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-- Paper by Chief Judge Diane P. Wood --

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ENHANCED INTERNATIONAL COOPERATION IN COMPETITION CASES: THE ROLE OF THE COURTS

By Chief Judge Diane P. Wood[1]

1. Cooperation among competition agencies has become ever more essential, as consumers around the world use products and services that reach them through international markets. But agency cooperation sometimes cannot stand on its own. A point is reached in some cases at which the judicial system must become involved. This paper examines the ways in which the courts can and do handle those cases. In the field of competition law, as in many others, international judicial cooperation has increased over the years. It has done so, inevitably, within the constraints to which courts are subject as one branch of government within a nation-state.

2. To state the obvious, a court is a national institution, and its authority is defined by the state of which it is a part. It is the division of the world into nearly 200 different sovereigns that makes international judicial cooperation necessary in the first place. Ever since the Peace of Westphalia, the importance of the territorial boundaries of a state for ascertaining the reach of its authority has been acknowledged. The question of how far sovereign power may reach beyond those boundaries has at times been difficult to answer, but for present purposes it is enough to say that extraterritorial jurisdiction is the exception rather than the rule. Not coincidentally, territorial boundaries are also the primary reference point for determining a court's competence and its ability to issue a judgment that will be binding on the parties. The reason that the authority of national courts is normally limited to sovereign territory is simple and practical: courts cannot enforce their judgments beyond the territorial reach of the sovereign that created them.

3. Almost 500 years ago, in the Peace of Augsburg in 1555, German princes and the Holy Roman Emperor agreed to the principle "*Cuius regio, eius religio*," or "Whose region, his religion." The Peace of Augsburg was an early articulation of the notion that sovereign power—the ability to control domestic affairs—is tied to territorial boundaries. Nearly a century later, in the Peace of Westphalia, the principalities further codified the idea that, within sovereign territories, the sovereign has the ability to set and enforce legal and social rules without outside interference. "Under the classic view of territorial sovereignty, each state has a monopoly on the exercise of governmental power within its borders and no state may perform an act in the territory of a foreign state without consent."[2] That classic view, however, has yielded to modern realities. Acts taken within one country that have significant effects in a second country may fall within the authority of both nations, just as countries continue to have power over their citizens even when those citizens are outside the national territory. These overlapping competences have led to the need for cooperation and coordination of the enforcement of comparable laws; they have also underscored the value of comity, both positive and negative, as each country assesses its own interests.

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2 *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522 (1987) (Blackmun, J., concurring in part and dissenting in part).

4. To provide a point of reference for the discussion of international judicial cooperation, it is helpful to take a brief look at the multi-sovereign system that exists in the United States. At the time of its adoption, the U.S. Constitution resembled an international agreement between sovereign states. These individual states surrendered a significant portion of their sovereign power—much more than they had been willing to give up under the failed Articles of Confederation—to accomplish the goal of creating a single nation from a group of constituent sovereign states. The solution reached by the Framers of the U.S. Constitution was brilliant, but complex: ever since 1789, when the Constitution took effect and the First Congress met, the United States has been struggling with difficult questions about how the Constitution divides sovereignty. These conflicts play out both horizontally, at the federal level, among the Executive, Legislative, and Judicial branches of government, and vertically, at the state level, between the states and the federal government. It is not too much to say that the modern understanding of these relationships took a Civil War to settle.

5. The power of American courts is likewise decentralized. In addition to the federal courts established under the Constitution, each state has its own court system. Perhaps counterintuitively, the state courts generally enjoy greater subject-matter jurisdiction than do the federal courts. Whereas the Constitution and federal statutes strictly limit federal jurisdiction to certain kinds of cases, the state courts have general jurisdiction over nearly all matters, including most federal questions. At the same time, the federal courts are competent to decide many state-law claims, for example if the parties are from different states or countries and the stakes are high enough. For these different courts and court systems to coexist, cooperation is not a luxury – it is essential.

6. Powerful tools for judicial cooperation are built into the constitutional design. The first is the supremacy principle: federal law trumps state law when the two are in conflict. Second, the federal Constitution expressly creates a national court of last resort for federal questions: Article III makes the Supreme Court the final arbiter of federal law, and its decisions are binding on the federal and state courts alike. The third tool relates to the enforceability of judgments: the states are required to give full faith and credit to the official pronouncements and judicial decisions of sister states; they must give comparable effect to the judgments of federal courts because of the supremacy principle, and by statute, federal courts must respect the judgments of state courts. Backing these rules is the coercive power of the federal government, which can compel compliance from intransigent states where necessary, as it did, for example, in the school desegregation cases of the 1950s and 60s.

7. This brief overview of the American legal system shows how hard it is to achieve judicial cooperation even within one nation. The international system presents greater challenges: it operates without the kind of binding and enforceable legal rules—supremacy, court of last resort, preclusive effect—that make domestic judicial cooperation work. International law is inevitably harder to enforce; countries occasionally deviate from international legal norms if they are willing to suffer diplomatic repercussions. In addition, countries differ in their approach to international law. While some national constitutions expressly state that international law is enforceable in domestic courts and that it may take precedence, others say nothing about the point. In the United States, some scholars have gone so far as to argue that it is illegitimate or undemocratic for international law to trump domestic law. Nor is there any global court of last resort with the final say on matters of international law. And although a variety of international agreements facilitate the enforcement of foreign arbitral awards or procedural matters like extradition or the taking of evidence, compliance is compelled primarily through “soft power” and persuasion. International judicial cooperation, in short, rests on a patchwork of self-restraint, comity, and bilateral and multilateral agreements.

8. The overview in this paper of international judicial cooperation will proceed in three main parts. Throughout, it uses the United States as an example to illustrate both the strengths and weaknesses of the various tools for cooperation. The first part discusses informal principles of comity that courts have adopted in order to minimize friction between domestic and international law, including limitations on the extraterritorial scope of domestic law and extraterritorial jurisdiction over the parties. The second part examines a variety of doctrines, including *forum non conveniens*, *lis alibi pendens*, and anti-suit injunctions, that courts apply when parallel litigation over the same dispute exists in multiple courts. The third and final part looks at formal cooperation between national courts in matters ranging from service of process and evidence-gathering to enforcement of judgments, as well as in certain areas (in particular, intellectual property and transnational insolvency) that are governed by specialized international accords.

1. Informal Cooperation

9. Much of the cooperation between national courts is informal. National courts have developed a variety of doctrines to minimize friction between domestic and foreign courts, and between domestic and foreign norms. As the U.S. Supreme Court put it more than 40 years ago, these doctrines reflect an aversion to the "parochial concept that all disputes must be resolved under our laws and in our courts."[3] But these principles are also based on pragmatism: national courts hope for reciprocity from their sister national courts as a consequence of their own voluntary adherence to international norms.

10. This section looks at three such cooperative principles that are followed by U.S. courts: the presumption that domestic law comports with international law; the presumption that domestic law lacks extraterritorial effect; and limitations on the court's jurisdiction over the parties.

1.1 Charming Betsy Presumption

11. Courts in the United States have concluded that in cases where international law conflicts with national law, the national courts must follow domestic law, for national courts remain under sovereign power. But courts work hard to reconcile domestic and international law when possible. For example, the U.S. federal courts apply the quaintly styled "*Charming Betsy* presumption," named after the 1830 case in which it originated. That presumption provides that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[4] Under the *Charming Betsy* presumption, domestic courts are required to reconcile Congress's pronouncements with international law unless the statute clearly directs otherwise. As Justice Harry Blackmun put it, the underlying principle is that interpretations of domestic law "should be informed by a decent respect for the global opinions of mankind."[5] Back in the early 19th century, judicial sensitivity to international norms also reflected the recognition that "the global legitimacy of a fledgling nation crucially depend[s] upon the compatibility of its domestic law with the rules of the international system within which it [seeks] acceptance."[6]

12. The *Charming Betsy* presumption helps to enforce the separation of powers among the three branches of the federal government. The U.S. Constitution assigns the responsibility for foreign relations in part to the President (or more broadly, the Executive Branch) and in part to the Congress; the judiciary plays only a minor role in this field. Courts therefore strive to avoid interpreting domestic law in ways that might create or exacerbate international discord.

