Loyola of Los Angeles Law Review

Volume 40
Number 4 *Developments in the Law: Transnational Litigation*

Article 2

6-1-2007

II. In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England

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II. IN PURSUIT OF THE PERFECT FORUM: TRANSNATIONAL FORUM SHOPPING IN THE UNITED STATES AND ENGLAND

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In the competitive world of international dispute resolution, location is everything. It follows, then, that one had better shop around, as the saying goes. Doing so may substantially benefit one's client by increasing the likelihood of prevailing at trial[1] or reaching a settlement on favorable terms;[2] failing to do so may lead to defeat, and perhaps a malpractice claim to boot.[3]

A. Introduction

Globalization and the proliferation of technological advances such as the Internet have catapulted private civil disputes to the forefront of international jurisprudence.[4] As companies and corporations continue to transcend borders and the modern global economy expands, transnational civil disputes will continue to increase in number and complexity.[5] The impact of this increase will be particularly forceful in the United States, given plaintiffs' well-documented attraction to U.S. courts.[6] Indeed, much of the litigation already taking place in the United States features foreign defendants, and this phenomenon is not likely to change in the near future.[7] As a result, the ability to identify and understand issues and complexities that may potentially arise in transnational disputes is essential to

1. *See* ANDREW BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 90 (2003) ("[A]s a result of lack of uniformity at the levels of procedural law, substantive principle, and choice of law rules throughout the international legal system, very different results may obtain in the resolution of any given legal dispute according to the forum in which that dispute is tried."); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1508 (1994) [hereinafter Clermont & Eisenberg, *Exorcising Evil*] ("Venue is worth fighting over because outcome often turns on forum.").

2. *See* discussion *infra* Part B.3.

3. *See* Georgene M. Vairo, *Is Selecting Shopping?*, NAT'L L.J., Sept. 18, 2000, at A16 [hereinafter Vairo, *Is Selecting Shopping?*].

4. *See* BELL, *supra* note 1, at 3.

5. *See* Frank G. Jones, *Service and Citation on Foreign Parties*, *in* INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS 1, 1 (David J. Levy ed., 2003); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 42–43 (2006).

6. Parrish, *supra* note 5, at 44; *see* discussion *infra* Part B.3.

7. Parrish, *supra* note 5, at 5; *accord* Jones, *supra* note 5, at 1.

successfully litigating such disputes. One area in particular upon which practitioners should focus is forum selection.

Although "shopping" for a forum is by no means exclusive to transnational litigation, the unique nature and character of transnational disputes make the practice particularly significant in that context. As Professor Park wrote some years ago,

> The absence of any non-national court with mandatory jurisdiction marks most international litigation. In our legally and culturally heterogeneous world, judges sharing one party's nationality risk appearing biased to the other side. And judges from a relatively neutral third country generally will have no power to hear the dispute except as a result of the disputing parties' agreement.
>
> The consequences of this cross-border jurisdictional vacuum can be dramatic. Litigation may take place before courts of questionable independence, with procedural traditions radically different from those to which the litigant is accustomed. Proceedings may unfold not in a variant of the language of Shakespeare, but in the tongues of Molière, Cervantes, Demosthenes or Mohammed.[8]

Typically, plaintiffs have the option of filing suit[9] in a number of different fora,[10] whether within the same court system or among different systems.[11] Because different fora may adhere to different rules,[12] choosing a forum in which to file suit warrants substantial

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8. WILLIAM W. PARK, INTERNATIONAL FORUM SELECTION 8–9 (1995) (footnote omitted).

9. The scope of this article is restricted to private civil suits.

10. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250 (1981) (recognizing that "many plaintiffs are able to choose from among several forums"); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) ("[General venue] statutes . . . usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy."); Tex. Instruments Inc. v. Micron Semiconductor, Inc., 815 F. Supp. 994, 996 (E.D. Tex. 1993) ("In reality, every litigant who files a lawsuit engages in forum shopping when he chooses a place to file suit. . . . The venue statutes are intentionally broad, and litigants must often make an election from among several options as to where to file a lawsuit."); *see also* Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 776 n.20 (1995) (referring to "the rare case in which an alternative forum is effectively unavailable").

11. *See* Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 79–80 (1999) (explaining that forum shopping can occur horizontally (within the same system of courts) or vertically (between state and federal courts)).

12. *See* BELL, *supra* note 1, at 25 ("The *raison d'être* for forum shopping lies in lack of uniformity throughout the world's legal systems, in terms both of internal laws and choice of law rules and the procedural rules developed by different countries to facilitate the enforcement of

consideration by the plaintiff. Likewise, a defendant will typically have a potent arsenal of procedural strategies and tactics with which to influence forum determinations.[13]

When evaluating fora, parties may consider both substantive and procedural factors.[14] In terms of substantive law, the conflicting

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those laws. . . . [The] lack of uniformity in any one of these three areas produces the consequence that the legal result in any given fact situation may vary according to the forum in which litigation takes place.").

