United States, is any less an imposition on sovereignty than the

[13] Many of the nations that participated in drafting the Convention regard nonjudicial evidence taking from even a willing witness as a violation of sovereignty. * * *

taking of a deposition when gathering documents also is regarded as a judicial function in a civil-law nation.

Use of the Convention advances the sovereign interests of foreign nations because they have given consent to Convention procedures by ratifying them. This consent encompasses discovery techniques that would otherwise impinge on the sovereign interests of many civil-law nations. In the absence of the Convention, the informal techniques provided by Articles 15-22 of the Convention—taking evidence by a diplomatic or consular officer of the requesting state and the use of commissioners nominated by the court of the state where the action is pending—would raise sovereignty issues similar to those implicated by a direct discovery order from a foreign court. "Judicial" activities are occurring on the soil of the sovereign by agents of a foreign state. These voluntary discovery procedures are a great boon to United States litigants and are used far more frequently in practice than is compulsory discovery pursuant to letters of request.[16]

Civil-law contracting parties have also agreed to use, and even to compel, procedures for gathering evidence that are diametrically opposed to civil-law practices * * *.[1] These methods for obtaining evidence, which largely eliminate conflicts between the discovery procedures of the United States and the laws of foreign systems, have the consent of the ratifying nations. The use of these methods thus furthers foreign interests because discovery can proceed without violating the sovereignty of foreign nations.

B

The primary interest of the United States in this context is in providing effective procedures to enable litigants to obtain evidence abroad. This was the very purpose of the United States' participation in the treaty negotiations and, for the most part, the Convention provides those procedures. * * *

There is also apprehension that the Convention procedures will not prove fruitful. Experience with the Convention suggests otherwise—contracting parties have honored their obligation to execute letters of request expeditiously and to use compulsion if necessary. * * * By and large, the concessions made by parties to the Convention not only provide United States litigants with a means for obtaining evidence, but also ensure that the evidence will be in a form admissible in court.

---

[16] According to the French Government, the overwhelming majority of discovery requests by American litigants are "satisfied willingly . . . before consular officials and, occasionally, commissioners, and without the need for involvement by a French court or use of its coercive powers." Brief for Republic of France as Amicus Curiae 24. * * *

[1] In France, the Nouveau Code de Procedure Civile, Arts. 736-748 (76th ed. Dalloz 1984), implements the Convention by permitting examination and cross-examination of witnesses by the parties and their attorneys, Art. 740, permitting a foreign judge to attend the proceedings, Art. 741, and authorizing the preparation of a verbatim transcript of the questions and answers at the expense of the requesting authority, Arts. 739, 748.

There are, however, some situations in which there is legitimate concern that certain documents cannot be made available under Convention procedures. Thirteen nations have made official declarations pursuant to Article 23 of the Convention, which permits a contracting state to limit its obligation to produce documents in response to a letter of request. These reservations may pose problems that would require a comity analysis in an individual case, but they are not so all-encompassing as the majority implies—they certainly do not mean that a "contracting party could unilaterally abrogate . . . the Convention's procedures." First, the reservations can apply only to letters of request for documents. Thus, an Article 23 reservation affects neither the most commonly used informal Convention procedures for taking of evidence by a consul or a commissioner nor formal requests for depositions or interrogatories. Second, although Article 23 refers broadly to "pre-trial discovery," the intended meaning of the term appears to have been much narrower than the normal United States usage. The contracting parties for the most part have modified the declarations made pursuant to Article 23 to limit their reach. Indeed, the emerging view of this exception to discovery is that it applies only to "requests that lack sufficient specificity or that have not been reviewed for relevancy by the requesting court." Thus, in practice, a reservation is not the significant obstacle to discovery under the Convention that the broad wording of Article 23 would suggest.

* * *

The approach I propose is not a rigid per se rule that would require first use of the Convention without regard to strong indications that no evidence would be forthcoming. All too often, however, courts have simply assumed that resort to the Convention would be unproductive and have embarked on speculation about foreign procedures and interpretations. When resort to the Convention would be futile, a court has no choice but to resort to a traditional comity analysis. But even then, an attempt to use the Convention will often be the best way to discover if it will be successful, particularly in the present state of general inexperience with the implementation of its procedures by the various contracting states. * * *

NOTES AND QUESTIONS FOR DISCUSSION

1. The majority of the *Aérospatiale* Court held the Convention to be merely optional and left it to the lower courts to decide on a case-by-case basis whether to use the Convention procedures. What exactly are the criteria that lower courts are supposed to employ for their decision, and how do they differ from those of the dissent?

2. Rejecting petitioners' interpretation that the application of the Convention is mandatory, or at least subject to a first-use status requirement, the majority offered several reasons:

a. Lack of mandatory language

Article 1 of the Hague Evidence Convention (see Appendix B) provides that a contracting state *may* request the competent authority of another Contracting state to obtain evidence or to perform some other judicial act. By contrast,

Article 1 of the Hague Service Convention stipulates that it *shall* apply in all civil or commercial cases where there is occasion to transmit documents for service abroad. But does the use of the word "may" in the Evidence Convention really support the majority's position that it is a purely optional device? Couldn't it be argued that Article 1 merely prescribes what is permissible under the Convention but that the Convention as such is mandatory in nature? If so, consider how one might explain the mandatory language in the Service Convention. What do you think were the expectations of the states negotiating the Evidence Convention?

b. Exclusion of document discovery

According to Article 23, every contracting state may declare at the time of signature that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents. Most contracting states have made such a declaration and refuse to execute such requests. The *Aérospatiale* majority concluded that the U.S. could not possibly have intended to be bound by an instrument that would empower other contracting states to eliminate document discovery, a procedural device of pivotal importance to the American litigation process. Is this argument persuasive? Is the intent of the U.S., presumed by the Court, of any relevance for the interpretation of the Convention?

c. Alternative methods provided by the Convention itself

The holding of the majority also rests on its interpretation of Article 27 of the Convention which permits contracting states to use less restrictive evidence-gathering methods than provided by the Convention. Is this argument persuasive? Consider the following counter-argument, advanced by the four justices who dissented from the majority's case-by-case analysis, and who would have applied a presumption, in most cases, that required initial resort to the Convention's procedures:

> Article 27 of the Convention is not to the contrary. The only logical interpretation of this Article is that a state receiving a discovery request may permit less restrictive procedures than those designated in the Convention. The majority finds plausible a reading that authorizes both a requesting and a receiving state to use methods outside the Convention. If this were the case, Article 27(c), which allows a state to permit methods of taking evidence that are not provided in the Convention, would make the rest of the Convention wholly superfluous. If a requesting state could dictate the methods for taking evidence in another state, there would be no need for the detailed procedures provided by the Convention.

482 U.S. at 551 n.2. Does the majority persuasively respond to this part of the dissent?

d. Fairness considerations

In a footnote, the majority points to what it perceives as "three unacceptable asymmetries" that would ensue if the Convention were the exclusive means of obtaining evidence:

> * * * First, within any lawsuit between a national of the United States and a national of another contracting party, the foreign party could obtain discovery under the Federal Rules of Civil Procedure, while the domestic party would be required to resort first to the procedures of the Hague Convention. This imbalance would run counter to the fundamental maxim of discovery that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Hickman v. Taylor, 329 U.S. 495, 507 (1947).
>
> Second, a rule of exclusivity would enable a company which is a citizen of another contracting state to compete with a domestic company on uneven terms, since the foreign company would be subject to less extensive discovery procedures in the event that both companies were sued in an American court. Petitioners made a voluntary decision to market their products in the United States. They are entitled to compete on equal terms with other companies operating in this market. But since the District Court unquestionably has personal jurisdiction over petitioners, they are subject to the same legal constraints, including the burdens associated with American judicial procedures, as their American competitors. A general rule according foreign nationals a preferred position in pretrial proceedings in our courts would conflict with the principle of equal opportunity that governs the market they elected to enter.
>
> Third, since a rule of first use of the Hague Convention would apply to cases in which a foreign party is a national of a contracting state, but not to cases in which a foreign party is a national of any other foreign state, the rule would confer an unwarranted advantage on some domestic litigants over others similarly situated.

482 U.S. at 540 n.25.

Are these concerns warranted? The minority took issue with the first two "asymmetries" by pointing to Rule 26(c), Fed. R. Civ. P., which permits a court to (in the language of the Rule as it then existed) "make any order which justice requires" to limit discovery, including an order permitting discovery only on specified terms and conditions, by a particular discovery method, or with limitation in scope to certain matters. This provision, and its state law equivalents, thus vests courts with the discretionary power to prevent the imbalances that the majority envisaged. Furthermore, consider whether the majority's focus on the parties' nationality is justified. The dissent argued that it is not and that mandatory use of the Convention could equally affect a foreign litigant trying to secure evidence from a foreign branch of an American litigant.

3. The minority also expressed disagreement with the Court's third fairness concern—that a domestic litigant suing a national of a state that is not a party to the Convention would have an advantage over a litigant suing a national of a contracting state:

> This statement completely ignores the very purpose of the Convention. The negotiations were proposed by the United States in order to facilitate discovery, not to hamper litigants. Dissimilar treatment of litigants similarly situated does occur, but in the manner opposite to that perceived by the Court. Those who sue nationals of noncontracting states are disadvantaged by the unavailability of the Convention procedures. This is an unavoidable inequality inherent in the benefits conferred by any treaty that is less than universally ratified.

482 U.S at 556. Do you agree? Or should this imbalance make a difference in determining the status of the Convention?

G. U.S. DISCOVERY AND EVIDENCE PRODUCTION FOR FOREIGN AND INTERNATIONAL TRIBUNALS

U.S. courts may provide assistance to foreign and international tribunals and to litigants before those tribunals. One statute, for example, gives the State Department the power to receive letters rogatory[*] issued by, or other requests made by, such tribunals and to transmit them to the U.S. tribunal, officer or agency to whom it is addressed. 28 U.S.C. § 1781(a)(1). But the statute does not preclude the transmittal of such matters directly from a foreign or international tribunal to the U.S. tribunal officer or agency to whom it is addressed. Id. at § 1781(b)(1). In addition, under 28 U.S.C. § 1696(a), a federal district court may order service upon a person residing in the district of "any document issued in connection with a proceeding in a foreign or international tribunal," including letters rogatory and other requests. But the provision also does not preclude service of such a document without court order. See id. at § 1696(b).

Another statute, 28 U.S.C. § 1782, pursues the twin aims of providing efficient means of assistance to participants in international litigation in U.S. courts and encouraging foreign countries (by example) to provide similar means of assistance to U.S. courts.

28 U.S.C. § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. * * * The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

[*] "[A] *letter rogatory* is the request by a domestic court to a foreign court to take evidence from a certain witness." Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 519 (1953).

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

Some of the language of the statute is mandatory; some is permissive. We offer two decisions interpreting § 1782. The first of them deals with the interpretation of the statute and the obligations that it imposes. The second deals with the question of the extent to which a court may exercise discretion under the statute.

Intel Corp. v. Advanced Micro Devices, Inc.

Supreme Court of the United States, 2004.
542 U.S. 241.

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the authority of federal district courts to assist in the production of evidence for use in a foreign or international tribunal. In the matter before us, respondent Advanced Micro Devices, Inc. (AMD) filed an antitrust complaint against petitioner Intel Corporation (Intel) with the Directorate-General for Competition of the Commission of the European Communities (European Commission or Commission). In pursuit of that complaint, AMD applied to the United States District Court for the Northern District of California, invoking 28 U.S.C. § 1782(a) for an order requiring Intel to produce potentially relevant documents. Section 1782(a) provides that a federal district court "may order" a person "resid[ing]" or "found" in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal . . . upon the application of any interested person."

Concluding that § 1782(a) did not authorize the requested discovery, the District Court denied AMD's application. The Court of Appeals for the Ninth Circuit reversed that determination and remanded the case, instructing the District Court to rule on the merits of AMD's application. In accord with the Court of Appeals, we hold that the District Court had authority under § 1782(a) to entertain AMD's discovery request. The statute, we rule, does not categorically bar the assistance AMD seeks: (1) A complainant before the European Commission, such as AMD, qualifies as an "interested person" within § 1782(a)'s compass; (2) the Commission is a § 1782(a) "tribunal" when it acts as a first-instance decisionmaker; (3) the "proceeding" for which discovery is sought under § 1782(a) must be in reasonable contemplation, but need not be "pending" or "imminent"; and (4) § 1782(a) contains no threshold requirement that evidence sought from a federal district court would be discoverable under the law governing the foreign proceeding. We caution, however, that § 1782(a) authorizes, but does not require, a federal district court to provide judicial assistance to foreign or international tribunals or to "interested person[s]" in

proceedings abroad. Whether such assistance is appropriate in this case is a question yet unresolved. To guide the District Court on remand, we suggest considerations relevant to the disposition of that question.

I

A

Section 1782 is the product of congressional efforts, over the span of nearly 150 years, to provide federal-court assistance in gathering evidence for use in foreign tribunals. Congress first provided for federal-court aid to foreign tribunals in 1855; requests for aid took the form of letters rogatory forwarded through diplomatic channels. See Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630 (circuit court may appoint "a United States commissioner designated . . . to make the examination of witnesses" on receipt of a letter rogatory from a foreign court); Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769 (authorizing district courts to respond to letters rogatory by compelling witnesses here to provide testimony for use abroad in "suit[s] for the recovery of money or property"). In 1948, Congress substantially broadened the scope of assistance federal courts could provide for foreign proceedings. That legislation, codified as § 1782, eliminated the prior requirement that the government of a foreign country be a party or have an interest in the proceeding. The measure allowed district courts to designate persons to preside at depositions "to be used in *any civil action* pending in any court in a foreign country with which the United States is at peace." * * * The next year, Congress deleted "civil action" from § 1782's text and inserted "judicial proceeding." * * *

In 1958, prompted by the growth of international commerce, Congress created a Commission on International Rules of Judicial Procedure (Rules Commission) to "investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements." * * * Six years later, in 1964, Congress unanimously adopted legislation recommended by the Rules Commission; legislation included a complete revision of § 1782. * * *

As recast in 1964, § 1782 provided for assistance in obtaining documentary and other tangible evidence as well as testimony. Notably, Congress deleted the words "in any judicial proceeding *pending* in any court in a foreign country" and replaced them with the phrase "in a proceeding in a foreign or international tribunal." While the accompanying Senate Report does not account discretely for the deletion of the word "pending," it explains that Congress introduced the word "tribunal" to ensure that "assistance is not confined to proceedings before conventional courts," but extends also to "administrative and quasi-judicial proceedings." S. Rep. No. 1580, 88th Cong., 2d Sess., p. 7 (1964); see H. R. Rep. No. 1052, 88th Cong., 1st Sess., p. 9 (1963) (same). Congress further amended § 1782(a) in 1996 to add, after the reference to "foreign or international tribunal," the words "including criminal investigations conducted before formal accusation." National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, § 1342(b), 110 Stat. 486. * * *

B

AMD and Intel are "worldwide competitors in the microprocessor industry." 292 F.3d 664, 665 (CA9 2002). In October 2000, AMD filed an antitrust complaint with the Directorate-General for Competition (DG-Competition) of the European Commission. "The European Commission is the executive and administrative organ of the European Communities." The Commission exercises responsibility over the wide range of subject areas covered by the European Union treaty; those areas include the treaty provisions, and regulations thereunder, governing competition. The DG-Competition, operating under the Commission's aegis, is the European Union's primary antitrust law enforcer. Within the DG-Competition's domain are anticompetitive agreements (Art. 81) and abuse of dominant market position (Art. 82).

AMD's complaint alleged that Intel, in violation of European competition law, had abused its dominant position in the European market through loyalty rebates, exclusive purchasing agreements with manufacturers and retailers, price discrimination, and standard-setting cartels. AMD recommended that the DG-Competition seek discovery of documents Intel had produced in a private antitrust suit [filed in an Alabama federal court]. After the DG-Competition declined to seek judicial assistance in the United States, AMD, pursuant to § 1782(a), petitioned the District Court for the Northern District of California for an order directing Intel to produce documents discovered in the [Alabama federal court] litigation and on file in the [Alabama] federal court. AMD asserted that it sought the materials in connection with the complaint it had filed with the European Commission.

[The California federal district court denied the discovery application of AMD, but the Ninth Circuit reversed and remanded the case for disposition on the merits. On remand, the district court concluded that the application was "overbroad" and ordered AMD to make a more specific request. The district court proceedings were eventually stayed pending Intel's petition for certiorari to the U.S. Supreme Court to review the Ninth Circuit's ruling regarding discovery.]

We granted certiorari, in view of the division among the Circuits on the question whether § 1782(a) contains a foreign-discoverability requirement. We now hold that § 1782(a) does not impose such a requirement. We also granted review on two other questions. First, does § 1782(a) make discovery available to complainants, such as AMD, who do not have the status of private "litigants" and are not sovereign agents? Second, must a "proceeding" before a foreign "tribunal" be "pending" or at least "imminent" for an applicant to invoke § 1782(a) successfully? * * * Answering "yes" to the first question and "no" to the second, we affirm the Ninth Circuit's judgment.

II

To place this case in context, we sketch briefly how the European Commission, acting through the DG-Competition, enforces European competition laws and regulations. The DG-Competition's "overriding responsibility" is to conduct investigations into alleged violations of the European Union's competition prescriptions. On receipt of a complaint or *sua*

sponte, the DG-Competition conducts a preliminary investigation. In that investigation, the DG-Competition "may take into account information provided by a complainant, and it may seek information directly from the target of the complaint." "Ultimately, DG Competition's preliminary investigation results in a formal written decision whether to pursue the complaint. If [the DG-Competition] declines to proceed, that decision is subject to judicial review" by the Court of First Instance and, ultimately, by the court of last resort for European Union matters, the Court of Justice for the European Communities (European Court of Justice). * * *

If the DG-Competition decides to pursue the complaint, it typically serves the target of the investigation with a formal "statement of objections" and advises the target of its intention to recommend a decision finding that the target has violated European competition law. The target is entitled to a hearing before an independent officer, who provides a report to the DG-Competition. Once the DG-Competition has made its recommendation, the European Commission may "dismis[s] the complaint, or issu[e] a decision finding infringement and imposing penalties." The Commission's final action dismissing the complaint or holding the target liable is subject to review in the Court of First Instance and the European Court of Justice.

Although lacking formal "party" or "litigant" status in Commission proceedings, the complainant has significant procedural rights. Most prominently, the complainant may submit to the DG-Competition information in support of its allegations, and may seek judicial review of the Commission's disposition of a complaint. * * *

III

As "in all statutory construction cases, we begin [our examination of § 1782] with the language of the statute." * * * The language of § 1782(a), confirmed by its context, our examination satisfies us, warrants this conclusion: The statute authorizes, but does not require, a federal district court to provide assistance to a complainant in a European Commission proceeding that leads to a dispositive ruling, *i.e.*, a final administrative action both responsive to the complaint and reviewable in court. Accordingly, we reject the categorical limitations Intel would place on the statute's reach.

A

We turn first to Intel's contention that the catalog of "interested person[s]" authorized to apply for judicial assistance under § 1782(a) includes only "litigants, foreign sovereigns, and the designated agents of those sovereigns," and excludes AMD, a mere complainant before the Commission, accorded only "limited rights." Highlighting § 1782's caption, "[a]ssistance to foreign and international tribunals and to *litigants* before such tribunals," Intel urges that the statutory phrase "any interested person" should be read, correspondingly, to reach only "litigants." (internal quotation marks omitted, emphasis in original).

The caption of a statute, this Court has cautioned, "cannot undo or limit that which the [statute's] text makes plain." *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U.S. 519, 529 (1947). The text of § 1782(a), "upon the application of any

interested person," plainly reaches beyond the universe of persons designated "litigant." No doubt litigants are included among, and may be the most common example of, the "interested person[s]" who may invoke § 1782; we read § 1782's caption to convey no more. * * *

The complainant who triggers a European Commission investigation has a significant role in the process. As earlier observed, in addition to prompting an investigation, the complainant has the right to submit information for the DG-Competition's consideration, and may proceed to court if the Commission discontinues the investigation or dismisses the complaint. Given these participation rights, a complainant "possess[es] a reasonable interest in obtaining [judicial] assistance," and therefore qualifies as an "interested person" within any fair construction of that term. * * *

B

We next consider whether the assistance in obtaining documents here sought by an "interested person" meets the specification "for use in a foreign or international tribunal." Beyond question the reviewing authorities, both the Court of First Instance and the European Court of Justice, qualify as tribunals. But those courts are not proof-taking instances. Their review is limited to the record before the Commission. Hence, AMD could "use" evidence in the reviewing courts only by submitting it to the Commission in the current, investigative stage.

Moreover, when Congress established the Commission on International Rules of Judicial Procedure in 1958, it instructed the Rules Commission to recommend procedural revisions "for the rendering of assistance to foreign courts *and quasi-judicial agencies.*" § 2, 72 Stat. 1743 (emphasis added). Section 1782 had previously referred to "any judicial proceeding." The Rules Commission's draft, which Congress adopted, replaced that term with "a proceeding in a foreign or international tribunal." Congress understood that change to "provid[e] the possibility of U. S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad]." S. Rep. No. 1580, at 7-8 [.] * * * We have no warrant to exclude the European Commission, to the extent that it acts as a first-instance decisionmaker, from § 1782(a)'s ambit.

C

Intel also urges that AMD's complaint has not progressed beyond the investigative stage; therefore, no adjudicative action is currently or even imminently on the Commission's agenda.

Section 1782(a) does not limit the provision of judicial assistance to "pending" adjudicative proceedings. In 1964, when Congress eliminated the requirement that a proceeding be "judicial," Congress also deleted the requirement that a proceeding be "pending." "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." * * * The legislative history of the 1964 revision is in sync; it reflects Congress' recognition that judicial assistance would be available "whether the foreign or international proceeding *or investigation* is of a criminal, civil, administrative, or other nature." S. Rep. No. 1580, at 9 (emphasis added).

In 1996, Congress amended § 1782(a) to clarify that the statute covers "criminal investigations conducted before formal accusation." See § 1342(b), 110 Stat. 486 [.] Nothing suggests that this amendment was an endeavor to rein in, rather than to confirm, by way of example, the broad range of discovery authorized in 1964. See S. Rep. No. 1580, at 7 ("[T]he [district] court[s] have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries.").

In short, we reject the view, * * * that § 1782 comes into play only when adjudicative proceedings are "pending" or "imminent." Instead, we hold that § 1782(a) requires only that a dispositive ruling by the Commission, reviewable by the European courts, be within reasonable contemplation. * * *

D

We take up next the foreign-discoverability rule on which lower courts have divided: Does § 1782(a) categorically bar a district court from ordering production of documents when the foreign tribunal or the "interested person" would not be able to obtain the documents if they were located in the foreign jurisdiction?

We note at the outset, and count it significant, that § 1782(a) expressly shields privileged material: "A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege." Beyond shielding material safeguarded by an applicable privilege, however, nothing in the text of § 1782 limits a district court's production-order authority to materials that could be discovered in the foreign jurisdiction if the materials were located there. "If Congress had intended to impose such a sweeping restriction on the district court's discretion, at a time when it was enacting liberalizing amendments to the statute, it would have included statutory language to that effect." *In re Application of Gianoli Aldunate*, 3 F.3d 54, 59 (CA2 1993) [.] * * *

Nor does § 1782(a)'s legislative history suggest that Congress intended to impose a blanket foreign-discoverability rule on the provision of assistance under § 1782(a). The Senate Report observes in this regard that § 1782(a) "leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable." S. Rep. No. 1580, at 7.

Intel raises two policy concerns in support of a foreign-discoverability limitation on § 1782(a) aid—avoiding offense to foreign governments, and maintaining parity between litigants. * * * While comity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases, they do not permit our insertion of a generally applicable foreign-discoverability rule into the text of § 1782(a).

We question whether foreign governments would in fact be offended by a domestic prescription permitting, but not requiring, judicial assistance. A foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions—reasons that do not necessarily signal

objection to aid from United States federal courts. * * * A foreign tribunal's reluctance to order production of materials present in the United States similarly may signal no resistance to the receipt of evidence gathered pursuant to § 1782(a). See *South Carolina Ins. Co.* v *Assurantie Maatschappij "De Zeven Provincien" N.V.*, [1987] 1 App. Cas. 24 (House of Lords ruled that nondiscoverability under English law did not stand in the way of a litigant in English proceedings seeking assistance in the United States under § 1782). When the foreign tribunal would readily accept relevant information discovered in the United States, application of a foreign-discoverability rule would be senseless. The rule in that situation would serve only to thwart § 1782(a)'s objective to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons having no bearing on international comity, they cannot obtain under their own laws.

Concerns about maintaining parity among adversaries in litigation likewise do not provide a sound basis for a cross-the-board foreign-discoverability rule. When information is sought by an "interested person," a district court could condition relief upon that person's reciprocal exchange of information. * * * Moreover, the foreign tribunal can place conditions on its acceptance of the information to maintain whatever measure of parity it concludes is appropriate. See *In re Application of Euromepa, S.A.*, 51 F.3d 1095, 1101 n.14 (2d Cir. 1995).

We also reject Intel's suggestion that a § 1782(a) applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding. * * * Section 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here. Comparisons of that order can be fraught with danger. For example, we have in the United States no close analogue to the European Commission regime under which AMD is not free to mount its own case in the Court of First Instance or the European Court of Justice, but can participate only as complainant, an "interested person," in Commission-steered proceedings. * * *

IV

As earlier emphasized, * * * a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so. * * * We note below factors that bear consideration in ruling on a § 1782(a) request.

First, when the person from whom discovery is sought is a participant in the foreign proceeding (as Intel is here), the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. * * * In contrast, nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid.