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3 See *M/S Bremen v Zapata Off-Shore Co*, 407 US 1, 9 (1972).

4 *Murray v. Schooner Charming Betsy,* 6 U.S. 64, 118 (1830) (Marshall, C.J.).

5 Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 48 (1994).

6 Harold H. Koh, *International Law as Part of Our Law*, 98 AMER. J. INT'L L. 43, 43-44 (2004).

1.2 Extraterritorial Reach of Domestic Law

13. Courts generally limit the scope of domestic laws to national borders, again unless a statute clearly directs them to do otherwise. Thus, for example, it is a "longstanding principle of American law that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[7] In 2010, the U.S. Supreme Court strongly reaffirmed this principle: "When a statute gives no clear indication of an extraterritorial application, it has none."[8] Like the *Charming Betsy* presumption, the presumption against extraterritorial application of domestic law is an example of national courts' efforts to harmonize domestic law with the international system. In the antitrust context in particular, the great American jurist Learned Hand explained the rule this way: "We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States."[9]

14. But in today's interconnected world, courts sometimes must extend domestic law across national borders, and international law recognizes the legitimacy of this practice when the regulated conduct has direct, substantial, and foreseeable consequences in the domestic forum.[10] For example, in 2012 the U.S. Court of Appeals for the Seventh Circuit (sitting *en banc*) decided an important case involving the application of U.S. antitrust law to an international potash cartel. The case was *Minn-Chem v. Agrium*,[11] and it required the court to interpret the Foreign Trade Antitrust Improvements Act. That statute provides, as relevant here, that U.S. competition law applies to activities outside the United States when they have a "direct, substantial, and reasonably foreseeable effect" on either U.S. domestic commerce or U.S. import commerce.[12] Import commerce itself is so connected with the national market that no special rule is needed for it. As the court explained:

> *The applicability of U.S. law to transactions in which a good or service is being sent directly into the United States, with no intermediate stops, is both fully predictable to foreign entities and necessary for the protection of U.S. consumers. Foreigners who want to earn money from the sale of goods or services in American markets should expect to have to comply with U.S. law.*

15. Applying the statutory test, the court found that the effects of the potash cartel were sufficiently direct and substantial because the defendants were responsible for the vast majority of the 5.3 million tons of potash imported annually into the United States. Furthermore, the court thought it "objectively foreseeable that an international cartel with a grip on 71% of the world's supply of a homogenous commodity will charge supracompetitive prices." Following Congress's explicit guidance in the statute, which the court was satisfied comported with international standards for the extraterritorial reach of domestic law, the court concluded that the relevant provisions of U.S. antitrust law could be applied against the international potash cartel.[13]

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7 *EEOC v. Arab.Amer. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*), quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

8 *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010).

9 *United States v. Alum.Co. of Amer.*, 148 F.2d 416, 443 (2d Cir. 1945) (*Alcoa*).

10 RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 401-403.

11 683 F.3d 845 (7th Cir. 2012) (*en banc*).

12 15 U.S.C. § 6a(1).

13 *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 853–60 (7th Cir. 2012) (*en banc*).

1.3 Personal Jurisdiction

16. Closely related to the extraterritorial scope of domestic law is the court's adjudicatory jurisdiction over the parties (known as "personal jurisdiction" in the United States). The modern test for personal jurisdiction asks whether the defendant has sufficient "minimum contacts" with the forum such that the suit "does not offend traditional notions of fair play and justice."[14] In the international sphere, the "minimum contacts" test takes into account such factors as the defendant's physical presence in the territory; the defendant's domicile, residence, or nationality; the defendant's state of incorporation or principal place of business (*siège social*); the defendant's consent to jurisdiction; the defendant's regular business activities in the forum; the relation between the defendant's activity in the forum and the lawsuit; and the substantiality, directness, and foreseeability of effects in the forum from the defendant's activity.[15]

17. Personal jurisdiction is not only a matter of individual rights—at its core, personal jurisdiction reflects also solicitude for the territorial jurisdiction of other courts. This principle was strictly observed in the 19th century, as these comments from Justice Joseph Story, in his classic treatise *Commentaries on the Conflict of Laws*, illustrate:

> *Considered in an international point of view, jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or upon the thing being within the territory; for, otherwise, there can be no sovereignty exerted, upon the known maxim Extra territorium jus dicenti non paretur ["he who administers justice outside his territory is disobeyed with impunity"] ... [N]o sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions.*[16]

18. In the early 1800s, the U.S. Supreme Court took the position that if a court "exercises a jurisdiction which, according to the law of nations, its sovereign could not confer … [its judgments] are not regarded by foreign courts. … [T]he law of nations is the law of all tribunals in the society of nations and is supposed to be equally understood by all."[17] Although this first articulation concerned application of a foreign judgment in the United States, the Supreme Court soon after applied the same principle to U.S. judicial jurisdiction over citizens of foreign states.[18]

19. The modern test for personal jurisdiction incorporates these concerns, though the nature of today's world has once again led to a more flexible test. In the 19th century, in a case discussing relations between U.S. states, the Supreme Court said that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."[19] By the mid-20th century, however, the Court had adopted the test requiring "minimum contacts" consistent with "fair play and substantial justice" mentioned above,[20] which applies both within the United States and internationally. In 2014, the Court expressly extended its rule about the limitations of personal jurisdiction to the international realm, in *Daimler AG v. Bauman*. Responding to the Solicitor General's concern about "international friction" flowing from "foreign governments' objections to some domestic courts' expansive views of general jurisdiction [that] have in the past impeded negotiations of international agreements on the reciprocal

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14 *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

15 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (1987).

16 JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 539 (2d ed. 1841).

17 *Rose v. Himely*, 8 U.S. 241, 277 (1808).

18 See *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

19 *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878).

20 See n. 14, *supra.*

recognition and enforcement of judgments," the Court held that personal jurisdictional limits are reinforced by "[c]onsiderations of international rapport."[21]

2. Parallel Litigation

20. One result of the expansion of modern principles of jurisdiction, both in the United States and in other countries, is that it happens more and more that the courts of more than one nation are called upon to adjudicate the same disputes in parallel proceedings.[22] In the absence of a binding international agreement governing these cases, the courts have adopted a number of informal tools aimed at focusing the litigation in the most appropriate venue. In the United States, those tools include the *forum non conveniens* doctrine, the *lis alibi pendens* doctrine, and anti-suit injunctions.

2.1 Forum Non Conveniens

21. "*Forum non conveniens* is a common law doctrine that permits a court to decline to exercise personal jurisdiction if an alternative forum would be substantially more convenient or appropriate."[23] This doctrine apparently originated in admiralty proceedings,[24] or possibly in Scotland,[25] but today *forum non conveniens* is widely recognized in state and federal courts in the United States. It is remarkable in that it allows dismissal of actions that are *properly* within the jurisdiction of the court based on both domestic law and principles of international law, comity, convenience, and judicial administration.[26] As Justice Brandeis explained in 1932 for a unanimous U.S. Supreme Court:

> *Courts of equity and of law … occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.*[27]

22. Or as the Court said when it first took a careful look at the doctrine in modern times in *Gulf Oil Corp. v. Gilbert*: "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."[28] In 1948, Congress codified a domestic version of the *forum non conveniens* doctrine to allow transfers between

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21 *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014).

22 Gary Born and Peter B. Rutledge, INTERNATIONAL CIVIL LITIGATION IN U.S. COURTS, at 521 (4th ed. 2006).

23 *Id.* at 347.

24 *E.g. Willendson v. Forsoket*, 29 F.Cas. 1283 (No. 17,682) (Pa. 1801) ("It has been my general rule not to take cognizance of disputes between masters and crews of foreign ships. … Reciprocal policy, and the justice due from one friendly nation to another, calls for such conduct in the courts of either country.").

25 See, *e.g., Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 249 n.13 (1981); Jeremy C. Bates, *Home is Where the Hurt is: Forum Non Conveniens and Antitrust*, 2000 U.CHI. LEGAL FORUM 281, 283.