13. For instance, in a civil action in federal court, a defendant can file a motion to transfer the case to another district or division with jurisdiction, even where the original venue is proper. 28 U.S.C. § 1404(a) (2000) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."); *see* Cameron & Johnson, *supra* note 10, at 777. In addition, a defendant in federal court and most state courts can move for dismissal under forum non conveniens, a doctrine that defendants commonly employ as a forum shopping tactic in transnational disputes. *See* Iragorri v. United Techs. Corp., 274 F.3d 65, 75 (2d Cir. 2001) ("[J]ust as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants also may move for dismissal under the doctrine of *forum non conveniens* not because of genuine concern with convenience but because of similar forum-shopping reasons."); *infra* Part D.1; *see also* Cameron & Johnson, *supra* note 10, at 777. Furthermore, as a means of forum shopping, a defendant can file a declaratory judgment suit in a favorable forum while concurrently litigating the plaintiff's suit in the plaintiff's chosen forum. *See* Sherwin-Williams Co. v. Holmes County, 343 F.3d 383, 391 (5th Cir. 2003) (acknowledging that defendants may file declaratory judgment suits for "improper and abusive [reasons], other than selecting a forum or anticipating related litigation"); *see also* Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 9–10 (2004) [hereinafter Teitz, *Both Sides of the Coin*]. Forum shopping via the initiation of parallel proceedings carries with it specific considerations that lie well beyond the scope of this article. Parties ought to be aware, however, of the advantages and disadvantages that parallel proceedings can offer within the context of forum selection. For more general information on parallel proceedings and other forum shopping strategies for defendants, see BELL, *supra* note 1, at 135–37 (discussing jurisdictional challenges, stays, anti-suit injunctions, and anticipatory suits in preferred fora), and Kenneth B. Reisenfeld, *"The Usual Suspects": Six Common Defense Strategies in Cross-Border Litigation*, *in* INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE 75, 75–86 (Barton Legum ed., 2005) (discussing challenges to service of process, jurisdictional challenges, forum non conveniens, stays and anti-suit injunctions, application of foreign law, and default judgments). *See also* John Fellas & David Warne, *Choice of Forum Under United States and English Law*, *in* TRANSATLANTIC COMMERCIAL LITIGATION AND ARBITRATION 333, 372 (John Fellas ed., 2004) (discussing anti-suit injunctions).

14. *See generally* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 572–74 (1989) (noting that substantive and procedural considerations may play a role in a plaintiff's choice of forum). For instance, to borrow a simple example from U.S. tort law, suppose that a Colorado resident intends to file a cause of action for battery based on events that transpired in Idaho. The plaintiff in such a scenario might decide to file the claim in Idaho because she would not need to prove intent to harm, White v. Univ. of Idaho, 797 P.2d 108, 109–10 (Idaho 1990), an essential element of the battery claim in Colorado, White v. Muniz, 999 P.2d 814, 818 (Colo. 2000). This type of forum shopping is premised on the substantive law applied by the fora under consideration. On the other hand, the plaintiff might file in Colorado because the plaintiff believes that the chances of successfully withstanding a potential personal jurisdiction challenge are better in that forum than in Idaho. In that instance, the plaintiff would be choosing a forum based on procedural considerations.

outcomes that arise among jurisdictions, both domestically and internationally, lead to forum shopping.[15] Even if uniformity exists in a given area of substantive law, however, forum shopping may continue to thrive.[16] In any action, a host of procedural factors that might influence choice of forum may come into play, irrespective of the substantive law underlying the claims at issue.[17] Like substantive law, disuniformity in procedural laws engenders forum shopping.[18]

In a given case, the propriety of forum shopping strategies will largely depend on the facts and circumstances surrounding the action.[19] Nevertheless, in most transnational cases, jurisdictional issues will warrant particular scrutiny in terms of forum selection,

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15. *See, e.g.*, Christianson v. Colt Indus. Operating Corp., 798 F.2d 1051, 1058 (7th Cir. 1986) (citing the inevitability of forum shopping "that results from conflicting patent decisions in the regional circuits," and noting that the primary purpose of the Federal Circuit is to prevent forum shopping by promoting uniformity of decisions); *see also* Jonathan D. Glater, *Finding a Friendly Court Is Not So Easy*, N.Y. TIMES, Aug. 20, 2006, at 45 ("To try to anticipate how receptive different courts might be to particular claims, lawyers review how appellate courts resolved similar cases in the past . . . .").

16. BELL, *supra* note 1, at 24–25 ("*Even if* extensive harmonization of substantive law were achieved or a set of uniform choice of law rules did exist . . . it would still not be the case that uniform results would obtain and that forum shopping would correspondingly dissipate. 'The true causes of forum shopping,' it has been said, 'are to be found elsewhere than in the divergences of the rules of private international law. The plaintiff usually shops in the forum with which he is most familiar or in which he gains the greatest procedural advantage or puts the defendant to the greatest procedural disadvantage.'. . . Even apparently uniform rules remain susceptible to differing judicial interpretation." (quoting Lawrence Collins, *Contractual Obligations—The EEC Preliminary Draft Convention on Private International Law*, 25 INT'L & COMP. L.Q. 35, 36 (1976))).

17. Procedural factors that parties to a transnational suit typically take into account when evaluating fora include: (1) the standards governing the exercise of personal jurisdiction over defendants; (2) the forum court's willingness to invoke the doctrines of forum non conveniens and international comity; (3) the rules governing the recognition and enforcement of foreign judgments; (4) the availability and extent of pre-trial discovery; (5) the availability of jury trials and punitive damages awards; (6) the tendency of juries to award large (or small) damages awards; (7) the speed and costs of litigation; (8) judicial and juror expertise; (9) the forum's reputation for fairness or bias; (10) the rules governing pleading and recovery of costs; (11) the convenience of collecting and presenting evidence; and (12) the quality of available counsel. *See* BELL, *supra* note 1, at 28–29; Algero, *supra* note 11, at 80 n.2; Juenger, *supra* note 14, at 573–74.

18. *Cf.* Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 ALB. L. REV. 1237, 1239 (1998) (stating that uniform international jurisdiction rules "would help reduce opportunities for forum shopping").

19. For instance, "the question of '[w]hether a non-resident defendant has the requisite minimum contacts with the forum state to establish in personam jurisdiction must be decided on the particular facts of each case.'" Benton v. Cameco Corp., 375 F.3d 1070, 1076 (2004) (alteration in original) (quoting Kuenzle v. HTM Sport-Und Freizeitgerate AG, 102 F.3d 453, 456 (10th Cir. 1996)).

because they possess the potential to impact not only outcome,[20] but the collection of judgments as well.[21] Accordingly, this article focuses mainly on the procedural considerations of personal jurisdiction, forum non conveniens, and the recognition and enforcement of foreign[22] judgments, analyzing their respective connections to forum shopping in private transnational civil disputes in the United States and England.[23] By summarizing the applicable legal principles and examining recent case law, this article aims to provide a general overview of the relevant issues and strategies to consider when selecting a forum, and to analyze the potential impact of recent court decisions in these areas with respect to forum selection.

