Recent Legal Developments in the United States

Reporter: Robert Brown

Reflecting the interest of LAWASIA and its members, this submission will review some of the most significant developments in international litigation as seen from the perspective of the United States. It is drawn from the *Year in Review*, an annual publication of the American Bar Association, International Law Section.

I. Foreign Sovereign Immunities Act

Foreign states are presumptively immune from suit, and their property is presumptively immune from attachment and execution, unless an exception in the Foreign Sovereign Immunities Act (FSIA) applies.[1]

A. Expropriation Exception

In *Republic of Germany v. Philipp,* the U.S. Supreme Court held that the FSIA's expropriation exception, which confers U.S. courts with jurisdiction over some expropriations in violation of international law, does not extend to expropriations by a state from its own citizens—specifically, claims of art confiscated by Germany's Nazi government—even if such takings violate other customary international law norms.[2] Writing for a unanimous Court,

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[1] 28 U.S.C. §§ 1602-1605, 1609-1611.

[2]Republic of Ger. v. Philipp, 141 S. Ct. 703, 711 (2021) (citing Republic of Austria v. Altman, 541 U.S. 677, 713 (Breyer, J., concurring)).

Chief Justice Roberts observed that when the FSIA was enacted in 1976, the international law of expropriations incorporated the domestic takings rule, which generally bars claims arising out of a state's taking of the property of its citizens, and that "[t]hese restrictions would be of little consequence if human rights abuses could be packaged as violations of property rights and thereby brought within the expropriation exception."3 The Court's decision in *Philipp* narrows the scope of the FSIA's expropriation exception and is consistent with the approach the U.S. Supreme Court has recently taken in other cases, as under the Alien Tort Statute (ATS),4 involving human rights claims premised on violations of international law.

Notably, the Supreme Court did not reach a second question presented in *Philipp* regarding whether the FSIA displaces common law international comity defenses—an issue more generally addressed by three Courts of Appeal this year, as discussed below. The Court also declined to reach this question in *Hungary v. Simon,* a related case brought by heirs of Holocaust survivors against Hungary, and instead remanded the U.S. Court of Appeals for the District of Columbia Circuit's decision in that case for further proceedings consistent with *Phi/W.5*

In another decision that also narrows the scope of the expropriation exception, the U.S. Court of Appeals for the Second Circuit in *Beierwaltes v. Federal Office of Culture of the Swiss Confederation* held that routine law enforcement seizures do not fall under the expropriation exception unless the seizure has no rational relation to a legitimate public purpose.6 Accordingly, the Second Circuit affirmed the lower court's decision dismissing claims based on seizure of art by Swiss authorities.?

B. COMMON LAW DEFENSES

The U.S. Court of Appeals for the Second and Ninth Circuits joined the D.C. Circuit in holding that FSIA displaces common law sovereign immunity defenses .8 In *United States v. Turkiye Halk Bankasi A.S. (Halkhank),* the Second Circuit held, *inter adia,* that the FSIA categorically precludes common-law sovereign immunity defenses.° The Ninth Circuit similarly rejected common-law immunity in *WhatsApp Inc. v. NSO Group Technologies.*

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3. *Id.* at 714.
4. *See* Nestle USA, Inc. v. Doe, 141 S.Ct. 1931, 1937 (2021).
5. Republic of Hung. v. Simon, 141 S. Ct. 691, 691 (2021) (per curiam).
6. Beierwaltes v. Fed. Off. of Culture of the Swiss Confederation, 999 F.3d 808, 821 (2d
7. Cir. 2021).
8. *Id.* at 828.
9. *See Philipp v. Fed. Republic of Ger.,* 894 F.3d 406, 416 (D.C. Cir. 2018) (finding the
10. FSIA "leaves no room for a common-law exhaustion doctrine based on the very same considerations of comity"), *vacated & remanded on other grounds,* 141 S. Ct. 703, 716 (2021); *see also* Usoyan v. Republic of Turk., 6 F.4th 31, 49 (D.C. Cir. 2021) (comity did not require dismissing action against Turkey for injuries to protesters outside Turkish embassy in Washington, D.C.).
11. United States v. Turkiye Halk Bankasi A.S. (Halkbank), 16 F.4th 336, 350-51 (2d Cir. 2021).

Ltd, finding that "the FSIA's text, purpose, and history demonstrate that Congress displaced common-law sovereign immunity doctrine as it relates to entities."[10]

C. JURISDICTION OVER CRIMINAL CASES

In *Halkbank,* the Second Circuit reviewed FSIA's application to criminal proceedings]] and affirmed the denial of a Turkish state-owned bank's motion to dismiss an indictment charging violations of U.S. sanctions against Iran.12 The Second Circuit avoided the issue of whether the FSIA, which confers immunity to sovereigns from civil actions (subject to its enumerated exceptions), also confers immunity in criminal cases.13 The court held that even assuming the FSIA conferred immunity in a criminal action, the complained-of conduct—fraudulent transactions intended to launder approximately $20 billion in Iranian oil and gas proceeds—•would fall within the FSIA's commercial activity exception since sanctions violations or money laundering were a *"type* of activity" that "literally any" bank could do.14 It is notable that both the Second Circuit and the D.C. Circuit have now expressly declined to reach the legal question of whether FSIA sovereign immunity (and exceptions thereto) applies to criminal cases at all. Is

II. International Service of Process

Several U.S. courts addressed vexing applications of Article 10 of the Hague Service Convention,t6 which, among other things, preserves "the freedom to send judicial documents, by postal channels, directly to persons abroad . [p]rovided the State of destination does not object."17 An important question, on which the appellate courts have not given guidance, is whether this provision allows for service via email, and if so, whether it does so in states that have objected.

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10. WhatsApp Inc. v. NSO Grp. Technologies Ltd., 17 F.4th 930, 933 (9th Cir. 2021).
11. *Halkbank,* 16 F.4th at 346-48.
12. United States v. Halkbank, No. 15cr867 (RBM), 2020 WL 5849512, at *4 (S.D.N.Y. Oct. 1, 2020).
13. *Halkbank,* 16 F.4th at 350-51.
14. *Id.* at 348-50 (emphasis original).
15. *See In re Grand July Subpoena, 912* F.3d 623, 634 (D.C. Cir. 2019) (affirming criminal contempt order against foreign state-owned entity for failure to comply with grand jury subpoena).
16. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, done at The Hague, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention].
17. *Id.* at art. 10, § a.