26 Born and Rutledge, *supra* note 22, at 348.

27 *Canada Malting Co. v. Paterson SS Ltd.*, 285 U.S. 413, 423 (1932).

28 *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

federal district courts within the United States,[29] but international litigation continues to be governed by the common law doctrine. Most U.S. state courts have also adopted some variation of the rule.[30]

23. Determining when the doctrine of *forum non conveniens* applies is an imprecise exercise, as the dissenters in *Gulf Oil* feared it would be.[31] Broadly, the decision is guided by two sets of factors: "the private interest of the litigants" on the one hand, and "public interest" factors on the other.[32] Focused on convenience to the parties and the court, the private interest factors include:

> *The relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action …; all other practical problems …; the enforceability of judgment … [and whether] the plaintiff [seeks to] vex, harass or oppress the defendant.*[33]

24. Public interest factors, by contrast, focus on the forum's sovereign interest in resolving mostly domestic disputes. As the Court put it, "[t]here is a local interest in having localized controversies decided at home."[34] In short, "the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice."[35]

25. The leading case for modern application of the *forum non conveniens* doctrine in the United States is *Piper Aircraft Co. v. Reyno*.[36] In *Piper*, Reyno, the administratrix of the estates of five deceased passengers, filed a wrongful death action in the United States against the American manufacturer of an airplane that crashed in Scotland en route from Blackpool to Perth. The suit was filed in a defendant's home venue, and the U.S. court otherwise had jurisdiction over it. But a great number of facts connected the case to Scotland: the pilots, most of the defendants, and all of the deceased passengers were Scottish, the flight had been operated by a Scottish air taxi service, and the salvaged wreckage was housed in a hangar in England. Reyno admitted candidly that the lawsuit "was filed in the United States because its laws regarding liability, capacity to sue, and damages [were] more favorable to [the plaintiffs'] position than [were] those of Scotland." The Supreme Court held that this change in legal standard was immaterial and upheld the district court's judgment dismissing on *forum non conveniens* grounds. The possibility of an unfavorable change in law should matter only where "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all."[37] Following this guidance, U.S. courts

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29 28 U.S.C. § 1404(a).

30 McMahon, *Forum Non Conveniens Doctrine in State Court as Affected by Availability of Alternate Forum*, 57 A.L.R. 4th 973 (1987 & Supp. 2005).

31 See *Gulf Oil*, 330 U.S. at 516 (Black, J., dissenting) ("The broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible.").

32 *Gulf Oil*, 330 U.S. at 508.

33 *Id.*

34 *Id.* at 509.

35 *Koster v. Amer. Lumbermen's Mut.Cas. Co.*, 330 U.S. 518, 527 (1947).

36 454 U.S. 235 (1981).

37 *Id.* at 254. For a close case in which a court refused to dismiss on the ground that the alternative forum was inadequate, with similar facts to *Piper*, see *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170 (3d Cir. 1991) (reversing dismissal in part on ground that alternate forum lacked certain third-party discovery rules available under American procedures).

sometimes attach conditions to a dismissal under *forum non conveniens* in order to ensure that the alternative forum proves to be adequate; those conditions, however, may not interfere unduly with foreign judicial proceedings.[38]

26. Few other national courts have embraced the proposition that a court with jurisdiction should be allowed to decline to hear the case for reasons of convenience.[39] As Lord Denning, one of the United Kingdom's most famous jurists, explained:

> *No one who comes to these courts asking for justice should come in vain. ... It may be very inconvenient for the defendant to have to contest the action here. But inconvenience falling short of injustice is not sufficient to stay the action. ... This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum-shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.*[40]

27. Sounding a similar theme, in 2005, the European Court of Justice held that the Brussels Convention, which at the time governed the allocation of jurisdiction among the various national courts of the European Union, "precludes a court … from declining the jurisdiction conferred on it … on the ground that a court of a non-Contracting State would be a more appropriate forum."[41] The court explained that the doctrine would "undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention … and consequently [] undermine the principle of legal certainty which is the basis of the Convention."[42]

28. Notably, the doctrine of *forum non conveniens* has not been used in competition cases to any great degree. For example, in *Laker Airways v. Pan American World Airways*,[43] a budget air carrier based in the United Kingdom brought U.S. antitrust claims against American and European carriers for allegedly scheming to destroy the plaintiff's transatlantic business. The district court recognized that the vast majority of the evidence and defendants were located in Europe, but it refused to dismiss the suit on grounds of *forum non conveniens*, saying:

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

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38 See, *e.g.*, *In re Union Carbide Gas Plant Disaster*, 809 F.2d 195 (2d Cir. 1987) (rejecting condition that defendant submit to American-style discovery rules in foreign court as unduly interfering but upholding condition that defendant waive statute-of-limitations and jurisdictional defenses).

39 See Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283 (1998).

40 *Owner of the Motor Vessel 'Atlantic Star' v. Owner of the Motor Vessel 'Bona Spes'*, [1973] Q.B. 364, 381–82.

41 *Owusu v. Jackson*, Case C-281/02, 2005 E.C.R. I-01445 [2005].

42 *Id.*

43 568 F. Supp. 811 (D.D.C. 1983).

> *Antitrust cases are unlike litigation involving contracts, torts, or other matter recognized in some form in every nation. A plaintiff who seeks relief by means of one of these types of actions may appropriately be sent to the courts of another nation where presumably he will be granted, at least approximately, what he is due. But the antitrust laws of the United States embody a specific congressional purpose to encourage the bringing of private claims in the American courts in order that the national policy against monopoly may be vindicated. To relegate a plaintiff to the courts of a nation which does not recognize the antitrust principles would be to defeat this congressional direction by means of a wholly inappropriate procedural device.*[44]

29. Other U.S. courts have also questioned whether *forum non conveniens* should be available in public-law actions, including those under the antitrust laws.

2.2 Lis Pendens

30. The *lis pendens* doctrine allows courts to stay proceedings when a similar dispute between the same or related parties is pending in another court.[45] Some authorities treat *lis pendens* as a version of *forum non conveniens*,[46] but the critical difference is that the former doctrine results only in stayed proceedings whereas the latter results in outright dismissal. The U.S. Supreme Court has never clearly delineated the standard for applying the *lis pendens* doctrine in international cases,[47] but the lower courts have frequently invoked it to stay U.S. litigation in favor of parallel proceedings in foreign courts.[48] Outside the United States, many national courts follow the *lis alibi pendens* ("litigation pending elsewhere") presumption, under which the first-filed suit in a court with jurisdiction has priority.[49]

31. U.S. courts applying the *lis pendens* doctrine fall in one of two camps, each linked with a different domestic doctrine.[50] The first camp relates *lis pendens* to a domestic doctrine known as *Colorado River* abstention.[51] *Colorado River* is a narrow doctrine that creates an exception to the ordinary duty of courts to decide matters properly before them; the exception rests on "considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'"[52] It permits abstention only in exceptional circumstances such as the "inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums."[53] Lacking clear guidance from the Supreme Court on the doctrine's

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44 *Id*. at 818.

45 Born and Rutledge, *supra* note 22, at 522–23.

46 See RESTATEMENT (SECOND) CONFLICT OF LAWS § 84, comm. e (1971).

47 See *Adv. Int'l Mgmt., Inc. v. Martinez*, 1994 WL 482114 (S.D.N.Y. 1994) ("[T]he Supreme Court has not addressed specifically the criteria that courts should consider when determining the propriety of staying or dismissing a federal action in deference to another lawsuit pending in a foreign jurisdiction …").

48 Born and Rutledge, *supra* note 22, at 523 n.11 (collecting cases).

49 Joachim Zekoll, Michael Collins & George Rutherglen, Transnational Civil Litigation at 399 (2013).

50 Born and Rutledge, *supra* note 22, at 523.

51 This abstention doctrine derives from *Colo. River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976). See also Born and Rutledge, *supra* note 22, at 524 n. 18 (collecting cases applying *Colorado River* abstention analysis to *lis pendens* inquiry regarding parallel foreign proceedings).

52 *Id.*, quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952).

