**International Litigation**

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**Part I: Introduction & Strategic Concerns**

1. **Introduction**
   1. **Attributes of U.S. Courts-** Why are πs (domestic and foreign) so eager to haul foreign ∆s into US courts and why do foreign ∆s want out of the US court system
      1. Damages
         1. Uncapped damages in many instances
         2. Attorney’s fees
         3. Strict liability in tort and other broad theories of substantive recovery, unavailable in other jurisdictions
         4. Punitive damages
            1. Punitive damages are against public policy in many countries
            2. Existence of punitive damages possibility drives up settlement costs
      2. Jury Trials
         1. Juries in Civil Cases
            1. Unique phenomenon particular to the US
         2. Emphasize oral advocacy
            1. Different skill set than most foreign lawyers have who are mostly trained in written arguments
         3. Susceptibility to emotional appeal, less rational
      3. Extensive Discovery
         1. Broad standard for discoverable material
            1. Many view the broad standard as an invitation for a fishing expedition
            2. Request for production of documents unknown, interrogatories, request for admissions, depositions
         2. Difference from civil law jurisdictions
            1. Mostly compelled to produce evidence which your argument or side relies upon

Not pulling information from the other side

* + 1. Elected Judges (state courts)
       1. Political motivations
       2. Worry of bias and untoward influence
       3. Judicial elections, by their nature, can sweep very incompetent people into office and banish competent judges on sole basis of political affiliation
    2. Anti-trust laws, our view of free market economy is thou shall compete
    3. Extraterritorial application of American Law
    4. Jurisdiction: Exorbitant basis for asserting American Jurisdiction over foreign individuals

**Part II: Suing Foreign Defendants in U.S. Courts**

1. **Problems of In Personam and In Rem Jurisdiction**
   1. **Strategic Considerations**
      1. Defending Foreign ∆
         1. First move should always contest the court’s personal jurisdiction over ∆
         2. The ∆ carries the burden of establishing a lack of personal jurisdiction
      2. Objecting to Personal Jurisdiction
         1. Federal Court
            1. 12(b) motion for want of jurisdiction
         2. Texas state courts

**Objecting to Personal**

**Jurisdiction**

* + - * 1. Must object to jurisdiction by special appearance

If not, ∆ has submitted himself to the PJ of the court and waives the right to contest the jurisdiction

* + - * 1. If attempting to remove to federal court, remove first and then challenge jurisdiction
      1. Waiver
         1. If objection to Personal Jurisdiction is not asserted first, it is waived

Contrasted with Subject Matter Jurisdiction, which can never be waived

* + 1. Always File for Special Appearance for foreign ∆
       1. ***Benefits***
          1. To protect your asserts
          2. You might win and then go home
          3. If you lose, you can still defend yourself on the merits of the case
          4. If you lose, Appeal
       2. ***Disadvantages***-
          1. Once you submit, you waive your right to challenge PJ

You have empowered the court to decide a binding issue on you which is entitled to res judicata

* + 1. Forum Non Conveniens
       1. Discretionary doctrine that permits a court with Personal Jurisdiction over a ∆ to nonetheless decline Jurisdiction over the case
    2. Representing π
       1. When asserting Personal Jurisdiction, plead both general and specific
          1. Include very detailed specific affidavits w/substantial evidence for purposes of Jurisdiction
    3. Appealing a Jurisdiction Ruling
       1. ***Federal Court***
          1. If motion to dismiss based on lack of Personal Jurisdiction is overruled, this is not a final order

But Cannot appeal the Jurisdiction issue until the entire case is tried and judgment rendered by district ct

CAVEAT

***Interlocutory Appeal***- A judge may certify the issue for appeal, but this is rarely done

* + - * 1. Effects on π

If ∆’s motion to dismiss for lack of Personal Jurisdiction is denied, this seemingly looks good for the π

∆ has motivation to settle

∆ will be forced to try the case, very $$$

Danger that the judgment could be wiped away on appeal

At which point π has essentially wasted resources in the actual trial

* + - * 1. Effects on ∆

∆ faces prospect of trial in foreign Jurisdiction

∆ must bear expenses of trial or settle

∆ still has shot to overturn judgment on appeal

* + - 1. ***State Court*** (Texas)
         1. If objection to Personal Jurisdiction is overruled, you can take an immediate appeal under Texas law

Less uncertainty for both sides

* 1. **Due Process Limits of In Personam Jurisdiction**
     1. Limits
        1. Outer limits of Personal Jurisdiction delineated by the due process clauses in the 5th amdmt (federal) and 14th amdmt (states)
        2. Courts must first look to the state long-arm statute
           1. Many state long-arm Jurisdiction statutes reach the widest breadth permitted by the constitution
           2. Other states have specifications for the reach of their long arm statute
     2. **Personal Jurisdiction**- the power of a court to enter a judgment against a specific defendant: Power must be authorized by
        1. ***a long arm statute*** and
        2. ***must not exceed the limitations of the Due Process Clause*** of the US constitution (14th amendment)
  2. **Personal Jurisdiction Test- Constitutional Test**
     1. Overview for Personal Jurisdiction
        1. **Long Arm Statute**
        2. **Due Process of Constitution (2-prong test)**
           1. Minimum Contacts/Systematic & Continuous

Specific

General

* + - * 1. Fairness
    1. **Constitutional** Independent two-prong test, if either prong is not met, there is no Personal Jurisdiction over the party

*Intent*

(O’connor in Asahi) 4

**1. Minimum sovereignty purposeful**

**contacts branch availment OR**

*Knowledge it could reach State*

*(Brennan in Asahi) 4*

***Interest of Judicial System***

**2. Fair play Fairness *Interest of Plaintiff***

**Justice branch *Burden on Defendant***

***Interest of State Forum***

* + - 1. ***Does the foreign ∆ have sufficient minimum contacts necessary to support Jurisdiction?***
         1. Specific Jurisdiction

Does the cause of action arise out of (Blackmun, narrower) or relate to (Brennan, broad) the claim?

* + - * 1. General Jurisdiction

Continuous and systematic contacts with the forum

Cause of action does not need to be related to ∆’s activities in the forum

* + - 1. ***Fairness Doctrine:***
         1. The exercise of Personal Jurisdiction must not offend “traditional notions of fair play and substantial justice (Shoe)

Balancing factors (Asahi)

Burden on the ∆ to litigate in the forum

Π’s interest in litigating and obtaining relief in the forum

The interest of the forum state in litigating the matter

Interest of the Judicial System

* + 1. **Specific Jurisdiction-** (1st Prong🡪Sovereignty Branch) Does the cause of action arise out of (Blackmun, narrower) or arise out of (Brennan, Narrower) ∆’s contacts with the Jurisdiction?
       1. Asserted when ∆’s contacts with forum state are sporadic, but the cause of action arises from those contacts
       2. Brennan Dissent- thinks there is no distinction between “arise out of” and “related to” and that labeling is unnecessary
    2. **General Jurisdiction-** (1st Prong🡪 Sovereignty Branch) when there are sufficient contacts, through substantial continuous and systematic activities, between the foreign ∆ and the State🡪 The state may have PJ over ∆’s activities that happen anywhere in the world.
       1. High threshold for finding general Jurisdiction
       2. Examples
          1. Domicile
          2. Place of incorporation
          3. Principle place of business
       3. Test: are ∆’s contacts with the forum state systematic and continuous?
          1. Helicopteros seemingly sets a high bar as to what constitutes systematic and continuous (General is more difficult to establish than specific Jurisdiction)

Defending against systematic & continuous labels from Helicopteros

Never authorized to do business in forum

Never had agent for service of process in forum

Never operated in forum

Never sold any product in the forum

Never solicited business in the forum

Never signed a contract in the forum

Never employed a person in forum and never recruited employees from forum

Does not own and has not owned real estate in the forum

Never maintained records in forum

No shareholders in the forum

Attempt to paint any contacts with forum as isolated and independent

* + - 1. *Helicopteros Dissent*- Brennan argues in his dissent that the Helicopteros claim possible related to the forum and that π may have had specific Jurisdiction over the foreign ∆, even though the court did not find general Jurisdiction
    1. Presence of a Registered Agent or Certificate of Business
       1. According to a 5th circuit opinion, aforeign company with a Certificate of Business and has registered agent for service of process is not sufficient for general jurisdiction (Siemer v. Learjet)
    2. Fed. R. Civ. P. 4(k)(2)
       1. Permits accumulating national contacts to obtain jurisdiction over ∆s to pursue federal claims
       2. ∆ must not be subject to personal Jurisdiction in any one state
       3. circuits are split as to who bears the burden for proving or disproving Jurisdiction via 4(k)(2)
    3. **Fairness Branch**🡪 2nd Prong
       1. Test: Exercise of Personal Jurisdiction must not offend traditional notions of fair play and substantial justice (International Shoe)
          1. Reasonableness of fairness of the exercise of jurisdiction
       2. ***Asahi Balancing Factors***
          1. Burden on the ∆ to litigate in the forum
          2. Π’s interest in litigating and obtaining relief in the forum
          3. The interest of the forum state in litigating the matter
          4. Interest of the Judicial System

International comity may be a consideration here

* + - 1. For the first time, Ct incorporated doctrines associated with discretionary Forum Non Conveniens
      2. Considerations
         1. “often the interests of the π and the forum in the exercise of Jurisdiction will justify even the serious burdens placed on the alien ∆” (Asahi)
  1. **“Stream of Commerce” Jurisdiction *(specific jurisdiction)*** 
     1. Generally: Split interpretation of **Purposeful Availment:**
        1. *Brennan’s view-* knowledge or awareness that product could possibly reach forum is sufficient, (4 Judges)
        2. *O’Connor’s view*- D must have intent, the action of the defendant was purposefully directed toward the forum state, (4 judges)
           1. The placement of a product into the stream of commerce, without more, is not an act of the ∆ purposefully directed toward forum state
           2. Activities to consider

Advertising

Communication with customers in the forum state

Designing product with an eye toward the forum

Marketing through a sales agent in the forum

* + 1. **Outcome determinative: State vs. Federal Court**
       1. The state and federal courts are split over the applicability of which opinion to apply from Asahi
          1. Fifth Circuit- will continue to follow its pre-Asahi cases, does NOT follow O’Connor’s approach (La Cienga Music)
          2. Texas State Court- applies O’Connor’s purposeful availment test (CSR Ltd v. Link)
  1. **Gotcha Jurisdiction**
     1. General jurisdiction- service of ∆ while transiently present in the forum is constitutionally sufficient to confer personal jurisdiction (Burnham v. Superior Ct)
     2. Considerations
        1. Case applied to individual ∆
           1. Gotcha Jurisdiction has yet to apply to corporations
        2. This case is most likely an outlier
           1. Nonsensical for Helicopteros to seemingly put stringent limits on general Jurisdiction but virtually no limits on Jurisdiction by service of process to one who is only in the Jurisdiction for a short time
     3. Japan- takes very expansive view of Personal Jurisdiction, see Goto v. Malaysian airlines
  2. **Piercing the Corporate Veil**
     1. Meier v. Sun Int’l Hotels (11th Cir.) General Jurisdiction Case (Jurisdiction granted)
        1. Generally, a foreign corporation is not subject to Jurisdiction in a forum state solely /c subsidiary is subject to Jurisdiction in that state, UNLESS
           1. ***Agency theory***- The subsidiary is merely an agent for the corporation to conduct business in the jurisdiction
           2. ***Alter Ego***- Subsidiary does not have the semblance of its own individual identity