Part B begins with a general assessment of the role of forum shopping in transnational litigation, explaining some of the issues that surround the practice and considering the significant role it can

20. *See* Parrish, *supra* note 5, at 44–45 ("Getting a case into a U.S. court can be outcome determinative."); *infra* Part B.3.

21. *See infra* Part E.

22. As used in this article and unless otherwise noted, the term "foreign" refers exclusively to foreign sovereign nations.

23. This article focuses exclusively on recent developments in the United States and England. From a practical standpoint, access to case law and other research materials in the United States is generally greater with respect to England than with most other foreign nations. More importantly, the United States and England possess a unique relationship within the context of jurisprudence, given that the U.S. and English legal systems share a "common law heritage." Nicholas W. Woodfield, *The Policy/Operational Dichotomy in Intra-State Tort Liability: An Example of the Ever-Continuing Transformation of the Common Law*, 29 DENV. J. INT'L L. & POL'Y 27, 29, 34 (2000); *see also* David Wille, *Personal Jurisdiction and the Internet—Proposed Limits on State Jurisdiction over Data Communications in Tort Cases*, 87 KY. L.J. 95, 150 (1998) (noting that U.S. courts' early conceptualizations of personal jurisdiction were informed in part by English law). Further, England may serve as a convenient alternative forum for U.S. defendants in transnational disputes because of similarity of language. In fact, some U.S. courts consider the absence of a language barrier between U.S. and English parties as a "mitigating factor" that supports the reasonableness of exercising personal jurisdiction over English defendants. *See, e.g.*, Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd., 328 F.3d 1122, 1133 (9th Cir. 2003) (citing Dole Food Co. v. Watts, 303 F.3d 1104, 1115 (9th Cir. 2002) (citing as support for a finding of personal jurisdiction the fact that the foreign defendant, a United Kingdom holding company that was haled to federal court in California, "[did] not face the additional burden of overcoming a language barrier"). Finally, English courts may provide certain tactical and procedural advantages to parties, at least when compared to nations other than the United States. For plaintiffs, higher damages awards, more comprehensive discovery procedures, courts' power to award interest, and more generous limitation periods on claims may afford substantial advantages in litigation. Spiliada Maritime Corp. v. Cansulex Ltd., [1987] A.C. 460, 482 (H.L.) (appeal taken from Eng.). For defendants, the absence of punitive damages, restrictions on discovery, limits on the use of juries, and the ability to collect legal costs from a losing plaintiff may be similarly appealing. Fellas & Warne, *supra* note 13, at 370–71. Thus, like U.S. courts, the courts of England may be particularly attractive for transnational litigants.

play in transnational disputes. Part C examines recent developments in personal jurisdiction case law to describe and explain the significance of personal jurisdiction in transnational disputes adjudicated in the United States and England. Part D begins by addressing the doctrine of forum non conveniens and its role in leveling out the litigation playing field in contemporary U.S. jurisprudence. The latter half of Part D discusses the application of forum non conveniens in the courts of England, and attempts to shed light on the differences in approach to forum non conveniens between U.S. and English courts. Finally, Part E examines recent changes in the area of recognition and enforcement of foreign judgments, and analyzes how these changes may affect forum shopping in transnational disputes.

B. Forum Shopping

1. Forum Shopping's Bad Rap

In customary legal parlance, "forum shopping" refers to a party's pursuit of the venue that affords the greatest chance of prevailing in a lawsuit.[24] Yet despite this seemingly innocuous definition and the practice's practical underpinnings, forum shopping has come to take on a pejorative connotation, both in the United States[25] and England.[26] On occasion, even the U.S. Supreme Court has expressed contempt toward the practice.[27]

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24. *See, e.g.*, BLACK'S LAW DICTIONARY 681 (8th ed. 2004) (defining forum shopping as "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard"); Algero, *supra* note 11, at 79 ("'Forum shopping' typically refers to the act of seeking the most advantageous venue in which to try a case."); Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 14 (1991) ("'Forum shopping' is commonly defined as attempting to have one's case heard in the forum where it has the greatest chance of success."); *cf.* Juenger, *supra* note 14, at 554 ("In its widest sense, forum shopping connotes the exercise of the plaintiff's option to bring a lawsuit in one of several different courts.").

25. *See, e.g.*, Sherwin-Williams Co. v. Holmes County, 343 F.3d 383, 388, 391 (5th Cir. 2003) (citing "abusive" forum shopping as a factor district courts must consider when deciding whether to dismiss a declaratory action, and recognizing the pejorative connotation of the term); Bray v. United States, 785 F.2d 989, 991 (Fed. Cir. 1986) ("The potential for *the evil of forum shopping* arises the moment two forums are made available." (emphasis added)); DeSantis v. Hafner Creations, Inc., 949 F. Supp. 419, 424 n.14 (E.D. Va. 1996) ("The term 'forum shopping,' often used indiscriminately, has a pejorative connotation."); *see also* Louise Ellen Teitz, *Where to Sue: Finding the Most Effective Forum in the World*, *in* INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE, *supra* note 13, at 49, 49 [hereinafter Teitz, *Where to Sue*] (labeling "forum shopping" as the "longest four-letter word in international litigation"). *But see* Goad v. Celotex Corp., 831 F.2d 508, 512 n.12 (4th Cir. 1987) ("There is nothing inherently evil about

U.S. federal courts often frame the issue of forum shopping in different ways. For instance, some courts approach the issue of forum shopping by focusing on the substantive law that applies in the action,[28] while other courts analyze the issue in terms of "impermissibility"[29] or "improper purpose."[30] But despite these differences in conceptualization, the aversion toward and regulation of procedural forum shopping appears to stem from the same root: the well-established legal principle that disputes should be resolved on their merits and not on procedural technicalities.[31] This principle

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forum-shopping. The statutes giving effect to the diversity jurisdiction under the Constitution are certainly implicit, if not explicit, approval of alternate forums for plaintiffs." (citations omitted)); *DeSantis*, 949 F. Supp. at 424 n.14 ("[S]trictly speaking, venue and long-arm statutes authorize some degree of legitimate forum shopping.").