53 *Id.* (citations omitted).

application to international cases, federal courts have wrestled over whether the *Colorado River* analysis applies when the second forum is a foreign court rather than a U.S. state court.[54]

32. Courts in the second *lis pendens* camp analogize the doctrine to a federal district court's discretion to stay proceedings when parallel litigation is ongoing in another federal district court. This discretion originates from the court's common law power to control its docket. From this general power to control its docket, courts in this camp conclude that a "court has inherent power to dismiss or stay an action based on the pendency of a related proceeding in a foreign jurisdiction."[55] Guiding a court's discretion whether to stay an action in favor of an international forum are several factors, including "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."[56] Some courts have blended these two approaches for international cases.[57]

33. Although the American discretionary approach to abstention can be complicated and unpredictable, the European effort to draw clear lines has also proven to be problematic. Article 27 of the Convention on Jurisdiction and Enforcement in Civil and Commercial Matters, as amended by the Brussels Regulation, provides:

1. Where proceedings involve the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.[58]

34. This provision has the considerable virtue of establishing a rule that is easy to follow: all subsequent courts must defer to the first court that acquires jurisdiction. But the rule's inflexibility has also spawned a dilatory tactic known as the "Italian Torpedo."[59] In Italy, it allegedly can take more than seven years for courts to render a final decision in a case, far longer than it takes in most European countries.[60] Parties seeking to benefit from delays can file preemptive suits in Italian courts, thereby depriving all other European courts of the ability to decide the case. In 2012, the European Commission adopted a new

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54 Compare *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 685 (7th Cir. 1987) (noting that "the alternate forum [a Belgian court] is not the tribunal of a state of the federal union to which, under our Constitution, we owe a special obligation of comity" and applying *Colorado River* abstention "with this difference in mind"), with *Finova Cap. Corp. v. Ryan Helicopters USA, Inc.*, 180 F.3d 896, 898 (7th Cir. 1999) ("[I]n the interests of international comity, we apply the same general principles [as *Colorado River* requires for state proceedings] with respect to parallel proceedings in a foreign court.").

55 *Evergreen Marine Corp. v. Welgrow Int'l, Inc.*, 954 F.Supp. 101, 103 (S.D.N.Y. 1997).

56 *MLC (Bermuda) Ltd. v. Credit Suisse First Boston Corp.*, 46 F.Supp.2d 249, 251 (S.D.N.Y. 1999);see also *I.J.A., Inc. v. Marine Holdings, Ltd.*, 524 F.Supp. 197, 197 (E.D. Pa. 1981).

57 See, *e.g.*, *Nat'l Union Fire Ins. Co v. Kozeny*, 115 F.Supp.2d 1243, 1246–47 (D. Colo. 2000) (balancing the court's "inherent power" under *Landis* against its "virtually unflagging obligation" under *Colorado River*).

58 Council Regulation (EC) 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L 12/1) (16.1.2001).

59 Zekoll et al., *supra* note 49, at 413.

60 *Id.*; see also Steven B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. PA. J. INT'L L. 663, 663–64 (2011).

regulation which allows the parties to agree to confer jurisdiction on a particular court, which then may hear the case even if another court was first seised.[61] Problems remain, of course, if the parties do not agree on a forum.

35. In 2000, the International Law Association Committee on International Civil and Commercial Litigation issued a comprehensive comparative report on approaches to declining and referring jurisdiction.[62] The Report adopts the bright-line abstention rule of Europe's Article 27 along with a mandatory referral system that recalls some features of *forum non conveniens* and American abstention doctrines. With respect to *lis pendens* abstention, the Report says: "Where proceedings involv[ing] the same parties and the same subject-matter are brought in the courts of more than one state, any court other than the court first seized shall suspend its proceedings … and thereafter it shall terminate its proceedings."[63] With respect to related actions involving similar but different issues or parties as parallel actions, the Report provides: "Where related actions are pending in the courts of more than one state either court may suspend or terminate its proceedings and refer the matter to the alternative court."[64] Finally, the Report sets out a list of factors that should be used to assess whether an "alternative court is the manifestly more appropriate forum for the determination of the merits of the matter, taking into account the interests of all the parties, without discrimination on the grounds of nationality."[65]

2.3 Anti-suit Injunctions

36. A longstanding problem concerns the power of a court to order persons subject to its personal jurisdiction to perform (or not perform) specified acts outside the territorial boundaries of the forum.[66] Judge Learned Hand, reviewing an order by a court in Vermont compelling a party to take an action in Maine, summarized it well:

> *The word 'jurisdiction' is … somewhat equivocal; in one sense, the judge had it; the [party] had personally appeared and was subject to his orders … . But although he thus had the power to prevent the defendant from asserting its rights in Maine, it might still be improper for him to do so. Courts do not always exert themselves to the full, or direct parties to do all that they can effectively compel, and such forbearance is sometimes called lack of 'jurisdiction.' What reserves a court shall make, when dealing with real property beyond its territory, is not altogether plain[.]*[67]

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61 Regulation 1215/2012, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast), 2012 O.J. (L 351/1) 31.1, 31.2.

62 International Law Association, Committee on International Civil and Commercial Litigation, *Third Interim Report: Declining and Deferring Jurisdiction in International Litigation* (McLachlan, Ed./Rapporteur 2000).

63 *Id.* at Principles, art. 4.

64 *Id.*

65 *Id.*

66 See generally Ernest Messner, *The Jurisdiction of a Court of Equity Over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State*, 14 MINN. L. REV. 494 (1930); see also *United States v. First Nat'l City Bank*, 379 U.S. 378 (1965).

67 *Amey v. Colebrook Guar. Savings Bank*, 92 F.2d 62, 63 (2d Cir. 1937) (Hand, J.), quoted in *First Nat'l City Bank*, 379 U.S. at 388 (Harlan, J., dissenting).

37. Although anti-suit injunctions can arise in a variety of contexts in international litigation,[68] the fundamental question is the same in each: When (if ever) can a court compel persons subject to its jurisdiction to refrain from litigating in a foreign forum?

38. For domestic cases in the United States, a federal statute enacted in the earliest days of the Republic, the Anti-Injunction Act, provides the answer. It forbids federal courts from enjoining proceedings in state court unless one of three narrow exceptions applies.[69] It is unclear how much light this might shed on the court's power to issue anti-suit injunctions against proceedings in foreign courts. The Anti-Injunction Act, passed in the first Judiciary Act of 1793, reflected the fears of the U.S. states about the potential power of the federal courts to interfere with state proceedings. No statute addresses the power to enjoin foreign suits, undoubtedly because principles of international jurisdiction make any such law unnecessary. It is one thing, however, to enjoin a tribunal, and another to enjoin a party over which the court has authority. And it is still a third matter to consider whether any such injunction would be proper, even if the technical power to issue it exists.

39. Lacking explicit guidance from the Supreme Court, U.S. lower courts have been divided on the question. Some courts believe that there are strict limits, similar to those imposed by the Anti-Injunction Act in the domestic context, on their authority to issue foreign anti-suit injunctions.[70] The leading case for this view is *Laker Airways v. Sabena*[71] out of the U.S. Court of Appeals for the District of Columbia. In that case, the court reviewed two rulings of the district court: first, the propriety of its injunction barring certain parties from joining parallel litigation in England; and second, its decision to ignore a similar anti-suit injunction issued against the parties by the English court. The court of appeals noted that it was "well established that English and American courts have power to control the conduct of persons subject to their jurisdiction to the extent of forbidding them from suing in foreign jurisdictions."[72] Because parallel suits ordinarily can proceed simultaneously,[73] however, the power to enjoin foreign suits should usually be exercised only where "necessary to protect the jurisdiction of the enjoining court or to prevent the litigant's evasion of the important public policies of the forum."[74]

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68 See Born and Rutledge, *supra* note 22, at 540–41 (detailing five situations in which anti-suit injunctions often arise in international litigation).

69 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.").

70 *E.g. Stonington Partners, Inc. v. Lernout & Hauspie Speech Products NV*, 310 F.3d 118, 127 (3d Cir. 2002); *LAIF X SPRL v. Axtel, SA de CV*, 390 F.3d 194, 199 (2d Cir. 1994); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349 (6th Cir. 1992); *Quaak v. Klynveld Peat Marwick GoerdelerBedrijfsrevisoren*, 361 F.2d 11, 17–19 (1st Cir. 2004).

