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### Recent Developments in International Litigation, 57 Tort Trial & Ins. Prac. L.J. 411 (2022)

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## RECENT DEVELOPMENTS IN INTERNATIONAL LITIGATION

*Mark E. Wojcik*

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This article surveys selected developments in international civil litigation during 2021.

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## I. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunity Act (FSIA)<sup>1</sup> provides the sole basis for asserting jurisdiction over foreign nations in United States courts.<sup>2</sup> The FSIA grants foreign nations, their political subdivisions, and their agencies and instrumentalities “immunity from suit in the United States (called jurisdictional immunity) and grants their property immunity from attachment and execution in satisfaction of judgments.”<sup>3</sup> The FSIA “establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state.”<sup>4</sup>

“Under the FSIA, a foreign state is immune from the jurisdiction of [state and federal courts in the United States] unless one of several enumerated exceptions to immunity applies.”<sup>5</sup> If a lawsuit falls within one of the enumerated exceptions, “the FSIA provides subject-matter jurisdiction in federal district courts.”<sup>6</sup> These statutory exceptions to foreign sovereign immunity include, for example, an exception for when a foreign entity is engaged in a “commercial activity carried on in in the United States by the foreign state” or “an act performed in the United States in connection with a commercial activity of the foreign state elsewhere,” and the lawsuit relates directly to that commercial activity.<sup>7</sup> The FSIA also allows courts to exercise jurisdiction over a foreign state if it “waived its immunity either explicitly or by implication.”<sup>8</sup> Another exception to the FSIA allows suits against state sponsors of terrorism.<sup>9</sup>

In 2021, the U.S. Supreme Court issued a unanimous decision in *Federal Republic of Germany v. Philipp*.<sup>10</sup> The case considered “whether a country’s alleged taking of property from its own nationals” falls with the FSIA’s exception denying immunity in any case “in which rights in property taken in violation of international law are in issue.”<sup>11</sup>

1. 28 U.S.C. §§ 1602–1611.

2. *Jenner v. Arab Bank PLC*, 138 S. Ct. 1386, 1426 (2018); *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *Rukoro v. Federal Republic of Germany*, 976 F.3d 218, 223 (2d Cir. 2020).

3. *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 829 (2018).

4. *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1127 (9th Cir. 2012) (quoting *Republic of Argentina v. Weltover*, 504 U.S. 607, 610 (1992)).

5. *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1053 (2019).

6. *Republic of Sudan*, 139 S. Ct. at 1053.

7. 28 U.S.C. § 1608(a)(2).

8. 28 U.S.C. § 1605(a)(1). “A foreign state explicitly waives its sovereign immunity in a treaty or contract only if it ‘clearly and unambiguously’ agrees to suit.” *Ivaneko v. Yanukovich*, 995 F.3d. 232, 239 (D.C. Cir. 2021).

9. *See, e.g., Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1607 (2020) (awarding approximately \$10.2 billion in punitive and compensatory damages against the Republic of Sudan for its support of al Qaeda in the 1988 bombings of the U.S. embassies in Kenya and Tanzania).

10. 141 S. Ct. 703 (2021).

11. *Id.* at 707–08; 28 U.S.C. § 1605(a)(3).

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The *Philipp* case involved several dozen medieval relics and devotional objects known as the Welfenschatz.<sup>12</sup> Heirs of the prior owners of the relics argued that their case fell within the exception for “property taken in violation of international law” because a coerced sale of the relics under the Nazi regime was “an act of genocide, and genocide is a violation of international human rights law.”<sup>13</sup> Germany argued that the exception did not apply “because the relevant international law is the international law of property—not the law of genocide—and under the international law of property a foreign sovereign’s taking of its own nationals’ property remains a domestic affair.”<sup>14</sup>

The Supreme Court sided with the arguments for Germany. The Court held that the exception for “rights in property taken in violation of international law” referred to violations of the international law of expropriation, applicable to takings of property from nationals of other countries but not to takings from its own nationals.<sup>15</sup> The Court remanded the case for the district court to consider an alternative argument that the sale of the Welfenschatz was not subject to the domestic takings rule “because the consortium members were not German nationals at the time of the transaction.”<sup>16</sup>

## II. INTERNATIONAL ORGANIZATIONS IMMUNITIES ACT

“The International Organizations Immunities Act [(IOIA)] of 1945 grants international organizations such as the World Bank and the World Health Organization the ‘same immunity from suit . . . as is enjoyed by foreign governments.’”<sup>17</sup> When the IOIA was enacted in 1945, however, “foreign governments enjoyed virtual immunity” in the federal and state courts of the United States.<sup>18</sup> Until 1952, the U.S. State Department “generally held the position that foreign states enjoyed absolute immunity from all actions in the United States.”<sup>19</sup> Today, however, sovereign immunity is subject to several exceptions.<sup>20</sup> A foreign state is not immune from jurisdiction today if an exception to immunity applies under the FSIA.<sup>21</sup>

Because the IOIA “grants international organizations the ‘same immunity’ from suit ‘as is enjoyed by foreign governments’ at any given time,”

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12. *Philipp*, 141 S. Ct. at 708.