26. *See, e.g.*, Boys v. Chaplin, [1971] A.C. 356, 378 (H.L.) (appeal taken from Eng.) (stating that "[it is] in the interests of public policy to discourage 'forum shopping' expeditions by the inhabitants of other countries"); Saipem S.p.A. v. Dredging VO2 B.V. (The "Volvox Hollandia"), [1988] 2 Lloyd's Rep. 361, 373 (C.A.) (appeal taken from Eng.) ("The undesirability for forum shopping followed by judgment racing is self-evident."); HIB Ltd. v. Guardian Ins. Co., [1997] 1 Lloyd's Rep. 412, 417 (Q.B.) (Eng.) ("unashamed forum shopping"). However, not all English courts have traditionally viewed forum shopping with disdain. *See, e.g.*, The Atlantic Star, [1973] Q.B. 364, 382 (C.A.) (appeal taken from Eng.) ("If a plaintiff considers that the procedure of our courts, or the substantive law of England, may hold advantages for him superior to that of any other country, he is entitled to bring his action here .... You may call this 'forum-shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service."); *see also* BELL, *supra* note 1, at 90 (quoting The Atlantic Star, [1974] A.C. 436, 459 (H.L.) (appeal taken from Eng.)).

27. *See, e.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) (characterizing forum shopping as the pursuit of "justice blended with some harassment"); *see also* Yee v. City of Escondido, 503 U.S. 519, 538 (1992) (finding forum shopping to be "of particular concern"); Hanna v. Plumer, 380 U.S. 460, 468 (1965) (identifying the "discouragement of forum-shopping" as one of the "twin aims" of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)).

28. *See, e.g.*, *Sherwin-Williams*, 343 F.3d at 399–400 (finding that the plaintiff in a declaratory judgment suit did not engage in forum shopping where the applicable substantive law would have been the same in both state and federal court).

29. *See, e.g.*, Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F. Supp. 1040, 1060 (S.D.N.Y. 1987) (holding that the plaintiff did not engage in "impermissible forum shopping" where the plaintiff "ha[d] not chosen a forum devoid of contacts between either itself or defendant" and received "no substantive advantage" in having the action decided in the forum).

30. *See, e.g.*, Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 446 F. Supp. 2d 163, 177–78 (S.D.N.Y. 2006) (holding that the plaintiff did not engage in "any improper purpose such as forum shopping" where the majority of the events giving rise to the suit had occurred in the forum, and the interest of the United States in enforcing its securities laws justified suing in federal court). Implicit in the courts' adoption of these various standards is the notion that under some circumstances, forum shopping may be permissible and proper. In fact, this was precisely the implication of the court's holding in *Rolls-Royce*, 657 F. Supp. at 1060. These approaches seem to suggest, then, that at least some courts have begun to shun the formalistic distinctions between forum "selection" and forum "shopping."

31. *See* Schiavone v. Fortune, 477 U.S. 21, 27 (1986) ("Justice Black reminded us, more than 30 years ago . . . that the 'principal function of procedural rules should be to serve as useful

is offended whenever a party obtains a favorable outcome simply by bringing or removing an action to a particular forum, because the party does so irrespective of the relative strength or weakness of that party's legal position.[32]

More recently, some commentators have criticized U.S. courts' aversion to forum shopping, and have questioned whether the practice truly warrants the scorn it has engendered.[33] To support their positions, these authors cite the arbitrariness of the semantic distinction between permissible "forum selection" and impermissible "forum shopping,"[34] emphasize the practical benefits forum shopping affords parties,[35] and note the possible legal ramifications for attorneys who do not seek the most beneficial forum for their clients.[36] But for all intents and purposes, parties continue to pay a

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guides to help, not hinder, persons who have a legal right to bring their problems before the courts.' This Court, too, in the early days of the federal civil procedure rules . . . announced that the spirit and inclination of the rules favored decisions on the merits . . . ." (citations omitted)); Foman v. Davis, 371 U.S. 178, 181–82 (1962) ("It is . . . entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of . . . mere [procedural] technicalities [in pleading]. . . . The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.'" (quoting FED. R. CIV. P. 1)). Some commentators believe, however, that the regulation of forum shopping in the transnational context is really a way for U.S. courts to insulate corporations from liability for acts abroad. *See, e.g.*, Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1191–92 (2006) (citing Malcolm J. Rogge, *Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of* Forum Non Conveniens *in* In Re: *Union Carbide, Alfaro, Sequihua, and Aguinda*, 36 TEX. INT'L L.J. 299, 300 (2001); Jeffrey A. Van Detta, *Justice Restored: Using a Preservation-of-Court-Access Approach to Replace Forum Non Conveniens in Five International Product-Injury Case Studies*, 24 NW. J. INT'L L. & BUS. 53, 54 (2003)). Under this "disguise" theory, the notion that the judgment-on-the-merits principle underlies courts' aversion to forum shopping loses much of its weight.

32. *Cf.* BELL, *supra* note 1, at 90 ("[A]s a matter of abstract justice, it seems intuitively offensive to notions of procedural fairness that the action goes for trial in the country . . . selected by the plaintiff . . . [who] chooses the country which suits him best." (third and fourth alterations in original) (internal quotation marks and footnote omitted)).

33. *See, e.g.*, Georgene M. Vairo, *Foreword: The Last Frontier*, 40 LOY. L.A. L. REV. 1247, 1248 (2007) ("Forum shopping is bad and evil only if we use the phrase to mean the bringing of frivolous claims in an improper forum."); sources cited *infra* notes 34, 36.

34. *See, e.g.*, Algero, *supra* note 11, at 80–81 (questioning whether "forum shopping" is different from "forum selection"); Georgene M. Vairo, *Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction: Supplemental Jurisdiction; Diversity Jurisdiction; Removal; Preemption; Venue; Transfer of Venue; Personal Jurisdiction; Abstention and the All Writs Act*, *in* 1 CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 743, 749–50 (ALI-ABA ed., 2005) (same); Vairo, *Is Selecting Shopping?*, *supra* note 3 (same).

35. *Cf.* sources cited *infra* note 42.