71 731 F.2d 909 (D.C. Cir. 1984).

72 *Id.* at 926, citing *Cole v. Cunningham*, 133 U.S. 107, 119 (1890) ("Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci reisitae*, which he could do voluntarily, to give full effect to the decree against him. Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*.") (quotation omitted).

73 *Id.* at 927–28, citing *Colorado River*, 424 U.S. at 817.

74 *Id.* at 928.

40. At the core of this relatively strict view was a concern for comity, as the following passage in the court's opinion reveals:

> *[C]omity serves our international system like the mortar which cements together a brick house. No one would willingly permit the mortar to crumble or be chipped away for fear of compromising the entire structure. 'Comity' summarizes in a brief word a complex and elusive concept—the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum. ...*
>
> *Comity is a necessary outgrowth of our international system of politically independent, socio-economically interdependent nation-states. As surely as people, products and problems move freely among adjoining countries, so national interests cross territorial borders. But no nation can expect its laws to reach further than its jurisdiction to prescribe, adjudicate and enforce. Every nation must often rely on other countries to help it achieve its regulatory expectations. Thus, comity compels national courts to act at all times to increase the international legal ties that advance the rule of law within and among nations. However, there are limitations on the application of comity. When the foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimize the aberration or to encourage retaliation, undercutting the realization of the goals served by comity.*[75]

41. Finding that the English courts had unduly undercut American antitrust law in purporting to enjoin the American suit, the court concluded that the district court properly declined to extend comity to the English anti-suit injunction.[76]

42. Applying the same test, the U.S. Court of Appeals for the Second Circuit concluded in *China Trade and Development Corp. v. MV Choong Yong*,[77] another antitrust case, that an anti-suit injunction was improper. There the district court had enjoined parallel litigation between the same parties in a second-filed action in the courts of Korea. The appellate court criticized the district court for basing its decision in part on the view that the anti-suit injunction would prevent the "vexatiousness" of the foreign proceeding and a "race to judgment" causing additional expense. Indeed, "since these factors are likely to be present whenever parallel actions are proceeding concurrently, an anti-suit injunction ground on these additional factors alone would tend to undermine the policy that allows parallel proceedings to continue and disfavors anti-suit injunctions."[78] Instead, the court held, the decision whether to issue an anti-suit injunction turns on two factors: "(a) whether the foreign action threatens the jurisdiction of the enjoining forum, and (b) whether strong public policies of the enjoining forum are threatened by the foreign action."[79] Unlike the situation in *Laker Airways*, the foreign court had done nothing to undermine the ongoing litigation in the U.S. courts. Therefore, the Second Circuit concluded that an anti-suit injunction could not issue.[80]

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75 *Id.* at 937 (citations omitted).

76 *Id.* at 939.

77 837 F.2d 33 (2d Cir. 1987).

78 *Id.* at 36.

79 *Id*.

80 *Id.* at 37.

43. Other U.S. courts have adopted a more expansive view of the power to issue anti-suit injunctions.[81] The Fifth Circuit's view in *Kaepa Inc. v. Achilles Corp.*[82] is illustrative:

> *[A] district court does not abuse its discretion by issuing an anti-suit injunction when it has determined that allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in inequitable hardship and tend to frustrate and delay the speedy and efficient determination of the cause. ... [Our view] by no means excludes the consideration of principles of comity. We decline, however, to require a district court to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action. ... [T]he prosecution of the Japanese action would entail an absurd duplication of effort and would result in unwarranted inconvenience, expense, and vexation. Achilles's belated ploy of filing as a putative plaintiff in Japan the very same claims against Kaepa that Kaepa had filed as plaintiff against Achilles smacks of cynicism, harassment, and delay. Accordingly, we hold that the district court did not abuse its discretion by granting Kaepa's motion for an anti-suit injunction.*[83]

44. Writing in dissent, Judge Emilio Garza chastised the majority for failing to give due "respect for the independent jurisdiction of a sovereign nation's courts [which] risk[ed] provoking retaliation in turn, with detrimental consequences that may reverberate far beyond the particular dispute and its private litigants."[84] Moreover, said Judge Garza, the majority's analysis was "more appropriately brought to bear in the context of a motion to dismiss for *forum non conveniens*," a measure far less intrusive than one that purports to deprive another court of the ability to act. At bottom, the dissent emphasized the *Laker Airways* view that parallel proceedings, without more, do not justify an anti-suit injunction that treads on comity of the courts: "The policies of avoiding hardships to the parties and promoting the economies of consolidat[ed] litigation 'do not outweigh the important principles of comity that compel deference and mutual respect for concurrent foreign proceedings. Thus, the better rule is that duplication of parties and issues alone is not sufficient to justify issuance of an anti-suit injunction.'"[85]

45. At the core of this debate—and, in many ways, of all the controversies so far discussed in informal international judicial cooperation—are questions about the legitimate weight of comity. To what extent should the decisions of national courts be guided by principles of comity? Critics, like the Fifth Circuit majority in *Kaepa*, contend that comity is "an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy and good faith."[86] It is a principle, oftentimes defined according to the expediencies of a given case, that may mean alternatively "the basis of international law, a rule of international law, a synonym for international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expediency, reciprocity, or consideration of high

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81 *E.g. Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996); *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981); *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425 (7th Cir. 1993); *Phillips Med. Sys. Int'l BV v. Bruetman*, 8 F.3d 600 (7th Cir. 1993).

82 76 F.3d 624 (5th Cir. 1996).

83 *Id.* at 627-28 (citations and quotations omitted).

84 *Id.* at 629 (Garza, J., dissenting); see also *id.* at 632 ("A dismissal on grounds of *forum non conveniens* by either court in this case would satisfy the majority's concern with avoiding hardship to the parties, without harming the interests of international comity. The district court is not in a position, however, to make the *forum non conveniens* determination on behalf of the Japanese court.").

85 *Id.* at 632, quoting *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992).

86 Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 (1982).

international politics concerned with maintaining amicable and workable relationships between nations."[87] But comity is also the principle that makes all the areas of judicial cooperation discussed above work.

46. One shortcoming of comity in parallel litigation is that national courts communicate with each other only through intermediaries. The parties present arguments to each court, and each court decides independently without consultation with the other whether to resolve a particular dispute. Some scholars have asked why courts should not be able to discuss these matters directly (as enforcement authorities often may do).[88] Such direct cooperation, dubbed "judicial negotiation" by some scholars, would not be entirely unprecedented. Faced with dual bankruptcy cases in the United States and Belgium, the U.S. Court of Appeals for the Third Circuit vacated an anti-suit injunction against prosecution of the Belgian case. Emphasizing the importance of judicial cooperation going forward, the court concluded with this:

> *We strongly recommend, in a situation such as this, that an actual dialogue occur or be attempted between the courts of the different jurisdictions in an effort to reach an agreement on how to proceed or, at the very least, an understanding as to the policy considerations underpinning salient aspects of the foreign laws. … Even if cooperation could not be achieved, it would be valuable to communicate regarding the policies animating a certain law so as to be better able to perform a choice-of-law analysis. While not required by our case precedent or any principle of law, we urge that, in a situation such as this, communication from one court to the other regarding cooperation or the drafting of a protocol could be advantageous to the orderly administration of justice.*[89]

47. Perhaps such direct judicial cooperation is the next frontier of international comity.

3. Formal Cooperation

48. Judicial cooperation has not been limited to the comity-driven principles just discussed. There are also more formal mechanisms available. The oldest and most well established of these is the letter rogatory, "a formal request by the courts of one nation to the courts of another country for assistance in performing judicial acts"[90] including service of process and taking of evidence. Under the U.S. Code, letters rogatory are often transmitted by the State Department, although direct transmission between courts is allowed.[91] In addition to letters rogatory, a handful of bilateral and multilateral agreements on matters ranging from service of process to taking of evidence to enforcement of judgments, as well as more particularized agreements in certain subject areas, govern cooperation between national courts.