13. *Id.* at 709.

14. *Id.*

15. *Id.* at 715.

16. *Id.*

17. *Jam v. Int’l Fin. Corp.*, 139 S. Ct. 759, 764 (2019) (quoting 22 U.S.C. § 2808a(b)); see also *Construction and Application of International Organizations Immunities Act*, 22 U.S.C.A. §§ 288 *et seq.* (IOIA), 43 A.L.R. Fed. 2d 659 (2010 & Supp. 2021).

18. *Jam*, 139 S. Ct. at 765.

19. *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 829 (2018).

20. *Jam*, 139 S. Ct. at 765.

21. *Republic of Sudan*, 139 S. Ct. at 1053.

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the U.S. Supreme Court ruled that the FSIA “governs the immunity of international organizations.”<sup>22</sup> Resolving a split between the federal circuit courts, the U.S. Supreme Court stated that the IOIA was “best understood to make international organization immunity and foreign sovereign immunity continuously equivalent”<sup>23</sup> and that “[t]he IOIA should . . . be understood to link the law of international organization immunity to the law of foreign sovereign immunity, so that the one develops in tandem with the other.”<sup>24</sup>

On remand from the Supreme Court in *Jam v. International Finance Corp.*, the U.S. Court of Appeals for the D.C. Circuit dismissed a case alleging that the International Finance Corporation negligently lent funds to a power-generation project in India, damaging the plaintiffs’ environment, health, and livelihoods.<sup>25</sup> The court stated that “[b]ecause the gravamen of appellants’ complaint is injurious activity that occurred in India, the United States’ courts lack subject-matter jurisdiction.”<sup>26</sup>

### III. ALIEN TORT STATUTE

The Alien Tort Statute (ATS) provides federal district courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>27</sup> The ATS was first passed in 1789, and it largely remained unused until plaintiffs began to challenge actions of U.S. multinational corporations that caused harm around the world. These ATS cases alleged corporate responsibility for human rights violations and environmental damage.

Following some successes using the ATS in lower courts, a series of decisions from the U.S. Supreme Court seemed to close off further use of the ATS as a tool to remedy human rights violations and to protect the environment. First, in *Sosa v. Alvarez-Machain*,<sup>28</sup> the Supreme Court held that the ATS should be limited to a modest number of international law violations such as “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”<sup>29</sup> Second, in *Kiobel v. Royal Dutch Petroleum*

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22. *Id.* at 772. The Supreme Court vote was 7–1, with Justice Breyer dissenting. Justice Kavanaugh did not take part in the consideration or decision of the case.

23. *Jam*, 139 S. Ct. at 768.

24. *Id.* at 769.

25. *Jam v. Int’l Fin. Corp.*, 3 F.4th 405, 407 (D.C. Cir. 2021), *cert. denied*, No. 21-995, 2022 WL 1205953 (U.S. Apr. 25, 2022).

26. *Id.* The court stated that U.S. courts “lack[ed] subject-matter jurisdiction over appellants’ complaint because their claims are not based upon activity carried on in the United States, and IFC has not waived its immunity to the claims.” *Id.* at 411.

27. 28 U.S.C. § 1350.

28. 542 U.S. 692 (2004).

29. *Id.* at 724.

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*Co.*,<sup>30</sup> the Supreme Court ruled that the ATS applied only to violations of international law occurring within the United States. And third, in *Jesner v. Arab Bank PLC*,<sup>31</sup> the Supreme Court held that courts should not extend ATS liability to foreign corporations without further congressional authorization. The Supreme Court's decisions in *Sosa*, *Kiobel*, and *Jesner* severely limited the reach of the ATS.