36. *See, e.g.*, Vairo, *Is Selecting Shopping?*, *supra* note 3 ("[A] plaintiff's lawyer is guilty of malpractice if he or she does not consider what forum is the best for resolving a client's dispute."); *accord* Algero, *supra* note 11, at 81; Juenger, *supra* note 14, at 572. Of course,

high price for forum shopping, as courts continue to base decisions on the policy of discouraging the practice.[37]

2. Forum Shopping Across Borders

Forum shopping takes on a unique character within the context of transnational litigation, primarily because of the nature and characteristics of litigation in the United States,[38] which are often anomalous when compared to those of other nations.[39] Traditionally, foreign parties and courts have viewed the United States as a haven for plaintiffs,[40] and recent scholarship points to the continued viability of this sentiment.[41]

> If it is the case that procedural advantages offered by particular forums provide, above all else, the incentive for forum shopping, then there can be little doubt that the United States is the most attractive destination for the forum shopping plaintiff, especially one with an action in tort. . . . [P]rocedural factors such as expansive rules of pre-trial discovery, jury trials, large damages awards, and the non-recovery of costs rule conspire to produce [this] result . . . . Other procedural inducements offered by litigation in the United States include low filing fees, the possibility of class actions, and liberal joinder rules as well as relatively loose . . . rules of pleading, [which] thereby reduc[e] the prospect of summary dismissal of speculative or vaguely cast claims. The contingency fee system greatly

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practitioners should bear in mind that forum shopping that exceeds the bounds of legal doctrine and the particular facts of a case may result in sanctions in federal court under Federal Rule of Civil Procedure 11. *See* GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTATIVE MEASURES 234 (Richard G. Johnson ed., 3d ed. 2004).

37. *See, e.g.*, *In re* BankAmerica Corp. Sec. Litig., 95 F. Supp. 2d 1044, 1050 (E.D. Mo. 2000).

38. "Nowhere is the issue of forum choice more important than in the area of international litigation. The reasons for its importance . . . generally stem from prominent characteristics of the United States judicial system." Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 502 (1993).

39. *Id.*

40. *See* Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 323 (1994).

41. *See, e.g.*, Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1184–85 (2005); *see also* sources cited *infra* note 42.

> facilitates a plaintiff's ability to enjoy many of these procedural advantages and may, in itself, be a reason for bringing suit in the United States . . . .[42]

Even U.S. courts have acknowledged their collective reputation.[43] Moreover, for U.S. plaintiffs, the appeal of staying home to litigate is amplified by the "natural disincentives" to litigating abroad, including the potential for higher expenses, the possibility of needing the assistance of local counsel, and the likelihood of a lack of familiarity with the foreign forum's laws and procedures.[44]

To be sure, "the United States is [not] the only destination of the dedicated forum shopper . . . nor should it be thought that plaintiffs have an unlimited ability to shop in that country's many forums."[45] In fact, some foreign plaintiffs may be at a distinct disadvantage in U.S. federal courts, where the doctrine of forum non conveniens serves as a powerful weapon with which U.S. defendants can defeat even the most meritorious transnational lawsuits.[46] Furthermore, the potential financial costs of litigating in the United States, where the prevailing party generally may not collect litigation expenses from the opposition,[47] may outweigh many of the advantages afforded by

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42. BELL, *supra* note 1, at 28–29 (footnotes omitted); *see also* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981) (discussing reasons why U.S. courts attract foreign plaintiffs); David Boyce, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond* Reyno, 64 TEX. L. REV. 193, 196–97 (1985) (discussing the "advantages for plaintiffs in the American legal system"); Parrish, *supra* note 5, at 44–47 (discussing reasons why U.S. courts attract plaintiffs); Weintraub, *supra* note 40, at 323–24 (citing reasons why the United States is a "magnet forum").

43. *See, e.g.*, *Reyno*, 454 U.S. at 252 & n.18 (1981) (noting that U.S. courts are "extremely attractive" to foreign plaintiffs).

44. Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 10 n.33 (1991).

45. BELL, *supra* note 1, at 34.

46. Courts do not consider the merits of the underlying dispute when conducting a forum non conveniens inquiry. *See infra* Part D.1. Thus, a plaintiff who has a strong claim against the defendant may nevertheless be unable to present any substantive arguments to the court if the court determines that dismissing the action on forum non conveniens grounds is appropriate. *See, e.g.*, Gonzalez v. Chrysler Corp., 301 F.3d 377, 381–84 (5th Cir. 2002) (upholding the trial court's dismissal on forum non conveniens grounds without ruling on the merits of the plaintiffs' various claims in a product liability action where the defendant manufacturer was subject to strict liability in the United States).

47. Derek J.T. Adler & Adam Johnson, *Overview of Litigation in the United States and England*, *in* TRANSATLANTIC COMMERCIAL LITIGATION AND ARBITRATION, *supra* note 13, at 1, 33 (noting that, in contrast to practice in England, "each party [to a lawsuit in the United States] must bear its own litigation expenses regardless of who wins or loses in the action," subject to certain exceptions).

U.S. courts.[48] Yet despite any countervailing factors that may exist, the mere possibility of a U.S. court adjudication of a transnational dispute changes the character of that dispute.[49] Thus, in virtually every transnational dispute involving a U.S. defendant, a plaintiff ought, at the very least, to explore the possibility of filing suit in the United States.

3. The Effectiveness of Forum Shopping

Amidst all the controversy that has surrounded forum shopping, what is perhaps most interesting is the relative absence of empirical data supporting the fundamental notion upon which the exercise of forum shopping is premised, namely, that forum influences outcome.[50] The few empirical studies that do exist provide mixed results on forum shopping's effectiveness.[51] As a result, the possibility remains that the influence of forum shopping in determining the outcome of a case may be more illusion than reality.

Indeed, the significance of forum shopping may not derive so much from the *actual* differences in procedural and substantive rules among fora, but from the mere *perception* that such distinctions exist in the first place.[52] This is especially true in the context of transnational litigation, in which a plaintiff who files suit in the United States might immediately gain substantial settlement leverage

48. Much has also been written about the disadvantages that foreign plaintiffs face as a result of the xenophobia of American jurors. *See, e.g.*, Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497 (2003). One study, however, recently questioned the existence of this phenomenon. *See* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996).