Court may extend Jurisdiction to any foreign corporation where the affiliated domestic corporation manifests no separate interests of its own and functions solely to achieve the purpose of the dominant corporation

* + - 1. Held that π sufficiently established that ∆s had continuous and systematic contacts with the forum sate through the activities of the FL subsidiaries
    1. Considerations
       1. Similar analysis is conducted in determining Jurisdiction for piercing the corporate veil, as is conducted for determining liability
          1. ***Does parent exercise direct control and management over the subsidiary’s daily activities***
       2. Possibly two veil piercing theories
          1. ***Agency***

Court in Meier essentially pierce the veil under the agency theory

Open question as to whether the agency needs to be exclusive

Non-exclusive agency is probably enough

* + - * 1. ***Alter Ego***- subsidiary and parent are really one in the same
    1. Miller v. Honda (ct refused to pierce the corporate veil to establish Personal Jurisdiction over the ∆)
       1. Π sought general Jurisdiction over the ∆ based on continuous and systematic contacts
          1. Ct refused under the reasoning that *Parent must be active and engage in direct participation or an intermingling of two companies for Jurisdiction to reach the foreign affiliate (parent)*
          2. Subsidiary/affiliate/parent relationship alone is NOT enough
       2. ***Reconciling Honda and Meier***
          1. In Honda, the subsidiary took independent actions, whereas the FL subsidiaries in Meier acted entirely for the Bahamian entities

Intermingling in Meier was much greater

* + 1. Jurisdictional Discover
       1. Π must plead sufficient facts to be entitled to jurisdictional discovery
          1. Pleading or discovery request should be specific, non-frivolous and logical
          2. Cannot simply offer conclusory pleading
       2. Must provide sufficient evidence to convince court to pierce corporate veil through jurisdictional discovery
          1. Π seeking Jurisdiction, then you need to take depositions, affidavits,
          2. Meier Ct noted that ∆’s affidavits were mostly conclusory statements, which were insufficient to shift the burden back to π to produce evidence supporting Jurisdiction
  1. **Jurisdiction based on Web Presence**
     1. Toys R Us v. Step Two (3rd cir)-
        1. **Rule**: Mere operation of a commercially interactive website should not subject the operator to Jurisdiction anywhere in the world
           1. More is required

Targeting web site to the forum state

Knowingly interacting with residents of the forum state via the website

* + - 1. **Considerations**
         1. Directly Targeting forum state
         2. Has intent been manifested
         3. Internet contact- with residents of forum states
         4. Non-internet Contacts with forum state (standard min. contacts analysis)
    1. Zippo Case
       1. ∆ made conscious choice to contact residents of forum state, therefore being subject to Jurisdiction in that state should be foreseeable
  1. **Other Attempts at Personal Jurisdiction**
     1. Jurisdiction by necessity
        1. If this court does not have Jurisdiction, NO court will have Jurisdiction
           1. Essentially that π will not have his day in ct if this particular ct rejects the dispute for lack of Jurisdiction
           2. Analysis includes ability of foreign courts to entertain the case (Helicopteros)

Compare with *Louring v. Kuwait Boulder Shipping*- where court upheld jurisdiction b/c no other US ct would have Jurisdiction over the ∆

This case was prior to Helicopteros

* + 1. Jurisdiction by Virtue of “Effects” Test (Toys R Us, FN 6)
       1. Personal Jurisdiction may, under certain circumstances, be based on the effects in the forum state of a ∆’s tortuous actions elsewhere
          1. Conduct must be intentionally tortuous and AIMED at the forum state
       2. Effects test is difficult to apply and circuits differ on the deference owed to the test (broadly or narrowly construed)
  1. **In Rem and Quasi in Rem Jurisdiction**
     1. Generally
        1. ***Rule: In rem jurisdiction must meet the standards of fair play and substantial justice announced in International Shoe*** *(Shaffer v. Heitner)*
           1. Just analyzing the fairness prong
           2. When dealing with property rights, the personal rights of a person in that property should be entitled to the same protection as in personam Jurisdiction
        2. In rem action limits the scope of judgment to the value of the property, subject to the court’s Jurisdiction
           1. Even so, court should not be in the business of denying rights to/in property without due process
     2. Considerations
        1. Usually no difficulty in finding substantial justice and fairness where claims to the property itself in the Jurisdiction is the source of the underlying controversy
           1. By virtue of his ownership of property in the Jurisdiction, ∆ took advantage of the Jurisdiction b/c Jurisdiction protects his interest and other benefits

Court would always have Jurisdiction in such a case and such Jurisdiction satisfies fairness branch

* + 1. Quasi in Rem Actions
       1. Where property that serves as basis for the Jurisdiction is completely unrelated to the cause of action
       2. Presence of such unrelated property alone is NOT sufficient for grant of Jurisdiction (Shaeffer)
  1. **EU Jurisdiction:** Council Regulation on Jurisdiction & the recognition and enforcement of Jurisdiction in Civil and Commercial Matters
     1. Art. 3- General Provisions section = US general Jurisdiction
        1. Domicile is only basis for **general** jurisdiction
        2. Domicile is defined in Art. 60 according to the law of the member state
           1. In case of business organizations, the domicile is the place where it has its

Statutory seat, or

Central administration, or

Principal place of business

* + - * 1. ***Distinguished from US*** where Helicopteros allows foreign companies to be subjected to general personal jurisdiction for continuous and systematic activities:

US has broader net of personal jurisdiction compared to EU legislation

* + - * 1. Art. 22 cites exceptions- patent, etc
    1. Art 5 is Special jurisdiction, analogous to our specific jurisdiction
       1. Council has specific clauses to cover specific instances
          1. Tort-

Jurisdiction in the courts for the place where the harmful event occurred or may occur

* + - * 1. Contract-

Jurisdiction in the place of performance of the obligation in question

The place in a member state where the goods were delivered or should have been delivered; or

Place in member state where services were provided or should have been provided

* + - * 1. US Courts use “arising out of” or “related to” analysis
      1. Art 5(2) would give jurisdiction over Asahi b/c matter is ancillary to proceeding
    1. Other Jurisdiction issues
       1. No fairness issue under Council
       2. No gotcha jurisdiction- EU rejects jurisdiction over parties based on mere transitory presence, completely different from international law
          1. Rejecting that notion of temporary presence justifying service of process

1. **Agreements to Litigate or Arbitrate Abroad**
   1. **Standards for Enforcement**
      1. Two Types (different from choice of law clause)
         1. Choose a court
         2. Choose an arbitration
      2. Effect of Forum-Selection Clause
         1. **RULE: Clauses considered Prima facie valid and should be enforced unless enforcement would be unreasonable under the circumstances (Bremen v. Zapata)**
            1. **Burden**- burden is on the party resisting the forum selection clause
            2. ***Bremen Standard for enforcing forum selection clause in court***: a forum selection clause is enforceable unless the party wishing to sue in violation of the clause demonstrates that trial in the agreed forum will be manifestly and gravely inconvenient or that the party will be effectively deprived of a meaningful day in court
         2. Two Exceptions
            1. **If application of clause would contravene strong public policy** 🡪 **Enforcement of the clause is “unreasonable or unjust;”**

Would it deprive a party of its day in court- no opportunity to litigate (due process concerns)

Would contravene some Public policy that reflects fundamental aspect of society or jurisprudence

Public policy ≠ their law is different from our law

* + - * 1. **Forum selection clause was drafted with fraud or undue influence**

The clause was invalid for such reasons as:

fraud, undue influence, or overreaching bargaining power

* + 1. Three ways a court could approach enforcement of Forum Selection Clause
       1. Balancing Test
          1. Weigh convenience, public policy
       2. Automatic enforcement
          1. Enfoce the clause as a away or respecting party autonomy, sanctity of contract
       3. Automatic rejection
          1. Concern with prerogative of the court
          2. Court’s possessiveness
    2. Policies in Favor of Forum Selection Clause Enforcement
       1. Advantages
          1. Certainty and predictability
          2. Material factor which was negotiated in the contract
          3. Selecting forum which specializes or has expertise in that area
          4. Neutrality
          5. Avoiding certain remedies
          6. International Comity

American business cannot expand if we insist on a parochial concept that all disputes be resolved under our laws and in our courts

Int’l trade is not be governed exclusively by US terms and US policy

Forum selection provision is an almost indispensable precondition to the orderliness and predictability essential to any international business transaction

* + - * 1. Respect for Party’s autonomy/freedom and sanctity of contract- negotiated for the terms which exist in the contract

Empowers parties

Choice of forum is made during an arm’s length negotiation between two sophisticated parties

Parties usually attempt to select a neutral forum and choice

Parties select particular forums for their sophistication in particular matters

* + - 1. Appeal
  1. Exceptions for Enforcements
     1. Fraud exception
  2. **Drafting Considerations**
     1. Types of Forum-Selection Clauses
        1. Choice of court
        2. Arbitration clause
        3. Characterized as a special form of the forum-selection clause (see infra)
     2. ii) Forum-Selection Clause Language
        1. Name the court correctly (avoid even the smallest naming mistakes)
        2. Include an express consent to that court’s jurisdiction
        3. May be a separate clause
        4. Provide that the chosen court has ***exclusive*** jurisdiction
        5. Include a choice-of-law clause
  3. **U.S. Statute Preemptions**
     1. Bills of Lading (*Sky Reefer*)
        1. Carriage of Goods by the Sea Act (COGSA)
           1. COGSA invalidates any clause in a contract of carriage that results in “lessening” of carrier liability for loss or damage to goods
           2. An arbitration clause does not lessen liability under COGS by increasing transaction costs associated with obtaining relief

Means and costs related to enforcement are not a lessening of liability

Instead these are separate transaction costs

* + - * 1. Skepticism regarding ability of foreign arbitrator’s to apply COGSA (or other US statutes) is misplaced and out of touch with principles of international comity

Premature to argue the arbitration clause would lessen liability, involves speculation

Issue will be addressed during the award enforcement portion of the judgment

* + 1. Securities & Exchange Commission (*Scherk v. Alberto-Culver*)
       1. *In favor of enforcing arbitration clause*
          1. Court may look to which laws control the dispute

Subject matter of the contract: US or foreign asset?

Location of assets: US or foreign jurisdiction

Activities of assets (corporations in *Scherk*): directed at US or foreign jurisdictions?