In 2019, a federal circuit court's denial of rehearing *en banc* restored some hope for using the ATS to remedy human violations. The case involved child slaves who were forced to harvest cocoa in the Republic of Côte d'Ivoire (the Ivory Coast).<sup>32</sup> The child slaves "were forced to work on Ivorian cocoa plantations for up to fourteen hours per day six days a week, given only scraps of food to eat, and whipped and beaten by overseers."<sup>33</sup> The children and others "were locked in small rooms at night and not permitted to leave the plantations, knowing that children who tried to escape would be beaten or tortured."<sup>34</sup> The children filed ATS claims against Nestlé USA, Inc., Archer Daniels Midland Company, Cargill Incorporated Company, and Cargill Cocoa, alleging that these corporations aided and abetted child slavery by providing financial and technical assistance to Ivorian farmers.<sup>35</sup> Because the allegations also indicated domestic conduct within the United States, the Ninth Circuit allowed the former child slaves to proceed with their ATS claims against the corporations for aiding and abetting child slavery.<sup>36</sup>

The Supreme Court issued its decision in *Nestlé USA, Inc. v. Doe I* in June 2021,<sup>37</sup> dismissing the case against the corporations given insufficient allegations of activity taking place within the United States.<sup>38</sup> Justice Thomas, writing for the majority, said that "[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."<sup>39</sup> The Ninth Circuit, however, allowed the case to proceed against the corporations because the

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30. 569 U.S. 108 (2012).

31. 138 S. Ct. 1386 (2018).

32. *Doe I v. Nestlé USA, Inc.*, 766 F.3d 1013, 1016 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 798 (2016).

33. *Id.* at 1017.

34. *Id.*

35. *Id.* at 1016. "The financial assistance includes advanced payment for cocoa and spending money for the farmers' personal use. The technical support includes equipment and training in growing techniques, fermentation techniques, farm maintenance, and appropriate labor practices." *Id.* at 1017.

36. *Doe I v. Nestlé, S.A.*, 929 F.3d 623 (9th Cir. 2019).

37. 141 S. Ct. 1931 (2021).

38. Although the decision was 8–1, Justice Gorsuch filed a concurring opinion in which Justice Alito joined in part and Justice Kavanaugh joined in part. Justice Sotomayor filed an opinion concurring in part and concurring in the judgment, in which Justice Breyer and Justice Kagan joined. Justice Alito filed a dissenting opinion.

39. *Nestlé USA, Inc.*, 141 S. Ct. at 1937.

plaintiffs had alleged that “every major operational decision by both companies is made in or approved in the [United States].”<sup>40</sup> The Supreme Court held that “allegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS.”<sup>41</sup> According to Justice Thomas, “[b]ecause making ‘operational decisions’ is an activity common to most corporations, generic allegations of this sort do not draw a sufficient connection between the cause of action respondents seek—aiding and abetting forced labor overseas—and domestic conduct” that would give rise to liability under the ATS.<sup>42</sup>

Although the *Nestlé* decision “was obviously a victory for the two companies, it was not the sweeping one that the business community had sought. The justices left open for another day the question of whether the federal law at the heart of the case allows lawsuits against U.S. corporations at all.”<sup>43</sup>

#### IV. TORTURE VICTIM PROTECTION ACT

The Torture Victim Protection Act (TVPA) provides that “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.”<sup>44</sup>

Unlike the Alien Tort Statute, courts have recognized that the TVPA has extraterritorial application.<sup>45</sup> Some claims for activities outside the United States that might be dismissed under the Alien Tort Statute might be successfully pursued under the TVPA.<sup>46</sup>

#### V. ANTI-TERRORISM ACT

The Anti-Terrorism Act creates a federal cause of action by providing U.S. nationals (or their estates, survivors, or heirs) with a right to sue in federal

40. *Id.*

41. *Id.*

42. *Id.*

43. Amy Howe, *Justices Scuttle Lawsuit Against Nestlé, Cargill for Allegedly Aiding Child Slavery Abroad*, SCOTUSBLOG (June 17, 2021, 1:36 pm), <https://www.scotusblog.com/2021/06/justices-scuttle-lawsuit-against-nestle-cargill-for-allegedly-aiding-child-slavery-abroad>.

44. Torture Victim Protection Act of 1991, Mar. 12, 1992, Pub. L. 102-256, 106 Stat. 73, 28 U.S.C. § 1350 note.

45. See, e.g., *Chowdury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 51 (2d Cir. 2014).

46. See, e.g., *Boniface v. Viliena*, No. 17-cv-10477-ADB (D. Mass. Aug. 31, 2018) (dismissing one count under the ATS while allowing three counts to proceed under the TVPA).