49. *See infra* Part B.3.

50. *Cf.* sources cited *supra* note 1.

51. *See, e.g.*, Cameron & Johnson, *supra* note 10, at 820 (discovering that in nearly 90 percent of the personal jurisdiction cases decided by the Supreme Court since 1945, "the party that prevailed on personal jurisdiction ultimately triumphed on the merits in either a judicial decision or a favorable settlement"); Clermont & Eisenberg, *Exorcising Evil*, *supra* note 1, at 1511–12, 1514 n.18 (finding that plaintiffs' win rate dropped from 58 to 29 percent after transfer to another jurisdiction under 28 U.S.C. § 1404(a), but refusing to extend the results to forum non conveniens); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 652–54 (2006) (concluding that the outcomes of the cases studied did not support plaintiffs' perceived advantages of litigating class action suits in state court, or defendants' perceived advantages of litigating such actions in federal court).

52. *See* BELL, *supra* note 1, at 15–16.

over a foreign defendant simply by choosing the U.S. forum.[53] In other words, even if the U.S. forum affords the plaintiff no actual advantages, the defendant's perception that it does so may be enough to induce the defendant into settlement, perhaps for less-than-favorable terms.[54] For example,

> [w]here the two potential forums . . . are the United States and India, . . . the likely difference in quantum which a successful plaintiff would be awarded may be such that one of, if not *the* most important of, the contingencies for the parties to consider in settlement negotiations will be the plaintiff's ability to maintain suit in the United States.[55]

In addition, courts' consideration of forum shopping and their attempts to regulate it may contribute to the perception that forum shopping is an effective practice. After all, litigants would be justified in reasoning that if forum shopping did not afford any tangible benefits to parties, courts would not attempt to discourage it.

The likely answer to the question of whether forum shopping is effective is that it typically has some impact on case outcomes, but

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53. *See, e.g.*, Weintraub, *supra* note 40 ("The fact that damage awards in the United States are higher than in the country where the foreign plaintiff was injured . . . influences settlements of claims.").

54. *Cf.* Silberman, *supra* note 38, at 502 ("[E]ven in cases where settlement is likely, the question of the appropriate forum is often litigated because it can define the parameters of the settlement.").

55. *Id.* (footnote omitted). The mid-Atlantic formula, a settlement formula that "derive[s] from practitioners' estimates of the difference between a case's potential monetary outcome in foreign and United States courts," Eugene J. Silva, *Practical Views on Stemming the Tide of Foreign Plaintiffs and Concluding Mid-Atlantic Settlements*, 28 TEX. INT'L L.J. 479, 481 (1993), reflects this principle. BELL, *supra* note 1, at 16.

> The fact that damage awards in the United States are higher than in the country where the foreign plaintiff was injured . . . influences settlements of claims. Under what has become known as "the mid-Atlantic formula," claims of European plaintiffs injured in Europe are being settled at figures above the likely recovery in the foreign forum. The amount of the settlement turns on the probability that jurisdiction over the defendant could have been obtained in the United States and that a motion for forum non conveniens dismissal would not be successful.

Weintraub, *supra* note 40, at 323–24 (footnote omitted); *accord* Hans W. Baade, *Foreign Oil Disaster Litigation Prospects in the United States and the "Mid-Atlantic Settlement Formula,"* 7 J. ENERGY & NAT. RESOURCES L. 125, 127–28 (1989) ("Since the[] defences [of lack of personal jurisdiction and *forum non conveniens*] are not certain to succeed, and given the tremendous differential between United Kingdom and United States liability exposure, the defendants are likely to concede not only liability, but also damages in excess of those typically awarded by Scottish and English judges in like cases. . . . They [sic] key factor is the perceived likelihood of success or failure of litigation in the United States or, more particularly, the viability of the lack-or-jurisdiction [sic] and *forum non conveniens* defences.").

the extent of that impact depends upon the specific facts and circumstances surrounding a particular case. For instance, filing suit against a foreign defendant in a court that does not recognize forum non conveniens (or an equivalent doctrine) is beneficial to the plaintiff, even if the benefits merely consist of saving the time and money that would be needed to adjudicate the issue. If the defendant cannot raise a forum non conveniens defense and the forum does not follow an analogous rule, then the defendant may be precluded from pleading inconvenience, even if the forum is grossly inconvenient. Similarly, a U.S. court that adheres to a particularly narrow conception of "contact" may increase the defendant's chances of waging a successful personal jurisdiction challenge, because the court will consider a smaller number of the defendant's activities when applying the minimum contacts test.[56] These benefits are real, though they may not be outcome determinative in every, or even most, circumstances.

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56. Under the federal minimum contacts test, where the nonresident defendant's contacts with the forum are such that the exercise of general personal jurisdiction would not comport with due process, a court may exercise specific personal jurisdiction over a nonresident defendant where (1) the defendant has purposefully directed activities to the forum state, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473–74 (1985), or otherwise purposefully availed herself of the privilege of conducting activities in the forum, Hanson v. Denckla, 357 U.S. 235, 253 (1958); (2) the cause of action is directly related to or arises from the defendant's forum-related activities, *see* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984) (citing Shaffer v. Heitner, 433 U.S. 186, 204 (1977)); and (3) the exercise of personal jurisdiction is reasonable, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). To determine reasonableness, courts must weigh the burden imposed on the defendant by being haled to the forum against the plaintiff's interest in effective and convenient relief, taking into account the forum state's interest in adjudication, the interstate interest in efficient resolution of controversies, and the shared interest in furthering fundamental substantive social policies. *World-Wide Volkswagen*, 444 U.S. at 292. Importantly, in transnational suits involving foreign defendants, "the unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi*, 480 U.S. at 114 (finding that the exercise of personal jurisdiction over the foreign defendant was unreasonable).