In *Amazon.com, Inc. v. Robojap Technologies. LLC,* Amazon sought leave of court to serve process by email on two defendants who resided in India.tH The company had also . attempted service via the Hague Service Convention's central authority mechanism,19 but it noted that it had taken more than a year for the Indian central authority to serve process on another defendant earlier in the case.20 Amazon "argue[d] that because the Hague Convention says nothing express about email service and India only objected to service by postal channels, the Convention does not prohibit service by email."21

The court recognized the many recent cases—all at the district court level—that had permitted service by email in similar circumstances.22 It nonetheless held that Amazon's argument "gets things backwards," [23] finding that since the list of methods of service the Hague Service Convention authorizes or permits is exclusive, 24 any form of service "not expressly permitted by the Convention"25 is "impermissible and prohibited."26 The court stated that "Ma conclude otherwise would mean that the Hague Service Convention's forms of service are not exclusive, contrary to the U.S. Supreme Court's clear pronouncement on this subject."27 Although many courts have given weight to states' failure to object expressly to service by email, the *Amazon* court took the view that "[b]ecause the Convention does not expressly permit email service, India had no reason or need to affirmatively reject it for it to be considered prohibited."2H

The holding in *Amazon* is contrary to the holding in a line of cases, beginning with *Gaming v. Malhotra,* on similar facts in which the state of destination had objected under Article 10(a) and did not provide an effective central authority mechanism for one reason or another, but in which courts

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18. Amazon.com Inc. v. Robojap Technologies. LLC, No. C20-694 MJP, 2021 WL 4893426, at *3 (W.D. Wash. Oct. 20, 2021); *see afro* FED. R. Civ. P. 4(f)(3) (court may authorize service "by other means not prohibited by international agreement").
19. *See Amazon.cont Inc.,* 2021 WL 4893426, at *3; *see also* Hague Service Convention art. 5.
20. *See* Amazon.com Inc., 2021 WL 4893426, at *2.
21. *Id.* at *6.
22. *See id. at* *7 (citing Amazon.com Inc. v. Sirowl Tech., No. C20-1217 RSL-JRC, 2020 WL 7122846, at *3 (W.D. Wash. Dec. 4, 2020); Will Co. v. Kam Keung Fung, No. C20-5666 RSL, 2020 WL 6709712, at *2 (W.D. Wash. Nov. 16, 2020); *In* re *LDK Solar Sec. Litig.,* No. C07-05182 WHA, 2008 VVL 2415186, at *3 (N.D. Cal. June 12, 2008); Williams—Sonoma Inc. v. Friendfinder Inc., No. C06-06572 JSW, 2007 WL 1140639, at *2 (N.D. Cal. Apr. 17, 2007); Shinde v. Nithyananda Found., No. EDCV1300363-JGB-SPX, 2014 WL 12597121, at *6-7 (C.D. Cal. Aug. 25, 2014); Fed. Trade Comm'n. v. Pecon Software, Ltd., No. 12 Civ. 7186, 2013 WL 4016272, at *5 (S.D.N.Y. Aug. 7, 2013); DisputeSuite.com, LLC v. Credit Umbrella Inc., No. CV146340, 2015 WL 12911757, at *4 (C.D. Cal. June 2, 2015).)
23. *Id.* at *6.
24. *Id.* at *6-7.
25. *Id.* at *6.
26. *Id.* at *6.
27. *Id.*
28. *Id. at* *7.

nonetheless allowed service by email.29 Until there is progress on delays—and in some cases overt state intransigence—in the operation of central authorities,30 U.S. courts will continue to face pressure from plaintiffs anxious to effect service of process to authorize service by email, notwithstanding the clear limitations of the Hague Service Convention.

III. Personal Jurisdiction

In *Bristol-Myers Squibb Co. v. Superior Court of California,* the U.S. Supreme Court held that, as a matter of constitutional due process, a plaintiff's suit seeking to maintain specific personal jurisdiction against an out-of-state defendant in state court must arise out of or relate to the defendant's contacts with the forum.31 The Court emphasized the need for a "connection between the forum and the specific claims at issue"32 and found none where the plaintiffs were not residents of the forum nor claim to have been injured there.33 Though the Court expressly disapproved of California's former "sliding scale" approach,34 it declined to clearly describe the nature of the causal connection required to properly assert specific jurisdiction.

In *Ford Motor Co. v. Montana Eighth Judicial District Court,* the Supreme Court again reviewed the relatedness requirement of *Bristol-Myers* but in the context of injuries to forum residents occurring within the forum state.35 The Court first rejected Ford's argument that the connection required by *Bristol-Myers* to support specific jurisdiction *was* causal in nature, finding that a "causation only approach" had no support in the Court's relatedness requirement jurisprudence.36 Instead, the Court held that the exercise of specific jurisdiction over Ford, a non-resident manufacturer, in a product liability action was appropriate where the manufacturer conducted systematic and substantial business in the forums even though it did not design, manufacture, or sell the specific products to the plaintiffs there.i7 Significantly, the Court held that the "arise out of *or relate to"* language in specific jurisdiction precedent is disjunctive in nature.3s While the former