Second, as the 1964 Senate Report suggests, a court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign

government or the court or agency abroad to U.S. federal-court judicial assistance. See S. Rep. No. 1580, at 7. Further, the grounds Intel urged for categorical limitations on § 1782(a)'s scope may be relevant in determining whether a discovery order should be granted in a particular case. Specifically, a district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States. Also, unduly intrusive or burdensome requests may be rejected or trimmed. * * *

Intel maintains that, if we do not accept the categorical limitations it proposes, then, at least, we should exercise our supervisory authority to adopt rules barring § 1782(a) discovery here. * * * We decline, at this juncture, to adopt supervisory rules. Any such endeavor at least should await further experience with § 1782(a) applications in the lower courts. The European Commission has stated in *amicus curiae* briefs to this Court that it does not need or want the District Court's assistance. It is not altogether clear, however, whether the Commission, which may itself invoke § 1782(a) aid, means to say "never" or "hardly ever" to judicial assistance from United States courts. Nor do we know whether the European Commission's views on § 1782(a)'s utility are widely shared in the international community by entities with similarly blended adjudicative and prosecutorial functions.

Several facets of this case remain largely unexplored. Intel and its *amici* have expressed concerns that AMD's application, if granted in any part, may yield disclosure of confidential information, encourage "fishing expeditions," and undermine the European Commission's Leniency Program. Yet no one has suggested that AMD's complaint to the Commission is pretextual. Nor has it been shown that § 1782(a)'s preservation of legally applicable privileges, and the controls on discovery available to the District Court, see, e.g., Fed. Rule Civ. Proc. 26(b)(2) and (c), would be ineffective to prevent discovery of Intel's business secrets and other confidential information.

On the merits, this case bears closer scrutiny than it has received to date. Having held that § 1782(a) authorizes, but does not require, discovery assistance, we leave it to the courts below to assure an airing adequate to determine what, if any, assistance is appropriate. [Affirmed.]

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

JUSTICE SCALIA, concurring in the judgment. [Omitted.]

JUSTICE BREYER, dissenting.

The Court reads the scope of 28 U.S.C. § 1782 to extend beyond what I believe Congress might reasonably have intended. Some countries allow a private citizen to ask a court to review a criminal prosecutor's decision not to prosecute. On the majority's reading, that foreign private citizen could ask an American court to help the citizen obtain information, even if the foreign prosecutor were indifferent or unreceptive. Many countries allow court review of decisions made by any of a wide variety of nonprosecutorial, nonadjudicative

bodies. On the majority's reading, a British developer, hoping to persuade the British Housing Corporation to grant it funding to build a low-income housing development, could ask an American court to demand that an American firm produce information designed to help the developer obtain the British grant. * * * This case itself suggests that an American firm, hoping to obtain information from a competitor, might file an antitrust complaint with the European antitrust authorities, thereby opening up the possibility of broad American discovery—contrary to the antitrust authorities' desires.

One might ask why it is wrong to read the statute as permitting the use of America's court processes to obtain information in such circumstances. One might also ask why American courts should not deal *case by case* with any problems of the sort mentioned. The answer to both of these questions is that discovery and discovery-related judicial proceedings take time, they are expensive, and cost and delay, or threats of cost and delay, can themselves force parties to settle underlying disputes. * * * To the extent that expensive, time-consuming battles about discovery proliferate, they deflect the attention of foreign authorities from other matters those authorities consider more important; they can lead to results contrary to those that foreign authorities desire; and they can promote disharmony among national and international authorities, rather than the harmony that § 1782 seeks to achieve. They also use up domestic judicial resources and crowd our dockets.

* * *

I respectfully dissent from the Court's contrary determination.

CHAPTER 8

Recognition and Enforcement of Judgments

A. INTRODUCTION

A final judgment on the merits normally marks the end of litigation in the jurisdiction in which this judgment was rendered. The judgment displays so-called res judicata and collateral estoppel effects—that is, it bars the relitigation of the same claims in a second court or, in many cases, relitigation of issues on which a party has previously litigated and lost. Having lost the case, the defendant will satisfy the judgment or, if he proves recalcitrant, will be compelled to satisfy it by way of enforcement proceedings.

Because it would ordinarily be pointless to bring an action against an insolvent party in the first place, it is not uncommon for plaintiffs to ascertain the liquidity of potential defendants prior to suing them. Many private companies in the United States offer services that help determine whether a defendant holds sufficient assets to satisfy a judgment, and where those assets are located. Once it is established that the defendant is in a position to satisfy a judgment, the plaintiff will have to decide where to litigate. The place at which the defendant's assets are located is one obvious choice, because it is there that a final judgment can most certainly be enforced. That choice, however, may not always be available or even desirable. It may not be available if courts in that state lack personal jurisdiction over the defendant, because the simple presence of assets is ordinarily not enough to establish personal jurisdiction in the U.S., particularly in connection with a lawsuit that is otherwise unrelated to those assets. And, even if personal jurisdiction is not a hurdle, a particular forum may not be desirable either because of the law that the forum would apply, or because of the remedies available in the forum, or because of the presence or absence of a jury.

Thus, in light of such considerations, the plaintiff might decide to initiate a lawsuit in a forum in which the defendant would be subject to personal jurisdiction, but in which he does not have adequate assets to satisfy a judgment. When that occurs, the recognition and enforcement of a resulting judgment in a second judicial system may become an issue. The difficulties associated with enforcing such a judgment vary, depending on where its enforcement is sought.

In purely domestic litigation in the U.S., the enforcement of a final judicial decree across state lines poses relatively few problems. According to the U.S.

Supreme Court, under the Commerce Clause, U.S. Const. art. I, § 8, "[the Framers] provided that the Nation was to be a common market, a 'free trade unit' in which the States are debarred from acting as separable economic entities." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980). Similar thinking arguably provided for the free movement of judgments among the states. The Full Faith and Credit Statute, 28 U.S.C. § 1738, which implements the Full Faith and Credit Clause, Art. IV, § 1 of the U.S. Constitution, imposes an obligation on state and federal courts to recognize and enforce final judgments handed down by state courts..

In order to guarantee the liberal enforcement of other states' judicial decrees, this full faith and credit obligation is subject to only a few exceptions. For example, a state court will not recognize and enforce the judgment of the sister state court when the latter lacked personal jurisdiction over the defendant, at least when the jurisdictional question was not itself litigated or somehow waived in the judgment rendering court. Similarly, recognition and enforcement will be denied when the defendant was not given adequate notice of the pendency of the original lawsuit. The want of personal jurisdiction (or notice) provides a constitutional limit on full faith and credit. Other limitations—typically subconstitutional—are noted elsewhere in this chapter, such as the traditional exception for penal judgments. On the other hand, the second court is ordinarily obligated to recognize and enforce the original judgment even if it would be contrary to the public policy of the enforcing state. Griffin v. Griffin, 327 U.S. 220 (1946); Fauntleroy v. Lum, 210 U.S. 230 (1908).

To be sure, states have traditionally been able to refuse to entertain a claim arising under sister state "laws" if the claim would run afoul of the forum state's strongly held public policy. But matters are different when it comes to enforcing a judgment from another state. In *Fauntleroy*, *supra*, the Supreme Court held that Mississippi was obligated to enforce a Missouri judgment that had found liability on a contract entered into in Mississippi between two Mississippi citizens, although Mississippi courts would not have enforced it in the first instance because the contract was illegal under Mississippi law. Even though Missouri courts may have misconstrued Mississippi law, and even though the contract was against Mississippi's public policy, enforcement of the Missouri judgment on the Mississippi contract was required. In short, the full faith and credit statute requires a judgment to be given the "same" faith and credit that the state that rendered the judgment would give to it (within the constitutional limits just noted). 28 U.S.C. § 1738. An enforcing state may not give a judgment merely the effect that a similar judgment would have in the enforcing state's courts.

By contrast, international recognition and enforcement proceedings involving American courts follow different rules—rules that ordinarily do not track the obligations surrounding full faith and credit. Two scenarios are possible. Either an American court is asked to enforce a judgment of a foreign tribunal, or an American court has rendered the original judgment and the successful plaintiff ("judgment creditor") seeks enforcement in a foreign forum where the defendant's assets are located. Because full faith and credit only provides that binding effect be given to state court judgments in other courts in the U.S., it has no application in the international context. Consequently, the plaintiff's prospects of having a

judgment recognized in the international civil litigation setting are much less certain than they are in a purely domestic setting.

A judgment recognition treaty between the U.S. and foreign countries could certainly solve the problem But by and large, such treaties have been few and far between (although, as noted below, there may be some changes on the horizon, at least as to some transnational judgments). For example, there are certain so-called Friendship Treaties in which the U.S. has agreed to treat foreign nationals pursuing their rights in American courts in a nondiscriminatory manner. See, e.g., The Friendship, Commerce and Navigation Treaty between the United States and Greece, Aug. 3, 1951, 5 U.S.T. 1829 (entered into force Oct. 13, 1954). Article VI, § 1 of that document provides in pertinent part: "Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice . . . in all degrees of jurisdiction, both in pursuit and in defense of their rights." Id., art. VI, 5 U.S.T. at 1851. Article XXIV, § 1, defines national treatment as that treatment which is "accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, . . ." Id., art. XXIV, 5 U.S.T. at 1907. This Treaty has been held to elevate a Greek judgment whose enforcement is sought in the U.S. to the status of an American sister state judgment entitled to full faith and credit. See Vagenas v. Continental Gin Co., 988 F.2d 104 (11th Cir.), cert. denied, 510 U.S. 947 (1993).

It might also be possible for Congress, by statute, to legislate a uniform rule of recognition of foreign judgments. As discussed later in this chapter, however, Congress has done so only in the setting of enforcement of certain foreign defamation judgments. See Section D, below. And in March 2022, the U.S. signed a Convention that would provide uniform rules of enforcement of judgments entered by courts chosen in accordance with a proposed agreement respecting enforcement of them, although it has not yet ratified that Convention. See Appendix C (Hague Choice of Court Convention). And even upon ratification, there might well have to be legislation to enforce the Convention. Consequently, most judgment enforcement law in the U.S. has been premised on the judgments law of the state in which recognition and enforcement is sought, whether in state or federal courts. On the other hand, the Uniform Foreign-County Money Judgments Act (discussed below)—provides a model act that a majority of states have adopted, albeit with various modifications.

Courts asked to enforce a foreign judgment will, to some extent at least, examine the procedural and substantive law that formed the basis for the foreign decision. Courts, including those of the U.S., do this to determine whether the foreign decree comports with domestic notions of judicial fairness. If the laws of the foreign forum are considered incompatible, enforcement of the judgment may be denied, as a matter of domestic public policy. Obviously, this approach tends to produce unfavorable results for plaintiffs whose judgments are based on legal rules that differ substantially from those of the enforcing state. Jurisdictions striving for regional integration, such as the European Union, have sought to eliminate this problem by providing mechanisms similar to the American full faith and credit provisions. In many cases judgment creditors can also rely on bilateral agreements that nations have executed to facilitate the mutual recognition and

enforcement of judgments. Unlike most other nations, however, the U.S. is currently not a member of any treaty or convention facilitating the recognition and enforcement of its judgments abroad. And while the friendship treaties with other nations have been interpreted by American courts to accord a type of full faith and credit treatment to judgments emanating from such nations' courts, American judgments generally do not seem to benefit from such agreements abroad.

Substantive and procedural rules in the U.S. are perceived to differ from their foreign counterparts to such an extent that attempts to forge international accords thus far have not succeeded. In 1992, a U.S. delegation to the Hague Conference on Private International Law proposed the creation of an international convention on jurisdiction and the recognition and enforcement of foreign judgments in civil and commercial matters. This effort failed, however, largely because American and European expectations could not be reconciled. In particular, the higher average level of damage awards and the types of awards (e.g., punitive damages) in the U.S. have been met with disapproval abroad. For details see Joachim Zekoll, *Comparative Civil Procedure*, in The Oxford Handbook of Comparative Law (2d ed.) 1306, 1320 et seq. (M. Reimann & R. Zimmermann eds., 2019). On the other hand, American courts likewise have been loath to enforce foreign judgments that do not comport with legal and constitutional principles considered to be of great importance in this country. Indeed, in the SPEECH Act of 2010, 28 U.S.C. §§ 4101-4105, Congress acted to prevent the enforcement of foreign defamation judgments that did not comport with American free-speech standards. We address the SPEECH Act as well as certain earlier state court decisions reaching similar results in Section D, below.

There are three notable exceptions to this general lack of international agreement. *First*, as just noted, The Hague Convention of 30 June 2005 on the Choice of Court Agreements, 44 I.L.M. 1294, set out at Appendix C, introduces a uniform set of rules for the enforcement of exclusive choice of court agreements for transactions between business entities ("B2B"). Importantly, the Convention also provides for the recognition and enforcement of judgments given by a court of a contracting State designated in an exclusive choice of court agreement (Art. 8). The Convention entered into force on October 1, 2015, and applies to all EU Member States, Denmark, Mexico, Singapore, and the United Kingdom. The U.S. (as well as China, Israel, Ukraine, and North Macedonia) have signed the Convention but have not yet ratified it.

Second, to promote the recognition of judgments *not* based on a choice of court agreement, in 2010 the Hague Conference resumed its work on a more extensive version of the treaty. After many years of negotiations, the Hague Conference on Private International Law finally concluded the new Convention of July 2, 2019, on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. This new Convention governs the recognition and enforcement of judgements issued in a Contracting State in another Contracting State by a national court (Art. 1 para. 2). In late August 2022, the E.U. and Ukraine became contracting parties to the Convention parties, thus triggering its entry into force under Art. 28, as of September 1, 2023. The U.S. has signed the Convention but has not yet ratified it.

The *third* exception applies to the area of arbitration—a topic that we take up in Chapter 9. The U.S. has signed a multilateral treaty for the enforcement of arbitral awards, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517 (entered into force Dec. 28, 1970), *codified in* 9 U.S.C. §§201-208 (1970) (hereinafter "New York Convention"). The U.S. courts have interpreted the New York Convention as a strict and binding obligation on the U.S. to enforce arbitral awards to the fullest extent. See, e.g., Parsons & Whittemore Overseas Co., Inc. v. Société Genérale de L'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974) (holding that since the Convention was signed in order to encourage the use of arbitration, the narrowest possible reading had to be given to the exceptions to enforcement contained in the treaty). In effect, where arbitral awards are concerned, the U.S. will enforce any final disposition so long as it does not violate general principles of international law or any specific provisions of the New York Convention. Errors of law, even where apparent, do not vitiate the enforcement of an award.

In the materials that follow, we will present American court decisions denying or granting the enforcement of a foreign judgment and we will then draw comparisons with foreign cases in which plaintiffs sought the enforcement of American judgments abroad. In the absence of a treaty or multilateral convention, all of these judgments raise the same two intriguing questions: (1) What elements of the decision whose enforcement is sought abroad can fairly be said to deviate from mandatory rules of the foreign (enforcing) forum? (2) To what extent can these deviations be tolerated without unduly compromising public policy or other judicial fairness concerns of the enforcing forum? Lastly, we will provide an introduction to the mechanisms governing the recognition of judgments as among the members of the European Union.

B. ENFORCING FOREIGN JUDGMENTS IN THE U.S.—BASIC CONSIDERATIONS

1. Traditional Approaches and the Regime of Comity

Hilton v. Guyot

Supreme Court of the United States, 1895.

159 U.S. 113.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

* * *

International law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must

be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations.

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." Although the phrase has been often criticized, no satisfactory substitute has been suggested.

"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.

* * *

[The Court then supplied a lengthy discussion of the practices of various nations and the views of various writers, foreign and domestic.] [W]e are satisfied that, where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendants, therefore, cannot be permitted, upon that general ground, to contest the validity or the effect of the judgment sued on.

But they have sought to impeach that judgment upon several other grounds, which require separate consideration.

It is objected that the appearance and litigation of the defendants in the French tribunals were not voluntary, but by legal compulsion, and therefore that the French courts never acquired such jurisdiction over the defendants, that they should be held bound by the judgment. * * *

But it is now settled in England that, while an appearance by the defendant in a court of a foreign country, for the purpose of protecting his property already in the possession of that court, may not be deemed a voluntary appearance, yet an appearance solely for the purpose of protecting other property in that country from seizure is considered as a voluntary appearance.

The present case is not one of a person travelling through or casually found in a foreign country. The defendants, although they were not citizens or residents of France, but were citizens and residents of the State of New York, and their principal place of business was in the city of New York, yet had a storehouse and an agent in Paris, and were accustomed to purchase large quantities of goods there, although they did not make sales in France. Under such circumstances, evidence that their sole object in appearing and carrying on the litigation in the French courts was to prevent property, in their storehouse at Paris, belonging to them, and within the jurisdiction, but not in the custody, of those courts, from being taken in satisfaction of any judgment that might be recovered against them, would not, according to our law, show that those courts did not acquire jurisdiction of the persons of the defendants.

It is next objected that in those courts one of the plaintiffs was permitted to testify not under oath, and was not subjected to cross-examination by the opposite party, and that the defendants were, therefore, deprived of safeguards which are by our law considered essential to secure honesty and to detect fraud in a witness; and also that documents and papers were admitted in evidence, with which the defendants had no connection, and which would not be admissible under our own system of jurisprudence. But it having been shown by the plaintiffs, and hardly denied by the defendants, that the practice followed and the method of examining witnesses were according to the laws of France, we are not prepared to hold that the fact that the procedure in these respects differed from that of our own courts is, of itself, a sufficient ground for impeaching the foreign judgment.

It is also contended that a part of the plaintiffs' claim is affected by one of the contracts between the parties having been made in violation of the revenue laws of the United States, requiring goods to be invoiced at their actual market value. Rev. Stat. § 2854. It may be assumed that, as the courts of a country will not enforce contracts made abroad in evasion or fraud of its own laws, so they will not enforce a foreign judgment upon such a contract. But as this point does not affect the whole claim in this case, it is sufficient, for present purposes, to say that there does not appear to have been any distinct offer to prove that the invoice value of any of the goods sold by the plaintiffs to the defendants was agreed between them to be, or was, in fact, lower than the actual market value of the goods.

It must, however, always be kept in mind that it is the paramount duty of the court, before which any suit is brought, to see to it that the parties have had a fair and impartial trial, before a final decision is rendered against either party.

When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction

of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect. * * *

In the case at bar, the defendants offered to prove, in much detail, that the plaintiffs presented to the French court of first instance and to the arbitrator appointed by that court, and upon whose report its judgment was largely based, false and fraudulent statements and accounts against the defendants, by which the arbitrator and the French courts were deceived and misled, and their judgments were based upon such false and fraudulent statements and accounts. This offer, if satisfactorily proved, would, according to the decisions [of the English Courts] be a sufficient ground for impeaching the foreign judgment, and examining into the merits of the original claim.

But whether those decisions can be followed in regard to foreign judgments, consistently with our own decisions as to impeaching domestic judgments for fraud, it is unnecessary in this case to determine, because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is, the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries.

* * *

By the law of France, settled by a series of uniform decisions of the Court of Cassation, the highest judicial tribunal, for more than half a century, no foreign judgment can be rendered executory in France without a review of the judgment *au fond*—to the bottom, including the whole merits of the cause of action on which the judgment rests. * * *

The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiffs' claim.

In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.

By our law, at the time of the adoption of the Constitution, a foreign judgment was considered as prima facie evidence, and not conclusive. There is no statute of the United States, and no treaty of the United States with France, or with any other nation, which has changed that law, or has made any provision upon the

subject. It is not to be supposed that, if any statute or treaty had been or should be made, it would recognize as conclusive the judgments of any country, which did not give like effect to our own judgments. In the absence of statute or treaty, it appears to us equally unwarrantable to assume that the comity of the United States requires anything more.

If we should hold this judgment to be conclusive, we should allow it an effect to which, supposing the defendants' offers to be sustained by actual proof, it would, in the absence of a special treaty, be entitled in hardly any other country in Christendom, except the country in which it was rendered. If the judgment had been rendered in this country, or in any other outside of the jurisdiction of France, the French courts would not have executed or enforced it, except after examining into its merits. The very judgment now sued on would be held inconclusive in almost any other country than France. In England, and in the Colonies subject to the law of England, the fraud alleged in its procurement would be a sufficient ground for disregarding it. In the courts of nearly every other nation, it would be subject to reexamination, either merely because it was a foreign judgment, or because judgments of that nation would be reexaminable in the courts of France. [Reversed.]

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE JACKSON, dissenting.

Plaintiffs brought their action on a judgment recovered by them against the defendants in the courts of France, which courts had jurisdiction over person and subject-matter, and in respect of which judgment no fraud was alleged, except in particulars contested in and considered by the French courts. The question is whether under these circumstances, and in the absence of a treaty or act of Congress, the judgment is reexaminable upon the merits. * * * [I]t seems to me that the doctrine of res judicata applicable to domestic judgments should be applied to foreign judgments as well, and rests on the same general ground of public policy that there should be an end of litigation. * * *

The principle that requires litigation to be treated as terminated by final judgment properly rendered, is as applicable to a judgment proceeded on in such an action, as to any other, and forbids the allowance to the judgment debtor of a retrial of the original cause of action, as of right, in disregard of the obligation to pay arising on the judgment and of the rights acquired by the judgment creditor thereby. * * *

I cannot yield my assent to the proposition that because by legislation and judicial decision in France that effect is not there given to judgments recovered in this country which, according to our jurisprudence, we think should be given to judgments wherever recovered (subject, of course, to the recognized exceptions,) therefore we should pursue the same line of conduct as respects the judgments of French tribunals. The application of the doctrine of res judicata does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion [i.e., reciprocity—eds.], if deemed under any circumstances desirable or necessary.

NOTES AND QUESTIONS FOR DISCUSSION

1. In *Hilton*, the Supreme Court considered the effect that a foreign court's judgment obtained by a foreign citizen against a U.S. citizen should have in a federal court proceeding to enforce the judgment. It concluded that while U.S. courts were generally under no absolute duty to enforce another country's judgments (absent a treaty or statute), principles of "comity" among nations would ordinarily control the preclusive effect that this nation would give to foreign judgments. Consequently, there is considerable discretion whether to honor the request to enforce foreign country judgments (as well as their laws).

2. Recall that in the U.S., under the full faith and credit statute, 28 U.S.C. § 1738, which implements the Constitution's Full Faith and Credit Clause, U.S. Const. art. IV, § 1, a state would ordinarily be required to enforce the jurisdictionally valid judgments of sister states. It therefore could *not* treat a sister state judgment as if it emanated from a foreign country under notions of "comity." Rather, such a judgment has to be given the same force and effect that they would have in the state that rendered the judgment in the first place. According to the modern Court, the "constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity." Broderick v. Rosner, 294 U.S. 629, 643 (1935). Thus, U.S. enforcement of judgments of foreign tribunals—being governed only by notions of comity rather than full faith and credit—is much less certain than the enforcement of domestic judgments within the U.S.

3. Nevertheless, in deciding what comity required in the context of enforcement of a foreign court's judgment, the Court in *Hilton* concluded that—given a decision of a court of competent jurisdiction, where there has been a full and fair opportunity to litigate, after due notice or voluntary appearance, "under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries," and absent fraud—"the merits of that case should not, in an action brought in this country upon the judgment, be tried afresh . . . upon the mere assertion of the party that the judgment was erroneous in law or in fact." 159 U.S. at 202-03. As thus articulated, how different is such a standard from that required by full faith and credit?

4. In *Hilton*, the parties in the original French action were permitted to testify other than under oath and were not subject to cross-examination. In addition, evidence inadmissible in a U.S. proceeding was admitted in the foreign proceeding. Even though the practice followed was according to the law of France, why weren't such differences a reason for nonenforcement?

5. Because French courts would not give similar faith and credit to another nation's judgments against a French citizen, and would instead allow for relitigation of the merits in the French courts, a narrow majority in *Hilton* concluded that the U.S. courts would not automatically enforce a French judgment. The Court explained that comity incorporated a notion of reciprocity that trumped the default rule against relitigation. Note that this is an obvious difference from the faith and credit that would have to be given to a sister state judgment, because "reciprocity" is essentially commanded as a matter of federal law. Four dissenters in *Hilton* argued that the Court's reciprocity analysis should give way to ordinary principles

of res judicata, and that second rounds of litigation in U.S. courts ought to be discouraged—whether or not the country that rendered the judgment would do the same for a judgment from a U.S. court. Were the *Hilton* dissenters right? Is there any argument that it would be in the nation's interest to enforce a foreign judgment unilaterally, the lack of reciprocity notwithstanding? For some classic critiques of the reciprocity requirement, see Joseph Beale, The Conflict of Laws § 434.3 (1935); Arthur Taylor von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 Harv. L. Rev. 1601, 1660-62 (1968); Willis L. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783, 790-93 (1950); Comment, *Reciprocity and the Recognition of Foreign Judgments,* 36 Yale L.J. 542 (1927).

6. *Hilton* is perhaps the only U.S. Supreme Court opinion to address the recognition of foreign judgments. What was the source of law that the Court applied? Hilton was a decision rendered prior to Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Consequently, the law that the Court applied was likely "general" law, which, strictly speaking, was neither state law nor federal law. Indeed, pre-*Erie*, it is possible that the result in *Hilton* may have differed from whatever the relevant state's law of judgment recognition might have been. After *Erie*, how should the question be resolved? Should the *Hilton* decision now be read as creating a "federal common law" of recognition and enforcement of foreign judgments, binding even on state courts? Or should the question of the force to be given foreign judgments now be seen as a question of state law? We consider the issue in the materials that follow.