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87 Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 3–4 (1991) (quotation omitted).

88 Born and Rutledge, *supra* note 22, at 559 (collecting authority). See generally Slaughter, *A Global Community of Courts*, 44 HARV. INT'L J.L. 191 (2003); Schlosser, *Direct Interaction of Courts of Different Nations*, 2005 STUDIO DI DIRITTO PROCESSUALE CIVILE 589; Westbrook, *International Judicial Negotiation*, 38 TEX.INT'L L.J. 567 (2003).

89 *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods NV*, 310 F.3d 118, 133 (3d Cir. 2002).

90 Born and Rutledge, *supra* note 22, at 962.

91 28 U.S.C. § 1781.

3.1 Service of Process

49. Under the law of most countries, process must properly be served before litigation can begin or binding final judgments entered against the defendant.[92] Although this much is true across the globe, the requisite procedures for effecting service of process differ from place to place. Because failure to follow these procedures may result in the invalidation or unenforceability of a judgment, courts and parties must be attuned to the approved methods of serving process in various states.

50. For service to be proper, it must first comply with the rules in the issuing court. In U.S. federal courts, service of process is governed by Rule 4 of the Federal Rules of Civil Procedure. Rule 4(f) provides the rules for serving process on an individual located in a foreign country. It lists three approved methods: (1) by an "internationally agreed means of service … such as those authorized by the Hague Convention;" (2) if no internationally agreed method applies, "by a method that is reasonably calculated to give notice" under the foreign country's law for service, via letter rogatory, or by standard domestic U.S. method if not prohibited by the foreign country's law; or (3) by "other means not prohibited by international agreement, as the court orders."[93] A similar rule governs service on legal persons.[94]

51. At first glance, it may appear that Rule 4 establishes a hierarchy for methods of service. But closer inspection reveals that, in fact, the language of the rule is ambivalent about which method the parties choose to effect service. This ambivalence has spawned some uncertainty. For example, U.S. courts have disagreed whether international service may be made under certain domestic provisions of Rule 4 or under state law, where either one permits service by mail.[95] Because Rule 4 prohibits service methods that are "prohibited by international agreement," the controversy often turns on whether the Hague Service Convention[96] prohibits service by mail (assuming that the countries involved are parties to that Convention).

52. Putting aside whether the Convention authorizes certain additional domestic methods of service, what are the Convention's usual methods? Concluded on November 15, 1965, the Hague Service Convention is a multilateral treaty formulated by the 10th Session of the Hague Conference of Private International Law.[97] The Convention applies "in all cases, in civil and commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."[98] It requires each signatory state to "designate a Central Authority … to receive requests for service" of documents from other signatory states.[99] Requests must be submitted to the Central Authority in the appropriate form.[100] After

92 Born and Rutledge, *supra* note 22, at 815.

93 FED.R. CIV. P. 4(f).

94 FED. R. CIV. P. 4(h)(2).

95 Compare *Bankston v. Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989) (concluding that Hague Service Convention does not allow service by mail), with *Brockmeyer v. May*, 383 F.3d 798 (2004) (concluding that Hague Service Convention permits, despite not providing for, service by mail). In particular, these courts debate whether Article 10 of the Convention contemplates service by mail. See Hague Service Convention, art. 10 (providing that the "Convention shall not interfere with … the freedom to send judicial documents, by postal channels, directly to persons abroad ….").

96 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965).

97 Zekoll *et al.*, *supra* note 49, at 324.

98 Hague Service Convention, art. 1.

99 *Id.* at art. 2.

100 *Id.* at art.3–4.

receiving the request, the Central Authority then serves the documents either "(a) … by its internal law for the service of documents in domestic actions upon persons who are within its territory, or (b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed."[101] After service, the Central Authority is required to remit a certificate of proof of service.[102]

53. In the United States, Congress has codified compliance with the Hague Service Convention in domestic statutes that govern the service of foreign process on U.S. territory. In fact, U.S. rules for foreign service go further than the Convention requires because, unlike many other countries, "the United States ordinarily imposes no significant direct restrictions on the service of foreign process on U.S. territory."[103] One statute provides that the "district court in which a person resides or is found may order service upon him of any document issued in connection with a proceeding in a foreign or international tribunal."[104] Requests for such service may be made through a formal request from the foreign court or "upon application of any interested person."[105] The U.S. Department of Justice serves as the Central Authority for purposes of the Convention,[106] but the U.S. Department of State serves as the general authority for letters rogatory outside the scope of the Convention.[107]

54. Where the Convention is invoked, the antecedent question often arises whether the Convention applies on its own terms. Under Article 1, the Convention may be invoked "where there is occasion to transmit a judicial or extrajudicial document for service abroad."[108] But it is not always clear to what "occasions" that language references. In *Volkswagenwerk Aktiengesellschaft v. Schlunk*,[109] the U.S. Supreme Court considered whether the Convention permitted "an attempt to serve process on a foreign corporation by serving its domestic subsidiary which, under state law, [was] the corporation's involuntary agent for service of process."[110] Because the Convention does not provide a standard for determining when it applies, the Court determined that it "almost necessarily must refer to the internal law of the forum state."[111] It then reasoned that "[i]f the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies."[112] It ultimately held that "[w]here service on a domestic agent is valid and complete under both state law and the Due Process Clause [of the U.S. Constitution], our inquiry ends and the Convention has no further implications."[113]

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101 *Id.* at art. 5.

102 *Id.* at art. 6.

103 Born and Rutledge, *supra* note 22, at 902.

104 28 U.S.C. § 1696(a).

105 *Id.*

106 See http://www.hcch.net/index_en.php?act=authorities.details&aid=279 (last visited 25 May 2014).

107 28 U.S.C. § 1781.

108 *Id.* at art. 1.

109 486 U.S. 694 (1988).

110 *Id.* at 696.

111 *Id.* at 700.

112 *Id*.

113 *Id.* at 707.

55. In resting the applicability of the Hague Service Convention on domestic law, the Court rejected Volkswagen's contention that the Convention was intended to ensure adequate notice by establishing minimum procedures that comport with international standards. As the Court admitted, "[its] interpretation of the Convention [did] not necessarily advance this particular objective, inasmuch as it [made] recourse to the Convention's means of service dependent on the forum's internal law." But, it said, it was unlikely that "this country, or any other country, will draft its internal laws deliberately so as to circumvent the Convention in cases in which it would be appropriate to transmit judicial documents for service abroad." Moreover, it predicted that parties would have incentives to comply with the Convention in order to facilitate the enforcement of judgments abroad.[114]

56. It is open to question whether the Court's assumption that signatory nations would comply with the spirit of the Convention was well founded. The decision in *Schlunk* proved to be controversial. In dissent, Justice Brennan argued that it was "implausible that the Convention's framers intended to leave each contracting nation, and each of the 50 states within [the United States], free to decide for itself under what circumstances, if any, the Convention would control."[115] The dissenters thought "the words 'service abroad,' read in light of the negotiating history [of the Convention], embody a substantive standard that limits a forum's latitude to deem service complete domestically."[116] And though the dissenters agreed with the Court that U.S. law and the U.S. Constitution would prevent many abuses, they sounded a warning about the consequences of relying on domestic safeguards rather than international ones:

> *[W]hile other nations are not bound by the Court's pronouncement that the Convention lacks obligatory force, after today's decision their courts will surely sympathize little with any United States national pleading that a judgment violates the Convention because (notwithstanding any local characterization) service was 'abroad.'*

57. The broader message transcends the particular issue in the case: National courts must strive to balance domestic prerogatives against the risk of disrupting the international system.

58. A case from Europe provides a good example of a national court permitting domestic interests to yield in order to advance international goals. One difficult question related to service involves whether a country may refuse service if it objects to the substantive law at issue in the foreign suit. The Hague Service Convention provides only the narrowest of exceptions on these grounds: "Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security."[117] In *Proceedings Concerning the Constitutional Complaint of L. ... GmbH*, the German Federal Constitutional Court considered "whether a complaint may be served by way of judicial assistance, in accordance with which a claim is to be made against a legal person under German law in a court of the United States of America for, *inter alia*, punitive or exemplary damages."[118] The German defendant objected that service would violate his civil rights under German basic law (*Grundgesetz*), which disallows punitive damages.