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29. Gurung v. Malhotra, 279 F.R.D. 215, 220 (S.D.N.Y. 2011).
30. *See, e.g.,* PERMANENT BUREAU OF TI-IF HAGUE CONFERENCE ON PRIVATE INTERNATIONAL. LAM SYNOPSIS OF RESPONSES TO THE QUESTIONNAIRE OF Nov. 2013 RELATING TO TI IE HAGUE CONVENTION OF 15 Nov. 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS 19-20 (2014), https ://assets.h cch met/docs/66Ib8dec-a0c8-45a1-9671-0144798e2597.pdf (statistics on time to execution); *Gurung,* 279 F.R.D at 219 (noting foreign sate refusal to execute letter of request on sovereignty grounds); Missouri *ex reL* Schmitt v. China, No. 1:20-cv-0099-SNLJ, 2021 WL 89733, at *'7* (ED. Mo. May 11, 2021) (noting foreign state refusal to execute letter of request on sovereignty grounds).
31. Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780 (2017).
32. *Id.* at 1781.
33. *Id.* at 1781-82.
34. *Id.* at 1781 ("Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims.").
35. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1026 (2021).
36. *Id.*

is principally concerned with causation, the latter "contemplates that some relationships will support jurisdiction without a causal showing." [39] Therefore, Ford's numerous related contacts which systematically served a market for its vehicles in the forums,40 including the same type of vehicles as those at issue, made the relationship between the plaintiff's claims and Ford's forum-contacts "close enough to support specific jurisdiction."40 The Court emphasized that the plaintiff's claims were a direct result of injuries received within the forums by forum residents.42 As a result, the Court was unpersuaded by Ford's attempted analogy to *Bristol-Myer,* where the plaintiffs were not injured in nor were residents of the forum state 13

In the context of collective actions under the Fair Labor Standards Act (FLSA), by contrast, *Bristol-Myers* recently has proven to be a powerful shield for corporate defendants. In *Canaday v. Anthem Cos., Inc.,* the Sixth Circuit upheld the dismissal of non-resident opt-in plaintiffs in a FLSA collective action where the non-resident plaintiffs claims were not connected to the defendant's activities in the forum.44 The claims in *Canaday* were brought in Tennessee by a forum resident-employee against a company both incorporated and headquartered in Indiana.-" The court analogized *Bristol-Myers* to demonstrate that only opt-in plaintiffs from Tennessee could show the required connection between their FLSA claims and the forum.46 The fact that the claims of the resident and non-resident plaintiffs were similar was held to be an insufficient basis for exercising specific jurisdiction.47

The U.S. Court of Appeals for the Eighth Circuit issued a nearly identical opinion in *Valiant v. CJS Solutions Group, LLC.4k* As in *Canaday,* the Eighth Circuit upheld the dismissal of FLSA claims brought by non-resident plaintiffs in Minnesota against a Florida-based company for actions taken

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37. *Id.* at 1026-27.
38. *Id.* at 1026 (emphasis original).
39. *Id.*
40. *Id.* at 1028 [B]y making it easier to own a Ford [in the forums], they encourage Montanans and Minnesotans to become lifelong Ford drivers.").
41. *Id.* at 1032.
42. Id. at 1030-31.
43. *Id.*
44. Canaday v. Anthem Cos., Inc., 9 F.4th 392, 397 (6th Cir. 2021).
45. *Id.* at 407-09.
46. *Id.* at 397 ("Anthem did not employ the nonresident plaintiffs in Tennessee. Anthem did not pay the nonresident plaintiffs in Tennessee. Nor *did* Anthem shortchange them overtime compensation in Tennessee. Taken together, the claims before us look just like the claims in *Bristol-Myra.")*
47. 1d. (citing *Bristol—Myers Squibb Co., 137* S. Ct, at 1781).
48. Vallone v. CJS Sol. Group, LLC, 9 F.4th 861,865 (8th Cir. 2021).

exclusively in Florida.49 The court similarly relied on *Bristol-Myers* to conclude that specific jurisdiction was improper where there was "no in-state injury and no injury to residents of the forum State."50

Taken together, these cases suggest that the presence of forum residents who have been injured within the forum state is a potentially significant factor in how rigorously the court will apply the relatedness standard.

IV. The Act of State Doctrine

The act of state doctrine is a prudential limitation on the exercise of judicial review, requiring U.S. courts to refrain from judging the validity of acts of a foreign sovereign taken within its own territory.51

In *Republic of Germany v. Philipp,* the U.S. Supreme Court examined the expropriation exception of the Second Hickenlooper Amendment to the Foreign Assistance Act of 1964.[2] The Amendment was adopted to allow adjudication of claims of expropriation of American-owned property abroad by prohibiting U.S. courts from applying the act of state doctrine to takings "in violation of . . . international law."5, The Court held that the expropriation exception applies only to expropriations that violate international law. At the time of the Amendment's adoption, a sovereign's expropriation of its own nationals' property was not considered internationally wrongful. Thus, the expropriation exception did not apply to claims by the heirs of German Jewish art dealers compelled to sell property during the Nazi regime, which were therefore barred by the act of state doctrine."

In *Celestin v. Martelly,* the U.S. District Court for the Eastern District of New York corrected and superseded a prior ruling (examined in last year's *Year in Review)* which had held that the act of state doctrine prevented review of Haitian presidential orders that allegedly enabled a price-fixing scheme on money transfers, food remittances, and international calls made to and from Haiti." The court previously had reasoned, in part, that the doctrine applied because the sovereign actions all took place in Haiti.56 In its updated opinion, the court recognized that even when the sovereign actions are taken within the state's territory, the act of state doctrine would not apply to expropriations of property located abroad.57 The court nonetheless granted defendants' motion to dismiss on act of state grounds after finding that the

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49. *Id.* at 865-66.
50. *Id.* at 866 (quoting *Bristol-Myers Squibb Co.,* 137 S. Ct. at 1782).
51. *See, e.g.,* WS Kirkpatrick & Co. Inc. v. Envtl. Tectonics Corp. Int'l, 493 U.S. 400, 406 (1990); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964).
52. *Republic of Ger.,* 141 S. Ct. 703, 711 (2021).
53. *Id.*
54. *Id.*
55. Celestin v. Martelly, 450 F. Supp. 3d 264, 271-72 (E.D.N.Y. 2021).
56. *Celestin,* 450 F. Supp. 3d at 269.
57. *Celestin v. Martelly,* 524 F. Supp. 3d 43, 51 (E.D.N.Y. 2021).

prospective tax on future transfers did not effect a seizure of property held in the United States.s8

In *Caballero v. Fuerzas Armadas Revolucionarias de Columbia* [sic], the U.S. District Court for the Western District of New York held that the act of state doctrine applied to a motion to substitute counsel for Petroleos de Venezuela (PDVSA), the national oil company of Venezuela.s9 The dispute arose because of competing appointments of counsel by the regime of Nicolas Maduro and the interim government of Juan Guaid6, which was officially recognized by the United States in 2019. The Maduro regime argued that hiring counsel is a private commercial activity rather than a foreign governmental act and therefore is outside the scope of act of state. However, the court took an expansive view of "public" or "official" acts and held that the act of state doctrine broadly applies to "acts regarding the management of Venezuela's state-owned corporations."60 The court further reasoned that the act of state doctrine applies to official acts taken by recognized sovereigns, and since the United States had recognized Guaidols Interim Government, only the Ad Hoc Board appointed by Guaid6 could retain counsel on behalf of PDVSA.61 Accordingly, the court approved the motion to substitute counsel with counsel appointed by the Guaido government.