3. Introduction to Current Approaches under State Law

Although the states are largely free to fashion their own law governing the enforcement of foreign judgments, and to apply their own procedures and enforcement mechanisms, the rules that have emerged over time are in important respects similar, and they are derived in part from the holding in *Hilton*. Most importantly, state laws espouse the principle enunciated in *Hilton* that ordinarily disallows relitigation of the merits of the foreign judgment. There is, moreover,

agreement over several grounds for denying enforcement: The most important ones are lack of personal jurisdiction over the defendant and lack of due process in the foreign proceedings. Important differences continue to exist, however. For example, unlike *Hilton*, most states do not require reciprocity as a prerequisite for enforcement, while some jurisdictions still do. In an effort to harmonize this area of the law, the National Conference of Commissioners on Uniform State Laws and the American Bar Association "codified" the prevailing state law approaches in the Uniform Foreign-Country Money Judgments Recognition Act (2005) ("UFCMJA"), a revised (and slightly re-titled) version of the Uniform Foreign Money Judgments Recognition Act of 1962. As of early 2021, more than half of the states, plus the District of Columbia and the territory of the Virgin Islands, have adopted some version of the Act. And more than 20 states plus the District of Columbia have adopted the latest (2005) revisions. Nevertheless, states that have adopted the Act in one or another of its versions have done so with sometimes significant deviations from the original text. Massachusetts and Georgia, for example, have adopted the Act but included *Hilton*'s reciprocity requirement that the drafters of the Act consciously omitted to facilitate foreign judgment recognition. Consequently, it cannot be said that the uniform act is applied uniformly.

***UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT OF 1962* (as modified, 2005)**:

* * *

Sec. 3. Applicability.

(a) Except as otherwise provided in subsection (b), this [act] applies to a foreign-country judgment to the extent that the judgment:

(1) grants or denies recovery of a sum of money; and

(2) under the law of the foreign country where rendered, is final, conclusive and enforceable.

(b) This [act] does not apply to a foreign-country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is:

(1) a judgment for taxes;

(2) a fine or other penalty; or

(3) a judgment for divorce, support, or maintenance, or other judgment rendered in connection with domestic relations.

(c) A party seeking recognition of a foreign-country judgment has the burden of establishing that this [act] applies to the foreign-country judgment.

Sec. 4. Standards for Recognition of Foreign-Country Judgments.

(a) Except as provided in subsections (b) and (c), a court of this state shall recognize a foreign-country judgment to which this [act] applies.

(b) A court of this state may not recognize a foreign-country judgment if:

(1) the judgment was rendered under a judicial system that does not

provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.

(c) A court of this state need not recognize a foreign-country judgment if:

(1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;

(2) the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present a case;

(3) the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;

(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;

(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or

(8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

(d) A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subsection (b) or (c) exists.

Sec. 5. Personal Jurisdiction.

(a) A foreign country judgment may not be refused recognition for lack of personal jurisdiction if:

(1) the defendant was served with process personally in the foreign country;

(2) the defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant;

(3) the defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;

(4) the defendant was domiciled in the foreign country when the proceeding was instituted, or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country;

(5) the defendant had a business office in the foreign country and the proceeding in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign country; or

(6) the defendant operated a motor vehicle or airplane in the foreign country and the proceeding involved a [cause of action] [claim for relief] arising out of that operation.

(b) The list of bases for personal jurisdiction in subsection (a) is not exclusive. And the courts of this state may recognize bases of personal jurisdiction other than those listed in subsection (a) as sufficient to support a foreign-country judgment.

* * *

Sec. 7. Effect of Recognition of Foreign-Country Judgment under this [Act].

If the court . . . finds that the foreign-country judgment is entitled to recognition under this [act] then, to the extent that the foreign-country judgment grants or denies recovery of a sum of money, the foreign judgment is:

(1) conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive; and

(2) enforceable in the same manner and to the same extent as a judgment rendered in this state.

NOTES AND QUESTIONS FOR DISCUSSION

1. Section 4 of the UFCMJA distinguishes between mandatory grounds for non-recognition (§ 4(b)) and discretionary grounds for non-recognition (§ 4(c)). Consider whether the distinctions make sense and whether the reasons listed in paragraph (c) should merely permit and not require denial of recognition. For example, why should a foreign judgment obtained by fraud (§ 4(c)(2)) or one that is repugnant to the public policy of the enforcing state (§ 4(c)(3)) be entitled to potentially greater respect than a judgment in which the rendering court did not have personal jurisdiction (§ 4(b)(2))?

2. Despite this comprehensive list of grounds for rejecting foreign judgments, there is a common perception (outside the U.S.) that American courts tend to be rather permissive when faced with requests to recognize and enforce foreign judgments. Section 4(a) of the Act arguably codifies this position by declaring favorable treatment of foreign judgments to be the rule, while pointing to the grounds for rejection listed in § 4 only as exceptions. Furthermore, the saving clause of § 6(b) provides that the Act does not prevent recognition of a foreign judgment in

situations not covered by the Act. Just how tolerant American courts are in practice, compared to their foreign counterparts, is a difficult matter to determine. Of course, there are those American decisions that liberally recognize foreign judgments and, in line with the spirit of § 4(a) of the Act, effectively accord them a kind of full faith and credit. See § 7(1). But there are also a number of cases in which American judges have displayed a great deal of distrust towards foreign decisions. The cases that follow illustrate these conflicting trends.

C. FOREIGN JUDGMENTS AND THE REQUIREMENT OF PERSONAL JURISDICTION

It is well accepted that a foreign judgment will not be enforced if the foreign court did not have personal jurisdiction over the defendant, and section 4(b)(2) of the current UFCMJA reinforces this view. But whose jurisdictional standards shall apply to this inquiry? Those of the judgment-rendering forum? Of the judgment-recognizing forum? Or both? The following decision provides a discussion of some of these issues.

Evans Cabinet Corp. v. Kitchen Int'l, Inc.

United States Court of Appeals, First Circuit, 2010.

593 F.3d 135.

RIPPLE, CIRCUIT JUDGE.*

Evans Cabinet Corporation ("Evans") [a Georgia corporation with a principal place of business in Georgia] instituted this diversity action in the United States District Court for the District of Massachusetts against Kitchen International, Inc. [a Louisiana corporation with its principal place of business in Montreal, Quebec] for breach of contract and quantum meruit. Kitchen International filed a motion to dismiss based on res judicata. It claimed that the action was foreclosed because of an earlier judgment entered by the Superior Court of Quebec. After a hearing * * * the court entered judgment for Kitchen International. Evans filed a timely appeal to this court.

For the reasons set forth in the following opinion, we reverse the judgment of the district court and remand for proceedings consistent with this opinion.

I

BACKGROUND

According to the allegations of the complaint, Kitchen International and Evans entered into a contract in 2004. Evans agreed to supply Kitchen International with manufactured cabinetry for several residential construction sites on the East Coast of the United States. Kitchen International placed these orders from its headquarters in Montreal with the Georgia offices of Evans. The materials were

* Of the Seventh Circuit, sitting by designation.

shipped directly to the construction sites.

According to Kitchen International, in 2004, the two parties also agreed that they would create a products showroom at Kitchen International's office in Montreal. Kitchen International claims that Paul Gatti of Evans approved the design and layout of the showroom. According to Kitchen International, later that year, Evans manufactured and shipped cabinetry, related products and sales and promotional materials to Quebec for use in the showroom. Evans denies the existence of such an agreement; it claims that it never authorized Kitchen International to build a showroom and that it did not supply products to Kitchen International for that purpose.

Various issues arose about the quality and conformity of the products that Evans had shipped to the East Coast projects. Consequently, in May 2006, Kitchen International engaged a Canadian attorney to file suit against Evans in the Superior Court of Quebec for breach of contract arising from the materials supplied by Evans. Evans was served with process and given notice of this proceeding. Evans did not answer or otherwise respond to the action, and, consequently, on May 31, 2007, the Superior Court of Quebec entered a default judgment against Evans in the amount of $ 149,354.74.

On April 23, 2007, Evans instituted this action for breach of contract and quantum meruit in the United States District Court for the District of Massachusetts. Kitchen International filed a motion to dismiss on the ground that the action was barred by res judicata by virtue of the Canadian judgment against Evans. Evans opposed the motion on the ground that the Superior Court of Quebec had lacked jurisdiction over it, and, therefore, the Quebec judgment could not be recognized by the district court. [The motion was converted to a motion for summary judgment because the issues went beyond the pleadings]. * * *

The district court, held that res judicata precluded the present action and entered summary judgment for Kitchen International.

II

DISCUSSION

A. Contentions of the Parties.

Evans submits that the district court erred in holding that its claim for damages for breach of contract or in quantum meruit were barred because of the prior default judgment entered against it by the Superior Court of Quebec. In Evans's view, the Superior Court of Quebec lacked personal jurisdiction over it, and, consequently, the default judgment was unenforceable and not subject to recognition by the district court. * * * Evans submits that there are significant unresolved factual questions concerning the nature of Evans's relevant contacts with the Province of Quebec. Evans contends that, if the district court had taken the facts in the light most favorable to its position, as the district court must do in the context of summary judgment, there would be no basis for concluding that the Quebec court could exercise personal jurisdiction over it.

Kitchen International takes a decidedly different view. It submits that the Quebec judgment must be recognized and precludes the present suit. Focusing on the summary judgment motion, it notes that the district court characterized its

evidence that Evans had purposeful contacts with Quebec as "overwhelming." * * * By contrast, Evans submitted only the affidavits of Mark Trexler, Evans's CEO, who, in Kitchen International's view, could show no involvement in the parties' agreements.

B. Threshold Matters.

* * * When sitting in diversity and asked to recognize and enforce a foreign country judgment, federal courts tend to apply the law of recognition and enforcement of the state in which they sit, as required by Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). However, some courts and commentators have suggested that recognition and enforcement of foreign country judgments deserves application of a uniform federal body of law because suits of this nature necessarily implicate the foreign relations of the United States.[7] This question has not been decided definitively in this circuit. In John Sanderson (Wool) Pty. Ltd. v. Ludlow Jute Co., 569 F.2d 696, 697 n.1 (1st Cir. 1978), we left the question open, noting that there was no reason to decide the matter under the facts of that case because there was no appreciable difference between the federal and the state rules. We shall follow the same course in this case because we need not resolve the matter here. Neither party has suggested that the district court ought to have followed a rule other than that of Massachusetts. In any event, even if the reciprocity rule of *Hilton v. Guyot* were applicable under the facts of this case, the Massachusetts rule of recognition and enforcement also contains a reciprocity requirement. See Mass. Gen. Laws ch. 235, § 23A (subsection (7) of third paragraph); see also *John Sanderson,* 569 F.2d at 697.

C. Massachusetts Law on the Recognition of Foreign Country Judgments.

With respect to the recognition of foreign *country* judgments, Massachusetts, like many other states of the Union, has enacted a version of the [Uniform Foreign Country Money Judgments] Recognition Act. [Massachusetts General Laws chapter 235 § 23A.][*] This section clearly requires that the *rendering* court have personal jurisdiction over the defendant in order for the resulting judgment to be recognized in Massachusetts. The statute does not state explicitly, however, whether the correctness of that exercise of jurisdiction by the rendering court ought to be determined according to the law of the rendering or the enforcing

---

[7] * * * According to *Hilton*, a diversity case from the *pre-Erie* era, foreign judgments shall be recognized so long as the rendering court afforded an opportunity for full and fair proceedings; the court was of competent jurisdiction over the persons and subject matter; the court conducted regular proceedings, which afforded due notice of appearance to adversary parties; and the court afforded a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries. *See* 159 U.S. at 202-03. The *Hilton* rule also requires reciprocity in the recognition and enforcement of United States judgments from the jurisdiction of the rendering court. *Id.* at 210, 226-27.

[*] [The relevant provisions of the Massachusetts statute parallel those of the UFCMJA: "A foreign judgment shall not be conclusive if (1) it was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; (2) the foreign court did not have personal jurisdiction over the defendant; or (3) the foreign court did not have jurisdiction over the subject matter."—eds.]

jurisdiction. The district court suggested that there is currently a division of authority on this question among the states that have enacted a form of the Recognition Act.[10] The district court also noted that the Supreme Judicial Court of Massachusetts has not yet spoken squarely on the matter.

The district court, faced with the ambiguity about the prevailing rule in Massachusetts with respect to the law governing personal jurisdiction in the rendering court, explicitly declined to resolve the matter and instead applied the governing rule of both jurisdictions. On appeal, neither party has contended that the district court erred in this regard. Nor has either party argued that Massachusetts would apply any other rule. Under these circumstances, we must conclude that the parties have waived any reliance on another rule and that we must decide this case by assessing the facts in light of the personal jurisdiction law of both the Province of Quebec and the Commonwealth of Massachusetts.

1. The Jurisdiction of the Superior Court of Quebec under the Law of Quebec

We turn, then, to the question of whether Kitchen International established that the Superior Court of Quebec properly exercised personal jurisdiction over Evans. [After a review of the record on summary judgment, the court of appeals concluded that "it is clear that genuine issues of fact remain to be resolved before

---

[10] Some states have concluded that the relevant question is only whether personal jurisdiction would have been present had the rendering court applied the law of the enforcing state. See, e.g., Genujo Lok Beteiligungs GmbH v. Zorn, 943 A.2d 573, 580 (Me. 2008) (looking only to whether the foreign jurisdiction could have established personal jurisdiction under Maine law); Sung Hwan Co. v. Rite Aid Corp., 850 N.E.2d 647, 650-51 (N.Y. 2006) (interpreting the term "personal jurisdiction" as used in an analogous New York statute to mean "whether exercise of jurisdiction by the foreign court comports with New York's concept of personal jurisdiction" and omitting any analysis of foreign law).

Other state courts instead have concluded that the proper interpretation is to ascertain first whether the rendering court could exercise personal jurisdiction over the defendant under its own laws. They then look to whether the rendering court could have exercised personal jurisdiction under the law of the forum state. The purpose of this second step is to ensure that the rendering court not only possessed jurisdiction at the time of judgment but also that the rendering court's procedures comported with United States due process standards. Under this approach, both of these requirements are necessary for a rendering court to have personal jurisdiction over the defendant within the meaning of the Recognition Act. See, e.g., Monks Own, Ltd. v. Monastery of Christ in the Desert, 168 P.3d 121, 124-27 (N.M. 2007) (adopting the approach of first ascertaining whether personal jurisdiction was satisfied under the law of the rendering foreign jurisdiction and then determining whether the judgment debtor's applicable contacts with the rendering jurisdiction satisfy the United States constitutional due process minimum); Vrozos v. Sarantopoulos, 195 Ill. App. 3d 610, 552 N.E.2d 1093, 1099-1100, 142 Ill. Dec. 352 (Ill. App. Ct. 1990) (reviewing a trial court decision concluding that a Canadian court had personal jurisdiction over the judgment debtor pursuant to United States principles of due process and remanding for consideration of whether the Canadian court also had personal jurisdiction pursuant to Canadian law of service of summons). Federal courts applying analogous state recognition acts also have adopted this approach. See K & R Robinson Enters. Ltd. v. Asian Exp. Material Supply Co., 178 F.R.D. 332, 339-42 (D. Mass. 1998). See generally Royal Bank of Canada v. Trentham Corp., 491 F. Supp. 404, 408-10 (S.D. Tex. 1980), vacated by, 665 F.2d 515 (5th Cir. 1981*)*. The American Law Institute adopts this approach in its model federal statute on the recognition of foreign money judgments. *See* American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* § 3 & cmt. c (2006).

the authority of Quebec to exercise personal jurisdiction over Evans can be established."] * * *

2. The Application of Massachusetts Standards to the Superior Court of Quebec's Exercise of Jurisdiction

* * * Here we review its determination of whether the exercise of personal jurisdiction by the Superior Court of Quebec comported with Massachusetts and federal standards.

The exercise of personal jurisdiction over a defendant such as Evans is governed by the Commonwealth's long-arm statute insofar as the exercise of jurisdiction also comports with the requirements of the federal Due Process Clause. * * * The Massachusetts long-arm statute permits the exercise of personal jurisdiction when a person has transacted business within the Commonwealth or when the person has contracted to supply services or things within the Commonwealth. This conferral of jurisdiction creates a specifically affiliating jurisdictional nexus; the personal jurisdiction conferred is only with respect to litigation *arising out of* the transaction within the Commonwealth, not with respect to the defendant's transactions that did not take place in the Commonwealth. Here, "[w]e may sidestep the statutory inquiry and proceed directly to the constitutional analysis . . . because the Supreme Judicial Court of Massachusetts has interpreted the state's long-arm statute as an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States." Daynard v. Ness, Motley, Loadholt, Richardson & Poole, 290 F.3d 42, 52 (1st Cir. 2002) (internal quotation marks omitted).

We have described in earlier cases these constitutional requirements:

> "First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable."

Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F.3d 138, 144 (1st Cir. 1995) * * *. With respect to the "Gestalt factors," we have observed that,

> In constitutional terms, the jurisdictional inquiry is not a mechanical exercise. The Court has long insisted that concepts of reasonableness must inform a properly performed minimum contacts analysis. This means that, even where purposefully generated contacts exist, courts must consider a panoply of other factors which bear upon the fairness of subjecting a nonresident to the authority of a foreign tribunal.

Ticketmaster-New York, 26 F.3d at 209 (internal quotation marks and citations omitted). The Gestalt [i.e., fairness] factors that a court will consider include: "(1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies." *Id*.

In applying these standards, the district court held: "The Quebec Superior Court's exercise of personal jurisdiction over Plaintiff did not contravene traditional notions of fair play and substantial justice. Plaintiff had several contacts with Quebec." * * * However, as we have noted in our earlier discussion of the Quebec jurisdictional statute, the affidavits supplied by the parties were in conflict. * * *

Furthermore, even if such an argument had been made successfully, the district court's analysis of jurisdiction still is deficient. Absent from the district court's analysis is any discussion of the "Gestalt factors," which, we have made clear, a court must consider to determine the fairness of subjecting the defendant to a foreign jurisdiction. * * *

Because the district court resolved material issues of fact against Evans, the nonmoving party, the judgment must be reversed. The controverted issues of fact that Evans has raised must be resolved. Accordingly, the judgment of the district court is reversed and the case is remanded for proceedings consistent with this opinion. *Reversed and Remanded*.

NOTES AND QUESTIONS FOR DISCUSSION

1. The UFCMJA indicates that a judgment will not be enforceable if the court that rendered the judgment did not have personal jurisdiction over the defendant. Yet neither the Act (nor Massachusetts' version of it) declares *whose* law is relevant to the personal jurisdiction question. In addition to insisting that jurisdiction be good as a matter of foreign law, the First Circuit in *Evans Cabinet* (as a matter of Massachusetts law) applied domestic standards to determine whether the foreign court had personal jurisdiction over the non-appearing U.S. defendant. Why should foreign judgments be subject to a minimum contacts/fairness analysis before they will be enforceable in the U.S. if personal jurisdiction was good in the foreign court under foreign standards and the exercise of jurisdiction was not exorbitant?

2. The First Circuit's decision to apply a federal due process (minimum contacts/fairness) analysis to foreign judgments, no matter what country they come from, is representative of the practice of most courts. See, e.g., Koster v. Automark Indus., Inc. 640 F.2d 77, 79 (7th Cir. 1981) ("Whether it be Wisconsin or the Netherlands, the standard of minimum contacts is the same."). Note that just as when a court determines whether personal jurisdiction exists in the first instance (see Chapter 1), there may be disputed questions of fact for the court to resolve. In denying summary judgment, was the First Circuit suggesting that the disputed questions of fact surrounding jurisdiction over Evans Cabinet in Canada were questions for a jury? Or was it merely asking the district court to hold an evidentiary hearing and to make further findings, such as those surrounding the fairness (or "Gestalt") considerations in the due process analysis?

3. The Massachusetts long-arm statute went to the length of due process. Suppose it did not. Should an enforcing court also test the foreign judgment against its own state standards as well as federal due process standards? In Siedler v. Jacobsen, 383 N.Y.S.2d 833 (N.Y. App. Term 1976), a lower New York court refused to recognize an Austrian judgment because personal jurisdiction did not

satisfy New York's long arm statute. New York C.P.L.R. § 302. An Austrian court had entered judgment in favor of an Austrian antique dealer and against a New York purchaser for nonpayment for an item purchased in Austria. (The buyer claimed that the seller misrepresented the provenance of the antique.) According to *Siedler*, the single "casual" incident of doing business was an insufficient basis for Austria to exercise jurisdiction when judged by New York law (and the New York courts' interpretation of that law). Even if it makes sense to test foreign judgments by federal due process standards, does it make sense that they be judged by possibly idiosyncratic state long-arm laws as well? It is open to question whether *Siedler*'s analysis was correct as a matter of (constitutional) minimum contacts analysis, given that it was defendant's "casual" purposeful activities in Austria that directly gave rise to the underlying action. Is *Siedler*'s approach simply a kind of state-law based public policy objection to the enforcement of the judgment, above and beyond due process? Note that *Siedler's* approach of looking solely to New York law was consistent with that of some other state courts and with later New York authority, as cited in footnote 10 of *Evans Cabinet*.

4. One interesting example of the courts' general approach is Guardian Insurance Co. v. Bain Hogg International Ltd., 52 F. Supp. 2d 536 (D. V.I. 1999). The case involved a dispute between a Virgin Islands insurance company (Guardian) and a British reinsurance company (HIB). Guardian sued HIB in a U.S. court and HIB defended on the ground that a British declaratory judgment, finding that it was not liable to Guardian for a breach of any duty, should bar Guardian's suit by res judicata. The U.S. District Court for the Virgin Islands examined whether the British court had personal jurisdiction over Guardian and, employing the standard minimum contacts test, concluded that the English court's exercise of jurisdiction comported with American due process requirements. The court noted that the Uniform Act (reproduced above) does not specifically articulate a standard for finding jurisdiction, and that according to the Restatement (Third) of Foreign Relations Law of the United States § 421(1) (1987), a foreign court has jurisdiction over a party if the relationship of the state to the person involved in litigation is "reasonable."

Because Guardian had appeared in the English proceedings and had unsuccessfully challenged the jurisdiction of the British court, one might question whether it was necessary or even appropriate for the federal District Court to reevaluate the issue of jurisdiction. The Court in *Guardian*, although stating that it was performing de novo review, indicated that such review might not be necessary when, as in that case, the foreign court's reasons "do not appear to be clearly untenable and the . . . Court's assertion of jurisdiction . . . was reasonable." *Guardian*, 52 F. Supp. 2d at 542. That approach is supported by the Restatement: "If the judgment debtor challenged the foreign court's jurisdiction in the foreign proceedings, the judgment debtor will be bound by that court's determinations with respect to jurisdiction under foreign law, even if the judgment debtor took no steps to defend the case on the merits". Restatement (Fourth) supra at § 483 (2018), Reporters' note 8.

5. *Guardian* notwithstanding, courts are split on whether a foreign court's decision on the question of personal jurisdiction should be treated as res judicata if that very question was already fully litigated abroad between the parties. (Note that within the U.S., actual litigation of the personal jurisdiction question in one U.S. court is ordinarily considered preclusive in another. See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée, 456 U.S. 694, 702 n.9 (1982) ("It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal.") *Guardian* allowed for review of the question, although it indicated that such review might not be needed if the judgment rendering court's reasons were not "untenable" and the exercise of jurisdiction was "reasonable." Would such a "reasonableness" inquiry be a weaker standard than what due process would call for? Would a possible solution be for a U.S. court to treat the foreign court's determination of its own (foreign) jurisdiction as a matter of its own (foreign) law as conclusive, but not conclusive as to whether the exercise of jurisdiction was "reasonable" (or comported with due process)? For the European approach to this issue under the Brussels Convention, see Section F, below.

6. There is consensus that if the defendant did not appear at all in the foreign proceedings and did not otherwise litigate or waive jurisdiction, the resulting default judgment is open to challenge on jurisdictional grounds. See, e.g., Restatement (Fourth) of Foreign Relations Law of the United States § 483 (2018), Reporter's note 8: "[I]f the judgment debtor took a default judgment without challenging jurisdiction in the foreign proceeding . . . the judgment debtor may raise lack of personal jurisdiction or lack of subject-matter jurisdiction under foreign law as a ground for nonrecognition in a court in the United States." Note that even if jurisdiction is not litigated, litigating the merits will ordinarily constitute a waiver of personal jurisdiction. Should that also be true if the jurisdictional defect is one of subject matter rather than personal jurisdiction? The answer is not altogether clear, even as between states in the U.S. See David L. Shapiro, Preclusion in Civil Actions 25-29 (2001); Restatement (Second) of Judgments §§ 11, 12, and 66 (1982).

D. FOREIGN JUDGMENTS RAISING DOMESTIC (U.S.) PUBLIC POLICY CONCERNS

1. Concerns Regarding Substantive Law

Under a regime of comity, the courts of the state asked to enforce a foreign judgment need not always do so, even when questions of jurisdiction and service are not obstacles to enforcement. A classic sort of objection to the enforcement of foreign country judgments is that it somehow runs counter to the "public policy" of the enforcing state. Indeed, section 4(c)(3) of the UFCMJA specifically provides that courts "need not" recognize a foreign judgment when "the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States." (Recall that a public policy objection *cannot* be raised by a U.S. state to the enforcement of a sister-state judgment. See Section A, above.) Consider the meaning of "public policy" here. Should a foreign judgment not be recognized anytime foreign substantive law is different? After all, all law is an expression of a jurisdiction's public policy. Or are public policy concerns triggered only when there is a more dramatic departure from local law? How dramatic a difference ought to be dramatic enough to overcome the party-based and system-based interests in preclusion, and the comity among nations?

Southwest Livestock & Trucking Co., Inc. v. Ramon

United States Court of Appeals, Fifth Circuit, 1999.