* + - * 1. Where considerable uncertainty exists as to what law (which country’s law) will govern the dispute, the court should not just preempt a forum-selection clause on the basis of US law

International comity concerns

* + - 1. *Against enforcing arbitration clause (Douglas dissent)*
         1. Plain language of SEC Act makes agreements to arbitrate void and inoperative
         2. “American standards of fairness in security dealings [should] govern the destinies of American investors”

Parochial concerns

* + - * 1. When foreign corporation subjects itself to US federal securities laws, it is fair to apply the SEC Act
    1. Bankruptcy
       1. Bankruptcy public policy might trump a forum-selection clause
          1. Strong public policy in favor of determining all claims under the bankruptcy procedure
  1. **Arbitration Agreements**
     1. **New York Convention**
        1. Fundamental Obligations of Signatories
           1. National courts, when seized of action in a matter governed by arbitration agreement, must refer the parties to arbitration unless agreement is found null and void, inoperative, or incapable of being performed
           2. ***Nation courts must enforce foreign arbitral awards without reviewing the merits of the arbitrator’s decision***
        2. **Four-Prong Test (Applied by Federal Courts) to Determine if NY Convention Applies:**
           1. **Scope Issue: Is there an agreement in writing to arbitrate the subject of the dispute?**

***Does the NY***

***Convention apply?***

* + - * 1. **Signatory: Does the agreement provide for arbitration in territory of a signatory to the convention?**
        2. **Commercial Dispute: Does the agreement arise out of commercial legal relationship?**
        3. **Is one party to the agreement a non-US citizen, or is the concerned dispute international (include goods from abroad)?**
      1. Important Articles
         1. Article I

Reciprocity Limitation

Allows for any signatory to restrict recognition to awards made only in the territory of another signatory

Commercial Transaction Limitation

Allows for any signatory to restrict recognition to awards made pursuant to legal relationships which are commercial in nation

* + - * 1. Article II

Compels courts of signatories “when seized” of an action subject to an arbitration agreement to refer the parties to arbitration

Similar to the *Bremen* Standard (*supra*)

A forum-selection clause (arbitration clause) is enforceable unless party wishing to sue in violation of the clause demonstrates that trial in the agreed forum (or arbitration) “will be so manifestly and gravely inconvenient that [the party] will be effectively deprived of a meaningful day in court”

Enforcement exceptions

Fraud, undue influence, or overweening bargaining power

Contravention of strong public policy of the forum

* + - * 1. Article III

Compels contracting states to recognize arbitral awards as binding and enforce them

* + - * 1. Article V

Sets out instances were vacating or setting aside of award by court in primary jurisdiction is permissible (not mandatory)

* + 1. Advantages of Arbitration over Litigation
       1. Speedier than litigation
          1. Average arbitration lasts only 10 months
       2. Cheaper (this is an opinion but not necessarily a truism)
       3. Ability to choose the arbitrator
          1. Arbitrator expertise
       4. Finality
          1. Arbitrators as judge, jury, and appeals court
          2. EXCEPTIONS

US courts may refuse to enforce based on fraud, corruption, or misbehavior (9 USC § 10) but this is not review of merits

Some US circuits have created a standard for appealability of arbitral awards

“Manifest disregard of the law”

Arbitrators disregarded the clear and settled binding law

HOWEVER

Very few arbitral awards are overturned for “manifest disregard of the law”

Other courts are trying to put the brakes on this judge-created exception

Recent *Mattel* decision may reverse any more movement toward “manifest disregard for the law”

* + - 1. Flexibility and party autonomy
         1. Parties can choose both the substantive and procedural law
      2. Arbitrator expertise
      3. Confidentiality
         1. Sensitive information may stay private

Confidentiality is not a given

* + - 1. Neutrality
         1. Key in international arbitration
         2. Neutral forum
      2. Parties can choose substantive law and procedural
         1. Goes again to flexibility and party autonomy
      3. Less adversarial than litigation
         1. Preserves business/working relationships
      4. No jury
      5. Different evidentiary rules
      6. Limited discovery
         1. No depositions unless otherwise agreed to
      7. Worldwide enforceability under the New York Convention
         1. Most important document in international commerce
    1. Disadvantages of Arbitration Compared to Litigation
       1. Many “advantages” can be labeled disadvantages depending on perspective
       2. Finality
          1. Limited review
       3. Does not strictly follow precedent
          1. Lack of predictability
       4. “Splitting the Baby”
          1. Commonly held perception that arbitrator will find a way to somehow appease both sides

This is not necessarily true

* + - 1. No marshals, no police officers to enforce the award
         1. Must be through national courts of convention signatories
      2. No jury
      3. Limited discovery
      4. Inability of arbitrators to consolidate related disputes
         1. May result in inconsistent awards
      5. Possible delays and scheduling conflicts
    1. **Characteristics of Arbitration Agreements**
       1. Arbitration is Consensual-
          1. Mediation and negotiation is also consensual
          2. Without an agreement to arbitrate, there is no obligation to arbitrate

EXCEPTION

Some non-signatory parties can find themselves bound by an arbitration decision

Carnival cruise ticket, shrink-wrap cases

* + - * 1. May be provided for in contract in a “Forum Selection Clause”

Arbitration is specialized form of the Forum Selection Clause

Parties are more amenable to a Forum Selection Clause at the outset during negotiation

Better to negotiate a Forum Selection Clause at the outset of the transaction/contract

Dynamics are different after a dispute has arisen

* + - * 1. Arbitration clause invoked if one party seeks arbitration

If parties wish to forego arbitration, agreement may be ignored

* + - 1. Binding
         1. Similar to but more powerful than a court judgment (finality)
      2. Party Autonomy
         1. Largely subject to the control of the parties involved

Control over procedures and participants

Ad hoc vs. administered arbitrations

* + - 1. **Severability: Buckeye**
         1. **Severability Doctrine**

**An arbitration provision is severable from the remainder of the contract (Buckeye)**

**Unless the challenge is to the arbitration clause itself, the issue of the contract’s *validity* is considered by the arbitrator in the first instance**

**The arbitration law applies in state as well as federal court**

* + - * 1. The underlying contract contains the arbitration clause

Supreme Court has ruled that where validity of the underlying contract is challenged, the arbitration agreement is severable (*Buckeye*)

This makes for two separate and severable contracts:

The Underlying Deal; and

The Independent Contract to Arbitrate

* + - * 1. ***Enormous practical applicability***

In a challenge to the contract as a whole, the severability preserves the independence and jurisdiction of the agreement to arbitrate

The challenge will still be decided by the arbitrator

* + - * 1. ***If the claim is fraud or attacking the Arbitration clause itself, then the federal or state court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of contract generally***

*Prima Paint* Court indicated that a federal court would consider allegation of fraud in formation of arbitration agreement itself

May be extended to formation issues regarding clause itself

* + - * 1. Art 3 §2 of NY Convention interpreted to mean that **agreement to arbitrate is null and void ONLY**

**When Agreement to**

**Arbitrate is Null and Void**

**When it is subject to an internationally recognized defenses, such as duress, mistake, fraud, or waiver, or**

**When it contravenes fundamental policies of the FORUM State**

* + - * 1. *Null and void language must be read narrowly*, for the signatory nations have jointly declared a general policy of enforceability of agreement to arbitrate
        2. Prima Paint & Buckeye- both involve broad arbitration clauses
      1. Private Proceeding
         1. Principal advantage to the agreement to arbitrate
         2. Will not necessarily translate into complete confidentiality

For best confidentiality, *include confidentiality clause in arbitration agreement*

* + - 1. **Procedures-** 
         1. are usually governed by the rules agreed to by both parties
      2. **Backdrop for Arbitration law** (Rhone Mediterranee)
         1. Backdrop for arbitration law in enforcing the clause will be decided by the forum situs
      3. Hypo: **Contract formation issues:** what if you had a gun at your head when you signed the contract; or what if it is forged
         1. Who is going to decide if there was **duress** or coercion? Who decides **forgery**? Who decides the **agency** doctrine? **Mental capacity** at time contract was made?

Does severability apply in these instances?

In Buckeye, there was no question of coercion, only on the validity of the contract

Pg 109- Frame your argument on the invalidity of the arbitration clause b/c you never agreed to anything, it was all force and therefore state/dist ct should decide the issue and NOT arbitrator

5th circuit- thinks you are attacking validity when you have questions of contract formation and that it is still for an arbitrator. WTF?

* + 1. **Arbitration Clauses**
       1. Scope: A party is bound to arbitrate only those disputes which parties agree to arbitrate in the agreement
          1. Scope controls which disputes will be sent to arbitration (arbitration eligible)
          2. **What are rules for construing scope of arbitration clause- rules of construction?**

The liberal federal policy favoring arbitration agreements manifested by this provision

*Moses H. Cone Memorial Hospital v. Mercury Construction Corp*., 460 US 1, 24 (1983) and *Mitsubishi* pg 114

The arbitration act establishes that, as a matter of federal law, any doubts concerning the scope of arbitratable **issues should be resolved in favor of arbitration,** whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or like defense to arbitrability

That federal policy applies with special force in the field of international commerce

***Broad scope means you can arbitrate statutory claims in international and even domestic suit which falls under the NY Convention***

* + - 1. ***Narrow Clause***
         1. A narrow clause will “capture” less disputes

Narrow clause generally marked by the phrase “arising under the contract”

Generally thought to exclude tort and statutory claims

* + - 1. ***Broad Clause***
         1. A broad clause will “capture” more disputes/issues

Broad clause generally marked by phrase like “arising under, relating to, or in connection with”

Generally thought to include tort and statutory claims

* + - 1. Remedies
         1. Generally, broader the clause, the broader the available remedies such as punitive damages and specific performance

Arbitrators have power to award all sorts of damages, including punitive damages, unless limited by the arbitration agreement

* + - 1. Jurisdiction of Arbitrators
         1. Default rule in the US is that court determines arbitrability of disputes
         2. Parties may clearly empower arbitrators to rule conclusively on jurisdictional (scope) matters (*First Options*)

*Kompetenz-kompetenz*

Must do so expressly and affirmatively or by incorporation

* + - 1. Parties may not expand a Court’s scope for reviewing an arbitration award beyond those grounds found in 9 USC § 10 (*Hall Street Assocs.*)
    1. Appointing Arbitrators
       1. Method of Appointment
          1. By Courts

If arbitration agreement does not specify method of appointment, arbitrators will be appointed per law of the situs

If the arbitration agreement does not contain this, either party may apply to court for an appointment

Time-consuming

Parties do not have control over who is appointed

* + - * 1. Appointment by List Method

Procedure

Institute provides parties with list of prospective arbitrators

Each party strikes any arbitrators that it objects to

Each party rank orders the remaining arbitrator candidates

Institute then composes tribunal according to unobjected to, ranked candidates

If list method does not result in appointment of panel, institute reserves the right to appoint all arbitrators

* + - 1. Neutrality of Arbitrators
         1. Most international rules have traditionally pressed for impartiality and neutrality for all arbitrators
    1. **Enforcement of Arbitration Clause by US Courts**
       1. Public Policy in Favor of Arbitration (*Mitsubishi*)
          1. “Liberal federal policy favoring arbitration agreements”
          2. ***“As a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”***

Powerful tool for proponent of arbitration [Sheppard]

Ambiguity goes in favor of arbitration

Court has notion that any big mistakes can be corrected at the enforcement stage

* + - * 1. “Federal policy applies with special force in the field of international commerce”
        2. Mitsubishi Holding: we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Mitsubishi

* + - 1. Court Approach to Arbitration Clause
         1. Considerations for Enforcement

Is the clause broad or narrow?