The minimum contacts analysis requires federal courts to apply the long-arm statutes of the state in which the courts are situated. *See, e.g.*, Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1076 & n.16 (9th Cir. 2006) (adopting the trial court's conclusion that the exercise of specific personal jurisdiction over the defendant was proper pursuant to Washington State's long-arm statute). If a long-arm statute extends to the limits of due process or otherwise permits the exercise of personal jurisdiction, the court must determine whether such exercise would comport with due process by applying the minimum contacts test. Dow Chemical Co. v. Calderon, 422 F.3d 827, 830 (9th Cir. 2005); *see also* Morris v. Barkbuster, Inc., 923 F.2d 1277, 1280 (8th Cir. 1991) ("A federal court in a diversity action may assume jurisdiction over nonresident defendants only to the extent permitted by the long-arm statute of the forum state and by the Due Process Clause.").

Interestingly, courts may actually perpetuate forum shopping by attempting to regulate it. For instance, the U.S. Supreme Court adopted the doctrine of forum non conveniens to curb forum shopping,[57] but the doctrine has provided defendants with a powerful means of reverse forum shopping.[58] In addition, the Supreme Court's minimum contacts doctrine has engendered forum shopping. As Professor Juenger notes,

> *International Shoe*[59] has enhanced the potential for forum shopping. That decision was, after all, intended to expand rather than constrict the jurisdiction of state courts. It enables plaintiffs to sue even those who are not physically present in the state . . . .
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> . . . .
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> Today's forum shoppers . . . need no longer stalk perambulatory defendants. Instead of having to rely on roaming process servers, they can seize upon the links that connect an adversary with various states to drag the defendant into a forum of the plaintiffs' choice.[60]

Another example of the Court's unintended promotion of forum shopping can be found by looking at what is perhaps the preeminent anti-forum-shopping case in U.S. jurisprudence, *Erie Railroad Co. v. Tompkins*.[61] One of the Court's "twin aims" in *Erie* was to curb forum shopping.[62] However, the Court's holding—that federal courts must apply state substantive law in cases arising out of state law—has itself produced a great deal of forum shopping, as parties seek

57. Juenger, *supra* note 14, at 555–56 (describing forum non conveniens as a "broadly gauged anti-forum-shopping device").

58. *See* Iragorri v. United Techs. Corp., 274 F.3d 65, 75 (2d Cir. 2001); *supra* note 13. In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the Court explicitly acknowledged this possibility, but held that it did not merit consideration in the forum non conveniens analysis. *Id.* at 252–53 n.19 ("If the defendant is able to . . . show[] that trial in the chosen forum would be unnecessarily burdensome, dismissal is appropriate—regardless of the fact that defendant may also be motivated by a desire to obtain a more favorable forum.").

59. International Shoe v. Washington, 326 U.S. 310 (1945)

60. Juenger, *supra* note 14, at 557; *see also* Gottesman, *supra* note 44, at 10 ("[L]ong-arm statutes and broadened conceptions of in personam jurisdiction have expanded the array of states in which defendants can be sued . . . .").

61. 304 U.S. 64 (1938).

62. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

out those fora that apply substantive rules that are most favorable to their positions.[63]

Regardless of the propriety of engaging in forum shopping and the degree of its effectiveness as a litigation strategy, the fact remains that the selection of a venue will continue to be an important consideration for plaintiffs and defendants alike. Although courts may be successful in curbing forum shopping in bits and pieces, any attempts to eradicate the practice entirely will ultimately fail. Not only do attorneys have an ethical duty to zealously advance their clients' interests, at least in the United States,[64] but they also have financial and reputational interests in prevailing. Thus, for better or worse, the practice of forum shopping is here to stay.

C. Personal Jurisdiction in Transnational Disputes

The proper exercise of personal jurisdiction over a foreign defendant is a fundamental component of litigation.[65] No U.S. court may adjudicate an action if it does not possess jurisdiction, i.e., the power to "speak by the law,"[66] over the defendant.[67] The same

63. *See* Gottesman, *supra* note 44, at 10 (noting that *Erie* allows plaintiffs to "survey the choice of law rules of the states in which service can be effected, and [to] sue in the state whose choice of law rules are likely to result in application of the substantive law most favorable to [the] client's cause"); *see also* PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 11 (5th ed. 2004).

64. MODEL RULES OF PROF'L CONDUCT pmbl. para. 2 (1983).

65. Challenging the court's exercise of jurisdiction "is perhaps the most basic step a defendant can take in seeking to prevent the continuance of litigation in a particular forum." BELL, *supra* note 1, at 137–38.

66. State *ex rel.* Summerfield v. Maxwell, 135 S.E.2d 741, 745 (W. Va. 1964) (internal quotation marks omitted).

67. A plaintiff impliedly submits to the personal jurisdiction of the forum upon filing the action therein. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) (recognizing that "an individual may submit to the jurisdiction of the court by appearance"); *see also* Kessler v. Crichton, No. 99-1994, 2000 WL 816242, at *1 (8th Cir. June 26, 2000) (unpublished table decision) (finding that "the district court had personal jurisdiction over [the plaintiff] by virtue of his filing the infringement action and voluntarily appearing at trial" (citing Carlson v. Hyundai Motor Co., 164 F.3d 1160, 1163 (8th Cir. 1999))). As a result, personal jurisdiction issues typically pertain to the propriety of exercising personal jurisdiction over the defendant. *See* Lindy B. Arwood, *Personal Jurisdiction: Are the Federal Rules Keeping Up with (Internet) Traffic?*, 39 VAL. U. L. REV. 967, 968 n.7 ("The main concern in personal jurisdiction questions is whether a court can assert jurisdiction over a nonresident defendant." (citing Kendrick D. Nguyen, Note, *Redefining the Threshold for Personal Jurisdiction: Contact and the Presumption of Fairness*, 83 B.U. L. REV. 253, 262 (2003))). In certain types of cases, however, personal jurisdiction over plaintiffs may become an issue. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807–11 (1985) (class actions).

generally holds true in the courts of England.[68] Personal jurisdiction is particularly important in transnational litigation because distinct issues may arise in disputes involving foreign parties that are typically absent from domestic suits.[69] Moreover, personal jurisdiction is a threshold issue, and therefore bears on whether the plaintiff will be permitted to argue the merits of the case to the court.[70] As a result, whether bringing or defending against a suit, practitioners involved in transnational cases in the courts of the United States and England should always be cognizant of potential personal jurisdiction issues and arguments.