169 F.3d 317.

EMILIO M. GARZA, CIRCUIT JUDGE:

Defendant-Appellant, Reginaldo Ramon, appeals the district court's grant of summary judgment in favor of Plaintiffs-Appellees, Southwest Livestock & Trucking Co., Inc., Darrel Hargrove and Mary Jane Hargrove. Ramon contends that the district court erred by not recognizing a Mexican judgment, that if recognized would preclude summary judgment against him. We vacate the district court's summary judgment and remand.

I

Darrel and Mary Jane Hargrove (the "Hargroves") are citizens of the United States and officers of Southwest Livestock & Trucking Co., Inc. ("Southwest Livestock"), a Texas corporation involved in the buying and selling of livestock. In 1990, Southwest Livestock entered into a loan arrangement with Reginaldo Ramon ("Ramon"), a citizen of the Republic of Mexico. Southwest Livestock borrowed $400,000 from Ramon. To accomplish the loan, Southwest Livestock executed a "pagare"—a Mexican promissory note—payable to Ramon with interest within thirty days. Each month, Southwest Livestock executed a new pagare to cover the outstanding principal and paid the accrued interest. Over a period of four years, Southwest Livestock made payments towards the principal, but also borrowed additional money from Ramon. In October of 1994, Southwest Livestock defaulted on the loan. With the exception of the last pagare executed

by Southwest Livestock, none of the pagares contained a stated interest rate. Ramon, however, charged Southwest Livestock interest at a rate of approximately fifty-two percent. The last pagare stated an interest rate of forty-eight percent, and under its terms, interest continues to accrue until Southwest Livestock pays the outstanding balance in full.

After Southwest Livestock defaulted, Ramon filed a lawsuit in Mexico to collect on the last pagare. The Mexican court granted judgment in favor of Ramon, and ordered Southwest Livestock to satisfy its debt and to pay interest at forty-eight percent. Southwest Livestock appealed, claiming that Ramon had failed to effect proper service of process, and therefore, the Mexican court lacked personal jurisdiction. The Mexican appellate court rejected this argument and affirmed the judgment in favor of Ramon.

After Ramon filed suit in Mexico, but prior to the entry of the Mexican judgment, Southwest Livestock brought suit in United States District Court, alleging that the loan arrangement violated Texas usury laws. Southwest Livestock then filed a motion for partial summary judgment, claiming that the undisputed facts established that Ramon charged, received and collected usurious interest in violation of Texas law. Ramon also filed a motion for summary judgment. By then the Mexican court had entered its judgment, and Ramon sought recognition of that judgment. He claimed that, under principles of collateral estoppel and res judicata, the Mexican judgment barred Southwest Livestock's suit. * * *

The district court * * * grant[ed] Southwest Livestock's motion for summary judgment as to liability under Texas usury law, and den[ied] Ramon's motion for summary judgment. The district court agreed that the Mexican judgment violated Texas public policy, and that Texas law applied. * * * Ramon appealed. * * *

II

We must determine first whether the district court properly refused to recognize the Mexican judgment. Our jurisdiction is based on diversity of citizenship. Hence, we must apply Texas law regarding the recognition of foreign country money-judgments. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (holding that in a diversity action, a federal court must apply the law of the forum state); Success Motivation Institute of Japan, Ltd. v. Success Motivation Institute Inc., 966 F.2d 1007, 1009-10 (5th Cir.1992) ("*Erie* applies even though some courts have found that these suits necessarily involve relations between the U.S. and foreign governments, and even though some commentators have argued that the enforceability of these judgments in the courts of the United States should be governed by reference to a general rule of federal law.").

Under the Texas Recognition Act, a court must recognize a foreign country judgment assessing money damages unless the judgment debtor establishes one of ten specific grounds for nonrecognition. See Tex. Civ. Prac. & Rem. Code Ann. § 36.005 (West 1998) * * * Southwest Livestock contends that it established a ground for nonrecognition. It notes that the Texas Constitution places a six percent interest rate limit on contracts that do not contain a stated interest rate. See Tex. Const. art. XVI, § 11. It also points to a Texas statute that states that usury is against Texas public policy. * * * Thus, according to Southwest Livestock, the Mexican judgment violates Texas public policy, and the district court properly

withheld recognition of the judgment. See Tex. Civ. Prac. & Rem.Code Ann. § 36.005(b)(3) (West 1998).

We review the district court's grant of summary judgment de novo. In reviewing the district court's decision, we note that the level of contravention of Texas law has "to be high before recognition [can] be denied on public policy grounds." Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 900 (N.D.Tex.1980). The narrowness of the public policy exception reflects a compromise between two axioms—res judicata and fairness to litigants—that underlie our law of recognition of foreign country judgments.

To decide whether the district court erred in refusing to recognize the Mexican judgment on public policy grounds, we consider the plain language of the Texas Recognition Act. * * * Section 36.005(b)(3) of the Texas Recognition Act permits the district court not to recognize a foreign country judgment if "the cause of action on which the judgment is based is repugnant to the public policy" of Texas. * * * This subsection of the Texas Recognition Act does not refer to the judgment itself, but specifically to the "cause of action on which the judgment is based." Thus, the fact that a judgment offends Texas public policy does not, in and of itself, permit the district court to refuse recognition of that judgment. See Norkan Lodge Co. Ltd. v. Gillum, 587 F. Supp. 1457, 1461 (N.D. Tex.1984) (noting that a "judgment may only be attacked in the event that 'the cause of action [on] which the judgment is based is repugnant to the public policy of this state,' not the judgment itself").

In this case, the Mexican judgment was based on an action for collection of a promissory note. This cause of action is not repugnant to Texas public policy. * * * Under the Texas Recognition Act, it is irrelevant that the Mexican judgment itself contravened Texas's public policy against usury. Thus, the plain language of the Texas Recognition Act suggests that the district court erred in refusing to recognize the Mexican judgment.

Southwest Livestock, however, argues that we should not interpret the Texas Recognition Act according to its plain language. Southwest Livestock contends that Texas courts will not enforce rights existing under laws of other jurisdictions when to do so would violate Texas public policy. See, e.g., Larchmont Farms, Inc. v. Parra, 941 S.W.2d 93, 95 (Tex.1997) (noting that "the basic rule is that a court need not enforce a foreign law if enforcement would be contrary to Texas public policy"). It believes that the reasoning of the Texas Supreme Court in DeSantis v. Wackenhut Corp., 793 S.W.2d 670 (Tex.1990), requires us to affirm the district court's decision not to recognize the Mexican judgment. In *DeSantis*, the Court refused to apply Florida law to enforce a noncompetition agreement, even though the agreement contained an express choice of Florida law provision, and Florida had a substantial interest in the transaction. The Court concluded that "the law governing enforcement of noncompetition agreements is fundamental policy in Texas, and that to apply the law of another state to determine the enforceability of such an agreement in the circumstances of a case like this would be contrary to that policy." Id. at 681. Southwest Livestock argues similarly that the law governing usury constitutes a fundamental policy in Texas, and that to recognize the Mexican judgment would transgress that policy.

We find that, contrary to Southwest Livestock's argument, *DeSantis* does not support the district court's grant of summary judgment.* * * [I]n *DeSantis* the Court refused to enforce an agreement violative of Texas public policy; it did not refuse to recognize a foreign judgment. Recognition and enforcement of a judgment involve separate and distinct inquiries. * * *

We are especially reluctant to conclude that recognizing the Mexican judgment offends Texas public policy under the circumstances of this case. The purpose behind Texas usury laws is to protect unsophisticated borrowers from unscrupulous lenders. This case, however, does not involve the victimizing of a naive consumer. Southwest Livestock is managed by sophisticated and knowledgeable people with experience in business. Additionally, the evidence in the record does not suggest that Ramon misled or deceived Southwest Livestock. Southwest Livestock and Ramon negotiated the loan in good faith and at arms length. In short, both parties fully appreciated the nature of the loan transaction and their respective contractual obligations.

Accordingly, in light of the plain language of the Texas Recognition Act, and after consideration of our decision in Woods-Tucker and the purpose behind Texas public policy against usury, we hold that Texas's public policy does not justify withholding recognition of the Mexican judgment. The district court erred in deciding otherwise. [Vacated and Remanded.]

NOTES AND QUESTIONS FOR DISCUSSION

1. In holding that the Mexican judgment was entitled to enforcement, the Fifth Circuit in *Southwest Livestock* relied on a literal reading of the Texas version of the UFCMJA. The court emphasized that the Act permits the district court not to recognize a foreign country judgment if "the cause of action on which the judgment is based is repugnant to the public policy" of Texas. It went on to hold that "[t]his subsection of the Texas Recognition Act does not refer to the judgment itself, but specifically to the 'cause of action on which the judgment is based.' Thus, the fact that a judgment offends Texas public policy does not, in and of itself, permit the district court to refuse recognition of that judgment." Is it persuasive to distinguish between the foreign cause of action (as the key criterion for the denial/grant of recognition) and the foreign judgment (as immaterial for the denial/grant of recognition)? If one distinguishes at all, why should the emphasis not be the other way round? In other words, isn't it the Mexican judgment that, by Texas standards, embodies a usurious interest rate, and isn't it the *effect of the enforcement of the judgment* containing this usurious interest rate that affects Texas' public policy interests? Does it make sense to focus on the highly abstract concept of cause of action rather than on the actual impact that the enforcement of the foreign judgment would entail?

2. The lender in *Southwest Livestock* charged effective annual interest rates between 48 and 52 percent—rates that are considered usurious under Texas law. Would the Fifth Circuit have reached a different result if the loan agreement had called for an interest rate of 250 percent? Should the court enforce a foreign judgment that orders the defendant to pay a promissory note for $20,000, an amount he lost in a poker game that is considered illegal under Texas law?

3. In DeSantis v. Wackenhut Corp., 793 S.W.2d 670 (Tex. 1990), discussed in *Southwest Livestock*, the Texas Supreme Court refused to apply foreign (Florida) law to enforce a non-competition agreement entered into in Florida, which the Texas Supreme Court considered violative of Texas public policy. It did so even though the parties had included a Florida choice of law clause in the non-competition agreement which, if applied, would have upheld the contract. Understandably, the debtor in *Southwest Livestock* relied on *DeSantis*, but the Fifth Circuit was unpersuaded. It drew a distinction between the application of foreign law in the first instance, as in *DeSantis*, and the recognition and enforcement of a foreign judgment, as in *Southwest Livestock*, stating that the latter "involve[s] separate and distinct inquiries." What is the difference, and why should a court be less willing to allow a public policy objection to foreign law in the judgment-recognition setting?

4. Not all states have such prickly standards of public policy when it comes to foreign judgments. Courts often invoke the classic statement of Justice Cardozo for the New York Court of Appeals: "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home." Loucks v. Standard Oil Co. of New York, 224 N.Y. 99, 111 (1918). See also Sung Hwan Co., Ltd. v. Rite Aid Corp., 7 N.Y.3d 78, 82 (2006) (stating that for a judgment to run afoul of New York public policy it must be "inherently vicious, wicked or immoral, and shocking to the prevailing moral sense") (quoting Intercontinental Hotels Corp., v. Golden, 15 N.Y.2d 9, 13 (1964)); Ackermann v. Levine, 788 F.2d 830, 841-42 (2d Cir. 1986) (quoting *Loucks*); CIBC Mellon Trust Co. v. Mora Hotel Corp., 100 N.Y.2d 215, 221 (2003) ("New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts."). As one federal court put it when construing the scope of the Massachusetts public policy exception:

> The public policy exception operates only in those unusual cases where the foreign judgment is "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought." Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981); Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986); See also, Restatement (Second) of the Conflict of Laws § 117 (1971). Under the "classic formulation" of the public policy exception, a judgment is contrary to the public policy of the enforcing state where that judgment "'tends clearly' to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property." *Ackermann*, 788 F.2d at 841 (quoting Somportex v. Philadelphia Chewing Gum, 453 F.2d 435, 443 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972)).

McCord v. Jet Spray Int'l Corp. 874 F. Supp. 436 (D. Mass. 1994).

In the case that follows, public policy concerns were raised in connection with the enforcement of a defamation judgment rendered in a foreign tribunal which provided speakers with fewer free-speech protections than those offered by the U.S. Constitution and the enforcing state's constitution. In response to what some

have called the problem of "libel tourism"—filing a defamation suit in a foreign jurisdiction that has weak rules favoring speakers and strong rules favoring victims—Congress undertook to restrict the enforcement of foreign defamation judgments in American courts in The SPEECH Act of 2010, 28 U.S.C. §§ 4101 et seq. We discuss the statute below. But we include the following case, in part because it illustrated the issues to which the federal statute was responsive and in part because it offers a model for dealing with such judgments on a state-by-state basis that is more congenial to traditional federalism values than the uniform rule for which Congress has opted.

Telnikoff v. Matusevitch

Maryland Court of Appeals, 1997.

347 Md. 561, 702 A.2d 230.

ELDRIDGE, J.

[An English jury returned a £240,000 verdict in favor of the plaintiff, Telnikoff (a Russian émigré and English citizen), finding that a letter written by the defendant Matusevitch and published in the London Daily Telegraph, conveyed that Telnikoff had made statements inciting racial hatred and/or racial discrimination, and that Telnikoff was a racialist and/or anti-Semite. (By birth, Matusevitch was a U.S. citizen who had lived in Russia for 28 years but was living in Europe at the time of the original suit; he later became a Maryland resident.) Judgment was entered for the amount of the jury's verdict. Telnikoff then attempted to have the English judgment enforced against Matusevitch in several American courts in states in which Matusevitch had assets. Eventually, upon certification by the United States Court of Appeals for the District of Columbia Circuit, the Court of Appeals of Maryland had to decide whether the English libel judgment was contrary to the public policy of Maryland.]

The question before us is whether Telnikoff's English libel judgment is based upon principles which are so contrary to Maryland's public policy concerning freedom of the press and defamation actions that recognition of the judgment should be denied. * * *

While we shall rest our decision in this case upon the non-constitutional ground of Maryland public policy, nonetheless, in ascertaining that public policy, it is appropriate to examine and rely upon the history, policies, and requirements of the First Amendment and Article 40 of the Declaration of Rights. In determining non-constitutional principles of law, courts often rely upon the policies and requirements reflected in constitutional provisions. * * *

Consequently, it is appropriate to examine some of the history, policies, and requirements of the free press clauses of the First Amendment and Article 40 of the Declaration of Rights, as well as the present relationship between those provisions and defamation actions in Maryland. * * *

American and Maryland history reflects a public policy in favor of a much broader and more protective freedom of the press than ever provided for under

English law. [The court went on to provide a very detailed account on the different historic developments in England and the United States.]

Despite the very strong public policy in Maryland regarding freedom of the press, the relationship between freedom of the press and defamation actions did not receive a great deal of attention prior to the Supreme Court's opinion in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). * * * Nevertheless, prior to *New York Times Co. v. Sullivan, supra,* and its progeny, numerous English common law principles governing libel and slander actions were routinely applied in Maryland defamation cases without any consideration or mention of the constitutional free press clauses or the strong public policy favoring freedom of the press. * * *

The Supreme Court in *New York Times Co. v. Sullivan* held that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The Court went on to hold that such malice could not be presumed, * * * that the constitutional standard requires proof having "convincing clarity," * * * and that evidence simply supporting a finding of negligence is insufficient. * * *

The Supreme Court in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 347 (1974), held that the "actual malice" standard of *New York Times Co. v. Sullivan* did not extend to defamation actions by persons who were neither public officials nor public figures. Nevertheless the Court went to hold that, in a defamation action by such a private person against a magazine publisher who published an article relating to a matter of public concern, the First Amendment precluded the imposition of liability for compensatory damages without fault. The Court further held that, in such a defamation action, there can be no recovery of presumed or punitive damages without a showing of actual malice, defined as "knowledge of falsity or reckless disregard for the truth." * * *

[The court went on, again in considerable detail, to state its own holdings based on *New York Times* and *Gertz* and concluded that] [t]he contrast between English standards governing defamation actions and the present Maryland standards is striking. For the most part, English defamation actions are governed by principles which are unchanged from the earlier common law period.

Thus, under English defamation law, it is unnecessary for the plaintiff to establish fault, either in the form of conscious wrongdoing or negligence. The state of mind or conduct of the defendant is irrelevant.

Moreover, under English law, defamatory statements are presumed to be false unless a defendant proves them to be true.

In England, a qualified privilege can be overcome without establishing that the defendant actually knew that the publication was false or acted with reckless disregard of whether it was false or not. It can be overcome by proof of "spite or ill-will or some other wrong or improper motive." Peter F. Carter-Ruck, Libel and Slander, 137 (1973). English law authorizes punitive or exemplary damages under numerous circumstances in defamation actions; unlike Maryland law, they are

not limited to cases in which there was actual knowledge of the falsehood or reckless disregard as to truth or falsity. Id. at 172-73. Furthermore, as one scholar has pointed out, id. at 172, "in practice only one sum is awarded and it is impossible to tell to what extent the damages awarded in any particular case were intended to be compensatory and to what extent exemplary or punitive. * * *"

* * * Finally, English defamation law flatly rejects the principles set forth in *New York Times Co. v. Sullivan, supra,* and *Gertz v. Robert Welch, Inc., supra.* The basic rules are the same regardless of whether the plaintiff is a public official, public figure, or a private person, regardless of whether the alleged defamatory statement involves a matter of public concern, and regardless of the defendant's status. * * *

A comparison of English and present Maryland defamation law does not simply disclose a difference in one or two legal principles. * * * Instead, present Maryland defamation law is totally different from English defamation law in virtually every significant respect. Moreover, the differences are rooted in historic and fundamental public policy differences concerning freedom of the press and speech.

The stark contrast between English and Maryland law is clearly illustrated by the underlying litigation between Telnikoff and Matusevitch. Telnikoff, an employee of the publicly funded Radio Free Europe/Radio Liberty, was undisputably a public official or public figure. In this country, he would have had to prove, by clear and convincing evidence, that Matusevitch's letter contained false statements of fact and that Matusevitch acted maliciously in the sense that he knew of the falsity or acted with reckless disregard of whether the statements were false or not. The English courts, however, held that there was no evidence supporting Telnikoff's allegations that Matusevitch acted with actual malice, either under the *New York Times Co. v. Sullivan* definition or in the sense of ill-will, spite or intent to injure. Despite the absence of actual malice under any definition, Telnikoff was allowed to recover. He was not even required to prove negligence, which is the minimum a purely private defamation plaintiff must establish to recover under Maryland law.

In addition, Telnikoff was not required to prove that Matusevitch's letter contained a false statement of fact, which would have been required under present Maryland law. Instead, falsity was presumed, and the defendant had the risky choice of whether to attempt to prove truth. Furthermore, Telnikoff did not have to establish that the alleged defamation even contained defamatory statements of fact; the burden was upon the defendant to establish that the alleged defamatory language amounted to comment and not statements of fact. * * *

The principles governing defamation actions under English law, which were applied to Telnikoff's libel suit, are so contrary to Maryland defamation law, and to the policy of freedom of the press underlying Maryland law, that Telnikoff's judgment should be denied recognition under principles of comity. In the language of the Uniform Foreign-Money Judgments Recognition Act, § 10-704(b)(2) of the Courts and Judicial Proceedings Article, Telnikoff's English "cause of action on which the judgment is based is repugnant to the public policy of the State. . . ."

The only American case which the two parties have called to our attention, which is directly on point, reached a similar conclusion. In *Bachchan v. India Abroad Publications,* 85 N.Y.S.2d 661 (1992), an Indian national brought a libel action in the High Court of Justice in London against the New York operator of a news service which transmitted stories exclusively to India. The suit was based upon an article, written by a London reporter and transmitted by the defendant to India, in which the plaintiff's name was used in connection with an international scandal. After a jury assessed 40,000 pounds in damages against the defendant, the plaintiff sought to enforce the judgment against the defendant in New York. The defendant opposed recognition of the judgment on the ground that the judgment was "repugnant to public policy" of New York as embodied in the First Amendment to the United States Constitution and the free speech and press guarantees of the New York Constitution. After contrasting English with American defamation law, the court concluded: * * *

> "It is true that England and the United States share many common-law principles of law. Nevertheless, a significant difference between the two jurisdictions lies in England's lack of an equivalent to the First Amendment to the U.S. Constitution. The protection to free speech and the press embodied in that amendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution."

Moreover, recognition of English defamation judgments could well lead to wholesale circumvention of fundamental public policy in Maryland and the rest of the country. With respect to the sharp differences between English and American defamation law, Professor Smolla has observed (Rodney A. Smolla, Law of Defamation, § 1.03[3] (1996)):

> "This striking disparity between American and British libel law has led to a curious recent phenomenon, a sort of balance of trade deficit in libel litigation: Prominent persons who receive bad press in publications distributed primarily in the United States now often choose to file their libel suits in England. London has become an international libel capital. Plaintiffs with the wherewithal to do so now often choose to file suit in Britain in order to exploit Britain's strict libel laws, even when the plaintiffs and the publication have little connection to that country."

* * * "At the heart of the First Amendment," as well as Article 40 of the Maryland Declaration of Rights and Maryland public policy, "is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine v. Falwell,* 485 U.S. 46, 50 (1988). The importance of that free flow of ideas and opinions on matters of public concern precludes Maryland recognition of Telnikoff's English libel judgment.

Dissenting Opinion by CHASANOW, J.

* * * I believe Maryland public policy should not prevent enforcement of this English libel judgment. * * *

For hundreds of years, up until 1964 when the Supreme Court decided *New York Times Co.,* the Maryland common law of libel was the same as the current English libel law under which the instant English libel case was decided. * * *

It was only after New York Times Co. and its progeny that this Court abandoned hundreds of years of common-law defamation. * * * It was the Supreme Court construing the First Amendment to the United States Constitution that made us jettison the same English common law of libel that we now find so offensive. * * *

* * * I believe Maryland's public policy should not preclude enforcement of this judgment. The majority opinion devotes page after page to a stirring tribute to freedom of the press, but this case does not involve freedom of the press. This is a libel judgment obtained by one resident of England against another resident of England. The libel was contained in a letter written by the defendant. Although the letter was published by a newspaper as a letter to the editor, that only increased the damages, the libel was the letter prepared and dispatched by a private person. The letter was libelous regardless of whether the newspaper chose to reprint it. Freedom of the press is not implicated, nor was any United States interest implicated. I trust the majority is not somehow suggesting that it is freedom of speech that protects speaking, but it is freedom of the press that protects printing or writing; that simply is wrong. * * *

Matusevitch's letter was determined to be libelous by a jury; the proceedings were fair and carefully reviewed by the House of Lords, the highest court in England. There is no grave injustice in this internal English litigation. * * *

There is another public policy that should also be considered by this Court. That public policy, recognized by our legislature when it adopted the Uniform Foreign Money-Judgment Recognition Act, is to give broad and uniform recognition to foreign judgments. The Act gives our courts discretion to subordinate our State's public policy. Our interest in international good will, comity, and res judicata fostered by recognition of foreign judgments must be weighed against our minimal interest in giving the benefits of our local libel public policy to residents of another country who defame foreign public figures in foreign publications and who have no reasonable expectation that they will be protected by the Maryland Constitution. Unless there is some United States interest that should be protected, there is no good reason to offend a friendly nation like England by refusing to recognize a purely local libel judgment for a purely local defamation. In the instant case, there is no United States interest that might necessitate non-recognition or non-enforcement of the English defamation judgment. * * *

The majority makes the finding of fact that "Telnikoff . . . was undisputably a public official or public figure," * * * but fails to take into account that Telnikoff was not an American public official or public figure. Our Constitution extracts a price for notoriety. American public officials and public figures must realize that if they are defamed there is no redress under our laws unless the defamation is done with malice. This may keep some people from becoming public officials and induce others to shun notoriety, but they generally have that choice. British public officials and public figures, however, expect their law to give them protection

from even non-malicious false defamatory statements. We should respect this difference between British public figures and their American counterparts in cases of purely internal English defamation by private persons. I doubt the public would find this as repugnant as does the majority of this Court. Matusevitch, at the time he falsely accused Telnikoff of being a racist hate monger, had no right to, or expectation that he would, be protected by the United States Constitution, and I doubt that the public would be outraged if we do not retroactively bestow our constitutional right to non-maliciously defame a public official on Matusevitch merely because he later moves to our country. * * *

Public policy should not require us to give First Amendment protection or Article 40 protection to English residents who defame other English residents in publications distributed only in England. Failure to make our constitutional provisions relating to defamation applicable to wholly internal English defamation would not seem to violate fundamental notions of what is decent and just and should not undermine public confidence in the administration of law. The Court does little or no analysis of the global public policy considerations and seems inclined to make Maryland libel law applicable to the rest of the world by providing a safe haven for foreign libel judgment debtors.

NOTES AND QUESTIONS FOR DISCUSSION

1. The majority in *Telnikoff* held that the English libel judgment was incompatible with Maryland's public policy and therefore unenforceable. Specifically, the majority feared that "recognition of English defamation judgments could well lead to wholesale circumvention of fundamental public policy in Maryland and the rest of the country." 347 Md. at 601. Given its reasoning, could *any* English libel judgment be enforced in Maryland? If so, under what circumstances?

2. At the time of the libel and the trial, both the plaintiff and the defendant in *Telnikoff* were Russian émigrés residing in England, and the speech in question had nothing to do with persons or events in the U.S. As the dissent asks, are American free speech interests implicated in such a case? At the time of judgment enforcement, Matusevitch was a Maryland resident. Does that suffice for Maryland to be able to assert a public policy objection to enforcement of the English judgment? Would it be a sufficient interest for purposes of such an objection that the judgment was being enforced in a state whose only connection with the litigation was the presence of assets of the judgment debtor? For doubts about *Telnikoff*, see Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 Ind. L.J. 635, 644 (2000). Consider also whether there might have been English interests involved in this litigation. Shouldn't they count as well? See Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 Brook. L. Rev. 999, 1033-34 (1994) (emphasizing English "interest in applying its law of defamation" and in the integrity of English libel judgments).