Does the claim fall within the scope of the clause?

Bremen issue- do strong public policy reasons exist for not applying the clause?

* + - 1. Against Enforcement of Arbitration Clause (*Mitsubishi* Dissent)
         1. Matters which involve “political passions and fundamental interests of nations” are not proper subject matter for international arbitration
      2. ***Appealing enforcement of arbitration***
         1. If motion to compel arbitration is AWARDED, then the arbitration must proceed until a final decision is made and then the party may appeal the decision

There is NO interlocutory appeal as there is for ordinary final orders (distinguished from final order on Forum Non Conveniens)

* + - * 1. But if motion to compel Arbitrations is DENIED, you get interlocutory appeal

This is b/c it is in the interest of speed and efficiency aligned with arbitration

* + 1. **Enforcement of Arbitration Award**
       1. Ultimate goal of arbitration is a judgment in the court of the “secondary jurisdiction”
          1. Court where award to be enforced
       2. Arbitration award itself is not a remedy
          1. It is no more than words on a piece of paper [Sheppard]

Arbitrators have no power to enforce the award or seize assets

* + - * 1. The invocation of the judiciary in the secondary jurisdiction gives an arbitral award teeth

Turns the words of the award into an effective remedy

* + - 1. New York Convention
         1. Article III

“Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where it is relied upon”

* + - * 1. Combines with Chapter 2 of FAA to enforce awards in the US

US requires reciprocity

~ 140 signatories to the NY Convention

* + - 1. ***Mechanics of Enforcement***
         1. Supply to court of secondary jurisdiction:

The duly authenticated original award or a duly certified copy thereof; and

There is no need to get certification of the award in the primary jurisdiction (unless seeking enforcement in primary jurisdiction)

This is a major departure from prior convention

The original agreement referred to in Article II or a duly certified copy thereof

Translated copy if necessary

* + - * 1. Note that secondary jurisdiction may have a time limit upon which enforcement must be sought on award

US time limit under FAA is 3 years

* + 1. **Binding Non-Signatories**
       1. General Rules
          1. A willing, non-signatory will be able to compel arbitration against an unwilling signatory
          2. A non-willing, non-signatory is unlikely to be compelled to arbitrate (*Thomson-CSF*)

Estoppel (direct benefit) seems to be obvious exception to this rule

* + - 1. Theories Upon Which Non-Signatory May be Bound
         1. Family of Companies (*Dow Chemical*)

Related companies appear to have been “veritable parties” to the contract containing agreement to arbitrate

Turns on companies’ role in the conclusion, performance, or termination of the contract containing clause

* + - * 1. Incorporation by Reference

New document/contract incorporates by reference another document which contains an arbitration agreement

* + - * 1. Corporate Veil-Piercing

In order to get to the parent company of a subsidiary

To prevent fraud or other wrong;

Where parent so controls or dominates the subsidiary; or

Where parent and subsidiary have abandoned separate identities

* + - * 1. Assumption of or Implied Contract

Where parent’s subsequent conduct indicates it is assuming obligation to arbitrate

* + - * 1. Agency Theory
        2. Third-Party Beneficiary
        3. Successor-in-Interest
        4. Equitable Estoppel

Where non-signatory knowingly exploits an agreement, the non-signatory is estopped from avoiding the arbitration clause contained in the agreement

Also known as Direct Benefit Estoppel (*Tencara*)

* + - * 1. Intimately Founded in and Intertwined With

Where claims against non-signatory (willing) are intimately founded in and intertwined with the underlying contractual obligation, non-signatory may compel arbitration (*Sunkist*)

* + - * 1. Inherently Inseparable

Where charges against parent company and its subsidiary are based on same facts and are inherently inseparable, court may refer claims against the parent to arbitration even if parent is not formally a party to the arbitration agreement (*Rhone*)

* + 1. **Non-Recognition**
       1. Setting Aside/Vacating or “Set Aside Proceedings”
          1. Courts at the seat of arbitration are the only courts which may vacate/set aside the arbitral award

May be called “primary jurisdiction”

* + - * 1. Law for setting aside/vacating arbitral award is the law of the situs

In the US FAA governs (9 USC § 10)

FAA Grounds for Vacating Award

Award procured by corruption, fraud, or undue means;

Evidence of partiality or corruption on part of arbitrators;

Where arbitrators are guilty of procedural misconduct; or

Where arbitrators have exceeded their powers

“Manifest disregard for the law”

* + - 1. Depends on Circuit but general consensus that “manifest disregard of law” is not an extra-statutory grounds for vacation
  1. **Hypo**: Contract between company in Texas (TexCo) and they have a contract with Germany (GermCo) Tex is building a refinery for Germ
     + 1. Arbitration clause: Any dispute arising under this contract goes to arbitration
          1. Calls for arbitration in Stockholm
          2. You represent Germco
       2. Actions
          1. Germ commences arbitration in Stockholm
          2. Tex has filed a lawsuit in state ct in Houston, claiming 1 million dollars owed under the contract
     1. **Responding to a π Bringing Lawsuit for Contract with an Arbitration Clause** 
        1. **Statutory Right of removal 9 USC § 205 under the NY Convention, regardless of diversity; or 1441 diversity removal**
        2. **Once in District Court, Challenge personal jurisdiction subject to 12b special appearance** 
           1. **First thing you want to know is what are ∆’s contacts with Texas**
        3. **Invoke Art. III of NY Convention to file for a motion to stay proceedings under Title 9 of USCA §3 pending arbitration**

**Steps for Handling Lawsuit for Contract With an Arbitration Clause**

* + - 1. **Invoke Art III of NY Convention and FAA for a motion to compel arbitration**
      2. **NY Convention- applies b/c four prong test applies**
         1. **Site of arbitration (Sweden) must have acceded to the convention**
         2. **Commercial transaction**
         3. **Scope- Signed agreement in writing to arbitrate the issues covered in the dispute**

**THIS IS WHERE MAJORITY OF DISPUTE OCCURS, is it BROAD/NARROW**

* + - * 1. **Must be a foreign deal- at least one party must be a foreign citizen**
      1. **Only if the π challenges the entire contract’s validity, do you bring up *Buckeye* severability doctrine and argue that an arbitrator decide’s the contract’s validity in the first instance**
      2. **If π challenges the arbitration clause’s validity, *Prima Paint* Court indicated that a federal court would consider allegation of fraud in formation of arbitration agreement itself**
    1. Change one fact- what if when Tex filed the lawsuit in US, GermCo had not yet commenced the arbitration in Sweden
       1. Tex claims they filed first
       2. RESULT: Nothing changes- b/c it is irrelevant whether there is a pending arbitration, under NY convention
          1. And FAA §3- stay of proceedings- upon any issue referable under arbitration
       3. To keep it in state court, argue statutory or tort claims which a narrow arbitration clause will not reach and therefore not within the scope of arbitration 🡪 should be resolved in US courts
          1. Narrow: “any claim or dispute arising under this contract are to be resolved by arbitration”
          2. Broad: “any claim or dispute arising under ***or related to*** this contract are to be resolved by arbitration”

1. **Enjoining Suit Abroad**
   1. **Ability to Enjoin Parties**
      1. **Federal courts have the power to enjoin those subject to their personal jurisdiction from pursuing litigation in foreign tribunals (Quaak, 1st Cir.) [pg 121]**

**Anti-Suit Injunction Middle Ground Approach**

* + - 1. **HOWEVER there should be a presumption in favor of concurrent jurisdiction and proceedings should be allowed to proceed simultaneously**
         1. **Rebuttable presumption against issuing anti-suit injunctions**

“*Conservative*” approaches stresses a greater presumption for comity and therefore greater presumption for parallel proceedings

* + - * 1. Rebutting the Presumption

Facts and factors particular to the specific case:

The nature of the two actions, whether they are merely parallel or interdictory (prohibited)

Posture of the proceedings in the two countries;

Conduct of the parties (examination of good faith or lack thereof);

Importance of the policies at stake in the litigation;

Extent to which the foreign action has the potential to undermine the forum court’s ability to reach a just and speedy result

* + 1. Typical Anti-Suit Injunction Situation
       1. Same parties
       2. Same issues
       3. The court has personal jurisdiction over the party filing the action in the foreign tribunal
       4. NOTE—if the suits do not involve the same parties and the same issues, the court need go no further 🡪 certainly no injunction should be issued
    2. Dueling Anti-Suit Injunctions
       1. What is the answer when we have seemingly reached a stalemate, where two different judicial systems have issued separate injunctions from proceeding in the other jurisdiction?
          1. Pursue an alternate forum
  1. **Foreign Anti-Suit Injunctions: *OUTCOME DETERMINATIVE***
     1. **Liberal Approach (5th Cir. & 9th Cir.)**
        1. An international anti-suit injunction is appropriate wherever there is a duplication of parties and issues, and the court determines that the prosecution of simultaneous proceedings would frustrate the speedy and efficient determination of the case

**Liberal Approach**

* + - 1. Concern for international comity assigned only “modest weight”
    1. **Conservative Approach (2d, 3rd, 6th, & D.C. Cirs.; TEXAS)**
       1. Whether the foreign action imperils the jurisdiction of the forum court or threatens some strong national policy

**Conservative Approach**

* + - 1. Greater weight (substantial weight) for international comity
         1. “Comity, like beauty, sometimes is in the eye of the beholder” (*Quaak*)

Cooperation, reciprocity, and respect among nations

* + 1. **Effect of International Parallel Proceedings** (or Why You Want an Injunction)
       1. **First to Judgment Rule**
          1. If two or more nations have jurisdiction in cases involving the same dispute, each suit should proceed until judgment is reached in one of the suits

**International Parallel Proceedings: Race to Judgment**

Once a judgment is reached, all other nations are supposed to recognize and enforce the judgment on principles of res judicata

Binding and enforceable

Judgments have a preclusive effect

No review based on foreign court’s judgment

The First to Judgment Rule does not necessarily mean the end of all appeals

First to Judgment Rule based on notions of respect and international comity

* + - 1. Pros and Cons of First to Judgment Rule
         1. Pros

Encourages speedier resolutions

Promotes international comity

* + - * 1. Cons

Waste of party/judicial resources in parallel proceedings

Encourages race to the courthouse

May provide a perverse incentive for court to just stay proceedings (abstain) and let the other court go forward