In *Oppenheimer v. ACL LLC,* the U.S. District Court for the Western District of North Carolina concluded that the act of *state* doctrine did not apply to the alleged infringement of a photographer's copyright in a photo of the Cherokee Casino Resort, which the Cherokee Nation allegedly provided to defendants for marketing an event.62 In reasoning that the doctrine did not apply because the connection to a sovereign action was too attenuated, the court implicitly recognized the applicability of the act of state doctrine to American Indian nations—an approach inconsistent with previous federal court decisions.63

V. International Discovery

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

In 2021, the U.S. Supreme Court was expected to answer the question whether 28 U.S.C. § 1782 can be used to obtain discovery for use in private international arbitration proceedings. However, the case before it,

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9 Caballero v. Fuerzas Armadas Revolucionarias de Columbia, 2021 WL 1884110, at *7 (W.D.N.Y. May 11, 2021).

0 *Id.*

1 *Id.* at *7-8.

2 Oppenheimer v. ACL LLC, 504 F. Supp. 3d 503, 508 (W.D.N.C. 2020).

3 *See* United States v. Funmaker, 10 F.3d 1327, 1333 (7th Cir. 1993) ("The act of states [sic] doctrine simply does not apply to Indian tribes.").

Servotronics, Inc. v. Rolls-Royce, settled before oral argument and was dismissed.[64]

The question has divided the U.S. Courts of Appeals and remains relevant.65 In *Luxsbare, Ltd. v. ZF Automotive US, Inc.,* the U.S. District Court for the Eastern District of Michigan upheld a magistrate judge's order authorizing discovery requested under 28 U.S.C. § 1782 for use in a German Arbitration Institute (DIS) proceeding.66 The discovery target has appealed this decision to the U.S. Court of Appeals for the Sixth Circuit, which is likely to affirm, consistent with its decision in *Abdul Latif lamed Transportation Co. Ltd. v. Fed&* Corp., [67] in which it became the first Court of Appeals to hold that Section 1782 applies to private international arbitrations. [68]

In *In re Fund for the Protection of Investor Rights in Foreign States v. AlixPartners,* the Second Circuit addressed a related question: whether 28 U.S.C. § 1782 can be used to obtain discovery in investor-state arbitrations.°° Applying a "functional approach" based on four factors it identified in *In re Application of Hanwei Guo,* the Second Circuit found that an arbitral panel constituted pursuant to a bilateral investment treaty has sufficient "affiliation with the foreign States" and "closely resemble[s] the sort of arbitral body" that would qualify as a "foreign or international tribunal," such that 28 U.S.C. § 1782 applies.70 In so holding, the Second Circuit joined other courts which have concluded that a tribunal constituted pursuant to an investment treaty (as opposed to a commercial contract) is a

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64. ServOtronics, Inc. v. Rolls-Royce PLC, 142 S. Ct. 54, 54 (2021).

65. The Second, Fifth, and Seventh Circuits have held that Section 1782 is not permitted in private international arbitrations, and the Fourth and Sixth Circuits have ruled that Section 1782 is available in private international arbitrations. *Compare In re* Application of Hanwei Guo, 965 F.3d 96, 106 (2d Cir. 2020); Servotronics, Inc. v. Rolls-Royce, 975 F.3d 689, 694-95 (7th Cir. 2020); Republic of KaZakhstan v. Biedennann Intl, 168 F.3d 880, 883 (5th Cir. 1999); Abdul Latif Jameel Transportation Co. Ltd. v. FedEx Corp., 939 F.3d 710, 730-31 (6th Cir. 2019); Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 216 (4th Cir. 2020). Decisions on this issue are pending before the Third and Ninth Circuits. *See In re* Application of EWE Gasspeicher GmbH, No. 20-1830 (3d Cir. 2021); HRC-Hainan Holding Co., LLC, et al. v. Yihan Hu, No. 20-15371 (9th Cir. 2021).

66. Luxshare, LTD. v. ZF Automotive US, Inc., 547 F.Supp. 3d 682, 694.(E.D.Mich. July 1, 2021).

67. *Abdul Latifjameel Transportation Co. Ltd.,* 939 F.3d at 730-31.

68. In a rare procedural move, ZF Automotive filed a petition for *certiorari* before judgment. Petition for a Writ of Certiorari Before Judgment at 1, ZF Automotive US, Inc. v. Luxshare, Ltd., 142 S.Ct. 416 (2021) (No. 21-2736). The U.S. Supreme Court signaled a potential interest in the case by granting a stay of discovery. *See* ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 416, 416 (2021).

69. *In re* Fund for the Protection of Investor Rights in Foreign States v. AlixPartners, 5 F.4th 216, 220 (2d Cir. 2021), *petition for writ of certiorari granted,* AlixPartners, LLP v, The Fund for Prot. of Investors' Rts. in Foreign States, 142 S. Ct. 638, 638 (2021).

70. *Id.* at In re Fund for the Protection of Investor Rights in Foreign States, 5 F.4th 216, at 225-27.