3. The majority in *Telnikoff* denied recognition and enforcement of the English libel judgment on grounds derived from Maryland's public policy and the First Amendment. Consider the interrelationship between the two, given that the First

Amendment itself could not possibly extend to the underlying actions. And consider what weight, if any, should be given to the dissent's argument that for hundreds of years, the Maryland common law of libel was identical with the English common law of libel.

4. The *Telnikoff* majority relied on both federal and state law in formulating its public policy objection. Yet the D.C. Circuit, which certified the question to the Maryland court, did so to get Maryland's input on the unclear question of Maryland law. Should the D.C. Circuit feel compelled to accept the Maryland Court's views of the federal constitution if, for example, it thought the Maryland courts were in error? Or is the reference to the federal constitution ultimately a question of state law? See also Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 481-82 (2d Cir. 2007) ("In deciding whether the French Judgments are repugnant to the public policy of New York, the district court should first determine the level of First Amendment protection required by New York public policy . . . . Then, it should determine whether the French intellectual property regime provides comparable protections.").

5. The *Telnikoff* majority relied in part on **Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).** In that case, the defendant resisting the enforcement of an English defamation judgment was a New York operator of a news service that transmitted reports only to India. The defamatory story was written by a reporter in London and wired by the defendant to a news service in India which relayed the story to Indian newspapers. Two Indian newspapers published the story and copies of those newspapers were distributed in the United Kingdom. The story was further published in an issue of defendant's New York newspaper, "India Abroad." An edition of "India Abroad" was also printed in, and distributed in, the United Kingdom by the defendant's English subsidiary. The claim leading to the English defamation judgment was based on the latter (U.K.) distribution. The New York supreme court refused to recognize the English judgment on the ground that it failed to comport with the protections of the First Amendment. Based on the facts presented here, is *Bachchan* distinguishable from *Telinikoff*?

6. *Bachchan* rested its own conclusion in part on the U.S. Supreme Court decision in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). There, the Court enunciated (for the first time) that the First Amendment required a reversal of the traditional burden of proof for private figures suing newspapers for articles raising issues of public concern. According to the time-honored common-law rule which was valid in the U.S. until 1986, and is still valid in England, the defendant has to prove the truth of its statement if it wishes to avoid liability for uttering a defamatory statement. The Court's new rule requires instead that the plaintiff bear the burden of showing falsity of the defendant's defamatory statement and of showing fault on the part of the defendant. Is it persuasive to argue that the English approach, long adhered to by American courts, should overnight be considered repugnant to New York's public policy? For doubts whether minor deviations from First Amendment law should trigger a public policy objection, see Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project,* 61 Alb. L. Rev. 1283, 1305 (1998).

7. As noted above, Congress chose to legislate a uniform solution to the problem of "libel tourism" in **The SPEECH Act of 2010**, 28 U.S.C. §§ 4101-4105. ("SPEECH" was the acronym for the contorted title of the statute: the "Securing the Protection of our Enduring Constitutional Heritage Act"). The Act basically provides that no court—state or federal—may recognize or enforce a defamation judgment that was rendered in a foreign court system with free speech protections less favorable than those under the federal Constitution or the relevant enforcing-state constitution, id. at § 4102(a)(1)(A), unless the party opposing enforcement would have been found liable in a domestic (U.S.) court applying federal and state constitutional provisions, id. at § 4102(a)(1)(B). Moreover, the judgment creditor has the burden of showing that the statute's prerequisites have been met. Id. at § 4102(a)(2). Consequently, states no longer have the ability to develop their own standards for enforcement of judgments covered by the Act. Finally, the statute specifically requires that federal due process requirements must be satisfied in the exercise of personal jurisdiction by the foreign court before its defamation judgment will be recognized, even if the other (free speech) provisions of the statute are satisfied. Id. at § 4102(b)(1). Although parts of the statute are directed toward "U.S. parties," the general prohibition on judgment enforcement is not limited to cases involving U.S. parties or U.S. transactions and would thus seem to apply to a case such as *Telnikoff*.

8. The SPEECH Act raises all of the policy questions noted above in connection with the Maryland judgment in *Telnikoff*—and leaves no room for a more moderate stance towards foreign defamation judgments as suggested by the dissent in that case. In fact, the Act all but requires that foreign law and foreign courts mimic American standards as a prerequisite to judgment recognition in the U.S. Is this quasi-extraterritorial application of American law justified? If your answer is "yes," consider whether you would change your opinion if the only nexus between the foreign litigation and the American forum happened to be the presence of assets of the (foreign) judgment debtor in the forum.

9. The SPEECH Act clearly raises federalism concerns to the extent that it provides a uniform federal solution in place of a state-by-state solution. Was a uniform solution preferable to state-by-state development, as in *Telnikoff* and *Bachchan*? If only state constitutional issues are present (because the foreign judgment satisfies federal but not, for example, tougher state free-speech requirements), shouldn't a state have the *option* whether or not to enforce the judgment? Is there federal power that would allow Congress to prevent states from enforcing foreign judgments that run afoul only of state law rather than federal law? The SPEECH Act is the only federal statute to date that purports to provide for the effect to be given to a foreign judgment. Do these sorts of judgments present a compelling case for such extraordinary intervention, particularly when states seem not to have been enforcing such judgments on their own? See e.g., N.Y.C.P.L.R. § 5304(b)(8) (2012) (providing a standard that is somewhat similar to that of The SPEECH Act); see also 735 I.L.C.S. 5/12-621(b)(7) (2008) (Illinois) (repealed Jan. 1, 2012).

10. English law responded to the SPEECH Act by enacting the Defamation Act of 2013. The home page pf the British Parliament had this to say about the Act:

The aim of the Bill is to reform the law of defamation to ensure that a fair balance is struck between the right to freedom of expression and the protection of reputation. The Bill makes a number of substantive changes to the law of defamation, but it is not designed to codify the law into a single statute.

Key areas

- Includes a requirement for claimants to show that they have suffered serious harm before suing for defamation
- Removes the current presumption in favor of a jury trial
- Introduces a defense of "responsible publication on matters of public interest"
- Provides increased protection to operators of websites that host user-generated content, providing they comply with the procedure to enable the complainant to resolve disputes directly with the author of the material concerned
- Introduces new statutory defences of truth and honest opinion to replace the common law defenses of justification and fair comment.

11. With the advent of the Internet, objections based on the First Amendment have become more frequent and to present difficult issues in American enforcement procedures. Illustrative is **YAHOO!, INC. v. LA LIGUE CONTRE LE RACISME ET L'ANTISEMITISME, 169 F. Supp. 2d 1181 (N.D. Cal. 2001)**, which was later dismissed (on grounds not relevant here) by the Ninth Circuit. See 433 F.3d 1199 (9th Cir. 2006) (en banc). A French court had enjoined a U.S. internet service provider from disseminating offers to French users in France to buy Nazi and Third Reich related objects. In an effort to prevent the French plaintiffs from enforcing the French injunction in the U.S., Yahoo! sought and obtained a declaratory judgment from a California federal district court on the ground that enforcement of the French injunction would be irreconcilable with American free speech protections. The following excerpt from the district court's opinion illustrates how Internet activities exacerbate the already-existing tensions in this area of the law:

> As this Court and others have observed, the instant case presents novel and important issues arising from the global reach of the Internet. Indeed, the specific facts of this case implicate issues of policy, politics, and culture that are beyond the purview of one nation's judiciary. Thus it is critical that the Court define at the outset what is and is not at stake in the present proceeding. * * *
>
> [T]his case [is not] about the right of France or any other nation to determine its own law and social policies. A basic function of a sovereign state is to determine by law what forms of speech and conduct are acceptable within its borders. In this instance, as a nation whose citizens suffered the effects of Nazism in ways that are incomprehensible to most Americans, France clearly has the right to enact and enforce laws such as those relied upon by the French Court here. What *is* at issue here is whether it is consistent with the Constitution and laws of the United

> States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation. In a world in which ideas and information transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually meaningless, the implications of this question go far beyond the facts of this case. The modern world is home to widely varied cultures with radically divergent value systems. There is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of the press. If the government or another party in one of these sovereign nations were to seek enforcement of such laws against Yahoo! or another U.S.-based Internet service provider, what principles should guide the court's analysis?
>
> The Court has stated that it must and will decide this case in accordance with the Constitution and laws of the United States. It recognizes that in so doing, it necessarily adopts certain value judgments embedded in those enactments, including the fundamental judgment expressed in the First Amendment that it is preferable to permit the non-violent expression of offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech. The government and people of France have made a different judgment based upon their own experience. In undertaking its inquiry as to the proper application of the laws of the United States, the Court intends no disrespect for that judgment or for the experience that has informed it.

Yahoo!, 169 F. Supp. 2d, at 1186-87.

Does a case such as this present a stronger argument in favor of refusing enforcement than in the defamation setting? Should it matter that the exhibition of Nazi propaganda and artifacts for sale is a violation of French *criminal* law? In the California federal district court, the two French Civil Rights organizations who were defendants in the declaratory action (i.e., the foreign plaintiffs) had objected to personal jurisdiction over them in California. Eventually, the Ninth Circuit Court of Appeals dismissed the action based in part on concerns about the ripeness of the dispute regarding enforcement of the judgment. See Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme 433 F.3d 1199 (9th Cir. 2006) (en banc). We discuss the personal jurisdiction dimension of *Yahoo!* in Chapter 1, Section B.

12. *Yahoo!* is not the only time U.S. judgment debtors have attempted to make a preemptive strike against enforcement of a foreign judgment in the U.S. by bringing a declaratory judgment prior to enforcement proceedings. For example, in Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir. 2012), the Second Circuit concluded that New York's version of the UFCMJA, N.Y.C.P.L.R. §§ 5301-5309, did not allow a pre-emptive injunction against judgment creditors prohibiting their enforcement of an allegedly fraudulent (non-defamation) judgment obtained against Chevron in Ecuador. Rather, the provisions of the UFCMJA could only be enforced defensively to an enforcement action once it was actually brought.

As noted in Chapter 1, Section B, however, New York has expressly provided in N.Y.C.P.L.R. § 302(d) (2012) for personal jurisdiction over certain foreign judgment creditors in actions for declaratory relief that a foreign defamation judgment is not enforceable because it did not comply with American free speech standards. What is the advantage to the judgment debtor in bringing such an anticipatory action, as opposed to waiting for the judgment creditor to enforce the action in the U.S.?

13. In the SPEECH Act, Congress expressly provided for federal court subject matter jurisdiction over declaratory judgment actions brought by "U.S. parties" seeking a pre-emptive declaration that a foreign defamation judgment did not comport with the requirements of the Act. Given that the Act's general command is not limited to foreign judgments involving U.S. parties, why is the declaratory remedy limited to such parties? Moreover, the Act requires that the foreign proceedings comply with both federal *and* state constitutional standards. Would there be a constitutional problem (absent diversity) with a federal court exercising jurisdiction over a U.S. party's declaratory judgment action to the effect that a foreign defamation judgment failed to comply with relevant *state* law, even though it may have complied with the U.S. Constitution?

NOTE ON U.S. RECOGNITION OF FOREIGN TAX AND PENAL JUDGMENTS

The UFCMJA does not apply—inter alia—to foreign country judgments for fines, penalties, and forfeitures. In addition, according to § 489 of the Restatement (Fourth) of Foreign Relations Law of the United States (2018), courts in the U.S. are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties by the courts of other countries, unless authorized by a statute or an international agreement. Although it has been acknowledged that neither U.S. law nor international law would be violated if such judgments were recognized or enforced, most American courts have refused to do so. See, e.g., Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson, 597 F. 2d 1161 (9th Cir. 1979). A similar practice generally prevails even as among the states of the U.S., at least as regards sister-state judgments for fines and penalties, the Full Faith and Credit Act (and Clause) notwithstanding. Nevertheless, the Supreme Court has held that the Clause requires states to enforce sister state judgments for taxes. See Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935) (leaving open question whether full faith and credit would have to be given to judgments for penalties or fines). But full faith and credit obviously cannot compel a similar result in the setting of foreign tax judgments.

What is the rationale for the nonenforcement of foreign judgments for fines, taxes, or penalties? Consider the explanation offered by Judge Learned Hand:

> To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are entrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.

Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring), aff'd on other grounds, 281 U.S. 18 (1930).

Is the explanation convincing? Perhaps having one state enforce the penal laws of another sovereign in the first instance is problematic. But is it equally problematic, once the dispute has been reduced to a money judgment? Does a court "seriously embarrass" another state or nation by evaluating the enforceability of its penal or tax laws? If so, isn't the application of the general rule—i.e., the wholesale refusal to enforce *any* foreign judgment in the tax or penal setting—more damaging than the enforcement of some of such judgments? Despite these considerations, courts continue to decline the enforcement of foreign country tax judgments. However, courts may be inclined to enforce a portion of a judgment if it is based on acts giving rise to both criminal and civil liability. There are civil law systems, such as France, which allow an injured party to pursue civil claims by joining such claims in criminal proceedings against the defendant. Thus, the civil portion of such a decision—based, for example, on reckless conduct of the defendant—may be enforceable even though it is embodied in a penal judgment.

See Restatement (Third) of Foreign Relations Law of the United States (1987), at § 483, Reporters' Note 4. See also Restatement (Fourth) of Foreign Relations Law of the United States (2018), at § 489, Reporters' Note 4: "So long as the purpose of the action is to afford a private remedy, enforcement is not barred even if the law creating liability is a criminal statute, . . . or the judgment is rendered during the course of a criminal proceeding . . . ."

E. U.S. JUDGMENTS AND FOREIGN PUBLIC POLICY CONCERNS

In this section, we will focus on two American judgments whose enforcement was sought in German courts and, additionally, on a recent decision of the Italian Supreme Court concerning the enforceability of American punitive damages. As discussed below, German courts decide recognition and enforcement matters on the basis of German federal procedural law. In many cases, the applicable legal standards derive from international treaty obligations that Germany has assumed by way of bilateral arrangements. See, e.g., The Treaty between the Federal Republic of Germany and the State of Israel Concerning the Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters of July 20, 1977. At other times, they arise from regional/multilateral legal regimes. See, e.g., Regulation (EU) 1215/2012 that governs both questions of personal jurisdiction in EU cross-border litigation settings (see *supra* Chapter1 G) and the recognition and enforcement of judgments in the European Union (discussed below). In relation to money judgments emanating from American courts, however, such treaty obligations do not exist, and German procedural default rules –the German (federal) Zivilprozessordnung (German Code of Civil Procedure – "ZPO"—apply instead. (,Other countries faced with the application to enforce U.S. judgments would, of course, apply their own (forum) procedural and substantive laws in deciding questions of recognition and enforcement.)

Sections 722 and 723 of the ZPO govern the enforcement phase, while ZPO § 328 addresses the recognition of foreign judgments. ZPO § 722(1) requires that the execution of a foreign judgment be authorized through a German court decision. According to ZPO § 723(1), the German court issuing this decision, must not reexamine the "legality" ("Gesetzmäßigkeit"), that is, the merits of the foreign judgment. Further, according to ZPO § 723(2), the foreign judgment must be final and its recognition must not be prohibited by any of the five reasons set out in ZPO § 328.

German Code of Civil Procedure [ZPO] § 328

(1) The recognition of a foreign court is excluded

1. if the courts of the state to which the foreign court belongs have no jurisdiction under German law;
2. if the defendant who has not argued the case on the merits and raises this plea, has not been served with the document that instituted the proceedings in the required manner or not so timely that he could defend himself;

3. if the judgment is irreconcilable with a judgment rendered here or with an earlier foreign judgment which must be recognized here …;
4. if the recognition of the judgment would lead to a result that is patently irreconcilable with fundamental principles of German law, particularly, if recognition would be irreconcilable with the Basic (i.e., Constitutional) Rights;
5. if reciprocity is not ensured. * * *

Compare this statutory scheme with the provisions of the Uniform Foreign-Country Money Judgments Recognition Act, discussed above in Section B. Does a textual comparison of these two sets of provisions indicate which regime is more lenient on foreign judgments? In what respects?

The first two cases address primarily questions of German public policy under ZPO § 328(1) No. 4. The first case involved a compensatory damages award handed down by a Massachusetts jury in a products liability action. The decision by a lower court in Berlin to reject enforcement of the award epitomizes the public policy concerns that American judgments encounter abroad. In the second case, the German Federal Supreme Court had to decide whether an American judgment containing both compensatory and punitive damages could be enforced in Germany. While finding the compensatory components of the American judgment were enforceable, and thereby articulating a much more lenient view than the lower court in Berlin, the German Supreme Court held that enforcement of the punitive damages portion would violate German public policy. In the third case, the Italian Supreme Court examined the compatibility of American punitive damages and Italian public policy reservations and displayed considerably more tolerance towards the remedy of punitive damages than did the German High Court.

Re the Enforcement of a U.S. Judgment

Before the Landgericht (District Court), Berlin (20th Civil Chamber), 1992.

Case 20.0.314/88, 3 Int. Lit. Proc. 430.

Facts, Proceedings and Argument

In July 1967, the defendant, at that time trading as a limited partnership, supplied to another firm a machine designed to stamp information on to electronic components and powered by a motor of American manufacture. The female plaintiff was employed by the latter firm as an operator of the machine.

On 8 October 1975, in the course of her work, the plaintiff switched off the machine in order to retrieve an electronic component which had fallen inside it from the main plate. In searching for the component, she unintentionally restarted the motor and, as a result, a swiveling arm descended and trapped her right wrist against the machine's main plate.

Following immediate medical treatment for a swollen wrist, which did not involve hospitalization, the plaintiff on 14 November 1975 underwent surgery necessitated by the appearance of the symptoms of carpal tunnel syndrome. She returned to work on 6 July 1976.

In subsequent proceedings in the U.S. State of Massachusetts under a 'warranty claim' pursuant to the law of that State, the plaintiff on 24 January 1985 obtained judgment against the defendant in the Superior Court, Middlesex for the sum of $275,000 plus interest of $207,905.50, making a total award of $482,905.50. On an appeal by the defendant, the judgment was upheld by the Supreme Judicial Court of Massachusetts. The Superior Court, Middlesex, in a writ of execution, awarded the plaintiff an additional sum of $177,392.61 in respect of further interest and costs.

In 1988, the plaintiff brought an action against the defendant before the Landgericht (District Court) in Berlin, seeking an order for compulsory enforcement of the Massachusetts judgment and payment of further interest thereon at 12 per cent. per annum pursuant to that judgment.

The plaintiff relied upon the fact that the function of her right hand had been reduced by 35 per cent. and that of her right arm by 46 per cent., that her own contributory negligence had been assessed by the Massachusetts court at only 5 per cent., and that the operation in November 1975 had been necessitated by the accident.

The defendant, in resisting the order sought, drew attention to certain alleged irregularities in the authentication, translation and interpretation of the documents exhibited by the plaintiff and asserted that the Massachusetts judgment of 24 January 1985 was in various respects contrary to the German *ordre public*. Also, on the basis of an up-to-date medical report, the defendant disputed that the carpal tunnel syndrome suffered by the plaintiff was a direct or indirect consequence of the accident and asserted that the plaintiff's loss of function in the right hand was less than that relied upon by her and in any event arose out of the surgical treatment of the carpal tunnel syndrome or of inadequate post-operative treatment.

JUDGMENT

This action—admissible in accordance with sections 722 and 723 of the Code of Civil Procedure—which is directed at obtaining an order for enforcement of the judgment of 24 January 1985 is not well-founded.

In so holding, the Court proceeds on the assumption that the judgment has become final and absolute on the basis of the judgment of the Supreme Court of Massachusetts. Nor does it entertain any substantial doubts that the documents lodged represent a foreign judgment which is amenable to an order for enforcement. The judgment of 24 January 1985 in particular, which is what primarily matters, has obviously been lodged in an authenticated copy. It emerges there from that, in any event, $275,000 plus interest at 12 per cent. as from 6 October 1978, that is, as from the time when the action was filed, must be paid. Interest is then again awarded at 12 per cent. on the whole of the overall sum of $482,905.50 which is apparent from the judgment, even though that sum already contains an element of interest. Furthermore, no misgivings arise from the fact that the documents are signed by an 'Assistant' or 'Deputy Assistant' who is to be compared in his function with a judicial official. Regard is to be had solely on whether some foreign court has reached the judgment. Who is competent by virtue of his function is irrelevant, so long as an independent judge has been involved. This involvement was here ensured even at first instance by the judge.

Nor does the Court have any substantial misgivings as to the fact that individual documents have not been lodged, or have only belatedly been lodged, in authenticated German translation. Under section 184 of the Constitution of Courts Act, the language of the courts is German. It must be assumed that, as a result of the proceedings conducted in America, the defendant was already familiar with all the documents. Moreover, individual errors of translation do not preclude comprehension of the documents. Thus, for instance, there has not been incorporated into the translation of the underlying judgment of 24 January 1985 a breakdown of the total sum to be paid. The breakdown emerges, however, from the exhibited document K 1 itself.

Furthermore, the rule contained in section 328(1)(i) of the Code of Civil Procedure does not pose any obstacle to the making of an order to enforce as sought. Under this rule, such order would have to be refused, if, under German law, the foreign court had no jurisdiction. The jurisdiction of the foreign court, however, follows here from the standpoint of the special rule awarding jurisdiction to the court for the place of commission of a tort under section 32 of the Code of Civil Procedure. It is sufficient in this respect that, in any event, the injury has come about in the United States. Whenever any factual ingredient occurs at the foreign place in question, there is in this respect a foundation for the rule as to jurisdiction under section 32 of the Code of Civil Procedure. It is not decisive in this respect that, here, enforcement is being sought of the judgment relating to the 'warranty claim,' and not of the judgment relating to the 'negligence claim.' It is true that the 'warranty claim' relates to a sort of contractual liability for an assurance, and not to any tortuous liability in the narrower sense. The concept of a tortuous act within the meaning of section 32 of the Code of Civil Procedure must, however, be understood in a wider sense. It includes, for instance, claims on the basis of statutory liability for putting someone at risk. The 'warranty claim' here asserted corresponds to such a claim. It includes, irrespective of the parties to the contract site of sale, all natural and legal persons as persons entitled to claim, and personal injury as well as damage to property, and moreover permits a claim against the manufacturer. In accordance with German notions, this corresponds to a claim in tort in the wider sense.

The reciprocity of recognition of judgments is also guaranteed in relations between the Federal Republic of Germany, including West Berlin, and the U.S. State of Massachusetts. The enforcement of German judgments is not substantially more difficult in Massachusetts than, vice versa, the enforcement of an American judgment in Germany. In 1966, Massachusetts, together with eight other U.S. States, adopted the Uniform Foreign Money Recognition Act of 1962, on condition that reciprocity was guaranteed. This Act applies to foreign judgment which are final and conclusive. This corresponds to German procedure. Under the practice in Massachusetts, the foreign judgment moreover has its full effect, even when it is not a judgment which would have been given under local law. It must be proved by the production of authenticated copies of the court documents. Enforcement does not take place until a copy of the documents certified by means of the court seal is lodged. It must therefore be assumed that there is a guarantee of reciprocity. * * *

The general *ordre public* examination under section 328(1)(iv) of the Code

of Civil Procedure which ultimately remains leads to the result that enforcement of the judgment of 24 January 1985 in the Federal Republic of Germany and West Berlin is not permissible. This arises from various aspects. First, it is noticeable that the judgment at first instance which is sought to be enforced does not contain any written reasoning. In the reasoning in support of the judgment on appeal, moreover, only the various objections raised by the defendant are discussed. What is, however, missing, for instance, is any general account as to how it was ascertained that the defendant was at fault and as to what circumstances played a part in the determination in relation to the respective contributions to causation. There is not a word as to the extent of the injury ascertained. While the absence of written reasons for the judgment is not in itself contrary to the German *ordre public*, the resultant uncertainties mitigate against the plaintiff as the party which was victorious in the foreign proceedings. Insofar as one can to some extent fall back upon the grounds recited in support of the appellate judgment, the latter shows that, ultimately, the conclusion is drawn from the fact of the occurrence of damage that there was a breach of duty by the defendant. This is made clear in the passage in the appellate judgment which deals with possible theories about the fault in construction. What is being discussed there is the arrangement of the on-off rocker switch or of possible protective devices projecting above it as well as a protective device over the swiveling arm of the machine. This accords with the American case law, which, contrary to the principles of a German manufacturer's liability under section 823 et seq. of the Civil Code, affirms the existence of liability once a product does not work as safely as the ordinary user/consumer is entitled to expect, or once the manufacturer fails to choose a construction which is conceivable on the basis of the possibilities for construction and which is—on balance—safe, and which can reasonably be required of him. It is then enough that—without evidence of a 'fault' having to be given—circumstances are set out which have led to the accident, in so far as grounds emerge there from for holding that the cause of the accident was a fault in the product. Therein lies something which is contrary to German *ordre public*. First, there are only conceivable—not even expressly ascertained—causes for the injury. Secondly, with regard to the conceivable causes, breach of duty is at the same time presumed. All of this is contrary to the fundamental notions of German liability and insurance law; it would, if it were to be enforceable in the Federal Republic of Germany, result in a serious encroachment upon the defendant's right of property and upon the right to conduct an established and operational commercial enterprise.