Circuits are split on the power of district courts to abstain

* + - 1. ***Avoiding Parallel Proceedings (Generally)***
         1. Avoid parallel proceeding scenario by using a forum selection clause (or arbitration clause)

An anti-suit injunction can be used to enforce a forum selection clause if one party attempts to file outside the agreed upon forum

* + 1. Level of Appellate Review
       1. Higher level of appellate review because of comity considerations (*Quaak*)
          1. “Intermediate level of scrutiny, more rigorous than the abuse-of-discretion or clear-error standards, but stopping short of plenary or de novo review”
          2. Appellate court will not hesitate to act on its own independent judgment
  1. **Domestic Anti-Suit Injunctions & Other State Court Concerns**
     1. Federal Courts
        1. Firmly established discretionary power of a federal court in which the first-filed action is pending to enjoin parties from proceeding with a later-filed action in *another federal court*
           1. NOTE—Similarly, it is unlikely any *state* would permit parallel proceedings within its own court system
     2. TEXAS State Court Approach (*Gannon v. Payne*, Texas 1986)
        1. Parallel Proceedings in the *Same State*
           1. When a suit is filed in a court of competent jurisdiction, that court is entitled to proceed to judgment and may protect its jurisdiction by enjoining the parties to a suit subsequently filed in another court of the same state
        2. Parallel Proceedings in *Different States*
           1. Same as rule above
        3. Parallel Proceedings in *State and Foreign Nation*
           1. Texas recognizes the caveat of limited use for injunctions in such instances
           2. Ordinarily, parallel actions should be allowed to proceed simultaneously
     3. **Effect of Domestic Parallel Proceedings** (or Why You Want an Injunction)
        1. **Race to Filing**: The court in the first filed action may enjoin the prosecuting Party from filing in 2nd court

**Domestic Parallel Proceedings: Race to Filing**

* + - * 1. race to filing
        2. Lower standard
      1. When dealing with state to state (US interstate) proceedings, there is no concern for international comity
         1. Anti-suit injunctions prohibiting litigants from proceeding in out-of-state courts necessarily involve two sovereigns with concurrent jurisdiction to decide the controversy
    1. Level of Appellate Review
       1. Clear-error standard or abuse-of-discretion standard

1. **Service of Process**
   1. **Introduction**
      1. ***Attacking Service of Process***
         1. Service of process is another thing that the defendant may attack as inadequate
         2. Quashing service *only* buys the defendant additional time
            1. Plaintiff will attempt service again and probably achieve proper service the second time
      2. ***Rule-* Forum state will make the decision themselves as to whether foreign service is required🡪 if forum state requires foreign service, then the Hague Service Convention applies**
      3. ***Timing Concerns***
         1. If a party is sued in state court, there is a limited amount of time for defendant to remove the case to federal court
            1. Time does not start to run until defendant has been properly served
      4. ***Collateral Attack- legal action challenging the judgment entered against ∆***
         1. If a default judgment is entered against the person, he or she may collaterally attack the authority of the issuing court to render it, claiming that there was a lack of [Personal Jurisdiction](http://legal-dictionary.thefreedictionary.com/Personal+Jurisdiction).
         2. *Like personal jurisdiction issues, a foreign defendant may collaterally attack service of process*
         3. **Collateral Attack Process**
            1. **∆ Defaults (if the US ct decides Personal Jurisdiction issue, then it is res judicata)**
            2. **π tries to enforce the judgment abroad**

**Collateral Attack**

* + - * 1. **∆ then challenges the personal jurisdiction/service of process in the court which entered the default judgment**
        2. **Then Personal Jurisdiction or Service is considered anew under foreign country’s laws**
      1. Collateral attack is NEVER an option if the assets are in the US
         1. Once the plaintiff has US default judgment, it can enforce that judgment in the US
         2. Only works where assets are in a foreign jurisdiction and plaintiff is attempting to get that judgment recognized in the foreign jurisdiction
      2. NOTE—merits can never be attacked in a collateral attack
  1. **Hague Service Convention**
     1. Introduction
        1. The Hague Convention deals mainly with service of process or summons
        2. NOTE—Adhere to every technical requirement called for under the Convention with regard to forms, seals, etc.
           1. Dot every “i" and cross every “t”
           2. Noncompliance opens the avenue for collateral attacks on the judgment
        3. If it applies, the Hague Convention is MANDATORY (***Volkswagon v. Schlunk,*** SCOTUS 1988)
           1. “If 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.”

**IF the forum state requires service abroad, then π must use Hague Service Convention**

* + - 1. Substituted Service—Service Outside the Hague Service Convention
         1. ***In the US, substituted service is governed by the Due Process clause***

Notice must be reasonably calculated to alert the parties of the action and afford the opportunity to present objections

* + - 1. Hague Service Convention (“HSC”) vs. Substituted Service (When You Have the Choice)
         1. Advantages

More enforcement weigh if service is accomplished “by the book” according to the HSC

Perhaps easier to get a default judgment

Service by HSC may in fact be quicker because parties will have difficulty challenging such service

* + - * 1. Disadvantages

Painstaking to comply with HSC provisions

* + - 1. Hague Service Convention Issues
         1. When does the statute of limitations toll?

When the letter of request is sent to the Central Authority or when the Central Authority serves the defendant?

* + - * 1. What is the deadline for removal?

Service is not complete until it is properly done under the Convention

Removal clock does not start ticking until proper service is completed

* + 1. **Analysis: If the forum state mandates foreign service, then you consider--**
       1. Is the country a signatory to the Hague Convention?

**If forum state requires service abroad, *Schlunk***

* + - 1. What conditions did the country impose on ratifying the Hague Convention? (specific methods for sending service)
      2. What language does the document need to be translated into?
      3. Who is the Central Authority and what is the address?
      4. Does the country have an agreement with the US to abide by less stringent methods than the Convention requires?
    1. Components of the Hague Service Convention
       1. Introduction
          1. Article I

Convention applies in all cases, in civil or commercial matters where there is occasion to transmit judicial documents abroad

Does NOT apply where address of person served is not known

* + - 1. Chapter I: Judicial Documents
         1. Article II

Each State designates a “Central Authority” which will undertake to receive requests for service coming from other contracting States

[In the US, the Central Authority is the State Department]

* + - * 1. Article III

Authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention

Document to be served or a copy thereof shall be annexed to the request

* + - * 1. Article V

“The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either—

By a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

By a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.”

The document may always be served by delivery to an addressee who accepts it voluntarily

The Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed

* + - * 1. Article XIII

“Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic of consular agents.”

[Meaning: If there is someone who is willing to accept a judicial document, you can have it served through diplomatic channels]

* + - * 1. Article X

“Provided the State of destination does not object, the present Convention shall not interfere with—

“The freedom to send judicial documents, by postal channels, directly to persons abroad…”

***[NOTE—US Circuit Court Split]***

[“Send” = Service]

[Some federal courts have equated the word “send” with service, in which case Article X authorizes service by mail]

[Send After Service]

[Other courts interpret Article X as merely allowing the sending of subsequent documents only after the Central Authority has served process]

* + - * 1. Article XI

“Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for [in the Convention], and, in particular direct communication between the respective authorities”

* + - * 1. Article XIII

“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.”

* + - * 1. Article XV

“Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that—

“The document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

“The document was actually delivered to the defendant or to his residence by another method provided for by the Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.”

“Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled—

“The document was transmitted by one of the methods provided for in this Convention,

“A period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document, [and]

“No certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.”

* + - * 1. Article XVI

“When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled—

“Defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

“The defendant has disclosed a prima facie [defense] to the action on the merits.”

“An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.”

Each contracting State must receive such application until at least 1 year after the declaration of judgment

* 1. **Fed. R. Civ. P. 4(f) Service Upon Individuals in a Foreign Country** 
     1. Rule
        1. “Service upon an individual from whom a waiver has not been obtained and filed…may be effected in a place not within any judicial district of the United States:
           1. “By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention…; or
           2. “If there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

“In a manner prescribed by the law of the foreign country for service in that country…; or

“As directed by the foreign authority in response to a letter rogatory or letter of request; or

“Unless prohibited by the law of the foreign country, by

“Delivery to the individual personally of a copy of the summons and the complaint; or

“Any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

* + - * 1. “By other means not prohibited by international agreement as may be directed by the court.”
    1. Notes on FRCP 4(f)
       1. Service by Mail
          1. Service by mail is allowed both by the Convention and in the absence of the convention unless the foreign country objects or prohibits such service

Must be mail which requires a signed receipt

* 1. **Service on Domestic Subsidiaries**
     1. Typical Situation
        1. Plaintiff wishes to sue a foreign company, but instead of serving process on the foreign corporation through the Hague Service Convention, plaintiff attempts service by serving the foreign corporation’s US-based subsidiary (*Schlunk* case)
     2. General Rule
        1. Where the internal law of the US does not require service abroad but allows service on defendant’s agent, plaintiff need not pursue service via the Hague Service Convention (***Schlunk*)**
           1. **The DP clause does not require an official transmittal of documents abroad every time there is service on a foreign national🡪** where service on domestic agent is valid and complete under both state law and DP clause, Convention has no further implications
        2. Criticism of General Rule (*Schlunk*, Brennan Dissent)
           1. Thin the Hague Service Convention should be mandatory and that it wouldn’t affect outcome of case b/c does not make significant changes to fed or state service rules.

In the US, such laws are subject to Due Process protection but other countries do not afford such protection

* 1. **Investigatory Subpoenas**
     1. Issue
        1. When is it acceptable for a US agency, such as the FTC, to serve investigatory subpoenas directly upon foreign citizens via registered mail? (*FTC v. SGPM*, DC Cir. 1980)
     2. Considerations
        1. General Rule
           1. Compulsory process is “an exercise of one nation’s sovereignty within the territory of another sovereign”

Generally seen as a violation of international law

Maximally intrusive

Especially true where enforcement of subpoena is on a non-party witness

* + - 1. Other Considerations
         1. There is a distinction between a summons (notice) and a compulsory subpoena
         2. Congress generally authorizes government agencies to serve documents using customary and legitimate means

This includes the Hague Service Convention

* + - * 1. Where a court can interpret a grant of authority in multiple ways, court will likely follow that interpretation which least interferes with international law

1. **Taking of Evidence**
   1. **Hague Evidence Convention**
      1. Generally for “judicial proceedings” not arbitration
         1. Witnesses
            1. Video depositions
            2. Written depositions
            3. Video with verbatim transcript
         2. Documents
            1. Affidavits
            2. Records
         3. Concerns
            1. US- Will the evidence be admissible in US Court?