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court and to recover treble damages for injuries caused by an act of international terrorism.<sup>47</sup>

One case decided in 2021 involved efforts to collect the remainder of a \$156 million judgment. In 1996, Hamas terrorists shot a seventeen-year-old American student in the head while he was waiting at a bus stop near Jerusalem.<sup>48</sup> His parents sued several individuals and U.S.-based nonprofit organizations, alleging that they raised and funneled money to Hamas operatives in the West Bank and Gaza, who, in turn, used those funds to carry out the attack on the American student in Israel.<sup>49</sup> The parents thus alleged that the defendants provided material support to a foreign terrorist organization and were civilly liable under the Anti-Terrorism Act.<sup>50</sup> A jury returned an award holding the defendants jointly and severally liable for \$52 million, which the district court tripled to \$156 million under the treble-damages clause of the Anti-Terrorism Act.<sup>51</sup> Facing a \$156 million judgment, the defendant organizations closed up their operations.<sup>52</sup>

In 2017, the parents filed a new lawsuit against two different American entities and three individuals, alleging that these new defendants were alter egos of the defunct organizations and that they were liable for the uncollected remainder of the \$156 million judgment.<sup>53</sup> The federal district court “allowed limited jurisdictional discovery, decided that the new entities and individuals were not alter egos of the defunct nonprofits, and then dismissed the action for lack of subject matter jurisdiction.”<sup>54</sup> The U.S. Court of Appeals for the Seventh Circuit reversed, holding that “the district court’s finding on the alter ego question constituted a merits determination that went beyond a proper jurisdictional inquiry” and that, because the parents new lawsuit arose under the federal Anti-Terrorism Act, the district court had federal question jurisdiction over the new case.<sup>55</sup> The Seventh Circuit also ruled that, even if the parents had not filed a new action, the federal district court would still have had jurisdiction over enforcement proceedings in the original action, using the court’s “ancillary enforcement

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47. The Anti-Terrorism Act provides: “Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.” 18 U.S.C. § 2333(a).

48. *Boim v. American Muslims for Palestine*, 9 F.4th 545, 547 (7th Cir. 2021).

49. *Id.* at 547–48.

50. *Id.* at 548.

51. *Id.*

52. *Id.*

53. *Id.* at 547.

54. *Id.*

55. *Id.*

jurisdiction” to bring subsequent proceedings in the same case, “even against third parties.”<sup>56</sup>

## VI. INTERNATIONAL SERVICE OF PROCESS

Rule 4(f) of the Federal Rules of Civil Procedure governs service of process outside the United States. The rule provides that “an individual may be served outside of the United States by any internationally agreed means of service that is reasonably calculated to give notice, such as those methods authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents.”<sup>57</sup> In 2021, the number of contracting state parties to the Hague Service Convention increased to seventy-nine with the addition of the Republic of the Marshall Islands.<sup>58</sup>

The Hague Service Convention gives litigants an easy and reliable way to serve legal documents in other countries that are parties to the treaty, without having to use consular or diplomatic channels. The website for the Hague Conference on Private International Law contains the contact information for the central and competent authorities in each state that is a party to the Hague Service Convention.<sup>59</sup> The Hague Service Convention also permits service by registered mail if authorized by the law of the sending state and so long as the receiving state has not expressly objected to service by registered mail.<sup>60</sup>

Successful service of process under the Hague Service Convention does not confer personal jurisdiction. A party can still raise lack of personal jurisdiction as a defense.

Despite its effectiveness, most countries are not parties to the Hague Service Convention. In the absence of “an internationally agreed upon method” to serve process upon a party in a foreign jurisdiction (such as the Hague Service Convention), Federal Rule of Civil Procedure 4(f)(2) allows service by “a method calculated to give notice,” such as personally

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56. *Id.* at 560.

57. FED. R. CIV. P. 4(f); Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965 (Hague Service Convention), 20 U.S.T. 361, T.I.A.S. No. 6638.

58. The Hague Service Convention entered into force for the Marshall Islands on February 1, 2021. Hague Conference on Private International Law, Status Table (2022), <https://www.hcch.net/en/instruments/conventions/status-table>.

59. HCCH, Authorities, 14. Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (2022), <https://www.hcch.net/en/instruments/conventions/authorities1/?cid=17>. The website also includes a model form used to transmit the documents being served. <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=65&cid=17>.

60. See *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504 (2017); Mark E. Wojcik, *Have You Been Served? International Service of Process by Registered Mail*, 46:5 INT'L L. NEWS 12 (2018).

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“delivering a copy of the summons and of the complaint.”<sup>61</sup> Of course, service in other countries must not violate local law. In some countries, such personal service of process for a foreign court proceeding may even be a criminal act that violates national sovereignty.<sup>62</sup>

In contracts made between parties located in common law countries, it may be possible for the parties to waive formal service of process. This may not be an option, however, for contracts made with parties in civil law countries.