There are also further aspects which support the proposition that there is an infringement of German *ordre public*. One, in particular, is the calculation of interest, which, in violation of section 289 of the Civil Code, is carried out in such a way that interest is calculated upon interest. This emerges from the mere fact that, in the further award of interest on the amounts arising out of the judgment of 24 January 1985 as a base figure, actual amounts of interest in the sum of $207,905.50 are included as a base figure, on which then, in future, further interest at 12 per cent. is calculated. Further aspects supporting an infringement of *ordre public* arise from the size of the sum of $275,000 originally awarded. This sum is many times in excess of sums which would have been paid in a comparable case in Germany. Its composition has neither been explained in more detail nor can it

be otherwise ascertained. Finally, regard must be had to the apparently arbitrary assessment of a contribution to causation of 95 per cent. against the defendant. How this has been arrived at is likewise neither explained nor can it be ascertained. So far as can be seen, the fact that the plaintiff herself switched the machine off, then reached into the machine and thereby set in motion the chain of causation which led to the injury is not gone into in more detail. The plaintiff knew the machine, on which she had apparently worked for some time. Taking account of these circumstances would under German law have led to the allocation of a considerable degree of contributory causation or of contributory blameworthiness, and possibly to the complete exclusion of liability. Finally, it remained to take account of the fact that the judgment of 24 January 1985 was clearly preceded by 'pre-trial discovery' proceedings. Such a procedure is represented by German standards as evidence obtained by investigation of the other party's case. In itself, the application of this procedure is not contrary to *ordre public*. Having regard, however, to the other aspects referred to, the result is an overall unequivocal infringement of German *ordre public*.

This leads in this case to the dismissal of the action as a whole, and not—as [sometimes] suggested—to the award of a sum which is capable of enforcement. The awarding of a sum capable of recognition would actually lead to the result that the foreign judgment is subjected to German rules. Moreover, it follows from the above discussions that, in particular in relation to the aspect of the here criticized conclusion in the American judgment, on the basis of the fact of the occurrence of injury, the defendant was found to be responsible, and in relation to the aspect of the in any event predominant contributory fault by the plaintiff, no sum would be left over to be awarded.

Action dismissed with costs.

NOTES AND QUESTIONS FOR DISCUSSION

1. There is no treaty arrangement between the U.S. and Germany that provides for the mutual recognition of money judgments. Therefore, Federal German law—the Code of Civil Procedure (ZPO)—applies instead. Under ZPO § 723, a German court faced with an action for enforcement of a final foreign judgment may not reexamine the judgment on its merits. One exception to this principle is set forth in ZPO § 328(1) No. 4. Recognition will be denied if, particularly in view of basic constitutional rights, it would lead to a result that would be clearly incompatible with fundamental principles of German law. This public policy clause (*ordre public*) is considered a solution of last resort that only applies in extreme cases. Thus, in principle, even if a foreign court relies on rules that deviate from German law, the resulting judgment could still be held enforceable. Did the Berlin court abide by this principle in the above decision? The court cited a number of reasons for its holding, which are discussed in the following notes.

2. In Germany, as in virtually all other legal systems, cases involving civil litigation are decided by professional judges rather than juries, and judges are required to provide reasons for their decision. But what is the harm of not having written reasons accompanying a jury verdict? After all, juries do not give reasons for their their verdicts, and it had been upheld on appeal before the Massachusetts Supreme

Judicial Court in Solimene v. B. Grauel & Co., K.G., 507 N.E. 2d 662 (1987). And that court *did* supply a comprehensive opinion on the issues involved in the case.

3. Why does the warranty cause of action, which does not require a showing of the defendant's fault, pose a problem for German public policy? Although it is true that the threshold for the imposition of liability tends to be lower in the U.S. than in Germany, can it really be said that fundamental German legal principles are at stake? Note that at the time the case was decided, German courts applied the principle of *res ipsa loquitur* in certain tort cases, thus requiring the defendant to prove that it acted without fault.

4. The Berlin court also took issue with the amount of damages handed down by the American tribunal. What should be the gauge for measuring excessive damages in an American court? German standards? Would this comport with the principle of refraining from reexamining the merits of the foreign decision? The amount of damages is usually a question of fact, and whether there is sufficient evidence for such an award is a question of law. Even if the amount is deemed to be incompatible with German fundamental legal principles, is it appropriate for the German court to declare the entire damages award to be unenforceable? Consider whether it might have made more sense to have enforced at least a portion of that award. What reasons does the court give for denying partial enforcement of the award?

5. Rightly or wrongly, American discovery procedures are perceived as intrusive fishing expeditions—not only in Germany, but throughout the world. Nevertheless, is it justified to view the American way of taking evidence in domestic proceedings as an obstacle to judgment enforcement abroad? If your answer is yes, consider whether any American judgment could ever be enforced abroad. The decision by the Berlin court was appealed, and it was reportedly settled in the courthouse, outside the judges' chambers.

Re the Enforcement of a U.S. Judgment

Before the Bundesgerichtshof (German Federal Supreme Court), 1992.

Case IX ZR 149/91. *Reprinted in* [1994] I.L. Pr. 602.

[Three years after the Berlin District court had rejected enforcement of the Massachusetts judgment, the request for the enforcement of another American judgment came before the German Federal Supreme Court.[1] This case involved the enforcement of American damage award rendered against a defendant with dual American and German citizenship. The defendant had earlier been found guilty on criminal charges of sexual misconduct, and was sentenced to a long prison term in California. He avoided the criminal sentence by moving to Germany, but prior to his departure, the plaintiff-victim served a civil summons and complaint on the defendant in an action filed with the San Joaquin County Superior Court in California.

[1] *Re* the Enforcement of a United States Judgment for Damages, Case IX ZR 149/91 (1992), reprinted in English in 5 Intern. Lit. Rep. 602 (1994) and 32 I.L.M. 1320 (1993).

The defendant failed to appear at trial, and judgment was entered in favor of the plaintiff in the amount of $750,260, of which $150,260 was for past and future medical expenses, $200,000 for anxiety, pain, and suffering, and $400,000 as punitive damages. Contrary to the Berlin District court, the German Federal Supreme Court took a significantly more lenient approach towards the American judgment. Premised on the view that German law prescribes a high level of tolerance in enforcement proceedings, the Supreme Court ruled out a blanket rejection of American judgments that are preceded by full-fledged discovery. It also held that neither the award for pain and suffering nor that for uncertain future medical expenses violated German public policy. The holding is noteworthy because a plaintiff suing under German law would not have received more than about one tenth of the pain and suffering award, and would have received no award for what are considered speculative medical costs which may or may not be incurred in the future. Although the Court thus exhibited great deference to the compensatory components of the foreign judgment, it rejected the enforcement of the punitive damages award. The central arguments of the Court are excerpted below]:

[T]he American concept of punitive damages is characterised by the main motives of punishment and deterrence. (ALI, *Enterprise Responsibility for Personal Injury*, Vol. II, pp. 231, 236, 247, Madden, *Products Liability* (2d ed.) p. 316, Kionka, *Torts in a Nutshell* p. 374, Fleming, *The American Tort Process,* 214, Zekoll*, US-Amerikanisches Produkthaftpflichtrecht vor deutschen Gerichten*: *Produkthaftpflichtrecht,* pp. 152 *et seq.,* 156, and 37 Am. J. Comp. L. at 325 *et seq.*) It is historically derived from those motives, and they are still a factor in the quantification of such damages in present times. The only relevant precondition is the heightened degree of the fault alleged. The absence of any specific right of the injured party to claim them demonstrates the subordinate significance of his private interests. Furthermore, since there is no measurable general relationship between the sums of money to be assessed and the injury suffered, considerations of compensation are generally subordinate.

On that basis, it is clearly incompatible with essential principles of German law to grant enforcement in this country of punitive damages awarded as a lump-sum to any significant level.

The essential principles of German law include the principle of proportionality, which follows from that of the rule of law, and is also applicable in the civil legal system. Account is taken of it in civil law *inter alia* by reference to considerations of compensation in the assessment of damages: generally speaking, the equalisation of the immediate parties' property relationships upset by an unlawful infringement is the only proper objective of the civil action brought in respect of the infringement. * * *

By contrast, according to German concepts sanctions serving to punish and deter—that is to say, to protect the legal system in general—in principle fall within the state's monopoly on punishment. The state exercises the monopoly in the public interest by means of a special type of proceeding, in which on the one hand investigation by the court of its own authority is intended to provide a greater guarantee of the correctness of the decision on matters of fact, and on the other hand the rights of the defendants are more strongly protected. From the German viewpoint it would not be acceptable for a civil judgment to order the payment of

a considerable sum of money which does not serve to compensate for injury, but is essentially assessed on the basis of the public interest and could possibly be imposed in addition to a criminal penalty for the same conduct.

In the final analysis that is the position in the present case. The amount of punitive damages awarded is higher than the total of all the sums awarded by way of compensation. Even that proportion of it that is ascribable to the lawyer's fee could only amount to about one-third of the "punitive damages". There is no evidence of any other injury for which compensation was required. That means that enforcement would have excessive effects for the defendant.

In the U.S. "punitive damages" awarded by courts in their discretion without a fixed relationship to the injury suffered and sometimes awarded at an excessively high level have had the effect of contributing to a rapid increase in the burden of compensation in economic terms, going to the limits of calculable and insurable risk. (*cf.* Zekoll, *Produkthaftpflichtrecht,* pp. 84, 155; Hoechst, [1983] VersR at 15; * * *).

From a German viewpoint, the motives alien to civil law and the absence of sufficiently precise and reasonable limits in the case of recognition of such judgments are calculated to destroy all the domestic standards of civil liability. On the basis of such judgments, foreign creditors could have access to the assets of debtors in this country to an extent many times greater than that available to domestic creditors, who in certain circumstances will have suffered substantially greater injury. Such preferential treatment solely for creditors from the few states in the world which allow for punitive damages as compared with all other creditors is not justified by considerations which give rise to a right to protection under the German legal system. For that reason alone the enforcement of a claim for lump-sum punitive damages (exceeding the compensation for all special and general losses) would be an insupportable consequence in Germany, so that the relatively slight connection of the present case with this country is by itself a reason to reject the application.

Accordingly, enforcement in Germany is ruled out in this respect. It is no longer necessary to decide whether the enforcement of punitive damages is contrary to German public policy for other reasons, too. In particular it is not necessary to decide whether the relatively undefined conditions for the award of "punitive damages" and for their quantification are subject to scrutiny under Article 103(2) of the Constitution, and whether the award of such damages in addition to a criminal penalty falls within the prohibition on double jeopardy from a German viewpoint (Article 103(3) of the Constitution). (*cf.* Zekoll, *Produkthaftpflichtrecht,* pp. 152 *et seq.;* Hoechst, *op. cit.,* [1983] VersR at 17).

The fact that the judgment of the Superior Court cannot be declared enforceable in Germany because of the punitive damages contained in it does not prevent its recognition in other respects. Contrary to the view set out in the appeal, the fact that the subject-matter of an enforcement order does not consist in the substantive law claim on which the foreign judgment is based but is determined by the creditor's application for the judgment to be enforced in this country does not make it necessary always to make a single order on the enforceability of a foreign judgment for the payment of damages covering the total sum awarded. If a foreign

judgment allows several legally independent claims, it is also possible for each to be examined individually to see whether the conditions for its recognition are satisfied. In so far as they are not satisfied for all the claims, partial recognition for a lesser sum is possible without it being necessary for the applicant to take account of that possibility in his application. (Geimer, IZPR, n. 2294; Zoller/Geimer, *ZPO* (17th ed.) s.328, n.285; Zekoll: *Produkthaftpftichtrecht,* p. 37, and 37 Am.J.Comp.L. at 330; * * *.)

NOTES AND QUESTIONS FOR DISCUSSION

1. Despite its refusal to enforce the punitive damage award in this case, the Court suggested in dicta that such damages may be enforceable if they serve legitimate compensatory purposes:

> The position might possibly be different in so far as the imposition of punitive damages is intended to compensate by way of a lump-sum for residual economic disadvantages not specifically allowed for or difficult to prove, or is for the purpose of depriving the tortfeasor of profits gained by his unlawful act. In this connection the passing on to the defendant of the costs of the action or other losses through non-payment which cannot be recovered independently is also a matter which generally arises for consideration.

[1994] I.L. Pr. 602, 630-631.

The "residual economic disadvantages," to which the Court refers, may include the attorney fees which successful plaintiffs owe their attorneys and which lead to a sizable reduction of the damages award. However, the Court's position is less generous than might appear at first glance. In contrast to the lower court and some commentators, the Court did not accept the proposition that one of the reasons for imposing punitive damages is invariably the intention to compensate plaintiffs for litigation costs and other incurred expenses. Consistent with its assessment of punitive damages as a means of punishing and deterring, the Court stated that it would allow enforcement only if the foreign decision provided evidence clearly indicative of the compensatory objective of the award.

The exception carved out by the Court appears, therefore, to be of relatively minor practical importance. It may apply to decisions rendered in those American jurisdictions that explicitly recognize compensation as a legitimate purpose for assessing punitive damages. Even these decisions, however, may not pass muster when they are based on general jury verdicts, because such verdicts might not spell out the basis for the award. And it is questionable whether jury instructions which designate compensation as one of several purposes would be recognized as sufficiently probative. The German Federal Court of Justice made clear that the judge in a German enforcement proceeding may not speculate as to whether compensatory motives played a role for the imposition of punitive damages. For a discussion of this decision, see Joachim Zekoll, *The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice*, 30 Colum. J. Transnat'l L. 641 (1992).

2. Finding that considerations of compensation play little or no role for the imposition of punitive damages, the German Supreme Court argued that "there is no

measurable general relationship between the sums of money to be assessed and the injury suffered." Note that the U.S. Supreme Court has established, since then, heightened due process protections against excessive punitive damages. In BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), the Court held, among other things, that punitive damages awards must be both reasonable and proportionate in relation to the plaintiff's harm and to the general damages recovered. As a result, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. See also Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); State Farm Mutual Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003). Reconsider the reasons the German Supreme Court advanced against enforcement. If faced with an American judgment that is in line with these more recently established American due process limits, would or should a German court enforce such a judgment? See also Phillip Morris USA v. Williams, 549 U.S. 346 (2007) (holding punitive damages award based in part on jury instructions that may have permitted jury to punish a defendant for having harmed nonparties to the litigation violated Due Process).

3. As in other civil law jurisdictions, the holding of the German Supreme Court is technically not binding on lower courts faced with similar issues. It is nevertheless safe to say that the Court's opinion will serve as an important guide post for future cases.

4. In a 1994 decision relating to The Hague Service Convention, the German Supreme Court stated in dicta that punitive damages seen in context are not necessarily a violation of German constitutional principles. The Court reasoned that they can be a means with which to shift attorney's fees, as well as a measure to make litigation affordable in especially egregious cases. See *Federal Constitutional Court Order Concerning Process of Punitive Damage Claims*, 1995 NJW 649, *reprinted and translated in* 34 I.L.M. 975, 993-994 (1995). The decision is excerpted and discussed in Chapter 4, Section E. Furthermore, recent developments in the conception of European (including German) tort law seem to call for a fundamental reassessment of the enforceability of American punitive damages awards under German (constitutional) law. The reasoning of the Italian Supreme Court (excerpted immediately below) in favour of accepting punitive damages is arguably applicable to the German legal framework as well, because the Court does not only dwell on Italian idiosyncrasies but also points to functional changes of civil liability that are occurring throughout Europe.

Re Punitive Damages in a U.S. Judgment

Cass. Civ., sez. Unite Civile, 5 Iuglio, no. 16602/2017**,** translated in Letizia Coppo, *The Grand Chamber's Stand on the Punitive Damages Dilemma*, 3 ITAL. L.J. 593 (2017).

SUMMARY OF FACTS

NOSA Corporation, headquartered in Florida (USA), obtained from the Venice Court of Appeal a judgment allowing the recognition and enforcement in Italy of three final decisions rendered in the United States. * * * With these judgments,

the U.S. courts granted NOSA's request to be indemnified by AXO for the payment of one million euros resulting from a settlement reached with the plaintiff, a motorcyclist who had suffered personal injuries in an accident which occurred during a motocross race as a consequence of an alleged defect of the helmet manufactured by AXO, distributed by Helmet House and resold by NOSA.

Pending the proceedings, which the injured had brought also against the importer and distributor of the helmet (Helmet House), NOSA had agreed on the settlement proposed by the motorcyclist, and the American court subsequently held that NOSA was entitled to seek indemnity from AXO for any payment in connection thereto.

NOSA obtained the recognition of the abovementioned judgments by the Venice Court of Appeal (on 3 January 2014), pursuant to Art. 64 of legge 31 May 1995 no. 218 (Italian rules of private international law), on the grounds that AXO had accepted the foreign jurisdiction. AXO appealed to the Supreme Court . * * *

REASONS FOR THE DECISION

* * *

(4.2) The * * * argument of the applicant's plea is also inadmissible. It states that the U.S. judgment would be a vehicle for a liquidation of punitive damages, on the assumption of the abnormality of compensation granted to the injured party. This assumption, representing the essential premise of the thesis according to which the recognition of the so-called punitive damages in our legal systems is banned by Art. 64, is groundless. * * *

* * * in no way could the award at issue be regarded as having a "punitive" character; and such character cannot be inferred from the mere fact that the judgment, or rather the underlying settlement ratified by the court, failed to clearly categorize the award's different components. * * *

(5) The dismissal of all * * * pleas submitted by the applicant results in the rejection of the appeal. However, the inadmissibility of the third plea allows the Joint Divisions to rule on the subject matter thereof pursuant to Art. 363, para. 3 of the Civil Procedure Code, which may be interpreted in the sense that, even if the appeal is to be rejected in its entirety, the Supreme Court may nonetheless express the relevant principle of law governing the matter, provided that it is one of particular importance. In the instant case, the statement of a principle of law is justified in consideration of the extended scholarly debate which has for some time urged an overruling intervention by this Court, as well as in pursuit of the First Division's order of remittance, prompted by the parties' sagacious arguments.

(5.1) In 2007, the Supreme Court denied the recognition and enforcement of a judgment, on a similar subject matter, on the assumption that the idea of punishment and sanction did not pertain to civil liability law and that "the tortfeasor's conduct" was to be considered irrelevant. The Court thus construed civil liability as having a monofunctional nature, by characterizing its purpose as merely 'restorative of the economic conditions' of the injured party. Though immediately criticized by the majority of scholars, highlighting the inconsistency of these

statements vis-à-vis the evolution of the notion of civil liability in the past decades, the principle expressed in ruling no. 1183/2007 was confirmed by a Supreme Court judgment a few years later. In ruling no. 1781/2012 the exclusion of any punitive purpose from the law of civil liability was more explicitly associated with the need to "control the compatibility of the foreign damages award with the Italian legal system."

It is the Joint Divisions' belief that this reasoning is outdated and can no longer constitute, in these terms, a suitable filter for the assessment at hand. For some years already, the Joint Divisions of the Supreme Court (see ruling no. 9100/2015 on the issue of directors' liability) have highlighted that the idea of a punitive function associated to a damages award is no longer "incompatible with the general principles of our legal system, as it was in the past, in view of the fact that here and there, in the last decades, the legislator has introduced several provisions pursuing, in a broad sense, a punitive goal".

The Joint Divisions have, however, pointed out that such punitive function is attainable only where "it is clearly set forth by some provision of law, in accordance with the principle which can be deduced from Art. 25 para. 2 of the Constitution, as well as from Art. 7 of the European Convention on the Protection of Human Rights and Fundamental Freedoms".

Similar concerns, in combination with the equally meaningful reference to Art. 23 of the Constitution, explain why, even in the same timeframe, some judgments continued to repudiate any punitive or deterrent foundation to the law of civil liability (the most significant example is Joint Divisions' ruling no 15350/15). Such denials, even if at times expressed as mere reinforcing arguments, pursued the goal of fencing off any attempt to expand the range of available damages beyond the boundaries set by law, in situations not provided with adequate normative coverage.

However, this does not obliterate the trajectory developed by the law of civil liability in the last decades and what resulted therefrom. In brief, it can be said that beside the primary and predominant compensatory-restorative function (which inevitably comes close to deterrence) a multi-functional nature has emerged (one scholar identified more than ten functions), extending to different areas, the most relevant of which are prevention (or deterrence-dissuasion) and sanction-punishment.

(5.2) [In this part of the opinion, the Court provided a detailed list of legislative acts and jurisprudential developments which indicate that private law liability rules, in addition to serving a compensatory function, now also aim at deterring and punishing wrongful conduct. The examples given by the Court include monetary *sanctions* for unjustly dismissing workers, for the violation of industrial and intellectual property rights, and for violating anti-discriminatory laws. These sanctions entail payments from the wrongdoer to the victim that may clearly exceed the amount necessary to compensate the victim.]

(5.3) The Constitutional Court's jurisprudence provides a number of particularly meaningful hints. In ruling no 303 of 2011, the Constitutional Court clarified that the above-mentioned labor legislation (legge 183 of 2010) was "intended to

introduce simpler, clearer and more homogeneous criteria for the liquidation of damages", having "the effect of approximating the indemnity in question with the losses potentially suffered from the date on which a formal contestation was brought up to the employer until the case is decided by a judge", without deduction of gains otherwise obtained by the employee; such a comprehensive indemnity was depicted as having "a clear sanctioning nature."

In ruling no. 152 of 2016, the Constitutional Court held that the nature of Art. 96 of the Civil Procedure Code, as well as of the former Art. 385 of the same Code, is "not compensatory (or at least not exclusively compensatory) but mainly punitive, with a dissuasive purpose."

The multi-functionality of civil liability in the present legal system is hence confirmed at the constitutional level, with the primary purpose of fostering effectiveness in the protection of rights (see Corte costituzionale no. 238/2014 and Corte di Cassazione no. 21255/13) which otherwise, in many cases examined by scholars, would be sacrificed by a mono-functionalistic approach.

Lastly, it should be recalled that the national legislator might introduce "punitive damages" to prevent the violation of EU law, as acknowledged in ruling 15 March 2016 no. 5072, by the Joint Divisions of the Supreme Court.

All this does not entail that the Aquilian institution has altered its own essence, nor that the observed tendency toward the goals of punishment and deterrence will henceforth give Italian judges indefinite leeway to increase the amount of damages at their discretion in contractual or extra-contractual liability cases.

Any imposition of fines requires statutory intermediation pursuant to the *riserva di legge* principle set forth in Art. 23 of the Constitution (in connection with Arts. 24 and 25), which requires that certain fields be regulated only by statute, thus preventing uncontrolled judicial subjectivism.

(6) The above overview sheds light on the issue of the compatibility of foreign punitive damages awards with public policy. * * * A foreign judgment which makes application of a legal institution not regulated by domestic law, even if not outlawed by the European rules, shall always have to be weighed against the principles of the Constitution and those laws that, like sensitive nerves, fibers of a sensorial system and vital parts of an organism, serve to reinforce the constitutional order. * * *

Meanwhile, a scrutiny of full consistency between foreign institutions and Italian institutions should not constitute a shield to be used in all cases. It would be pointless to investigate if the deterrent function of civil liability pursued in our system relies on an identical rationale as that of the jurisdiction generating punitive damages awards.

The only question is the following: whether the institution that is knocking on the door is in patent conflict with the pattern of values and rules that need to be taken into account in an exequatur proceeding.

(7) Such considerations pave the way to the conclusions that are to be drawn with regard to the recognition and enforcement of judgments awarding punitive damages. Simply stated, having removed the obstacle connected with the nature

of the damages award, the scrutiny must be focused on the requirements that such award must satisfy in order to be imported into our national legal system without infringing the underlying values of the matter, which can be derived from Arts. 23 to 25 of the Constitution.

Since, * * * the imposition of economic fines for purposes of punishment or deterrence by Italian courts is not permitted unless expressly provided for by law, the same applies with regard to foreign judgments. Which means that in the foreign legal system (not necessarily in the Italian system, whose role is confined to verifying the foreign judgment's compatibility) there must be a normative anchoring for an award of punitive damages.

The principle of legality requires that a foreign punitive damages award be grounded on a recognizable normative source, that is to say that the *a quo* [i.e., judgment rendering] court's decision must bear an adequate legal basis, satisfying the requirements of subject-specificity (*tipicità*) and predictability (*prevedibilità*). In sum, there must be a statute, or a similar source, having regulated the matter "according to principles and solutions" of that country, whose effects should not be in conflict with the Italian legal system.

The facts subject to punishment must therefore be precisely pre-identified (*tipicità*) and limits must be set as to the damages that may be awarded (*prevedibilità*). It is then for each national system, depending on whether it focuses more on the tortfeasor's or the offended party's side, to shape the contours of punitive damages, thus emphasizing their sanctioning rather than their compensatory aims, presumably also by taking into consideration the differences between merely negligent and wilful misconduct.

The fundamental principle guiding the analysis is in any case to be inferred from Art. 49 of the Charter of Fundamental Rights of the Union, concerning the "Principles of legality and proportionality of crimes and penalties." As emphasized by scholars, its application requires that the control carried out by the Courts of Appeal be directed to check the proportionality between restorative-compensatory damages and punitive damages and between the latter and the wrongful conduct, in order to shed light on the nature of the sanction/punishment inflicted. Proportionality of damages, whatever their nature may be, even beyond this legal provision, remains a core element of civil liability law.

(7.1) At this point of the analysis it is worth mentioning that in the North American system, which gave rise to many of the damages awards with which European courts have been concerned regarding their recognition, a rapid evolution has taken place, reducing the risk of the so-called grossly excessive damages.