If admissible, will it be persuasive

* + - * 1. Abroad- will you be able to obtain the evidence from the foreign party through US discovery procedures
    1. **Procedure for Obtaining Evidence via Hague Evidence Convention**
       1. You must go to the local court and invoke art I of the Convention for a Letter of Request to obtain evidence located abroad

**Procedure for Obtaining Evidence via Hague Evidence Convention**

* + - * 1. “Judicial authority of a Contracting state may, in accordance with the provisions of the law of that state, request the competent authority of another contracting state, by means of a Letter of Request to obtain evidence, or to perform some other judicial act”
      1. Letter of Request should set out any “special methods or procedures” to be followed🡪 Art III discusses the required content of the letter
         1. Ex- ask for deposition transcript, otherwise you may only get the deposition summary
      2. Once US Court issues the Letters of Request, the US lawyer is responsible for sending those letters to the foreign Central Authority
         1. Letters of Request generally go to the Central Authority of the other country, but some allow court-to-court system communication
    1. Hague Evidence Convention is PERMISSIVE, not mandatory (*Societe Nationale Industrielle* ***Aerospatiale))***
       1. Evidence Convention uses the word “may” rather than “shall”
          1. No presumption exists in favor of the Hague
          2. Contrast with the Hague Service Convention, which is mandatory
       2. ***Supplemental method of discovery as determined on case-by-case basis***
          1. International comity requires prior scrutiny in each case of

The particular facts,

**Considerations in Determining Whether**

**to Apply the Hague**

Sovereign interests, and

Likelihood that resort to those Convention procedures will prove effective

* + - * 1. “The optional Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention”
      1. Asymmetry Concern
         1. If Convention was mandatory, in litigation between a US national and a foreign national:

The US national would be required to go under the Convention to obtain evidence in the foreign jurisdiction, but

The foreign national could obtain discovery under the broad rules of the FRCP

* + - * 1. Do not want to embrace a general rule that would give foreign nationals a competitive advantage in the form of less burdensome litigation (potential)
      1. *Aerospatiale* dissenters (4 votes) would have employed a presumption that in most cases the courts should resort first to the Convention procedures
    1. **Important Components of Hague Evidence Convention**
       1. Chapter I: Letters of Request
          1. Article 1

Convention applies to “civil or commercial matters”

“A judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.”

[Under Article 1, an arbitral tribunal cannot get evidence under the Hague Convention]

* + - * 1. Article 2

Each contract State designates a Central Authority to receive incoming Letters of Request and transmit them to the authority competent to execute on them

* + - * 1. Article 3

“A Letter of Request shall specify—

“The authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

“The names and addresses of the parties to the proceedings and their representatives;

“The nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

“The evidence to be obtained or other judicial act to be performed. Where appropriate, the Letter shall specify, inter alia—

“The names and addresses of the persons to be examined;

“The questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

**Required Content In Letter Of Request**

“The documents or other property, real or personal, to be inspected;

“Any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

“Any special method or procedure to be followed under Article 9

[In an *Aerospatiale* footnote, the Supreme Court suggested that the producing party “bear the burden of providing translations and detailed descriptions of relevant documents]

[More “American-style,” broad discovery”]

[Practice Tip: Use the available forms to ensure compliance with the Convention!]

* + - * 1. Article 9

“The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.”

“However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties”

[Practice Tip: Always associate with local counsel to ensure that what you are requesting is not incompatible with internal law]

Letters of Request should be executed “expeditiously”

* + - 1. Chapter III: General Clauses
         1. **Article 23**

“A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining ***pre-trial discovery of documents*** as known in Common Law Countries.”

[NB: No mention of depositions but probably similar hostility]

* + - * 1. Article 27

“The provisions of the present Convention shall not prevent a Contracting State from—

“Declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

“Permitting, by internal law or practice, any act provided for in this Convention to be performed under less restrictive conditions;

“Permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.”

[State is free to make it easier on seekers of evidence]

[Practice Tip: *always* associate with local counsel in order to ascertain existence of less burdensome discovery avenues]

* + 1. **Hague Evidence Materials**
       1. Hague Evidence Conventions and related materials widely available via the US State Department web site
          1. Web site also contains information on evidence gathering procedures (or limitations) on a country-specific basis

EXAMPLE

In China, there are limitations on administration of an oath for a deposition

Incorrect deposition proceeding in China might actually result in criminal sanctions!

Practice Tip: Fly your witnesses to Hong Kong which has more lax procedures

* + - 1. Letter of Request form available at 28 USC § 1781
         1. Following the form will ensure compliance with the Convention
  1. **28 U.S.C. § 1782(a)**
     1. Statutory Language
        1. “The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interest person…”
     2. Notes on the Statute
        1. Statute essentially allows a district court to order a person to give testimony or a statement, or produce a document or thing, for use in a proceeding before a “foreign or international tribunal”
           1. After *Intel Corp. v. Advanced Micro Devises* (SCOTUS), an arbitral panel is a “tribunal” under § 1782

***Courts may order a person to give evidence to an arbitral tribunal***

* + - 1. Statute is often used in a proceeding abroad when a party comes to get evidence in the US
  1. **Blocking Statutes-** 
     1. Effect of Blocking Statutes
        1. *With Personal Jurisdiction over party:* ***Blocking statutes do NOT vitiate the power of a court to order discovery or impose sanctions for non-compliance with a discovery order***
           1. NOTE—court must have personal jurisdiction over the party resisting discovery *(In re Uranium)*
        2. IF court does NOT have Personal Jurisdiction- over 3rd parties who are not party to the law suit *(Nat’l Bank of Chicago)*
           1. You will have to use a treaty to obtain evidence

The Hague Convention art 27(c) allows you to use the discovery procedures of the state

* + 1. **How Does a Blocking Statute Affect the Decision to Issue a Production Order?** 
       1. **When the Court has Personal Jurisdiction over the party** (***Uranium Antitrust Litigation*** case, N.D. Ill. 1979, 7th Cir)
          1. **Under Fed. R. Civ. P. 37(a) A court has power to enter an order compelling a person subject to its jurisdiction to perform an act in another state as part of its power under “enforcement jurisdiction”, IF**

**The court has personal jurisdiction over the person**

**The person has control over the documents**

**Court has Personal Jurisdiction**

**Location of the documents is IRRELEVANT**

**The existence of a conflicting foreign law which prohibits the disclosure of the requested documents does no prevent the exercise of the power to order production**

* + - * 1. Court’s power to Decision to issue a production order is discretionary and informed by three factors:

Importance of the policies underlying the United States statute which forms the basis of the plaintiff’s claims;

The importance of the requested documents in illuminating key elements of the claims; and

The degree of flexibility in the nation’s application of its nondisclosure laws

* + - * 1. Court says Balancing Test is UNWORKABLE here-

“we do not seek to force any ∆ to violate foreign law, But we do seek to make each ∆ feel full measure of each sovereigns conflicting commands”

Many instances will present irreconcilable conflicts

EXAMPLE

Countries passing blocking statutes in response to US litigation in a particular area, i.e. existence of monopoly in uranium production

* + - 1. **When the Court DOES NOT HAVE Personal Jurisdiction over the party**: Non-Party Witnesses (***First Nat’l Bank of Chicago, 7th Cir. 1983🡪*** *criminal penalties imposed on neutral party if complied with production request*)
         1. **RULE**: In deciding whether to enforce a summons against a neutral or non-party, a court must undertake “a sensitive balancing of the competing interests at stake”

Balancing factors from Restatement (2nd) Foreign Relations Law § 40.

Vital national interests of each of the states;

Extent and nature of the hardship that inconsistent enforcement actions would impose upon the person;

**Court does NOT Have Personal Jurisdiction**

The extent to which the required conduct is to take place in the territory of the other state;

Nationality of the person; and

Extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state

* + - * 1. Non-party/neutral should be given an opportunity to make a good faith effort to pursue any exceptions (or other options) to the blocking statute

Court will likely impose *severe* sanctions for failure to comply with discovery orders made in bad faith

Ex: if the party refusing to make discovery deliberately stored the records to take advantage of a country’s block statutes

* + 1. **Sanctions for failing to obey an order to produce evidence caused by a foreign blocking Statute** 
       1. ***Societe Internationale v. Rogers****, 1958- Before imposing sanctions on a foreign party failing to produce requested evidence b/c of a foreign blocking statute, the court should consider the party’s good faith attempts to comply with the discovery request*
          1. In the absence of disclosure due to blocking statutes, court (probably) should not dismiss a complaint outright

Rule 37 should NOT be construed as authorizing dismissal of complaint b/c of ∆’s noncompliance with pre-trial production order, when it has been established that failure to comply has been due to inability and not to willfulness, bad faith, or any fault of ∆

***Sanctions***

Allow a party a hearing on the merits

Ensures that person is not deprived property without due process of law (5th Amend.)

* + - * 1. Rule 34 used to compel production of evidence “in the responding party's possession, custody, or control”
    1. **Burden of Proof** is on the petitioner to show good faith in its efforts to comply with the production order: consists 2 components of litigation risk
       1. Risk of Non-production of evidence- risk of not getting witnesses or documents there
          1. Court imposed sanctions or dismissal of claim
       2. Risk of Non-persuasion- Risk decision maker will not believe you
          1. Fact-finder evaluates your case based on failure to produce
       3. There are three possibilities of how burden of proof can be affected b/c a party, despite good faith efforts, is unable to secure a waiver of a foreign blocking statute
          1. Entire burden is shifted to that party

Both risk of non-production and non-persuasion

Court will decide if case should proceed and if it does, an adverse inference against petitioner

* + - * 1. Only part of burden shifts- Risk of Non-persuasion

Court will allow case to proceed but there is an adverse inference based on failure to produce evidence

* + - * 1. No burden of proof is Formally shifted

Party who cannot secure the waiver and produce the evidence simply suffers the natural consequences of being unable to rebut evidence introduced by the other party

Rogers case- no formal shifting of burden, but party will have tougher case to argue without the evidence

* + 1. **What is a Tribunal under §1782**
       1. Pg 173 **Intel** case filed in Directorate-General for the Competition of the Commission of the European Communities,
          1. Ct held that- Commission was a tribunal under §1782
          2. The proceeding for which discovery is sought must be in reasonable contemplation but need not be pending or imminent
          3. Discovery is not limited to materials that could be discovered in the foreign jurisdiction if the materials were located there
       2. **NBC v. Bear Stears-** held that a private arbitral panel in mexico is not a foreign or international tribunal and therefore §1782 does not apply to facilitate discovery in that proceeding
  1. **Foreign Discovery for Use in U.S. Courts**
     1. Obtaining Evidence from Abroad
        1. Foreign jurisdictions abhor potential “fishing expeditions”
           1. Foreign jurisdictions implement an incredibly high bar for discovery requests

In many cases, it seems the only way to satisfy foreign courts’ standards would be to name the document with specificity

The only way to name the document with specificity is to already have the document!