"foreign or international tribunal" under 28 U.S.C. § 1782,71 although this view is not universa1.72

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

U.S. courts frequently compel the production of documents located abroad for use in U.S. proceedings using the multi-factor comity analysis set forth in *Societe Nationale Industrielle Airospastiale v. U.S. District Court for the Southern District of Iowa.7*[3] In the three years since the European Union's General Data Protection Regulation (GDPR) has taken effect, U.S. courts have continued to apply this test and find that GDPR's privacy constraints do not outweigh U.S. interests in discovery. In a recent case, *AnywhcreCommerce, I,w. v. Ingenico,* the court made particular note of the fact that the parties had agreed to a protective order limiting the dissemination of confidential information, which the court found to be "[c]onsistent with the [privacy] objectives of the GDPR."74

VI. Extraterritorial Application of United States Law

A. ALIEN TORT STATUTE

In *Nestle USA, Inc. v. Doe,* the Supreme Court held that allegations of corporate oversight in the United States are insufficient to overcome the extraterritoriality presumption and establish domestic application of the Alien Tort Statute (ATS), 28 U.S.C. § 1350.75 Plaintiffs were former child slaves in the Ivory Coast who contended that the defendants, U.S. food producers, aided human rights abuses on the cocoa plantations where they worked. The Ninth Circuit allowed the suit to proceed, reasoning that plaintiffs' aiding and abetting allegations "had pleaded a domestic

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71. "District courts ... have regularly found that arbitrations conducted pursuant to Bilateral Investment Treaties . . . qualify as international tribunals." Islamic Republic of Pakistan v. Arnold & Porter Kaye Scholer LLP, No. 18-103 (RMC), 2019 WL 1559433, at *7 (D.D.C. Apr. 10, 2019). *See, e.g., In re* Mesa Power Grp., LLC, No. 2:11-mc-280-ES, 2012 WL 6060941, at *"5,* *7 (D.NJ. Nov. 20, 2012); Chevron Corp. v. Shefftz, 754 F. Supp. 2d 254, 260 (D. Mass. 2010).

72. *See* Brief for United States as Amicus Curiae Supporting Respondents, Servotronics, Inc. v. Rolls-Royce PLC, 2021 WL 2714670, (2021) (No. 20-794), at 28-33 (2021) (arguing that 28 U.S.C. § 1782 should not extend to investor-state arbitration).

73. Societe Nationale Industrielle Aerospastiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 544 n.28 (1987); *see* Arcelik A.S. v. E.I. DuPont de Nemours and Co., 856 F. App'x 392, 397-400 (3d Cir. 2021) (applying five factors and finding that letters of request to Germany was not overly burdensome).

74. *See* AnywhereCommerce, Inc. v. Ingenico, No. 19-cv-1145701T, 2021 WL 2256273, at *3 (D. Mass. June 3, 2021).

75. Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1931-32 (2021). The petition for certiorari in *Nestle* was profiled in last year's Year in Review. *See* Aaron Marr Page et *al., International Litigation,* 55

application of the ATS . because the 'financing decisions . .. originated' in the United States."76

The Supreme Court reversed. The Court held that plaintiff's complaint "would impermissibly seek extraterritorial application of the ATS because "[n]early all the conduct that they say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast."77 As the Court explained, "allegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS."78

B. ENVIRONMENTAL LAW

In *City of New York v. Chevron Corp.,* New York City sued five multinational oil companies for damages caused by greenhouse gas emissions.° Addressing whether the presumption against extraterritoriality applies to federal common law claims, such as nuisance, the U.S. Court of Appeals for the Second Circuit observed that, although the presumption is a tool of statutory interpretation, the principle is also premised on "broad concerns over separation of powers."88 The Second Circuit therefore affirmed the dismissal of the city's claims, because to hold otherwise would "affect the price and production of fossil fuels," "bypass the various diplomatic channels," "sow confusion and needlessly complicate the nation's foreign policy," and "clearly infring[e] on the prerogatives of the political branches."81

C. ANTITRUST

The U.S. Court of Appeals for the Second Circuit in *In re Vitamin C Antitrust Litigation* considered whether U.S. purchasers of vitamin C could sue sellers in the People's Republic of China (PRC) for price-fixing in violation of U.S. antitrust law.'" The Second Circuit previously held, deferring to the PRC government's construction of its law, that the sellers were required by law to fix the price and quantity of exports.8; The U.S. Supreme Court vacated, instructing that a foreign state's interpretation of its

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76. Nestle USA, Inc. .141 S. Ct. at 1936 (quoting Doe v. Nestle, S. A., 906 F.3d 1120, 1124-26 (9th Cir. 2018)).
77. *Nestli,* 141 S. Ct. at 1937.
78. *Id.* Justice Thomas, joined by Justices Gorsuch and Kavanaugh, would have also held that the ATS does not create a private right of action for violations of international law beyond certain narrow historical torts previously recognized by the Court. *Id.* at 1937-40 (Thomas, J., concurring); *see also id.* at 1942-43 (Gorsuch, J., concurring).
79. City of New York v. Chevron Corp., 993 F.3d 85, 85-86 (2d Cir. 2021).
80. *Id.* at 102.
81. *Id.* at 103.
82. *In re Vitamin C Antitrust Litigation,* 8 F.4th 136, 140 (2d Cir. 2021).
83. *In re Vitamin C Antitrust Litig.,* 837 F.3d 175, 179 (2d Cir. 2016), *vacated and remanded rub nom.* Animal Sci. Prod., Inc. v. Hebei Welcome Pharmacy Co., 138 S. Ct. 1865, 1868 (2018).

own law is accorded only "respectful consideration," not deference.e4 On remand, the Second Circuit again affirmed dismissal of the antitrust claims.°° The panel majority determined that PRC law required the challenged price-fixing and, therefore, the sellers in the PRC could not have complied with both PRC law and U.S. antitrust law.° The majority then held that the principles of international comity prohibited the extraterritorial application of U.S. antitrust law.B[7] Although the PRC's export controls foreseeably harmed American commerce, other comity factors—including that the anticompetitive conduct took place in the PRC, that the United States would expect a PRC court to recognize the same defense, and that the U.S. judiciary is ill-equipped to assess the foreign relations at stake—counseled against extraterritoriali ty.B[8]