In 1996 the U.S. Supreme Court (in *BMW* ruling no. 20-051996 [BMW v. Gore, 517 U.S. 559 (1996)]), with only two dissenting opinions, addressed this particular aspect of punitive damages. Twelve years later the process was almost completed. While most States have regulated punitive damages by statute, thus fencing them off from unpredictable jury verdicts (whose original function was to ensure that the wrongdoers were tried by their peers), the US Supreme Court (in *Philip Morris*, ruling no. 20-022007 [Philip Morris v. Williams, 549 U.S. 376 (2007]) held that, in the U.S. legal system, an award of punitive damages based

on the potential harm to persons who were not party to the lawsuit constituted an infringement of the Due Process Clause set forth in the 14th Amendment of the Federal Constitution. Finally, in the *Exxon* ruling (U.S. Supreme Court, 25 June 2008 [Exxon Shipping v. Baker, 554 U.S. 461 (2008)]), it went as far as indicating a maximum ratio of one to one between the amounts awarded for compensatory and punitive damages.

By way of example, it may be worth considering that the current legislation of Florida (Florida Statute)—the State in which the judgments were handed down in the instant case—introduced limits to the multiple liability phenomenon. Such limits operate through the application of the *ne bis in idem* [no two actions over the same matter] principle, the provision of alternative caps depending on the nature of the liability at issue, and the implementation of an articulated process with an initial verification of liability and a subsequent phase for the possible award of punitive damages (a mini-trial, quite significant in the perspective of our legal system, insofar as it strengthens the procedural guarantees pursuant to Art. 24 of the Italian Constitution). * * *

(8) The following principle of law can, therefore, be laid down:

In the current legal system, the purpose of civil liability law is not just to make the victim of a tort whole again, since the functions of deterrence and punishment are also inherent in the system. The American doctrine of punitive damages is therefore not ontologically contrary to the Italian legal system. However, the recognition of a foreign judgment awarding such damages is subject to the condition that the judgment has been rendered in accordance with some legal provisions of the foreign law guaranteeing the standardization of cases in which they may be awarded (*tipicità*), their predictability, and their outer quantitative limits. The enforcing court must focus solely on the effects of the foreign judgment and on their compatibility with public policy. * * *

NOTES AND QUESTIONS FOR DISCUSSION

1. Prior to this decision, the Italian Supreme Court had denied the recognition and enforcement of American punitive damages on essentially the same ground as the German Federal Supreme Court, i.e., by arguing that the function of civil law liability is solely to compensate the victim for actual losses and not (at all) to deter, let alone punish, the wrongdoer. In changing its view, the Italian Supreme Court acknowledges the emergence of a multifunctional liability system which is no longer diametrically opposed to the values underlying American liability rules.

2. Many of the examples the Court invokes to illustrate the partial convergence between the Italian concept of civil liability and the U.S. approach towards punitive damages apply to the German private law system as well. Among other reasons, that is so because several causes of action on which the Italian Court relied to make its point about the multi-functionality of its civil liability system do not have their origin in Italian legal thinking but follow from legislative acts of the European Union. These acts bind all EU Member States alike. For example, remedies for damages for discriminatory hiring practices must not be limited to com-

pensating the victim. According to the European Court of Justice (ECJ), the damages awarded to the victim of such discrimination must be high enough to create the deterrence necessary to ensure equal opportunities on the employment market as required under EU law. See Case C-14/83, von Colson and Kamann v. State of North Rhine-Westphalia, 1986 E.C.R 1891, 1907-1909. Similarly, the ECJ held that Directive 2006/54/EC allows Member States to address sexual discrimination with punitive damages. See Case C-407/14, Arjona Camacho v. Securidad España SA, ECLI:EU:C:2015:831, ¶ 40 (Dec. 17, 2015) ("Article 25 of Directive 2006/54 allows . . . Member States to take measures providing for the payment of punitive damages to the person who has suffered discrimination on grounds of sex."). Also heavily influenced by European legislation is the enforcement of intellectual property law which the Italian Supreme Court presented as evidence of the polyfunctionality of today's domestic tort law regime. According to Recital 26 of the Directive 2004/48/EC on the enforcement of intellectual property rights, "when determining the amount of damages to be paid to the right holder, all relevant aspects shall be taken into account, such as . . . undue profits made by the infringer."[2] This concept of absorbing profits cannot be reconciled with the traditional understanding that civil damages serve but a compensatory purpose. For a comprehensive discussion of these developments, see Joachim Zekoll & Wiebke Voß, *The Conflict between American Punitive Damages and German Public Policy – a Reassessment*, 61 Va. J. of Int'l Law 32-50 (2020).

3. Like the Italian Supreme Court, Spanish and French courts have adopted more lenient approaches towards the recognition and enforcement of American punitive damages. See Zekoll and Voß, *supra*, at pp. 37-38.

4. Despite the acknowledgment that European civil liability regimes are polyfunctional and despite the ensuing greater tolerance towards American punitive damages awards in Europe, important restrictions/reservations remain and continue to pose obstacles to the recognition and enforcement of such damages What are those restrictions or, conversely, which conditions/requirements must American punitive damages verdicts meet to be enforceable in Italy? Are the remaining Italian restrictions the same as those enunciated by the German Supreme Court?

F. JUDGMENT RECOGNITION UNDER EUROPEAN UNION LAW

A plaintiff who has obtained a judgment in one member state of the European Union ordinarily does not encounter problems when seeking to enforce that judgment in another member state. Perhaps inspired by the full faith and credit provisions of federal law, the drafters of the EC Treaty (renamed the "Treaty on the Functioning of the European Union" (TFEU) in 2009) realized that market integration in Europe not only requires the free movement of goods, persons, services and capital, but also depends on the liberal enforcement of judgments across borders. Until 2002, the Brussels Convention provided the legal framework for simple and speedy cross-border enforcement procedures. As of March 1, 2002, EU-Regulation 44/2001 (the "Brussels Regulation") replaced the Convention. In

[2] Directive 2004/84, of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

2012, the Brussels Regulation was replaced by the EU-Regulation 1215/2012, applicable to legal proceedings instituted on or after January 10, 2015. See Appendix D. Both the Convention and the Regulation in its former and in its current version pursue the twin goals of harmonizing the rules for the exercise of personal jurisdiction and those for the recognition and enforcement of judgments in the member states of the European Union.

In this section, we will discuss the cross-border recognition and enforcement of judgments in the European Union under the Brussels Convention/Regulations (EU-Regulation 44/2001 and EU-Regulation 1215/2012). While the Convention has been displaced by the Regulation, most of the changes have clarified rather than modified the recognition and enforcement provisions. The same holds true regarding the relation between the EU-Regulation 44/2001 and EU-Regulation 1215/2012. Therefore, existing European Court of Justice case law interpreting the Convention and EU-Regulation 44/2001 continues to serve as an important guidepost for deciding future recognition and enforcement disputes which will arise under EU-Regulation 1215/2012.

The latter Regulation leaves no doubt about the drafters' intent to establish a simple and effective procedure designed to facilitate the "free movement" of judgments throughout the European Union. Article 2(a) provides a broad definition of what constitutes a judgment, "including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court."

According to Regulation 1215/2012 Article 36, "[a] judgment given in a Member State shall be recognised in the other Member States without any special procedure being required." […]. However, Article 38(a) permits a court in which recognition is sought to stay the proceedings if the judgement is being challenged in the original forum. Article 45 spells out the ground for denying judgment recognitions (see also Appendix D):

> **Article 45.**
>
> 1. On the application of any interested party, the recognition of a judgment shall be refused:
>
> (a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed;
>
> (b) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
>
> (c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;
>
> (d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action

and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; or

(e) if the judgment conflicts with:

(i) Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or

(ii) Section 6 of Chapter II.

2. In its examination of the grounds of jurisdiction referred to in point (e) of paragraph 1, the court to which the application was submitted shall be bound by the findings of fact on which the court of origin based its jurisdiction.

3. Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction.

4. The application for refusal of recognition shall be made in accordance with the procedures provided for in Subsection 2 and, where appropriate, Section 4.

Finally, Article 52 prohibits the relitigation of the merits of the foreign judgment: "Under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed." Under EU-Regulation 1215/2012, the actual enforcement of the judgment in another Member State no longer requires a second step. It abolishes the so-called *exequatur* procedure, a separate declaration of enforceability upon application of an interested party that the predecessor, EU-Regulation 44/2001, still provided for. This *exequatur* procedure had been perceived by many observers as an unnecessary time-consuming and costly additional procedural layer. Thus, by abolishing it, EU-Regulation 1215/2012 further facilitates and expedites the enforcement of foreign judgments within the European Union. However, even under the revised rules, the judgment debtor is still entitled to raise certain procedural public policy objections to prevent the enforcement of the foreign judgment in extreme cases.

The following excerpt from the European Court of Justice decision in *Krombach v. Bamberski*, which was rendered on the basis of the almost identical Brussels Convention rules, illustrates the operation of the EU-Regulation 1215/2012 rules which are currently in effect:

Krombach v. Bamberski

Court of Justice of the European Communities, 2000.
Case C-7/98, 2000 E.C.R. I-01935.

The dispute in the main proceedings

* * *

12. Mr [Dieter] Krombach was the subject of a preliminary investigation in Germany following the death in Germany of a 14-year-old girl of French nationality. That preliminary investigation was subsequently discontinued.

13. In response to a complaint by Mr. [Andre] Bamberski, the father of the young girl, a preliminary investigation was opened in France, the French courts declaring that they had jurisdiction by virtue of the fact that the victim was a French national. At the conclusion of that investigation, Mr Krombach was, by judgment of the Chambre d'Accusation (Chamber of Indictments) of the Cour d'Appel de Paris (Paris Court of Appeal), committed for trial before the Cour d'Assises de Paris.

14. That judgment and notice of the introduction of a civil claim by the victim's father were served on Mr. Krombach. Although Mr. Krombach was ordered to appear in person, he did not attend the hearing. The Cour d'Assises de Paris thereupon applied the contempt procedure governed by Article 627 et seq. of the French Code of Criminal Procedure. Pursuant to Article 630 of that Code, under which no defence counsel may appear on behalf of the person in contempt, the Cour d'Assises reached its decision without hearing the defence counsel instructed by Mr. Krombach.

15. By judgment of 9 March 1995 the Cour d'Assises imposed on Mr. Krombach a custodial sentence of 15 years after finding him guilty of violence resulting in involuntary manslaughter. By judgment of 13 March 1995, the Cour d'Assises, ruling on the civil claim, ordered Mr. Krombach, again as being in contempt, to pay compensation to Mr. Bamberski in the amount of FRF 350 000.

16. On application by Mr. Bamberski, the President of a civil chamber of the Landgericht (Regional Court) Kempten (Germany), which had jurisdiction ratione loci, declared the judgment of 13 March 1995 to be enforceable in Germany. Following dismissal by the Oberlandesgericht (Higher Regional Court) of the appeal which he had lodged against that decision, Mr. Krombach brought an appeal on a point of law (Rechtsbeschwerde) before the Bundesgerichtshof in which he submitted that he had been unable effectively to defend himself against the judgment given against him by the French court.

17. Those are the circumstances in which the Bundesgerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

> 1. May the provisions on jurisdiction form part of public policy within the meaning of Article 27, point 1, of the Brussels Convention [Art. 45(1)(a) of Regulation 1215/2012] where the State of origin has based its jurisdiction as against a person domiciled in another Contracting State * * * solely on the nationality of the injured party * * * ?

If Question 1 is answered in the negative:

> 2. May the court of the State in which enforcement is sought * * * take into account under public policy within the meaning of Article 27, point 1 of the Brussels Convention [Art. 45(1)(a) of Regulation 1215/2012]that the criminal court of the State of origin did not allow the debtor to be defended by a lawyer in a civil-law procedure for damages instituted within the criminal proceedings (Article II of the Protocol of 27 September 1968 on the interpretation of the Brussels Convention) because he, a resident of another Contracting State, was charged with an intentional offence and did not appear in person? * * *

The first question

29. By this question, the national court is essentially asking whether, regard being had to the public-policy clause contained in Article 27, point 1 of the Convention [Art. 45(1)(a) of Regulation 1215/2012], the court of the State in which enforcement is sought can, with respect to a defendant domiciled in that State, take into account the fact that the court of the State of origin based its jurisdiction on the nationality of the victim of an offence. * * *

31. Under the system of the Convention, with the exception of certain cases exhaustively listed in the first paragraph of Article 28 [Art. 45(1)(e), point 1 of Regulation 1215/2012], none of which corresponds to the facts of the case in the main proceedings, the court before which enforcement is sought cannot review the jurisdiction of the court of the State of origin. This fundamental principle, which is set out in the first phrase of the third paragraph of Article 28 of the Convention [Art. 45(3) of Regulation 1215/2012], is reinforced by the specific statement, in the second phrase of the same paragraph, that 'the test of public policy referred to in point 1 of Article 27 [Art. 45(1)(a) of Regulation 1215/2012] may not be applied to the rules relating to jurisdiction.'

32. It follows that the public policy of the State in which enforcement is sought cannot be raised as a bar to recognition or enforcement of a judgment given in another Contracting State solely on the ground that the court of origin failed to comply with the rules of the Convention which relate to jurisdiction.

33. Having regard to the generality of the wording of the third paragraph of Article 28 of the Convention [Art. 45(3) of Regulation 1215/2012], that statement of the law must be regarded as being, in principle, applicable even where the court of the State of origin wrongly founded its jurisdiction, in regard to a defendant domiciled in the territory of the State in which enforcement is sought, on a rule which has recourse to a criterion of nationality.

34. The answer to the first question must therefore be that the court of the State in which enforcement is sought cannot, with respect to a defendant domiciled in that State, take account, for the purposes of the public-policy clause in Article 27, point 1, of the Convention [Art. 45(1)(a) of Regulation 1215/2012], of the fact, without more, that the court of the State of origin based its jurisdiction on the nationality of the victim of an offence.

The second question

35. By this question, the national court is essentially asking whether, in relation to the public-policy clause in Article 27, point 1 of the Convention [Art. 45(1)(a) of Regulation 1215/2012], the court of the State in which enforcement is sought can, with respect to a defendant domiciled in its territory and charged with an intentional offence, take into account the fact that the court of the State of origin refused to allow that defendant to have his defence presented unless he appeared in person.

36. By disallowing any review of a foreign judgment as to its substance, Article 29 [Art. 52 of Regulation 1215/2012] * * * prohibits the court of the State in which enforcement is sought from refusing to recognise or enforce that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State in which enforcement is sought had it been seised of the dispute. Similarly, the court of the State in which enforcement is sought cannot review the accuracy of the findings of law or fact made by the court of the State of origin.

37. Recourse to the public-policy clause in Article 27, point 1 of the Convention [Art. 45(1)(a) of Regulation 1215/2012], can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.

38. With regard to the right to be defended, to which the question submitted to the Court refers, this occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights deriving from the constitutional traditions common to the Member States.

39. More specifically still, the European Court of Human Rights has on several occasions ruled in cases relating to criminal proceedings that, although not absolute, the right of every person charged with an offence to be effectively defended by a lawyer, if need be one appointed by the court, is one of the fundamental elements in a fair trial and an accused person does not forfeit entitlement to such a right simply because he is not present at the hearing [citing case law of the European Court of Human Rights].

40. It follows from that case-law that a national court of a Contracting State is entitled to hold that a refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right. * * *

43. The Court has also held that, even though the Convention is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, it is not permissible to achieve that aim by undermining the right to a fair hearing.

44. [Therefore] recourse to the public-policy clause must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the ECHR. * * *

45. The answer to the second question must therefore be that the court of the State in which enforcement is sought can, with respect to a defendant domiciled in that State and prosecuted for an intentional offence, take account, in relation to the public-policy clause in Article 27, point 1 of the Convention [Art. 45(1)(a) of Regulation 1215/2012], of the fact that the court of the State of origin refused to allow that person to have his defence presented unless he appeared in person.
* * *

NOTES AND QUESTIONS FOR DISCUSSION

1. According to Article 2(1) of the Convention (and the Regulation, which substitutes "Member State" for" Contracting State"), "persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State." Mr. Krombach was domiciled in Germany. There are special jurisdictional rules which permit deviation from this principle. Article 5 of the Convention (and the Regulation) provides:

> A person domiciled in a Contracting State may, in another Contracting State, be sued:
>
> . . .
>
> 4. As regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings[.]

However, Article 3 prohibits plaintiffs from relying on certain exorbitant jurisdictional rules. They include Articles 14 and 15 of the French Civil Code that premise jurisdiction on the parties' nationality. See Chapter I, Section G.

If the French courts, by exercising jurisdiction on the basis of the victim´s nationality, violated the Convention, why was such error in itself not a ground for denying the recognition of the judgment? The Court, finding no obstacle to recognition in this respect, focused on the language of Article 28 of the Convention (Art. 35 of the Regulation). Reread the text of that Article. Was it a wise decision by the drafters of the Convention to prohibit courts from reviewing the jurisdiction of the original court? By contrast, American courts called upon to enforce foreign judgments typically examine such jurisdictional questions. See Section C, above. Can you see an argument why either approach may be justified?

2. With a view towards facilitating the free movement of judgments to the greatest extent possible, the ECJ has consistently interpreted the public policy reservation in Article 27(1) of the Convention as a solution of last resort (see, e.g., Case C-145/86, Hoffmann v. Krieg, 1988 E.C.R. 645, paragraph 21; and Case C-78/95, Hendrikman and Feyen v. Magenta Druck & Verlag, 1996 E.C.R. I-4943, paragraph 23). Judgments premised on rules that merely differ from those applied in

the enforcement state do not justify refusal of recognition. Instead, as formulated in paragraph 37 of the *Krombach* decision, recognition or enforcement cannot be refused unless it entailed a "manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order." Note that the new body of law governing judgment recognition, the Brussels Regulation, embodies the Court's strict interpretation of public policy. While Article 27(1) of the Convention simply stated that a judgment must not be recognized if such recognition is contrary to the public policy of the enforcing Member State, the pertinent provision in Art. 45(1)(a) of Regulation 1215/2012), requires that the infringement "manifestly" violate the public policy of the Member State.

Despite the self-imposed high threshold, the Court invoked the public policy clause against the French decision in *Krombach*. It did so by drawing on its "fundamental rights" jurisprudence which, among other things, is informed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Although the European Union is not yet a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6(2) of the Treaty on European Union calls for such accession. Furthermore, Article 6(3) acknowledges the relevance of that Convention by providing that "[f]undamental rights, as guaranteed by the . . . Convention . . . and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." Even prior to the enactment of this provision, the Court has cited fundamental rights in a variety of cases. In this respect, it has repeatedly relied on the European Convention and constitutional traditions of the Member States. For example, in a case involving an administrative decision not to renew a contract of a female police officer in Northern Ireland for reasons of public safety, the Court invoked Articles 6 and 13 of the European Convention to hold that judicial review of such decisions must be available; see Case C-222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, 1986 E.C.R. 1651. How would an American Court resolve the public policy question in *Krombach*?

3. In the fall of 2009, Andre Bamberski arranged for the kidnapping of Dieter Krombach in Germany so that he could be tried in France for murdering his daughter. Krombach fought to have the case dismissed arguing that the German authorities' decision to drop the case for lack of evidence was conclusive in this matter and did not allow for a retrial in France. Krombach also argued that a retrial should be rejected as it would be the consequence of a crime committed through his illegal abduction. In 2011, however, a French court decided that Mr. Krombach must stand trial for the 1982 death of Mr. Bamberski's daughter.

Appendix I:

Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

(**Brussels I Regulation**)

I

(Legislative acts)

REGULATIONS

REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 12 December 2012

on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

(recast)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 67(4) and points (a), (c) and (e) of Article 81(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the ordinary legislative procedure [2],

Whereas:

(1) On 21 April 2009, the Commission adopted a report on the application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [3]. The report concluded that, in general, the operation of that Regulation is satisfactory, but that it is desirable to improve the application of certain of its provisions, to further facilitate the free circulation of judgments and to further enhance access to justice. Since a number of amendments are to be made to that Regulation it should, in the interests of clarity, be recast.

(2) At its meeting in Brussels on 10 and 11 December 2009, the European Council adopted a new multiannual programme entitled 'The Stockholm Programme – an open and secure Europe serving and protecting citizens' [4]. In the Stockholm Programme the European Council considered that the process of abolishing all intermediate measures (the exequatur) should be continued during the period covered by that Programme. At the same time the abolition of the exequatur should also be accompanied by a series of safeguards.

(3) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, inter alia, by facilitating access to justice, in particular through the principle of mutual recognition of judicial and extra-judicial decisions in civil matters. For the gradual establishment of such an area, the Union is to adopt measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market.

(4) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters, and to ensure rapid and simple recognition and enforcement of judgments given in a Member State, are essential.

(5) Such provisions fall within the area of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty on the Functioning of the European Union (TFEU).

(1) OJ C 218, 23.7.2011, p. 78.
(2) Position of the European Parliament of 20 November 2012 (not yet published in the Official Journal) and decision of the Council of 6 December 2012.
(3) OJ L 12, 16.1.2001, p. 1.
(4) OJ C 115, 4.5.2010, p. 1.

(6) In order to attain the objective of free circulation of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a legal instrument of the Union which is binding and directly applicable.

(7) On 27 September 1968, the then Member States of the European Communities, acting under Article 220, fourth indent, of the Treaty establishing the European Economic Community, concluded the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, subsequently amended by conventions on the accession to that Convention of new Member States ([1]) ('the 1968 Brussels Convention'). On 16 September 1988, the then Member States of the European Communities and certain EFTA States concluded the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ([2]) ('the 1988 Lugano Convention'), which is a parallel convention to the 1968 Brussels Convention. The 1988 Lugano Convention became applicable to Poland on 1 February 2000.

(8) On 22 December 2000, the Council adopted Regulation (EC) No 44/2001, which replaces the 1968 Brussels Convention with regard to the territories of the Member States covered by the TFEU, as between the Member States except Denmark. By Council Decision 2006/325/EC ([3]), the Community concluded an agreement with Denmark ensuring the application of the provisions of Regulation (EC) No 44/2001 in Denmark. The 1988 Lugano Convention was revised by the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ([4]), signed at Lugano on 30 October 2007 by the Community, Denmark, Iceland, Norway and Switzerland ('the 2007 Lugano Convention').

(9) The 1968 Brussels Convention continues to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU.

(10) The scope of this Regulation should cover all the main civil and commercial matters apart from certain well-defined matters, in particular maintenance obligations, which should be excluded from the scope of this Regulation following the adoption of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ([5]).

(11) For the purposes of this Regulation, courts or tribunals of the Member States should include courts or tribunals common to several Member States, such as the Benelux Court of Justice when it exercises jurisdiction on matters falling within the scope of this Regulation. Therefore, judgments given by such courts should be recognised and enforced in accordance with this Regulation.

(12) This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.

This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

([1]) OJ L 299, 31.12.1972, p. 32, OJ L 304, 30.10.1978, p. 1, OJ L 388, 31.12.1982, p. 1, OJ L 285, 3.10.1989, p. 1, OJ C 15, 15.1.1997, p. 1. For a consolidated text, see OJ C 27, 26.1.1998, p. 1.
([2]) OJ L 319, 25.11.1988, p. 9.
([3]) OJ L 120, 5.5.2006, p. 22.
([4]) OJ L 147, 10.6.2009, p. 5.
([5]) OJ L 7, 10.1.2009, p. 1.

(13) There must be a connection between proceedings to which this Regulation applies and the territory of the Member States. Accordingly, common rules of jurisdiction should, in principle, apply when the defendant is domiciled in a Member State.

(14) A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised.

However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile.

(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(16) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

(17) The owner of a cultural object as defined in Article 1(1) of Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State [1] should be able under this Regulation to initiate proceedings as regards a civil claim for the recovery, based on ownership, of such a cultural object in the courts for the place where the cultural object is situated at the time the court is seised. Such proceedings should be without prejudice to proceedings initiated under Directive 93/7/EEC.

(18) In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.

(19) The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.

(20) Where a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-of-laws rules of that Member State.

(21) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously.

(22) However, in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general *lis pendens* rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings.

(1) OJ L 74, 27.3.1993, p. 74.

This exception should not cover situations where the parties have entered into conflicting exclusive choice-of-court agreements or where a court designated in an exclusive choice-of-court agreement has been seised first. In such cases, the general *lis pendens* rule of this Regulation should apply.

(23) This Regulation should provide for a flexible mechanism allowing the courts of the Member States to take into account proceedings pending before the courts of third States, considering in particular whether a judgment of a third State will be capable of recognition and enforcement in the Member State concerned under the law of that Member State and the proper administration of justice.

(24) When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time.

That assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction.

(25) The notion of provisional, including protective, measures should include, for example, protective orders aimed at obtaining information or preserving evidence as referred to in Articles 6 and 7 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [1]. It should not include measures which are not of a protective nature, such as measures ordering the hearing of a witness. This should be without prejudice to the application of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2].

(26) Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure. In addition, the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed.

(27) For the purposes of the free circulation of judgments, a judgment given in a Member State should be recognised and enforced in another Member State even if it is given against a person not domiciled in a Member State.

(28) Where a judgment contains a measure or order which is not known in the law of the Member State addressed, that measure or order, including any right indicated therein, should, to the extent possible, be adapted to one which, under the law of that Member State, has equivalent effects attached to it and pursues similar aims. How, and by whom, the adaptation is to be carried out should be determined by each Member State.

(29) The direct enforcement in the Member State addressed of a judgment given in another Member State without a declaration of enforceability should not jeopardise respect for the rights of the defence. Therefore, the person against whom enforcement is sought should be able to apply for refusal of the recognition or enforcement of a judgment if he considers one of the grounds for refusal of recognition to be present. This should include the ground that he had not had the opportunity to arrange for his defence where the judgment was given in default of appearance in a civil action linked to criminal proceedings. It should also include the grounds which could be invoked on the basis of an agreement between the Member State addressed and a third State concluded pursuant to Article 59 of the 1968 Brussels Convention.

(30) A party challenging the enforcement of a judgment given in another Member State should, to the extent possible and in accordance with the legal system of the Member State addressed, be able to invoke, in the same procedure, in addition to the grounds for refusal provided for in this Regulation, the grounds for refusal available under national law and within the time-limits laid down in that law.