* + - * 1. *See In re Asbestos Insurance Coverage Cases* (House of Lords, 1985)

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**Part III: Suits by Foreign Plaintiffs**

1. Forum Shopping and Forum Non Conveniens
   1. **U.S. as Magnet Forum**
      1. Typical Case
         1. Foreign entity sues a US company in the United States
         2. Personal jurisdiction typically not an issue
      2. Why the US is an Attractive Forum
         1. “As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.” – Lord Denning, *Smith Kline* case
         2. Footnote 18 Factors (*Piper Aircraft Co. v. Reyno*, Footnote 18)
            1. Most US states offer strict liability regime;
            2. At least 50 jurisdictions with 50 different choice-of-law regimes

Seek out favorable law

* + - * 1. Availability of jury trials
        2. Contingent fee arrangements

Readier access to courts

Most parties cannot afford to fund litigation

* + - * 1. US does not “tax” losing parties automatically with opponent’s attorney’s fees

US rule is not “loser pays” which is potentially draconian [Sheppard]

* + - * 1. Liberal discovery

Liberal discovery leads to increased attorney’s fees

May also lead to more settlements

* + - 1. Other Factors
         1. Usually seen as awarding larger damages (perhaps as a consequence of the jury system)
         2. Punitive damages available
  1. **Forum Non-Conveniens**
     1. Introduction
        1. Doctrine of forum non-conveniens deals with the court’s *discretionary* decision to dismiss a case for matters of convenience
           1. NOTE—In *Asahi* the Court elevated these matters of convenience to constitutional statute when dealing with the “fairness prong” of the personal jurisdiction inquiry
        2. Court Approach
           1. Analyze

Convenience of the chosen forum

Availability of an alternative forum

Private and Public Interests

* + - * 1. Evaluation of conditions imposed (appellate review)
    1. **Circumstances for Dismissal and granting Forum Non Conveniens motion**
       1. Doctrine of forum non-convenience (FNC) is intended to be a flexible doctrine
          1. Each case turns on a fact-specific inquiry
       2. Presumption for Plaintiff’s Choice of Forum
          1. “Plaintiff’s choice of forum should rarely be disturbed” (***Piper Aircraft)***

“***There is ordinarily a strong presumption in favor of the plaintiff’s choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum***”

“When the home forum has been chosen, it is reasonable to assume that this choice is convenient”

This has a certain logic to it [Sheppard]

IN CONTRAST

“The presumption applies with less force when the plaintiff or real parties in interest are foreign”

* + - 1. **Courts Analysis for Forum Non Conveniens Motions:** Overcoming the Presumption in Favor of Plaintiff’s Choice of Forum
         1. **Convenience of the chosen forum**
         2. **Availability of an alternative forum**
         3. **Court balances “private interest factors” and “public interest factors”**

**Private Interest Factors**

Factors bearing on litigants’ convenience

Relative ease of access to sources of proof

Availability of compulsory processes for attendance of the unwilling

**Private Interest Factors**

Cost of obtaining attendance of willing witnesses

Possibility of view of premises, if viewing would be appropriate to the action

All other practical problems that make trial of a case easy, expeditious and inexpensive

Convenience of one trial, for instance

**Public Interest Factors**

Policy implications related to forum location

Administrative difficulties flowing from court congestion

Local interest in having localized controversies decided at home

**Public Interest Factors**

Interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action

Avoidance of unnecessary problems in conflict of laws or in application of foreign laws

“The need to apply foreign law point[s] toward dismissal”

Seen as complex and unwieldy to have inexperienced courts apply a foreign law

Unfairness in burdening citizens in an unrelated forum with jury duty

* + - 1. **Availability and Adequacy of Alternative Forum**
         1. ***Whether Forum Non Conveniens/transfer renders a less favorable law for the π is not an issue, unless the case is completely barred where ∆ wants to transfer***

The possibility of a change in substantive law should ordinarily not be given conclusive OR even substantial weight in the FNC inquiry; any deficiency in the foreign law was a matter to be dealt with in the foreign forum

* + - * 1. Significant delay in the alternative forum *might* equal lack of alternative forum
        2. English Law (*Lubbe v. Cape PLC*)

Only where plaintiff establishes that “substantial justice will not be done” is an alternative forum “unavailable”

Held- S. Africa is more appropriate forum, b/c π’s would (1) have no means of obtaining professional representation or (2) expert evidence which would be essential for claims to be justly decided….. THIS WOULD AMOUNT TO A DENIAL OF JUSTICE

* + 1. **Granting Forum Non Conveniens Motion Pursuant to Conditions** 
       1. A court may dismiss a suit on the grounds of FNC but impose certain conditions on the defendant (or on the parties)
          1. If a defendant prevails on the FNC motion, the next point of contention is the conditions on which the motion is granted

Imposition of conditions is somewhat like a bargain

* + - 1. Court does not impose conditions on the foreign court
         1. ***Conditions are imposed on the defendant***
         2. No such thing as “shared/dual jurisdiction”

US keeps the case or it dismisses the case (but may impose its conditions)

* + - 1. Appellate court may overturn conditions for abuse of discretion
      2. Application of Conditions in US Forum Non Conveniens cases
         1. ***Harrison v. Wyeth*** (oral contraceptives produced and packaged in UK but with US Subsidiary)- US Dist granted Forum Non Conveniens motion pursuant to conditions, before trial could commence in UK Court

Conditions

∆ must agree to make available at its own expense, any documents, witnesses or other evidence under its control that are needed for fair adjudication in UK by π

∆ must also agree to pay any judgment rendered against it by UK

Ct also suggests that a lawsuit against the subsidiary alone in the US would not constitute an adequate alternative forum

* + - * 1. ***In Re Union Carbide Corporation*** (UCC) (Indian Chemical Plant explosion kills 2000 Indian citizens) Forum Non Conveniens granted pursuant to conditions

Conditions

UCC Parent Corporation consent to Jurisdiction of Indian courts and continue to waive SOL defenses

UCC itself must waive SOL defenses

Conditions Appellate Court reversed-

UCC satisfy judgment rendered by Indian Ct (X) b/c Uniform Judgments Act already ensured that Indian judgment was enforceable in NY Ct

UCC subject to discovery under Fed. R. Civ. P. (X) b/c would put UCC on unequal footing

Also, once US grants Forum Non Conveniens, they no longer have Jurisdiction over parties and cannot supervise what India does, or impose US rules/laws on them

No dual Jurisdiction

* + 1. **Appellate Review**- the district ct’s decision is almost always final b/c insulated by deference and standard for reversal is abuse of discretion
       1. Denial of FNC Motion to Dismiss
          1. Denial of an FNC motion to dismiss is NOT subject to immediate appeal

Denial of motion to dismiss is not a “final decision”

District court may certify the matter for an interlocutory appeal but this is rarely done

* + - * 1. This means that in many cases an appellate court will rule on an FNC dismiss motion only *after* there has been a trial on the merits

Existence of a previous trial on the merits is evidence of the convenience of the forum

Treated as a factor, not *the* factor, in the balancing test

“Unless the defendant can show that he was greatly prejudiced by the fact that the trial occurred in the particular forum selected by the plaintiff, we believe the trial’s occurrence and completion bolsters the district court’s original decision to deny the motion to dismiss” (*In re Air Crash Disaster*, 5th Cir)

Establishing “great prejudice”

Key evidence or witness unavailable

Forum was biased or prejudiced against the

defendant

* + - * 1. *Van Dusen v. Barrack*- D may transfer a case from one fed ct to another using §1404, (original venue was proper) but original venue’s laws will apply, regardless of where case is transferred

Limited to cases where state law applies in Fed cts

Relying on *Van Dusen*, ***Ferens v. John Deere****-* ct held in a diversity suit (§1391a), the trasferee forum (new site) is required to apply the law of the transferor ct, regardless of who initiates the transfer

* + - 1. Granting FNC Motion to Dismiss
         1. Granting of motion to dismiss is a final order so it is immediately appealable
         2. Interlocutory appeal available
    1. **Procedural or substantive?**
       1. IF procedural, then it affects the choice of forum, but if substantive, then can likely be disregarded
          1. See *Gasperini*- pg 24 of class notes- holding standard for a new trial is substantive law

Therefore fed ct applying NY substantive law must apply the NY standard for a new trial

1. Erie, Reverse Erie, and Litigation Strategy
   1. **Jurisdictional Issues**
      1. State Court vs. Federal Court
         1. As a general rule, plaintiff wants to be in state court
            1. Elected judges in state court (political or influence-peddling ramifications)
            2. State court judges generally allow lawyers more sway
         2. Defendants want to remove to federal court
            1. Get out from under “local” judges
            2. Federal court seen as more sophisticated
            3. Federal court viewed (perhaps incorrectly) as more expensive

Winning through attrition

* + 1. Federal Court Jurisdiction
       1. Federal Question Jurisdiction § 1331
          1. Whether the cause of action arises under federal statutes or the Constitution
          2. Look to the face of the pleading
       2. Diversity Jurisdiction § 1332
          1. Complete diversity of citizenship is necessary
          2. Corporate Citizenship

Corporations have dual citizenship

Place of incorporation; and

Principal place of business

* + - * 1. Alienage Jurisdiction

All foreign parties treated as if they have the same citizenship [all non-US citizens?]

* + 1. Removal Jurisdiction
       1. Limitations on Removal § 1441
          1. Defendant cannot remove if the defendant is a citizen of the forum

This scenario presents no danger of home-cooking which removal is designed to alleviate

* + - 1. If federal question jurisdiction, always removable, regardless of citizenship of parties
      2. Removal is often the real battleground for issues of diversity [Sheppard]
    1. Corporations
       1. Citizen of state where incorporated
       2. AND Citizen of state that is principal place of business
    2. Objections
       1. Personal Jurisdiction
       2. **Motion to stay**
       3. FNC
    3. **Jurisdictional Strategies & Tactics**
       1. IF you want to stay in State Court, Don’t assert a federal claim §1331
       2. If you want to get out of fed court based on diversity Jurisdiction, then Add a party which would destroy diversity §1332
          1. Rebuttal fraudulent joinder- no relief based on that claim

Defendant first attempts to remove and argues that the targeted defendant was fraudulently joined

**Jurisdictional Strategies**

Defendant need only show that there is no possibility of recovery against the defendant and assert that defendant was joined solely to destroy diversity

If successful, then diversity is not destroyed and fed ct Jurisdiction is preserved

* + - 1. If a diversity case, file claim in the state court where one of the ∆’s domiciled, incorporated, or has its principal place of business, so it cant be removed to federal court §1441(b)
      2. Who’s going to keep your case? Consider FNC policy, a restrictive FNC or none at al**l**
      3. If in diversity case, if you are seeking to destroy fed ct jurisdiction, then add a alien party to have one on both sides
         1. All aliens are treated as if they have the same citizenship
    1. Class actions over 5 million have fed jurisdiction
  1. **Erie & Forum Non Conveniens**
     1. **Erie and Reverse Erie-**
        1. **Eerie-** Federal Courts sitting in diversity jurisdiction should apply state substantive law (decision and statutory) and federal procedural law
        2. **Reverse Eerie- (**federal law in state courts) 1. When a federal question is brought in state court, federal substantive law controls the issue
     2. State vs. Federal FNC Doctrines
        1. Some state FNC doctrines are more restrictive or more lenient than federal FNC doctrine
           1. EXAMPLE

Florida FNC looks only to contacts between the lawsuit and the state of Florida

Federal FNC looks to contacts between the lawsuit and the whole of the United States

* + - * 1. QUESTION

When a federal court is sitting with diversity jurisdiction, should state or federal FNC doctrine apply?