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114 *Id.* at 706.

115 *Id.* at 708 (Brennan, J., dissenting)

116 *Id.*

117 Hague Service Convention, art. 13.

118 34 I.L.M. 986 (BVerfG 1994), reproduced in Zekoll *et al., supra* note 49, at 352–58.

59. The Federal Constitutional Court rejected the defendant's argument. As the Court explained:

> *Service is a sovereign act of the State by which foreign court proceedings are assisted. ... [S]ervice may not in principle be refused simply because of the incompatibility of the plaintiff's claim with the internal public policy of the State, but only if the State requested to carry out the service considers that such service would endanger its sovereignty or security. This restriction on the authority to examine the action to be served is justified because of the goal of the Convention. If the principles of the internal legal order were set as the standard for service, then the flow of international judicial assistance would be significantly hindered. ... Finally, it must be taken into consideration that the possibilities for the Federal Republic of Germany to guarantee domestic parties a form of service in relation to the United States of America which ensures their chances of effective participation would be seriously impaired if the service of such actions were to be refused.*[119]

60. Decisions like this one, which elevates the systemic integrity of international law over parochial interests, advance the cause of international judicial cooperation.

61. Because it applies only in suits involving private parties, the Hague Service Convention does not govern service of process on foreign states, agencies, and instrumentalities. Domestic law, informed by international law relating to sovereignty, controls these matters. In the United States, the Foreign Sovereign Immunities Act (FSIA) includes detailed service provisions that are binding on both state and federal courts.[120] These provisions differ depending whether service is to be made on a "foreign state or political subdivision of a foreign state" on the one hand,[121] or on an "agency or instrumentality of a foreign state" on the other.[122] In general, the service rules with respect to the former category are stricter than those respecting the latter category.[123] Often much turns on the categorization: where the defendant is determined to be a political subdivision rather than an agency, failure to observe "strict" compliance with the service rules will result in dismissal for lack of personal jurisdiction.[124] By contrast, if the defendant is determined to be an agency or instrumentality of a foreign state, "substantial" compliance with the rules suffices.[125]

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119 *Id.* at ___ (citations omitted).

120 28 U.S.C. § 1608.

121 *Id.* § 1608(a).

122 *Id.* § 1608(b).

123 *E.g., Magness v. Russian Fed.*, 247 F.3d 609 (5th Cir. 2001) ("We conclude that the provisions for service of process upon a foreign state or political subdivision of a foreign state outlined in § 1608(a) can only be satisfied by strict compliance.").

124 *E.g. Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994) (dismissing after determining that service on Bolivian military arm did not comply with requirements for service of process on a foreign state or political subdivision).

125 See *Magness*, 247 F.3d at 616; *Pradhan v. Al-Sabah*, 299 F.Supp.2d 493, 499–500 (D. Md. 2004); see also Born and Rutledge, *supra* note 22, at 901 (noting the "prevailing view among federal courts that a plaintiff only must 'substantially comply' with § 1608(b)'s service requirements").

3.2 Taking Evidence

62. One of the most critical, yet thorny, areas of international judicial cooperation involves the taking of evidence.[126] The subject is critical because, in today's world, important evidence in a given case may be scattered across many different jurisdictions. The subject is thorny because different legal traditions have very different standards and practices for acquiring and presenting evidence. For example, American pretrial discovery historically has been far more intrusive than the law of most other nations allows, although there has been a trend for the last 20 years toward tightening the rules that prevail in federal courts. That robust discovery is one of the hallmarks of American law and has been one of the features that makes American courts attractive to plaintiffs. Working through these different approaches is an important function of judicial cooperation.

63. As with service of process, the starting point for judicial cooperation on the taking of evidence is the letter rogatory. Letters rogatory may be used to compel a person within the foreign court's jurisdiction to provide testimony or documents to the foreign court, which will in turn forward the evidence to the requesting court.[127] Often, a letter rogatory is the only way for the requesting court to compel discovery from a recalcitrant foreign witness. Letters rogatory operate comfortably within a regime that gives great force to national sovereignty: the foreign receiving court has discretion to decide whether to comply with the letters, and the foreign court presides over the process of evidence-gathering.[128]

64. But these same features also limit the efficacy of letters rogatory. Many foreign courts balk at administering robust American-style discovery, either for practical or principled reasons. The scholars Born and Rutledge provide a succinct overview of the limitations of letters rogatory:

> *Despite their potential importance, letters rogatory have historically had significant disadvantages as a means of obtaining extraterritorial discovery. First, foreign courts are under no obligation to execute letters rogatory. Foreign courts have frequently refused to execute U.S. letters of request—including because of poor diplomatic relations, because the underlying dispute involves claims that conflict with foreign public policy, or simply because of bureaucratic inertia. Moreover, even when foreign courts agree to execute letters rogatory, they often prove to be unwilling to require the full extent of discovery sought by U.S. letters of request … . Finally, in at least some nations, courts object to (or misunderstand) 'pretrial discovery' and will honor only requests for materials to be used as evidence at trial.*[129]

65. Additionally, the process of transmitting letters and obtaining a response may get bogged down in time-consuming procedures.

66. To avoid some of these pitfalls, multilateral agreements like the Inter-American Convention on Letters Rogatory codify the process for submitting and responding to letters. The Inter-American Convention applies to "letters rogatory issued in conjunction with proceedings in civil and commercial matters," and it facilitates the "performance of procedural acts of a merely formal nature, such as service of process, summonses or subpoenas abroad" and the "taking of evidence and the obtaining of information

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126 Another significant difference between the common-law and civil-law traditions lies in their approach to witness cross-examination. Whereas common-law traditions generally view cross-examination as a critical tool for the discovery of truth, the practice is extremely rare and seen as distastefully combative in the civil-law tradition.

127 Born & Rutledge, *supra* note 22, at 962.

128 Note, *Taking Evidence Outside of the United States*, 55 B.U. L. REV. 368, 374 (1975).

129 Born & Rutledge, *supra* note 22, at 963.

abroad."[130] But important caveats remain. For example, the Convention provides that the "State of destination [*i.e.* the receiving court] may refuse to execute a letter rogatory that is manifestly contrary to its public policy."[131] In addition, the Convention provides that the letters "shall be executed in accordance with the laws and procedural rules of the State of destination,"[132] which may preclude the taking of some evidence that would have been permissible in the requesting court. Still, the codification of procedures for letters rogatory in agreements like the Inter-American Convention removes much of the uncertainty involved with the letters and can serve to facilitate and speed up the process.

67. The Inter-American Convention, however, is only a regional agreement between a handful of North American nations. The preeminent international agreement on taking evidence is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention). The Evidence Convention, which has been joined by 57 nations spanning six continents, was designed to "facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods [signatory states] use for this purpose."[133] The Evidence Convention "attempts to bridge the gap between the U.S. and other legal systems" and to provide "a set of rules and procedures that does not impinge upon the sovereignty of the state in which the evidence is located, while yielding evidence that can be used in the country requesting discovery."[134]

68. One of the most significant innovations of the Evidence Convention is the requirement that contracting states designate a Central Authority to receive letters of request (essentially the Convention's terminology for letters rogatory) from judicial authorities of other contracting states.[135] The Central Authority streamlines judicial cooperation between national courts. Another important rule in the Convention limits the grounds on which the receiving state may refuse execution to two scenarios: first, where the execution of the letter does not fall within the functions of the judiciary, an obvious limitation if a foreign court is asked to perform a task outside its domestic purview; and second, where the recipient state believes its sovereignty or security would be prejudiced by execution of the letter. The Convention expressly provides that "[e]xecution may *not* be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it."[136]

69. Another notable provision of the Evidence Convention allows for the use of a "special method or procedure" for taking evidence when requested.[137] This provision was intended to establish a mechanism for implementing in the recipient state evidence-taking procedures specific to the requesting state, even though as a general rule (as with the Inter-American Convention) the "judicial authority which executes a Letter of Request [applies] its own law as to the methods and procedures to be followed."[138] This provision is particularly useful for American litigants seeking deposition testimony in civil-law forums. Whereas cross-examination and verbatim transcripts of testimony are basic features of American litigation, these

130 Inter-American Convention on Letters Rogatory, art. 2.

131 *Id.* art. 17.