Even if a lawyer can effect service by means other than those expressly provided for in the Hague Service Convention or another treaty, lawyers should consider how foreign courts will view that service when later trying to enforce a U.S. judgment in that other country. If service is made on a foreign party in violation of local law, it will likely be impossible to enforce a U.S. judgment in that foreign court.<sup>63</sup>

#### VII. FORUM NON CONVENIENS

The judicial doctrine of *forum non conveniens* “allows a court to decline to exercise jurisdiction and dismiss a case where that case would be more appropriately brought in a foreign jurisdiction.”<sup>64</sup> A defendant seeking to have a case dismissed based on *forum non conveniens* must show that (1) there is an adequate alternative forum, and (2) the balance of private and public interest factors strongly favors dismissal.<sup>65</sup>

If the parties to a contract designated a particular court to resolve a dispute, a party generally later cannot argue that the chosen forum was inconvenient. “Forum selection clauses ‘are presumptively valid and enforceable unless the plaintiff makes a strong showing that enforcement would be unfair or unreasonable under the circumstances.’”<sup>66</sup>

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61. FED. R. CIV. P. 4(f)(2).

62. For example, Article 271(1) of the Swiss Penal Code provides that anyone attempting to serve process in Switzerland may be subject to arrest on criminal charges. Specifically, it states that (a) any person who carries out activities on behalf of a foreign state on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official; (b) any person who carries out such activities for a foreign party or organization; or (c) any person who facilitates such activities, is liable to a custodial sentence not exceeding three years or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year. Swiss Criminal Code (2020), [https://www.legislationline.org/download/id/8991/file/SWITZ\\_Criminal%20Code\\_as%20of%202020-07-01.pdf](https://www.legislationline.org/download/id/8991/file/SWITZ_Criminal%20Code_as%20of%202020-07-01.pdf).

63. See, e.g., Wojcik, *supra* note 60.

64. If the appropriate alternative forum is a federal district court in another state, the federal court can transfer the case under 28 U.S.C. § 1404(a) rather than dismissing it.

65. See, e.g., Mark E. Wojcik, *International Civil Litigation and the Doctrine of Forum Non Conveniens: A Case Study of How to Sue in Chicago for an Airplane Crash in Turkey*, ABA TIPS INT’L COMM. NEWS 11 (Fall 2012).

66. *Turner v. Costa Crociere S.p.A.*, 9 F.4th 1341, 1345 (11th Cir. 2021) (citing *Rucker v. Oasis Legal Fin., L.L.C.*, 632 F.3d 1231, 1236 (11th Cir. 2011)).

In 2021, motions to dismiss based on the doctrine of *forum non conveniens* were raised successfully in cases involving Germany,<sup>67</sup> Qatar,<sup>68</sup> and the United Kingdom,<sup>69</sup> among other countries. Motions to dismiss based on the doctrine were denied in 2021 in cases involving Canada,<sup>70</sup> Greece,<sup>71</sup> and Jordan,<sup>72</sup> among other countries.

#### VIII. ANTISUIT INJUNCTIONS

International litigation sometimes involves parallel legal proceedings in more than one country. Where it does, an antisuit injunction can sometimes be issued to prohibit a party from litigating in a foreign forum. “A federal district court with jurisdiction over the parties has the power to enjoin them from proceeding with an action in the courts of a foreign country, although the power should be used sparingly.”<sup>73</sup> The injunction is not issued against the foreign tribunal. Rather, the party appearing before the court may be enjoined from bringing or continuing a case before a foreign tribunal.

There is a three-part test to assess the propriety of issuing an antisuit injunction.<sup>74</sup> First, the court must “determine whether the parties and issues are the same in both domestic and foreign actions and whether ‘the first action is dispositive of the action to be enjoined.’”<sup>75</sup> Second, the court must determine whether maintaining the foreign action 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) prejudice other equitable considerations.”<sup>76</sup> Third, the court must determine whether the anti-suit injunction’s “impact on comity is tolerable.”<sup>77</sup>

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

68. *Fouad ex rel. Digital Soula Sys. v. State of Qatar*, 846 F. App’x 466 (9th Cir. 2021) (unpublished).

69. *Levin v. HIBU PLC*, No. 20-2731, 2021 WL 5742664 (3d Cir. Dec. 2, 2021).

70. *Nandjou v. Marriott Int’l, Inc.*, 985 F.3d 135 (1st Cir. 2021).

71. *Curtis v. Galaktos*, 19 F.4th 41 (1st Cir. 2021).

72. *Estate of I.E.H. v. CKE Rests., Holdings, Inc.* (8th Cir. 2021).

73. *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012) (quoting E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 989 (9th Cir. 2006)).