This turns on whether Forum Non Conveniens is procedural or substantive issue.

* + - 1. *Esfeld v. Costa Corciere* – Held Forum Non Conveniens is procedural rule under Erie Doctrine Fed cts sitting in diversity apply federal procedural law
         1. Therefore the federal court applied the federal Forum Non Conveniens standard rather than the Florida statute
      2. Federal Interest in Applying Federal FNC Doctrine
         1. Federal interest

Docket impact

Public interest

Private interest

* + - * 1. Pre-emption
        2. US citizen access to courts
        3. Foreign relations- international comity
        4. Availability of adequate alternative forum
        5. Suitability of foreign jurisdiction
        6. State courts with no FNC doctrine or limited FNC doctrines become magnets for foreign plaintiffs
      1. Court Approaches
         1. **1st, 5th, 9th & 11th Circuits**

***Federal court sitting in a diversity case should apply federal FNC doctrine, not state FNC doctrine***

If case gets removed to federal court, odds are good that the case will be dismissed on federal FNC doctrine, which is generally more lenient than a lot of state FNC doctrine

* 1. Anti-Injunction Act §2283 (***Chick Kam Choo***)
     1. **Relitigation Exception**: ***A federal court cannot enjoin proceedings in state courts unless authorized by Act of Congress or “where necessary in aid of its jurisdiction, or to protect or effectuate its judgments”***
        1. “Designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court” (*Chick Kam Choo v. Exxon Corp*.)
        2. Prerequisite for applying the Relitigation Exception-
           1. the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal courts
        3. Fed Ct does not have inherent power to ignore limitations of §2283 and to enjoin state proceedings merely b/c those proceedings interfere with a protected federal right or invade an area pre-empted by federal law, even if interference is blatant

**Part IV: Recognition of Judgments**

1. **Bases for Non-Recognition**
   1. **U.S. Standards for Recognition**
      1. Arbitration
         1. NY Convention
         2. Federal Arbitration Act
      2. Judgments
         1. ***Recognition of foreign judgments in the US is a matter of state law***
            1. State Statute- Uniform Foreign Money Judgments Act, OR
            2. State Common Law
         2. No broad federal law covering enforcement and recognition of foreign judgments
            1. No treaty

Most foreign countries unwilling to recognize massive damages awards by US courts

* + - * 1. No federal statute

Strong federalism tradition has thwarted efforts

Exception- Foreign Sovereign Immunities Act

* + - 1. Hague Choice of Court Convention
         1. Applies where the parties agree to a specific court (via an exclusive choice of court provision) in a Contracting State

If parties have agreed to such a court, to the exclusion of the jurisdiction of any other courts, another Contracting State should recognize the judgment of such a court

* + - * 1. Recently ratified by the United States

This is a newly emerging area of the law [Sheppard]

* + 1. **Recognition in General**
       1. Comity is a *purely discretionary* doctrine (Hilton v. Guyot, 1895)
          1. However, Comity is still a viable doctrine for judgment recognition in some states [Sheppard]

Those states that have not adopted the Uniform Act may still recognize foreign judgments on the grounds of international comity

* + - 1. Apart from the Uniform Act, modern recognition law revolves around the doctrine of res judicata and international comity (*Guyot* dissent becomes the modern standard)
         1. Factors in Favor of Enforcement (*Guyot*)

Opportunity for a full and fair trial;

Trial before a court of competent jurisdiction;

Trial is conducted upon regular proceedings;

Due citation or voluntary appearance by the defendant;

System likely to secure an impartial administration of just between citizens of its own country and those of other countries;

No other special reason why comity should be set aside

* + - * 1. When Not to Enforce

“Foreign decree is so palpably tainted by fraud or prejudice as to outrage our sense of justice” (*Somportex*)

The foreign tribunal was invoked to circumvent US public policy or US laws (*Somportex*)

Court proceedings do not comport with ideas of due process (*Bridgeway Corp. v. Citibank*, 2d Cir. 2000)

* + - 1. The fact that another country’s court procedures differ from US court procedures is not a sufficient ground for impeaching the foreign judgment
      2. **Jurisdictional Judgments**
         1. “The principles of res judicata apply to questions of jurisdiction as well as other issues” (*American Surety Co.*) (Brandeis, J.)
         2. Generally this means that a US court will not examine a foreign court’s jurisdiction determination with respect to the idea of “minimum contacts”

HOWEVER ***US court may well look at personal jurisdiction issue with respect to the Due Process/Fairness aspect as such is not litigated abroad*** (*Somportex*)

Samportex- ∆ was permitted to collaterally attack the UK jurisdiction, even though his objection to Jurisdiction was raised and failed in the English Court

Due process argument has never been raised

American Constitutional grounds are likely the only place you may be allowed to bring a claim again in US after raised elsewhere

* + - 1. Arbitration as the Alternative
         1. A binding arbitration clause under NY Convention is a good way around the judgment enforcement problem [Sheppard]
    1. **Options for contesting Personal Jurisdiction if foreign party sued in the US**
       1. Make a special appearance to contest personal jurisdiction
          1. Consider Collateral Attack argument
       2. Do nothing- ignore the suit🡪 π will take a default judgment
          1. Make sure client does not have any assets in that jurisdiction, otherwise π creditor will be able to seize them thru collateral attack
       3. For UK recognition see pg 31 of class notes *Patel* case
    2. Reciprocity
       1. Idea that judgments of countries in which US judgments are reviewable on the merits are not entitled to full credit and conclusive effect when sued upon in US
          1. Foreign judgment only prima facie evidence in winning party’s favor
       2. Reciprocity is NOT the basis for modern judgment recognition
       3. Problem with Reciprocity Doctrine
          1. Circularity Problem

One country will only recognize the judgment of another country if that country recognizes the judgment of the first country and so on

* + 1. **TEXAS** and other states have incorporated reciprocity into their versions of the Uniform Foreign Money-Judgment Act
       1. §4 of Uniform Act corresponds with TX 36.005
          1. Except Texas has 7th ground for non-recognition, which is reciprocity
       2. We have subsection 7- requiring reciprocity agreement, distinguishing TX from the original treaty
       3. 36.005 (grounds for non-recognition)
          1. (a) Mandatory
          2. (b) Discretionary
       4. 36.006
          1. permits gotcha jurisdiction
          2. volunteering PJ – Patel
          3. Somportex- b/c due process of US Constitution does not apply abroad, a ∆ voluntarily appears in proceedings abroad, he can still challenge Personal Jurisdiction in US

If you make a special appearance you vest and empower court to decide the jurisdiction issue and you are bound by that decision, cannot be challenged abroad

* + - * 1. Reciprocity is the MINORITY rule
      1. Detamore v. Sullivan- Texas act is unconstitutional b/c registering foreign judgments was insufficient for ∆ to challenge them and make claims for non-recognition
         1. The court conditionally granted relator debtor's petition for writ of mandamus and held the applicable statute did not require a plenary suit or a plenary hearing for recognition and enforcement of a foreign country money judgment and the statute was unconstitutional because it provided for recognition and enforcement of a foreign country money judgment but provided no procedures to assert non-recognition of such judgment, violating due process.

Law was modified to require notice to ∆ 36.002

Method and procedure so that judgment debtor can contest recognition of the judgment 36.0044

* + - * 1. If you have client with foreign country money judgment,

you have option to file plenary law suit, or

you can just register your judgment and the ∆ has procedure by which it can present defenses to the award

REGISTER is the way to go!!!!! Super easy

* + - * 1. TX did not adopt section 6: Procedure for recognition of foreign country judgment pg 309

1. **UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT**
   1. **Introduction**
      1. Coverage
         1. Only applies to money judgments
         2. Must be final, conclusive, and enforceable
         3. Does NOT cover
            1. Taxes, fine, penalty, or
            2. Support in matrimonial or family matter
            3. So how do you get foreign judgments on excluded matters enforced?

**COMITY**

* + 1. Methods of Enforcement
       1. Plenary Suit/Judgment Enforcement
          1. Procedure

New lawsuit is filed asking the court for relief: Court, enforce this judgment

* + - * 1. Characteristics

There is service of process, notice, hearings, etc.—just like any other lawsuit

* + - 1. Registration Method
         1. File the foreign judgment with the clerk of the court and ask for abstract of judgment and writ of execution
  1. **Recognition**
     1. Applicability.
        1. UFMJRA § 2
           1. “This Act applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal”
     2. Recognition & Enforcement
        1. “…a foreign judgment meeting the requirements of section 2 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.”
  2. **Grounds for Non-Recognition**
     1. ***Mandatory Grounds for Non-Recognition***
        1. UFMJRA § 4(a)
           1. “A foreign judgment is not conclusive if:

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

“the foreign court did not have personal jurisdiction over the defendant; or

“the foreign court did not have jurisdiction over the subject matter”

* + 1. ***Discretionary Grounds for Non-Recognition***
       1. UFMJRA § 4(b)
          1. “A foreign judgment need not be recognized if:

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

“the judgment was obtained by fraud;

“the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state;

“the judgment conflicts with another final and conclusive judgment;

“the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

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

[Forum non-conveniens]

* + - * 1. TEXAS

Texas (and 6 other states) adds reciprocity as a non-mandatory, discretionary ground for non-recognition

Tex. Civ. P. & Rem. Code § 36.005(b)(7)

“[A foreign country judgment need not be recognized if] it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, conform to the definition of ‘foreign country judgment.’”

* 1. **Notice Provisions**
     1. Due Process Required
        1. Regardless of the method of judgment recognition, enforcement or registration, there must be some opportunity for a defendant to present a defense or contest the enforcement of the judgment (*Detamore* case, Texas)
        2. Texas Legislature amended the Texas statute for registering judgments in order to comply with due process requirement
           1. Tex. Civ. P. & Rem. Code § 36.0042

Requires party registering judgment to provide clerk of the court with last known address of debtor

Requires clerk of the court to mail notice to the debtor

NB—the smart lawyer will not only ask the clerk to mail notice but will himself mail notice to the debtor as well [Sheppard]

* + 1. Contesting Recognition
       1. Defendant must be afforded opportunity to contest recognition
       2. Tex. Civ. P. & Rem. Code § 36.0044
          1. Defendant/debtor must file with court/serve other party with notice of intent to contest recognition (and grounds for contest) within 30 DAYS of receiving above-discussed notice
          2. Party filing a motion for non-recognition may request an evidentiary hearing which the court in its discretion may or may not grant

1. **JUDGMENTS ENFORCING PUBLIC LAW**
   1. **General Rule**
      1. Courts will NOT enforce judgments of another country based on that country’s penal or revenue statutes
         1. EXCEPTION
            1. Treaty between the countries covering such matters