D. COMMUNICATIONS DECENCY ACT

In *Gonzalez v. Google,* the U.S. Court of Appeals for the Ninth Circuit considered whether family members of victims of terrorist attacks could sue Twitter, Facebook, or Google under the Anti-Terrorism Act, 18 U.S.C. § 2333, for providing material support to ISIS.R9 Gonzalez alleged that ISIS terrorists used YouTube, for example, to recruit members, plan attacks, and issue threats.90 The U.S. District Court for the Northern District of California ruled that Section 230 of the Communications Decency Act, 47 U.S.C. § 230, largely immunized Google and the other companies from liability arising out of third-party material on their platforms."" The Ninth Circuit held, however, that Section 230 need not overcome the presumption against extraterritoriality because "the relevant conduct occurs where immunity is imposed . . . *i.e.,* at the situs of this litigation," not where the claims arose.92

VII. Recognition and Enforcement of Foreign Judgments

In U.S. courts, the U.N. Convention on the Recognition and Enforcement of Foreign Arbitration Awards (the Convention) governs the recognition and enforcement of most foreign arbitral awards.93 State law,

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84. *Animal Sci. Prod., Inc.,* 138 S. Ct. 1865, 1869 (2018).
85. *In Re: Vitamin C Antitrust Litig.,* 8 F.4th 136, 163 (2d Cir. 2021).
86. *Id.* at 148-59.
87. *Id.* at 160-63.
88. *Id.*
89. Gonzalez v. Google LLC, 2 F.4th 871, 880-82 (9th Cir. 2021).
90. *Id.* at 881.
91. Gonzalez v. Google, Inc., 335 F. Supp. 3d 1156, 1170 (N.D. Cal. 2018), *aff'd sub nom. Gonzalez,* 2 F.4th at 913 (9th Cir. 2021).
92. *Id.* at 888.
93. U.N. Convention on the Recognition and Enforcement of Foreign Arbitration Awards, 21 U.S.T. 2517, June 10, 1959, 9 U.S.C. §§ 201-08 (The Inter-American Convention on International Commercial Arbitration, implemented in Chapter 2 of the Convention, governs

however, governs the recognition and enforcement of foreign court judgments.

A. FOREIGN ARBITRAL AWARDS

In *Beijing Shougang Mining Inv. Co. v. Mongolia,* the U.S. Court of Appeals for the Second Circuit considered a challenge to an International Centre for Settlement of Investment Disputes award in which the New York-seated tribunal found it lacked jurisdiction to reach the merits of the claim.94 Shougang filed a petition to vacate the jurisdictional award in the U.S. District Court for the Southern District of New York, arguing the parties had not consented to submit questions of arbitrability to the tribunal and the tribunal's award on jurisdiction therefore exceeded its powers.95 The district court denied Shougang's petition and granted Mongolia's cross-motion to confirm the jurisdictional award.96

The Second Circuit affirmed the district court's finding that "the question of arbitrability was clearly and unmistakably put before the arbitral tribunal"97 due to the parties' agreement "that the tribunal will hear jurisdictional issues in the first phase of the arbitration," which was memorialized in a procedural order issued by the tribunal:Ai In reaching this conclusion, the Second Circuit expanded on prior judicial decisions that used evidence other than arbitration agreements narrowly defined, such as separate agreements between parties during arbitration99 or contractual incorporation of institutional arbitral rules,100 to identify intent to arbitrate arbitrability and explicitly noted that such evidence need not be limited to "arbitration agreements" alone.1o1

In *CLMS Management Services Ltd. Partnership v. Anzwins Brokerage of Georgia, LLC,* the U.S. Court of Appeals for the Ninth Circuit held that state laws subject to the McCarran-Ferguson Act, which provides that state insurance laws preempt conflicting federal laws, could not bar the enforcement of arbitration agreements under the Convention.102 The Ninth Circuit found that Article II, Section 3 of the Convention is self-executing

the recognition and enforcement of awards if a majority of the parties to an arbitration agreement are citizens of states that have ratified it.).

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94. Beijing Shougang Mining Inv. Co. Ltd. v. Mongolia, 11 F.4th 144, 154-56 (2d Cir. 2021).
95. *Id.* at 151.
96. Beijing Shougang Mining Inv. Co. Ltd. v. Mongolia, 415 F. Supp. 3d 363, 370 (S.D.N.Y. 2019), *aff'd, Beijing Shougang Mining inv. Co.,* 11 F.4th at 163.
97. *Beijing Shougang Mining 171V. Co. Ltd.,* 415 F. Supp. 3d at 370, *aft d, Beijing Shougang Mining Inv. Co., 11* F.4th at 163.
98. *Beijing Shougang Mining Inv. Co., 11* F.4th at 154-55.
99. *Id. at* 155 (citing Schneider v. Kingdom of Thailand, 688 F.3d 68, 71 (2d Cir. 2012)).
100. *Id.* at 155-56 (citing Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 395 (2d Cir. 2011).
101. *Id. at* 155.
102. CLMS Mgmt. Servs. Ltd. P'ship v. Amwins Brokerage of Georgia, LLC, 8 F,4th 1007, 1009 (9th Cir. 2021).

and therefore not a federal law subject to the ACt.103 As a result, parties can be compelled to arbitrate certain insurance disputes subject to arbitration agreements despite state laws prohibiting such arbitration.104

B. FOREIGN COURT JUDGMENTS

In *Banca di Credito Cooperativo v. Small,* the U.S. Court of Appeals for the Second Circuit addressed the enforceability of foreign bankruptcy orders under New York law.305 An Italian bankruptcy court had issued two orders recognizing Banca's claims as a creditor in Italian bankruptcy proceedings, and Banca filed suit in the U.S. District Court for the Southern District of New York to recognize and enforce the two orders.106 The district court denied recognition and enforcement because the two orders did not meet the requirement under New York law that the foreign judgments were "final, conclusive and enforceable where rendered."107

The Second Circuit affirmed.1013 Examining Italian law, which governed whether the orders were "enforceable where rendered," the Second Circuit found that Italian bankruptcy orders are unenforceable outside of the bankruptcy framework, unless an Italian commercial court converts the orders into generally enforceable orders)"" Since Banca had obtained no such conversion, the orders were enforceable only within the Italian bankruptcy proceedings."" While Banca argued that the phrase "enforceable where rendered" merely required that the orders were enforceable by the specific court that issued them, the Second Circuit rejected this argument because it would require U.S. courts to enforce foreign orders that could not be generally enforced in the issuing jurisdiction. H

New York has since amended its law on the recognition of foreign judgments,112 and it remains to be seen whether *Banca di Credito Cooperativo* will persist despite the amendments.