74. *Id.*

75. *Id.*

76. *Id.* at 881–82 (quoting *Gallo Winery*, 446 F.3d at 990). These factors are referred to as the *Unterweser* factors. *In re Unterweser Reederei GmbH*, 428 F.2d 888, 896 (5th Cir. 1970), *aff’d en banc*, 446 F.2d 907 (5th Cir. 1971).

77. *Id.* at 881 (quoting *Gallo Winery*, 446 F.3d at 991).

## IX. PROVING FOREIGN LAW UNDER FRCP RULE 44.1

Rule 44.1 of the Federal Rules of Civil Procedure provides a procedure for proving foreign law in a federal district court. The rule states:

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.<sup>78</sup>

First promulgated in 1966, Rule 44.1 fundamentally changed how federal courts determine foreign law.<sup>79</sup> Before the adoption of Rule 44.1, foreign laws had to be proven in court "as facts."<sup>80</sup> The modern approach under Rule 44.1 now provides the court's determination of foreign law "must be treated as a ruling on a question of law."<sup>81</sup> Additionally, Rule 44.1 provides that courts "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence."<sup>82</sup>

## X. HAGUE EVIDENCE CONVENTION

The Hague Convention of 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention")<sup>83</sup> is a multi-lateral treaty that allows requests for evidence to be sent between countries without recourse to consular and diplomatic channels. The website of the Hague Conference on Private International Law includes model forms<sup>84</sup> as well as the contact information for central and competent authorities for those states that are parties to the Hague Evidence Convention.<sup>85</sup>

In 2021, the number of contracting parties increased to sixty-four with the addition of the Republic of Georgia.<sup>86</sup>

78. FED. R. CIV. P. 44.1.

79. *See* *Animal Sci. Prods. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1868 (2018).

80. *See, e.g., Talbot v. Seeman*, 5 U.S. 1, 37–38 (1801).

81. FED. R. CIV. P. 44.1.

82. *Id.*

83. T.I.A.S. No. 7444, 23 U.S.T. 2555.

84. HCCH, Model Forms, 20. Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (2022), <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=65&cid=82>.

85. HCCN, Authorities, 20. Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (2022), <https://www.hcch.net/en/instruments/conventions/authorities1/?cid=82>.

86. The Hague Evidence Convention entered into force for the Republic of Georgia on July 30, 2021. HCCN, Status Table, 20. Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (2022), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=82>.

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XI. OBTAINING DISCOVERY FOR USE IN FOREIGN  
OR INTERNATIONAL TRIBUNALS

Many cases may be aided by evidence obtained from another country. Federal law allows an “interested person” to obtain discovery in the United States for use before a foreign or international tribunal.<sup>87</sup> 28 U.S.C. § 1782 allows a federal district court to facilitate the taking of testimony or collection of evidence from a person who resides or is found in that district.<sup>88</sup> “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 . . . .”<sup>89</sup> A person may not be compelled to testify or produce evidence in violation of any legally applicable privilege.<sup>90</sup>

A court can deny a section 1782 application when the applicants cannot show that they can use the evidence that they seek to obtain. Likewise, if a foreign or international tribunal would reject the evidence obtained through section 1782, there is no reason for a federal district court to grant discovery under section 1782.

Normally, discovery is not even available in an arbitration, but section 1782(a) might provide a way to obtain discovery for an arbitration proceeding if the evidence sought is in the United States. The federal circuit courts have split, however, on the issue of whether the statutory language “foreign or international tribunals” extends to private international arbitration tribunals. The Second,<sup>91</sup> Fifth,<sup>92</sup> and Seventh<sup>93</sup> Circuits hold that section 1782(a) cannot be used to aid private international arbitration proceedings. The Fourth<sup>94</sup> and Sixth<sup>95</sup> Circuits hold that it can be used for private international arbitration proceedings.<sup>96</sup>

In March 2021, the U.S. Supreme Court granted certiorari in *Servotronics, Inc. v. Rolls-Royce PLC* to resolve the circuit split as to whether federal district courts have the discretion to order discovery for private international arbitration proceedings.<sup>97</sup> Normally discovery is not even available

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87. 28 U.S.C. § 1782.

88. *Id.*

89. *Id.*

90. *Id.*

91. *See In re Application of Hanwei Guo for an Order to Take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. § 1782*, 965 F.3d 96 (2d Cir. 2020); *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999).

92. *See Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999).

93. *See Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020).

94. *See Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020).

95. *See Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019).

96. *See id.* at 720 (“American jurists and lawyers have long used the word ‘tribunal’ in its broader sense: a sense that includes private, contracted-for commercial arbitral panels.”).