The recognition of a judgment should, however, be refused only if one or more of the grounds for refusal provided for in this Regulation are present.

(1) OJ L 157, 30.4.2004, p. 45.
(2) OJ L 174, 27.6.2001, p. 1.

(31) Pending a challenge to the enforcement of a judgment, it should be possible for the courts in the Member State addressed, during the entire proceedings relating to such a challenge, including any appeal, to allow the enforcement to proceed subject to a limitation of the enforcement or to the provision of security.

(32) In order to inform the person against whom enforcement is sought of the enforcement of a judgment given in another Member State, the certificate established under this Regulation, if necessary accompanied by the judgment, should be served on that person in reasonable time before the first enforcement measure. In this context, the first enforcement measure should mean the first enforcement measure after such service.

(33) Where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation. However, provisional, including protective, measures which were ordered by such a court without the defendant being summoned to appear should not be recognised and enforced under this Regulation unless the judgment containing the measure is served on the defendant prior to enforcement. This should not preclude the recognition and enforcement of such measures under national law. Where provisional, including protective, measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures should be confined, under this Regulation, to the territory of that Member State.

(34) Continuity between the 1968 Brussels Convention, Regulation (EC) No 44/2001 and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation by the Court of Justice of the European Union of the 1968 Brussels Convention and of the Regulations replacing it.

(35) Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.

(36) Without prejudice to the obligations of the Member States under the Treaties, this Regulation should not affect the application of bilateral conventions and agreements between a third State and a Member State concluded before the date of entry into force of Regulation (EC) No 44/2001 which concern matters governed by this Regulation.

(37) In order to ensure that the certificates to be used in connection with the recognition or enforcement of judgments, authentic instruments and court settlements under this Regulation are kept up-to-date, the power to adopt acts in accordance with Article 290 of the TFEU should be delegated to the Commission in respect of amendments to Annexes I and II to this Regulation. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

(38) This Regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to an effective remedy and to a fair trial guaranteed in Article 47 of the Charter.

(39) Since the objective of this Regulation cannot be sufficiently achieved by the Member States and can be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

(40) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the TEU and to the then Treaty establishing the European Community, took part in the adoption and application of Regulation (EC) No 44/2001. In accordance with Article 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of this Regulation.

(41) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application, without prejudice to the possibility for Denmark of applying the amendments to Regulation (EC) No 44/2001 pursuant to Article 3 of the Agreement of 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [1],

[1] OJ L 299, 16.11.2005, p. 62.

HAVE ADOPTED THIS REGULATION:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

2. This Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration;

(e) maintenance obligations arising from a family relationship, parentage, marriage or affinity;

(f) wills and succession, including maintenance obligations arising by reason of death.

Article 2

For the purposes of this Regulation:

(a) 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court.

For the purposes of Chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement;

(b) 'court settlement' means a settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings;

(c) 'authentic instrument' means a document which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which:

(i) relates to the signature and the content of the instrument; and

(ii) has been established by a public authority or other authority empowered for that purpose;

(d) 'Member State of origin' means the Member State in which, as the case may be, the judgment has been given, the court settlement has been approved or concluded, or the authentic instrument has been formally drawn up or registered;

(e) 'Member State addressed' means the Member State in which the recognition of the judgment is invoked or in which the enforcement of the judgment, the court settlement or the authentic instrument is sought;

(f) 'court of origin' means the court which has given the judgment the recognition of which is invoked or the enforcement of which is sought.

Article 3

For the purposes of this Regulation, 'court' includes the following authorities to the extent that they have jurisdiction in matters falling within the scope of this Regulation:

(a) in Hungary, in summary proceedings concerning orders to pay (fizetési meghagyásos eljárás), the notary (közjegyző);

(b) in Sweden, in summary proceedings concerning orders to pay (betalningsföreläggande) and assistance (handräckning), the Enforcement Authority (Kronofogdemyndigheten).

CHAPTER II

JURISDICTION

SECTION 1

General provisions

Article 4

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.

Article 5

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

2. In particular, the rules of national jurisdiction of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1) shall not be applicable as against the persons referred to in paragraph 1.

Article 6

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State.

SECTION 2

Special jurisdiction

Article 7

A person domiciled in a Member State may be sued in another Member State:

(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

— in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;

(c) if point (b) does not apply then point (a) applies;

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

(3) as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

(4) as regards a civil claim for the recovery, based on ownership, of a cultural object as defined in point 1 of Article 1 of Directive 93/7/EEC initiated by the person claiming the right to recover such an object, in the courts for the place where the cultural object is situated at the time when the court is seised;

(5) as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place where the branch, agency or other establishment is situated;

(6) as regards a dispute brought against a settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;

(7) as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

(a) has been arrested to secure such payment; or

(b) could have been so arrested, but bail or other security has been given;

provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

Article 8

A person domiciled in a Member State may also be sued:

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

(2) as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

(3) on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

(4) in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights *in rem* in immovable property, in the court of the Member State in which the property is situated.

Article 9

Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability.

SECTION 3

Jurisdiction in matters relating to insurance

Article 10

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7.

Article 11

1. An insurer domiciled in a Member State may be sued:

(a) in the courts of the Member State in which he is domiciled;

(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the claimant is domiciled; or

(c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.

2. An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 12

In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 13

1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.

2. Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

Article 14

1. Without prejudice to Article 13(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 15

The provisions of this Section may be departed from only by an agreement:

(1) which is entered into after the dispute has arisen;

(2) which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section;

(3) which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that Member State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that Member State;

(4) which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State; or

(5) which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 16.

Article 16

The following are the risks referred to in point 5 of Article 15:

(1) any loss of or damage to:

(a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;

(b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;

(2) any liability, other than for bodily injury to passengers or loss of or damage to their baggage:

(a) arising out of the use or operation of ships, installations or aircraft as referred to in point 1(a) in so far as, in respect of the latter, the law of the Member State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;

(b) for loss or damage caused by goods in transit as described in point 1(b);

(3) any financial loss connected with the use or operation of ships, installations or aircraft as referred to in point 1(a), in particular loss of freight or charter-hire;

(4) any risk or interest connected with any of those referred to in points 1 to 3;

(5) notwithstanding points 1 to 4, all 'large risks' as defined in Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) [1].

SECTION 4

Jurisdiction over consumer contracts

Article 17

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:

(a) it is a contract for the sale of goods on instalment credit terms;

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 18

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

[1] OJ L 335, 17.12.2009, p. 1.

Article 19

The provisions of this Section may be departed from only by an agreement:

(1) which is entered into after the dispute has arisen;

(2) which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

(3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

SECTION 5

Jurisdiction over individual contracts of employment

Article 20

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, in the case of proceedings brought against an employer, point 1 of Article 8.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 21

1. An employer domiciled in a Member State may be sued:

(a) in the courts of the Member State in which he is domiciled; or

(b) in another Member State:

(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or

(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.

Article 22

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 23

The provisions of this Section may be departed from only by an agreement:

(1) which is entered into after the dispute has arisen; or

(2) which allows the employee to bring proceedings in courts other than those indicated in this Section.

SECTION 6

Exclusive jurisdiction

Article 24

The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

(1) in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;

(2) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

(3) in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;

(4) in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction in proceedings concerned with the registration or validity of any European patent granted for that Member State;

(5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

SECTION 7

Prorogation of jurisdiction

Article 25

1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing;

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.

4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.

5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

Article 26

1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.

2. In matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.

SECTION 8

Examination as to jurisdiction and admissibility

Article 27

Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 24, it shall declare of its own motion that it has no jurisdiction.

Article 28

1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

3. Article 19 of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) [1] shall apply instead of paragraph 2 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

4. Where Regulation (EC) No 1393/2007 is not applicable, Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

SECTION 9

Lis pendens — related actions

Article 29

1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 30

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Article 31

1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

4. Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.

Article 32

1. For the purposes of this Section, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

The authority responsible for service referred to in point (b) shall be the first authority receiving the documents to be served.

[1] OJ L 324, 10.12.2007, p. 79.

2. The court, or the authority responsible for service, referred to in paragraph 1, shall note, respectively, the date of the lodging of the document instituting the proceedings or the equivalent document, or the date of receipt of the documents to be served.

Article 33

1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if:

(a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and

(b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

2. The court of the Member State may continue the proceedings at any time if:

(a) the proceedings in the court of the third State are themselves stayed or discontinued;

(b) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or

(c) the continuation of the proceedings is required for the proper administration of justice.

3. The court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.

4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.

Article 34

1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:

(a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

(b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and

(c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

2. The court of the Member State may continue the proceedings at any time if:

(a) it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments;

(b) the proceedings in the court of the third State are themselves stayed or discontinued;

(c) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or

(d) the continuation of the proceedings is required for the proper administration of justice.

3. The court of the Member State may dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.

4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.

SECTION 10

Provisional, including protective, measures

Article 35

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.

CHAPTER III

RECOGNITION AND ENFORCEMENT

SECTION 1

Recognition

Article 36

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party may, in accordance with the procedure provided for in Subsection 2 of Section 3, apply for a decision that there are no grounds for refusal of recognition as referred to in Article 45.

3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of refusal of recognition, that court shall have jurisdiction over that question.

Article 37

1. A party who wishes to invoke in a Member State a judgment given in another Member State shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) the certificate issued pursuant to Article 53.

2. The court or authority before which a judgment given in another Member State is invoked may, where necessary, require the party invoking it to provide, in accordance with Article 57, a translation or a transliteration of the contents of the certificate referred to in point (b) of paragraph 1. The court or authority may require the party to provide a translation of the judgment instead of a translation of the contents of the certificate if it is unable to proceed without such a translation.

Article 38

The court or authority before which a judgment given in another Member State is invoked may suspend the proceedings, in whole or in part, if:

(a) the judgment is challenged in the Member State of origin; or

(b) an application has been submitted for a decision that there are no grounds for refusal of recognition as referred to in Article 45 or for a decision that the recognition is to be refused on the basis of one of those grounds.

SECTION 2

Enforcement

Article 39

A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.

Article 40

An enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State addressed.

Article 41

1. Subject to the provisions of this Section, the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed. A judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed.

2. Notwithstanding paragraph 1, the grounds for refusal or of suspension of enforcement under the law of the Member State addressed shall apply in so far as they are not incompatible with the grounds referred to in Article 45.

3. The party seeking the enforcement of a judgment given in another Member State shall not be required to have a postal address in the Member State addressed. Nor shall that party be required to have an authorised representative in the Member State addressed unless such a representative is mandatory irrespective of the nationality or the domicile of the parties.

Article 42

1. For the purposes of enforcement in a Member State of a judgment given in another Member State, the applicant shall provide the competent enforcement authority with:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) the certificate issued pursuant to Article 53, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest.

2. For the purposes of enforcement in a Member State of a judgment given in another Member State ordering a provisional, including a protective, measure, the applicant shall provide the competent enforcement authority with:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

(b) the certificate issued pursuant to Article 53, containing a description of the measure and certifying that:

(i) the court has jurisdiction as to the substance of the matter;

(ii) the judgment is enforceable in the Member State of origin; and

(c) where the measure was ordered without the defendant being summoned to appear, proof of service of the judgment.

3. The competent enforcement authority may, where necessary, require the applicant to provide, in accordance with Article 57, a translation or a transliteration of the contents of the certificate.

4. The competent enforcement authority may require the applicant to provide a translation of the judgment only if it is unable to proceed without such a translation.

Article 43

1. Where enforcement is sought of a judgment given in another Member State, the certificate issued pursuant to Article 53 shall be served on the person against whom the enforcement is sought prior to the first enforcement measure. The certificate shall be accompanied by the judgment, if not already served on that person.

2. Where the person against whom enforcement is sought is domiciled in a Member State other than the Member State of origin, he may request a translation of the judgment in order to contest the enforcement if the judgment is not written in or accompanied by a translation into either of the following languages:

(a) a language which he understands; or

(b) the official language of the Member State in which he is domiciled or, where there are several official languages in that Member State, the official language or one of the official languages of the place where he is domiciled.

Where a translation of the judgment is requested under the first subparagraph, no measures of enforcement may be taken other than protective measures until that translation has been provided to the person against whom enforcement is sought.

This paragraph shall not apply if the judgment has already been served on the person against whom enforcement is sought in one of the languages referred to in the first subparagraph or is accompanied by a translation into one of those languages.

3. This Article shall not apply to the enforcement of a protective measure in a judgment or where the person seeking enforcement proceeds to protective measures in accordance with Article 40.

Article 44

1. In the event of an application for refusal of enforcement of a judgment pursuant to Subsection 2 of Section 3, the court in the Member State addressed may, on the application of the person against whom enforcement is sought:

(a) limit the enforcement proceedings to protective measures;

(b) make enforcement conditional on the provision of such security as it shall determine; or

(c) suspend, either wholly or in part, the enforcement proceedings.

2. The competent authority in the Member State addressed shall, on the application of the person against whom enforcement is sought, suspend the enforcement proceedings where the enforceability of the judgment is suspended in the Member State of origin.

SECTION 3

Refusal of recognition and enforcement

Subsection 1

Refusal of recognition

Article 45

1. On the application of any interested party, the recognition of a judgment shall be refused:

(a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed;

(b) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

(c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;

(d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; or

(e) if the judgment conflicts with:

(i) Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or

(ii) Section 6 of Chapter II.

2. In its examination of the grounds of jurisdiction referred to in point (e) of paragraph 1, the court to which the application was submitted shall be bound by the findings of fact on which the court of origin based its jurisdiction.

3. Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction.

4. The application for refusal of recognition shall be made in accordance with the procedures provided for in Subsection 2 and, where appropriate, Section 4.

Subsection 2

Refusal of enforcement

Article 46

On the application of the person against whom enforcement is sought, the enforcement of a judgment shall be refused where one of the grounds referred to in Article 45 is found to exist.

Article 47

1. The application for refusal of enforcement shall be submitted to the court which the Member State concerned has communicated to the Commission pursuant to point (a) of Article 75 as the court to which the application is to be submitted.

2. The procedure for refusal of enforcement shall, in so far as it is not covered by this Regulation, be governed by the law of the Member State addressed.

3. The applicant shall provide the court with a copy of the judgment and, where necessary, a translation or transliteration of it.

The court may dispense with the production of the documents referred to in the first subparagraph if it already possesses them or if it considers it unreasonable to require the applicant to provide them. In the latter case, the court may require the other party to provide those documents.

4. The party seeking the refusal of enforcement of a judgment given in another Member State shall not be required to have a postal address in the Member State addressed. Nor shall that party be required to have an authorised representative in the Member State addressed unless such a representative is mandatory irrespective of the nationality or the domicile of the parties.

Article 48

The court shall decide on the application for refusal of enforcement without delay.

Article 49

1. The decision on the application for refusal of enforcement may be appealed against by either party.

2. The appeal is to be lodged with the court which the Member State concerned has communicated to the Commission pursuant to point (b) of Article 75 as the court with which such an appeal is to be lodged.

Article 50

The decision given on the appeal may only be contested by an appeal where the courts with which any further appeal is to be lodged have been communicated by the Member State concerned to the Commission pursuant to point (c) of Article 75.

Article 51

1. The court to which an application for refusal of enforcement is submitted or the court which hears an appeal lodged under Article 49 or Article 50 may stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired. In the latter case, the court may specify the time within which such an appeal is to be lodged.

2. Where the judgment was given in Ireland, Cyprus or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

SECTION 4

Common provisions

Article 52

Under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed.

Article 53

The court of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex I.

Article 54

1. If a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests.

Such adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin.

2. Any party may challenge the adaptation of the measure or order before a court.

3. If necessary, the party invoking the judgment or seeking its enforcement may be required to provide a translation or a transliteration of the judgment.

Article 55

A judgment given in a Member State which orders a payment by way of a penalty shall be enforceable in the Member State addressed only if the amount of the payment has been finally determined by the court of origin.

Article 56

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for the enforcement of a judgment given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State addressed.

Article 57

1. When a translation or a transliteration is required under this Regulation, such translation or transliteration shall be into the official language of the Member State concerned or, where there are several official languages in that Member State, into the official language or one of the official languages of court proceedings of the place where a judgment given in another Member State is invoked or an application is made, in accordance with the law of that Member State.

2. For the purposes of the forms referred to in Articles 53 and 60, translations or transliterations may also be into any other official language or languages of the institutions of the Union that the Member State concerned has indicated it can accept.

3. Any translation made under this Regulation shall be done by a person qualified to do translations in one of the Member States.

CHAPTER IV

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Article 58

1. An authentic instrument which is enforceable in the Member State of origin shall be enforceable in the other Member States without any declaration of enforceability being required. Enforcement of the authentic instrument may be refused only if such enforcement is manifestly contrary to public policy (ordre public) in the Member State addressed.

The provisions of Section 2, Subsection 2 of Section 3, and Section 4 of Chapter III shall apply as appropriate to authentic instruments.

2. The authentic instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin.

Article 59

A court settlement which is enforceable in the Member State of origin shall be enforced in the other Member States under the same conditions as authentic instruments.

Article 60

The competent authority or court of the Member State of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex II containing a summary of the enforceable obligation recorded in the authentic instrument or of the agreement between the parties recorded in the court settlement.

CHAPTER V

GENERAL PROVISIONS

Article 61

No legalisation or other similar formality shall be required for documents issued in a Member State in the context of this Regulation.

Article 62

1. In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.

2. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.

Article 63

1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat;

(b) central administration; or

(c) principal place of business.

2. For the purposes of Ireland, Cyprus and the United Kingdom, 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.

3. In order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.

Article 64

Without prejudice to any more favourable provisions of national laws, persons domiciled in a Member State who are being prosecuted in the criminal courts of another Member State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person. However, the court seised of the matter may order appearance in person; in the case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his defence need not be recognised or enforced in the other Member States.

Article 65

1. The jurisdiction specified in point 2 of Article 8 and Article 13 in actions on a warranty or guarantee or in any other third-party proceedings may be resorted to in the Member States included in the list established by the Commission pursuant to point (b) of Article 76(1) and Article 76(2) only in so far as permitted under national law. A person domiciled in another Member State may be invited to join the proceedings before the courts of those Member States pursuant to the rules on third-party notice referred to in that list.

2. Judgments given in a Member State by virtue of point 2 of Article 8 or Article 13 shall be recognised and enforced in accordance with Chapter III in any other Member State. Any effects which judgments given in the Member States included in the list referred to in paragraph 1 may have, in accordance with the law of those Member States, on third parties by application of paragraph 1 shall be recognised in all Member States.

3. The Member States included in the list referred to in paragraph 1 shall, within the framework of the European Judicial Network in civil and commercial matters established by Council Decision 2001/470/EC [1] ('the European Judicial Network') provide information on how to determine, in accordance with their national law, the effects of the judgments referred to in the second sentence of paragraph 2.

CHAPTER VI

TRANSITIONAL PROVISIONS

Article 66

1. This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015.

2. Notwithstanding Article 80, Regulation (EC) No 44/2001 shall continue to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation.

CHAPTER VII

RELATIONSHIP WITH OTHER INSTRUMENTS

Article 67

This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national legislation harmonised pursuant to such instruments.

[1] OJ L 174, 27.6.2001, p. 25.

Article 68

1. This Regulation shall, as between the Member States, supersede the 1968 Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU.

2. In so far as this Regulation replaces the provisions of the 1968 Brussels Convention between the Member States, any reference to that Convention shall be understood as a reference to this Regulation.

Article 69

Subject to Articles 70 and 71, this Regulation shall, as between the Member States, supersede the conventions that cover the same matters as those to which this Regulation applies. In particular, the conventions included in the list established by the Commission pursuant to point (c) of Article 76(1) and Article 76(2) shall be superseded.

Article 70

1. The conventions referred to in Article 69 shall continue to have effect in relation to matters to which this Regulation does not apply.

2. They shall continue to have effect in respect of judgments given, authentic instruments formally drawn up or registered and court settlements approved or concluded before the date of entry into force of Regulation (EC) No 44/2001.

Article 71

1. This Regulation shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

2. With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner:

(a) this Regulation shall not prevent a court of a Member State which is party to a convention on a particular matter from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not party to that convention. The court hearing the action shall, in any event, apply Article 28 of this Regulation;

(b) judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this Regulation.

Where a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Regulation on recognition and enforcement of judgments may be applied.

Article 72

This Regulation shall not affect agreements by which Member States, prior to the entry into force of Regulation (EC) No 44/2001, undertook pursuant to Article 59 of the 1968 Brussels Convention not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third State where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention.

Article 73

1. This Regulation shall not affect the application of the 2007 Lugano Convention.

2. This Regulation shall not affect the application of the 1958 New York Convention.

3. This Regulation shall not affect the application of bilateral conventions and agreements between a third State and a Member State concluded before the date of entry into force of Regulation (EC) No 44/2001 which concern matters governed by this Regulation.

CHAPTER VIII

FINAL PROVISIONS

Article 74

The Member States shall provide, within the framework of the European Judicial Network and with a view to making the information available to the public, a description of national rules and procedures concerning enforcement, including authorities competent for enforcement, and information on any limitations on enforcement, in particular debtor protection rules and limitation or prescription periods.

The Member States shall keep this information permanently updated.

Article 75

By 10 January 2014, the Member States shall communicate to the Commission:

(a) the courts to which the application for refusal of enforcement is to be submitted pursuant to Article 47(1);

(b) the courts with which an appeal against the decision on the application for refusal of enforcement is to be lodged pursuant to Article 49(2);

(c) the courts with which any further appeal is to be lodged pursuant to Article 50; and

(d) the languages accepted for translations of the forms as referred to in Article 57(2).

The Commission shall make the information publicly available through any appropriate means, in particular through the European Judicial Network.

Article 76

1. The Member States shall notify the Commission of:

(a) the rules of jurisdiction referred to in Articles 5(2) and 6(2);

(b) the rules on third-party notice referred to in Article 65; and

(c) the conventions referred to in Article 69.

2. The Commission shall, on the basis of the notifications by the Member States referred to in paragraph 1, establish the corresponding lists.

3. The Member States shall notify the Commission of any subsequent amendments required to be made to those lists. The Commission shall amend those lists accordingly.

4. The Commission shall publish the lists and any subsequent amendments made to them in the *Official Journal of the European Union*.

5. The Commission shall make all information notified pursuant to paragraphs 1 and 3 publicly available through any other appropriate means, in particular through the European Judicial Network.

Article 77

The Commission shall be empowered to adopt delegated acts in accordance with Article 78 concerning the amendment of Annexes I and II.

Article 78

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Article 77 shall be conferred on the Commission for an indeterminate period of time from 9 January 2013.

3. The delegation of power referred to in Article 77 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 77 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

Article 79

By 11 January 2022 the Commission shall present a report to the European Parliament, to the Council and to the European Economic and Social Committee on the application of this Regulation. That report shall include an evaluation of the possible need for a further extension of the rules on jurisdiction to defendants not domiciled in a Member State, taking into account the operation of this Regulation and possible developments at international level. Where appropriate, the report shall be accompanied by a proposal for amendment of this Regulation.

Article 80

This Regulation shall repeal Regulation (EC) No 44/2001. References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table set out in Annex III.

Article 81

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 10 January 2015, with the exception of Articles 75 and 76, which shall apply from 10 January 2014.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Strasbourg, 12 December 2012.

For the European Parliament	*For the Council*
The President	*The President*
M. SCHULZ	A. D. MAVROYIANNIS

Appendix II:

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

(**Hague Evidence Convention**)

HCCH
Connecter Protéger Coopérer Depuis 1893
Connecting Protecting Cooperating Since 1893

20. CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS[1]

(Concluded 18 March 1970)

The States signatory to the present Convention,
Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,
Desiring to improve mutual judicial co-operation in civil or commercial matters,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions –

CHAPTER I – LETTERS OF REQUEST

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.
A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.
The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organise the Central Authority in accordance with its own law.
Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify –
a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
b) the names and addresses of the parties to the proceedings and their representatives, if any;
c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
d) the evidence to be obtained or other judicial act to be performed.

---

[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under “Conventions” or under the “Evidence Section”. For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Onzième session (1968)*, Tome IV, *Obtention des preuves* (219 pp.).

Where appropriate, the Letter shall specify, *inter alia* –

e) the names and addresses of the persons to be examined;

f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

g) the documents or other property, real or personal, to be inspected;

h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.
No legalisation or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.
Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorised by Article 33.
A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.
A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.
Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorised in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorisation by the competent authority designated by the declaring State may be required.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.
A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence –

a) under the law of the State of execution; or

b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Article 12

The execution of a Letter of Request may be refused only to the extent that –

a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.
In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.
Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.
The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.
A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if –

a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if –

a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.
If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorised under Articles 15, 16 or 17 to take evidence –

a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III – GENERAL CLAUSES

Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.
Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of

Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.
Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from –

a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;
b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;
c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from –

a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;
b) the provisions of Article 4 with respect to the languages which may be used;
c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;
d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;
e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;
f) the provisions of Article 14 with respect to fees and costs;
g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at The Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 8-16 of the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.
Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.
When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.
A Contracting State shall likewise inform the Ministry, where appropriate, of the following –

a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;
b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;
c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;
d) any withdrawal or modification of the above designations and declarations;
e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.
It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.
The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.
The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.
The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.
At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.
If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.
It may be limited to certain of the territories to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following –
a) the signatures and ratifications referred to in Article 37;
b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;
c) the accessions referred to in Article 39 and the dates on which they take effect;
d) the extensions referred to in Article 40 and the dates on which they take effect;
e) the designations, reservations and declarations referred to in Articles 33 and 35;
f) the denunciations referred to in the third paragraph of Article 41.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 18th day of March, 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.