132 *Id.* art. 10.

133 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, preamble (1970) (Hague Evidence Convention).

134 Zekoll *et al, supra* n. 49, at 453.

135 Hague Evidence Convention, art. 2.

136 *Id.* art. 12 (emphasis added).

137 *Id.* art. 9.

138 *Id.*

practices are foreign to civil law traditions. Cross-examination and verbatim transcripts are the kind of "special method and procedure" that Article 9 theoretically makes possible in forums that do not ordinarily allow these procedures, though the requested court retains the authority to decide whether or not to use them.

70. The Evidence Convention has other significant limitations as well. Most important, the Convention reserves the right of contracting states to declare that they will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents.[139] All but three contracting states (the United States, Israel, and the former Czechoslovakia) have made such a reservation, although the states making the reservation differ on the degree to which they restrict obtaining pretrial discovery.[140] Even countries that allow pretrial discovery of documents to some extent, like Switzerland, fall far short of the pretrial discovery enabled by the American discovery system.[141] Because of these limitations on American-style discovery, many U.S. litigants avoid using the Convention if they can, thereby undermining one of the primary rationales for the Convention.

71. Disputes about the effects of the Evidence Convention on U.S. discovery procedures highlight the extent to which Westphalian sovereignty still poses an obstacle to robust international judicial cooperation. For years, U.S. courts wrestled with the question whether the Evidence Convention established the exclusive means for obtaining evidence located in foreign countries. In *Société Nationale Industrielle Aérospatiale v. U.S. District Court*,[142] the U.S. Supreme Court rejected the proposition that the Hague Evidence Convention forecloses U.S. district courts from ordering foreign national parties to produce evidence physically located within a signatory nation pursuant to domestic procedural rules. Instead, the Court held, the Hague Convention is just "one method of seeking evidence that a court may elect to employ." Moreover, the Court said that U.S. litigants need not even attempt to use the Convention's procedures before resorting to other means of seeking evidence because in "many situations the Letter of Request procedure authorized by the Convention would be unduly time consuming and expensive as well as less certain to produce needed evidence than direct use of the Federal Rules."

72. Justice Blackmun, dissenting in part, warned that "the Court's decision in this case [was] as an affront to the nations that have joined the United States in ratifying the Hague Convention." In his view, the majority "ignore[d] the importance of the Convention by relegating it to 'optional' status, without acknowledging the significant achievement in accommodating divergent interests that the Convention represents." Indeed, "[m]any of the nations that participated in the drafting of the Convention regard nonjudicial evidence taking from even a willing witness as a violation of sovereignty." The use of U.S. discovery procedures to compel production of documents overseas in contradiction of the Convention might be seen as a "raw exercise of [U.S. courts] jurisdictional power to the detriment of the United States' national and international interests." The majority was unpersuaded; it said only that "American courts should … take care to demonstrate due respect for any special problem confronted by the foreign litigants on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state." The Court declined to "articulate specific rules to guide this delicate task of adjudication."

139 *Id.* art. 23.

140 Zekoll *et al.*, supra note 49, at 456–57.

141 See FED. R. CIV. P. 26.

142 482 U.S. 522 (1987).

73. The debate over *Aérospatiale* and the role of the Hague Evidence Convention in U.S. litigation underscores the difficulty of achieving international judicial cooperation in a world of multiple sovereigns. Ultimately, international cooperation agreements are only as good as the will of the signatory nations to abide by them. On a more positive note, however, cooperation does take place. Some nations, including the United States, have unilaterally adopted measures to assist foreign courts in the collection of evidence located within the United States.[143]

3.3 Enforcement of Judgments

74. International judicial cooperation also extends to the enforcement of foreign court judgments and foreign arbitral awards. In some countries, including the United States, certain private antitrust disputes may be submitted to arbitration.[144] Thanks to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[145] to which the overwhelming majority of countries in the world are parties, agreements to arbitrate are enforceable in the court of any state party, and awards are entitled to recognition and enforcement. Efforts to produce a comparable convention for money judgments in civil and commercial matters have not succeeded, though there is a new Hague Convention on Choice of Court Agreements, concluded in June 2005, which will take a step in that direction when it comes into force.[146] At present, the rules governing recognition and enforcement of both foreign money judgments and foreign judgments requiring specific relief are a matter of national law. Indeed, in the United States they are not even governed at the national level: every one of the 50 states has its own rules for this field (although many of the states voluntarily have enacted versions of a uniform law that has been prepared by a private group known as the Uniform Law Commission).[147] Some regimes offer full enforceability, as long as the rendering court had proper subject-matter jurisdiction and personal jurisdiction under its own law; some insist on reciprocity; some regard the rendering court's judgment only as *prima facie* evidence of the winning party's right to recover; and some use the rendering court's judgment only as ordinary evidence. The situation is even less deferential when it comes to injunctive relief or other forms of specific relief. Very few, if any, national courts regard themselves as being under any particular obligation to enforce a foreign court's injunction. Instead, the second court will undertake its own inquiry into the matter and decide for itself what is proper.

3.4 Special Cooperation in Certain Subject Areas

75. It is beyond the scope of this paper to explore areas other than competition law in any detail. But it is worth noting that principles facilitating international cooperation have been developed in areas as diverse as international insolvency, international intellectual property, and criminal law enforcement. Those principles might serve as a template for further instruments in competition cases. The best example comes from the American Law Institute, which has published "Global Principles for Cooperation in International Insolvency Cases."[148] Principle 1.1 states that the overriding objective of the project is to enable "courts and insolvency administrators to operate effectively and efficiently in international insolvency cases … ." Principle 4, on Case Management, illustrates how courts would work within this system:

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143 See 28 U.S.C. 1782-1784. See also *Intel v. AMS*, 542 U.S. 241.

144 See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985).

145 21 U.S.T., T.I.A.S. No. 6997 (concluded in 1970).

146 http://www.hcch.net/index_en.php?act=conventions.text&cid=98 (last visited 25 May 2014).

147 See http://www.uniformlaws.org (last visited 25 May 2014).

148 Published 2012 by the ALI; see http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=85.

4.1. A court should, by actively managing an international insolvency case, coordinate and harmonize the proceedings before it with those in other states except where there are genuine and substantial reasons for doing otherwise and then only to the extent considered to be appropriate in the circumstances.

4.2 A court:

(i) Should seek to achieve disposition of the international insolvency case effectively, efficiently, and timely, with due regard to the international character of the case;

(ii) Should manage the case in consultation with the parties and the insolvency administrators involved and with other courts involved;

(iii) Should determine the sequence in which issues are to be resolved; and

(iv) May hold status conferences regarding the international insolvency case.

76. There is much more of interest in these principles, but this quick look shows that in the insolvency field, where assets are often scattered around the world, experts have put together a promising set of principles for the coordination of actions.

4. Conclusion

77. Until now, cooperation in the field of competition policy has occurred primarily among national and regional authorities. Often that will suffice. But there can come a time when the national or regional courts become involved in a case. Under the enforcement system that prevails in the United States, that stage comes quickly, because both the Department of Justice and the Federal Trade Commission must turn to the courts for the enforcement of their orders, and in the case of the Department of Justice, for the prosecution of any civil or criminal case. In other countries the courts will become involved only when an appeal is taken from an administrative order. Either way, however, it is important to understand what kinds of mechanisms are available to courts to coordinate their efforts in these cases. A number of possibilities exist, ranging from measures that help to allocate authority among potentially interested countries by respecting jurisdictional lines, to doctrines designed to cope with parallel litigation, to specific judicial assistance in the collection of evidence or the enforcement of judgments. As the number of cases reaching the courts increases, the competition area may benefit from studying the coordination mechanisms now being used for international insolvency cases. This has become possible as countries around the world have developed a consensus around the practices that a sound competition law should address. Judges in competition tribunals around the world stand ready to do their part to bringing about the effective, fair, and efficient enforcement of this important set of laws.