97. *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794 (U.S. Mar. 22, 2021). The question presented is “[w]hether the discretion granted to district courts in 28 U.S.C. 1782(a) to render assistance in gathering evidence for use in ‘a foreign or international tribunal’ encompasses

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in an arbitration, but section 1782(a) might provide a way to obtain discovery if the evidence sought is in the United States. In September, however, counsel for petitioner informed the Supreme Court that it was dismissing the case, even though oral arguments had been scheduled for October 5, 2021. The Supreme Court removed the case from its calendar.

The U.S. Supreme Court resolved the split in June 2022, ruling that only a governmental or intergovernmental adjudicative body could be a “foreign or international tribunal” under section 1782.<sup>98</sup>

## XII. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Parties engaged in international litigation may agree to submit all or part of their dispute to an international arbitration panel. In 2021, the number of state parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>99</sup> increased to 168 with the additions of Belize,<sup>100</sup> Malawi,<sup>101</sup> and Sierra Leone.<sup>102</sup> The Convention also entered into effect for Iraq on February 9, 2022, bringing the number of state parties to 169.<sup>103</sup>

## XIII. HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

Unlike the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards that requires recognition and enforcement of foreign arbitration awards, no international treaty mandates the recognition of foreign court judgments in courts of the United States. However, if ratified by the United States, the Hague Convention on Choice of Court Agreements (HCCCA)<sup>104</sup> would require U.S. courts to recognize foreign judgments from countries that are parties to the treaty.

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private commercial arbitral tribunals, as the Fourth and Sixth Circuits have held, or excludes such tribunals without expressing an exclusionary intent, as the Second, Fifth, and . . . Seventh Circuit have held.”

98. *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022). That case will be discussed in next year’s review of developments in international litigation.

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

100. The Convention entered into effect for Belize on June 13, 2021.

101. The Convention entered into effect for Malawi on June 2, 2021.

102. The Convention entered into effect for Sierra Leone on January 26, 2021.

103. The Convention also entered into effect for Iraq on February 9, 2022, [https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards/status2](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2).

104. Hague Convention on Choice of Court Agreements (HCCCA), June 30, 2005, 44 I.L.M. 1294 (2005).

The HCCCA was concluded in 2005 and entered into force on October 1, 2015.<sup>105</sup> Under Article 5 of the HCCCA, if parties enter into an exclusive choice of court agreement, the designated court will have jurisdiction over the dispute to which that agreement applies.<sup>106</sup> This agreement allows the parties to a contract to choose a completely neutral court to decide any future disputes, even if the court has no other connection to the contract. Article 6 requires courts in other Contracting States to dismiss or suspend proceedings in favor of the court designated.<sup>107</sup> This means that courts in other countries will lack jurisdiction to decide a case when the parties otherwise designated a choice of a court. Article 8 provides for recognition and enforcement of the foreign court judgment.<sup>108</sup> Article 9 allows for only limited exceptions to enforcement, such as lack of capacity or that the judgment was obtained by fraud.<sup>109</sup> And unless the judgment was a default judgment, the recognizing court is bound by the findings of facts made by the designated court.<sup>110</sup>

As of December 2021, the HCCCA is in effect for thirty-one countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Montenegro, the Netherlands, Poland, Portugal, Romania, Singapore, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom (which in 2020 acceded to the HCCCA in its own right after leaving the European Union).<sup>111</sup> The treaty is also in effect for the European Union as a regional organization.<sup>112</sup> The People's Republic of China, the Republic of North Macedonia, Ukraine, the United States, and, most recently, Israel have signed the HCCCA but not yet ratified it.<sup>113</sup>

The first case under the HCCCA was brought in Singapore in 2018,<sup>114</sup> where an entity sought to enforce a judgment of the High Court of Justice

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105. Hague Conference on Private International Law, Convention of June 30, 2005 on Choice of Court Agreements: Status Table, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>; see also H. Scott Fairley & John Archibald, *After the Hague: Some Thoughts on the Impact on Canadian Law of the Convention on Choice of Court Agreements*, 12 ILSA J. INT'L & COMP. L. 417 (2006).

106. 44 I.L.M. at 1296 (art. 5).

107. *Id.* (art. 6).

108. *Id.* at 1296–97 (art. 8).

109. *Id.* at 1297 (art. 9).

110. *Id.* (art. 8(2)).

111. *Treaty Status Table*. The United Kingdom of Great Britain and Northern Ireland expressed its consent for it and the island of Gibraltar to be bound by the HCCCA, subject to certain declarations. *Id.*

112. *Id.*

113. *Id.*

114. Hague Conference on Private International Law, *News & Events: First Case Under the Choice of Court Convention* (2022), <https://www.hcch.net/en/publications-and-studies/details4/?pid=6616&dtid=55>.