VIII. Forum Non Conveniens

A guiding principle of the forum non conveniens doctrine is that a "plaintiff's choice of forum should rarely be disturbed."113 This year, courts

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103. *Id.* at 1015, 1017.
104. *Id.* at 1017-18.
105. Banca Di Credito Cooperativo di Civitanova Marche e Montecosaro Soc. Cooperativa v. Small, 852 F. App'x 15, 17-19 (2d Cir. 2021).
106. *Id. at* 16.
107. *Id.* at 17.
108. *Id.* at 22.
109. *Id.* at 18; *see also* N.Y. C.P.L.R. § 5302.
110. *Banca Di Credito Cooperativo,* 852 F. App'x at 18.
111. *Id. at* 17.
112. *See* N.Y. C.P.L.R. § 5302(a)(2).
113. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

have discussed how this doctrine might be impacted by the virtual platform, the timeliness of a motion to dismiss for forum non conveniens, and whether the doctrine applies to antitrust actions.

COVID- 19 propelled the legal field to utilize technology in extraordinary ways.114 A Canadian court provided a particularly striking discussion and illustration of what forum non conveniens analyses might come to look like in world of routine virtual proceedings. In *Kore Meals LLC v. Freshii,* the Ontario Superior Court asked broadly whether "[ijn the age of Zoom, is any forum more non conveniens than another? Has a venerable doctrine now gone the way of the VCR player or the action in assumpsit?"i1[5] The dispute was filed in Ontario, but there was an arbitration agreement requiring arbitration in Chicago under the American Arbitration Association (AAA). 116 The court first noted that in deciding whether to stay an arbitral proceeding, a court must undertake a forum non conveniens analysis to determine if the arbitral tribunal is unfair of impractical. "[7] But, in setting aside the parties' arguments regarding what was required under the arbitration agreement versus what would be most convenient, the court simply asked where the AAA was located." When neither party could identify the location of the AAA, but both were certain that submissions would be made online arid the hearings would likely be virtual, the judge began to analyze whether litigation in this virtual setting could truly be "inconvenient."119 The court determined there is no location "any more or less convenient than the other" because "a digital-based adjudicative system with a videoconference hearing is as distant and as nearby as the World Wide Web."120 In enforcing the arbitration agreement, the judge took a strong stance against forum non conveniens by stating that judges "can now say farewell to what was *until recently a* familiar doctrinal presence in the courthouse."121

This year, the U.S. Court of Appeals for the Eighth Circuit addressed, for the first time, the timeliness requirement of a motion to dismiss for forum non conveniens.122 The court explained that the forum non conveniens analysis involves looking at both private and public-interest factors, but it is unclear where the issue of timeliness falls.123 The Fifth Circuit considers

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114. The United States' first virtual jury trials were tried in 2020. *See* Nate Raymond, *Texas Tries a Pandemic First: s4 Jury Trial by Zoom,* REUTERS (May 18, 2020), https://www.reuters.com/ articicius-hcalth-coronavirus-courts-texas/texas-tries-a-pandemic-first-a-jury-trial-by-zoom-idUSKBN22U1FE.
115. Kore Meals LLC v. Freshii Dev. LLC (2021), 2021 ONSC 2896, ¶ I (Can. Ont. Super. Ct.).
116. *Id.*
117. TELUS Communications Inc. v. Wellman, [2019] S.C.R. 144, Q 64 (Can.).
118. *Kore Meals,* 2021 ONSC 2896, €11 28.
119. *Id.* TT 28-29.
120. *Id.* 111 25, 29.
121. *Id,* I 31 (emphasis added).
122. Eitate of IEH v. CKE Holdings, Inc., 995 F.3d 659, 663 (8th Cir. 2021).
123. *Id.* at 663-64.

timeliness as a private-interest factor,124 while the Third Circuit categorizes it as a factor for both private- and public-interest,125 and, uniquely, the Sixth Circuit analyzes timeliness as an independent hurdle.126 But, declining to categorize timeliness, the Eighth Circuit simply found that timeliness is a relevant inquiry in the forum non conveniens analysis and that filing eighteen months after the complaint "belies the claim that the forum is truly inconvenient."127

The Sixth Circuit this year also clarified its stance on whether the forum non conveniens analysis applies to antitrust actions. [128] The plaintiff, a shell company set up primarily for bringing suit within the United States, claimed that antitrust actions could *never* be dismissed for forum non conveniens. 129 The plaintiff relied on a case from the Fifth Circuit, *Industrial Development Corp. v. Mitsui a' Go.,* which held that because of a broad venue provision in the Clayton Act,lio forum non conveniens would not apply to antitrust actions.' n The Sixth Circuit criticized the Fifth Circuit precedent and affirmed the dismissal for forum non conveniens.132 The Sixth Circuit noted the Fifth Circuit's opinion that the Clayton Act actually "says nothing at all about case transfers" and "simply adds to the number of courts *empowered* to hear a plaintiff's claim."133 Agreeing with the First and Second Circuit,134 the Sixth Circuit confirmed that an antitrust action can be dismissed for forum non conveniens.135

IX. Parallel Proceedings

A. ANTI-SUIT INJUNCTIONS

In *Alfandary v. Nikko Asset Management,* the U.S. District Court for the Southern District of New York denied a motion for an anti-suit injunction (ASI), finding that the plaintiffs had not shown that resolution of the case

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124. *Id.* at 663-64 (citing Trivelloni-Lorenzi v. Pan Am. World Airways, 821 F.2d 1147, 1165 (5th Cir. 1987), *vacated on other grounds,* 490 U.S. 1032 (1989)).

125. *Id. at* 664 (citing Lony v. E.I. Du Pont de Nemours & Co., 935 F.2d 604, 613 (3d Cir. 1991)).