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of England in the High Court of Singapore.<sup>115</sup> Relying on the Singaporean law that gave domestic effect to the HCCCA, the court granted the enforcement application.<sup>116</sup>

#### XIV. SINGAPORE CONVENTION ON MEDIATION

Parties engaged in international litigation may agree to submit all or part of their dispute to international mediation. The U.N. Convention on International Settlement Agreements Resulting from Mediation entered into force on September 12, 2020.<sup>117</sup> Known informally as the Singapore Convention on Mediation, the treaty will allow businesses seeking enforcement of a mediated settlement to apply directly to the courts of countries that have ratified the treaty. The treaty has fifty-five signatories including Australia, Brazil, the People's Republic of China, India, and the United States.<sup>118</sup>

Nine states have ratified the treaty as of the end of 2021: Belarus, Ecuador, Fiji, Georgia, Honduras, Qatar, Saudi Arabia, Singapore, and Turkey. Nations that have signed but not ratified the treaty are Afghanistan, Armenia, Australia, Benin, Brazil, Brunei Darussalam, Chad, Chile, the People's Republic of China, Colombia, Congo, Democratic Republic of the Congo, Eswatini (previously known as Swaziland), Gabon, Ghana, Grenada, Guinea-Bissau, Haiti, India, the Islamic Republic of Iran, Israel, Jamaica, Jordan, Kazakhstan, Lao People's Democratic Republic, Malaysia, Maldives, Mauritius, Montenegro, Nigeria, North Macedonia, Palau, Paraguay, Philippines, Republic of Korea, Rwanda, Samoa, Serbia, Sierra Leone, Sri Lanka, Timor-Leste, Ukraine, the United States of America, Uruguay, and the Bolivarian Republic of Venezuela.<sup>119</sup>

As more countries ratify the treaty, businesses will increase their reliance on mediation as a mechanism for dispute resolution. An increased use of mediation will likely help preserve commercial relationships.

#### XV. ENFORCING FOREIGN DEFAMATION JUDGMENTS

The Securing the Protection of our Enduring and Established Constitutional Heritage Act, also known as the SPEECH Act, provides that a U.S. domestic court may not recognize or enforce a foreign judgment for defamation unless it finds that "(1) the defamation law applied in the foreign

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115. *Ermgassen & Co. Ltd. v. Sixcap Fin. Pte. Ltd.*, [2018] SGHCR 8 (Sing.), available at [https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/gd---os-680-of-2018-\(20180618\)-\(final\)-pdf.pdf](https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/gd---os-680-of-2018-(20180618)-(final)-pdf.pdf).

116. *Id.*

117. The treaty required only three ratifications to enter into effect.

118. Singapore Convention on Mediation (2021), <https://www.singaporeconvention.org>.

119. *Id.*

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jurisdiction provides at least as much protection for freedom of speech and press as would be provided by the First Amendment to the Constitution and by the constitution and law of the state in which the domestic court is located”; or (2) if the party challenging the enforcement of that judgment “would have been found liable for defamation by a domestic court applying the First Amendment to the Constitution and the constitution and law of the state in which the domestic court is located.”<sup>120</sup> The SPEECH Act protects U.S. persons from “libel tourism,” which is “a form of international forum-shopping in which a plaintiff chooses to file a defamation claim in a foreign jurisdiction with a more favorable substantive law.”<sup>121</sup>

The SPEECH Act bars domestic courts from recognizing foreign defamation judgments unless “the domestic court determines that the exercise of personal jurisdiction by the foreign court comported with the due process requirements imposed on domestic courts by the Constitution.”<sup>122</sup> The Act also provides that a foreign defamation judgment against an interactive computer service provider may not be enforced in a domestic court unless “the domestic court determines that the judgment would be consistent with section 230 of the Communications Act of 1934 if the information subject to judgment has been provided in the United States.”<sup>123</sup> Any U.S. person held liable for defamation in a foreign jurisdiction is permitted to “bring an action in district court for a declaration that the foreign judgment is repugnant to the Constitution or laws of the United States.”<sup>124</sup> The act also provides attorneys fees to a U.S. party who successfully opposes enforcement of a foreign defamation judgment.<sup>125</sup>

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120. 28 U.S.C. § 4102(a).

121. *Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 487 (5th Cir. 2013); *see also Elec. Frontier Found. v. Global Equity Mgmt. (SA) Pty Ltd.*, 290 F. Supp. 3d 923, 941 (N.D. Cal. 2017).

122. 28 U.S.C. § 4102(b).

123. *Id.* § 4102(c).

124. *Id.* § 4104(a).

125. *Id.* § 4105.