126. *Id.* at 664 (citing Rustal Trading US, Inc. v. Makki, 17 F. App'x 331, 337-38 (6th Cir. 2001)).

127. *Id.* at 665.

128. Prevent USA Corp. v. Volkswagen AG, 17 F.4th 653, 660 (6th Cir. 2021).

129. Brief for Plaintiffs-Appellants at 16, Prevent USA Corp. v. Volkswagen AG, 17 F.4th 653 (No. 21-1379).

130. 15 U.S.C. § 22.

131. Indus. Inv. Dcv. Corp. v. Mitsui & Co., 671 F.2d 876, 890-91 (5th Cir. 1982).

132. *Prevent USA Corp., 17* F.4th at 661.

133. *Id.* at 662 (citing Howe v. Goldcorp Inv., Ltd., 946 F.2d 944, 949 (1st Cir. 1991)).

134. Cap. Currency Exch., N.V. v. Nat'l Westminster Bank PLC, 155 F.3d 603, 606 (2d Cir. 1998).

135. *Id.* at 612.

would be "dispositive" of the foreign proceeding.136 The case was brought by former executives of a Japanese investment advisory company who alleged that the company had intentionally undervalued their stock acquisition rights.117 The Japanese company subsequently sued one of the executives in the Tokyo District Court, arguing that the former executive had breached a covenant in his separation agreement.138 In response, the executives sought an ASI in the U.S. district court to enjoin the Japanese company from pursuing its Tokyo action.139

Applying the rest developed by the Second Circuit in *China Trade Development Corp. v. M.V. Choong liong,Pm* the district court observed that "two threshold requirements [must be] met" to grant an ASI: "first, the parties must be the same in both proceedings, and second, resolution of the case before the enjoining court must be dispositive of the action to be enjoined."141 Applying the second prong of this test, the district court noted that the Second Circuit "has not articulated precisely what it means for an action to be dispositive," but that the relevant initial inquiry was "whether the 'substance' of the claims is the same in the two actions."I42 The court noted that, while "related," the claims in the U.S. and Japanese proceedings did "not share the same 'substance' because they concerned different contracts," and would therefore "turn on different issues, arguments, and evidence."143 Finding that the plaintiffs had otherwise failed to satisfy their burden of demonstrating that resolution of the case would be dispositive of the Tokyo action, the U.S. district court denied the motion for an ASI.144

B. INTERNATIONAL ABSTENTION

Under *Colorado River Water Conservation District v. United States,* a federal court may stay or dismiss a lawsuit in light of parallel proceedings only if the court first determines that the actions in question are indeed parallel, and then that there are exceptional circumstances such that abstention would promote "wise judicial administration.nm To promote international comity, U.S. courts may abstain in light of parallel foreign proceedings after

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136. Alfandary v. Nikko Asset Mgmt., 2021 U.S. Dist. LEXIS 77701, at *13 (S.D.N.Y. Apr. 22, 2021).
137. *Id.* at *2-3.
138. *Id.* at *3-4.
139. *Id.* at *6-8.
140. *Id.* at *7 (citing China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F. 2d 33, 36 (2d Cir. 1987)).
141. *Id.* (quoting Eastman Kodak Co. v. Asia Optical Co., 118 F. Supp. 3d 581, 586 (S.D.N.Y. 2015)).
142. *Id.* at *10 (citing Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111, 121 (2d Cir. 2007)).
143. *Id.* at *10-11.
144. *Id.* at *10-11, *13.
145. Colorado River Water Conservation District v. United States, 424 U.S. 800, 818 (1976).

considering each government's interests and the adequacy of the foreign forum. 196

In *HEK, LLC v. Akstrom Imports-,* the U.S. District Court for the District of Minnesota refused to apply the doctrine of international abstention where the party invoking that doctrine demonstrated apparent bad faith in filing a parallel foreign proceeding.) s[7] Akstrom, a Canadian distributor, contracted with HEK, a Minnesota-based company (doing business as Kinneberg Management Group (KMG)), for KMG to serve as Akstrom's sales representative with certain U.S. retailers.[14] Akstrorn agreed to pay KMG a portion of its sales as a commission.149 After KMG performed the contract for several weeks, Akstrom refused to pay the accrued commissions and instead sought to terminate the contract.150 After KMG issued a demand letter, Akstrom asked KMG to "keep thfel matter in abeyance," and indicated that it wanted "to discuss settling the dispute."' [51] Instead, Akstrom filed an action against HEK/KMG in Canada seeking a declaratory judgment that the contract was null and void.152 HEK/KMG then sued Akstrom in Minnesota, seeking damages for contractual breaches, statutory violations, and unjust enrichment.' [53]

In response, Akstrom moved to dismiss or stay the Minnesota case pending resolution of the Canadian action.ts4 The U.S. district court observed that "[d]eferring to a foreign proceeding is a form of abstention," and that "staying or dismissing a case based on international comity is . . . a rule of practice, convenience, and expediency rather than of law, and does not have the force of an imperative or obligation."iss The relevant test, the court noted, involved consideration of "multiple factors," namely: "the similarity of parties and issues, the adequacy of the alternative forum, the convenience of the parties, the promotion of judicial efficiency, the possibility of prejudice, and the temporal sequence of filing."[156] The court, however, found that consideration of those factors was unnecessary given "Akstrom's apparent bad faith" being the "reason there is a parallel suit in Canada in the first place."157 Applying the international comity doctrine, the court observed, "would permit Akstrom—who convinced KMG to hold its

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146. *See, e.g.,* Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227,1237-38 (11th Cir. 2004).

147. HEK, LLC v. Akstrom Imps., Inc., No. 20-CV-1881 (NEB/LIB), 2021 U.S. Dist. LEXIS 32384, at *7 (D. Minn. Feb. 22, 2021).

148. *Id. at *1-2.*

149. *Id.* at *1-2.

150. *Id.* at *2.

151. *Id. at *8-10.*

152. *Id. at* *2-3.

153. *Id.* at *3.

154. *Id. at* *3.

155. *Id. at* *7-8.

156. *Id.* at *8.

157. *Id.*

claim in abeyance while it filed suit in Quebec—to benefit from its deception and manipulation."158

158. Id. at 9-10.