1. Personal Jurisdiction over Foreign Defendants in U.S. Federal Courts[71]

In U.S. federal courts,[72] the plaintiff has the burden of proving that the exercise of personal jurisdiction is lawful once the defendant

68. *Cf.* Civil Procedure Rules, 1998, S.I. 1998/3132, r. 11 (U.K.) (requiring that a defendant who wishes to challenge the court's exercise of jurisdiction must do so within fourteen days after filing an acknowledgment of service, or the defendant will be treated as having accepted the court's jurisdiction); Theodore V.H. Mayer & Peter Sigler, *Personal Jurisdiction over Foreign Defendants in the United States and England*, *in* TRANSATLANTIC COMMERCIAL LITIGATION AND ARBITRATION, *supra* note 13, at 79, 79 (labeling personal jurisdiction as "[t]he threshold issue for determining whether a lawsuit can be brought against a particular party in the courts of a particular country").

69. *See* Parrish, *supra* note 5, at 42 ("Whether a U.S. court should exercise personal jurisdiction over an alien defendant raises a host of collateral issues, *unique to international litigation*." (emphasis added)); *see also* BELL, *supra* note 1, at 139–40 (discussing the reasons behind the "cautious approach" English courts have traditionally taken with respect to the exercise of jurisdiction over foreign defendants).

70. In the United States, a personal jurisdiction challenge must be submitted in the defendant's first substantive filing of the litigation, and is thus a threshold issue. *See* FED. R. CIV. P. 12(b)(2). In England, a plaintiff who seeks to serve process upon a foreign defendant must first demonstrate a "good arguable case" that England is the proper forum for adjudication of the dispute. *See infra* notes 178–79 and accompanying text. The plaintiff's failure to do so could lead to dismissal of the action at the onset of litigation. *See* discussion *infra* Part C.2.

71. This section briefly recapitulates the rules governing the exercise of personal jurisdiction in federal courts. For a more detailed summary of personal jurisdiction principles, see Edward B. Adams, Jr., *Personal Jurisdiction over Foreign Parties*, *in* INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS, *supra* note 5, at 113, 113–31.

72. Practitioners must bear in mind that federal circuit courts' application of personal jurisdiction doctrine is by no means uniform. *See, e.g.*, *id.* at 120–22 (noting circuit courts' varied application of the "stream of commerce" theory); *infra* note 74. Thus, a plaintiff generally has an incentive to forum shop among U.S. jurisdictions for a venue that affords the greatest chance of withstanding a personal jurisdiction challenge, particularly when the plaintiff believes that a personal jurisdiction challenge is likely.

raises a challenge.[73] The extent to which the plaintiff is prepared to meet this burden may constitute the difference between arguing the case on its merits and going home empty-handed. In using personal jurisdiction as a touchstone for selecting a U.S. forum, the plaintiff should focus on (1) the nature of the underlying claim,[74] (2) the manner in which process was or will be served upon the defendant,[75] (3) whether any terms in a contract or other agreement could reasonably be construed as waivers of personal jurisdiction,[76] and (4)

73. McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936). The guiding principle of personal jurisdiction doctrine in the United States is that a court's exercise of personal jurisdiction over a nonresident defendant must "not offend 'traditional notions of fair play and substantial justice.'" Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

74. The substantive claim and underlying facts of the case will often affect the personal jurisdiction analysis. For instance, the circuit courts take different approaches with respect to Internet cases or those involving product liability. With regard to the former, some courts apply the *Zippo* "sliding scale," Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123–24 (W.D. Pa. 1997), while others have adopted a modified analysis combining the *Zippo* and "effects" tests. *See* Adams, Jr., *supra* note 71, at 124–26; Jeffrey M. Jensen, Developments, *Personal Jurisdiction in Federal Courts over International E-Commerce Cases*, 40 LOY. L.A. L. REV. 1507, 1534–36 (2007). With respect to product liability cases, some circuits adhere to the "stream of commerce" theory established by the majority in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980) (citing Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961)), while others adhere to Justice O'Connor's "foreseeability plus" theory, adopted by the plurality in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112 (1987). Adams, Jr., *supra* note 71, at 120–22.

75. Conferring personal jurisdiction by serving the defendant while physically present in the forum (a process that is commonly referred to as "transient" or "tag" jurisdiction) is constitutional. *See* Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (plurality opinion) (holding that "jurisdiction based on physical presence alone" is constitutional). *But see id.* at 629–33 (Brennan, J., concurring) (stating that even transient jurisdiction must comport with contemporary notions of due process in accordance with *International Shoe v. Washington*, 326 U.S. 310 (1945), and its progeny); *see also* Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 478 (2006) ("[T]ransient jurisdiction probably is constitutional only where its application is not so outlandish as to be unreasonable in the particular circumstances.").

76. Either party to an action may waive the personal jurisdiction requirement, thereby consenting to the court's exercise of personal jurisdiction. *See supra* note 67. Parties may waive personal jurisdiction "by extensively participating in the litigation without timely seeking dismissal," Rates Tech. Inc. v. Nortel Networks Corp., 399 F.3d 1302, 1309 (Fed. Cir. 2005), or via valid forum-selection clauses, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985) ("Where . . . forum-selection provisions have been obtained through freely negotiated agreements and are not unreasonable and unjust, their enforcement does not offend due process." (citation and internal quotation marks omitted)); Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315–16 (1964) ("[P]arties to a contract may agree in advance to submit to the jurisdiction of a given court . . . ."); *see, e.g.*, D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 103-04 (2d Cir. 2006) (holding that the defendants consented to the personal jurisdiction of the forum court by entering into agreements that contained forum-selection clauses limiting jurisdiction to that forum). For other means by which parties may waive personal jurisdiction, see *Insurance Corp. of Ireland v.*

the general willingness of the circuit court to stray from traditional formulations of personal jurisdiction to meet the complexities of contemporary business transactions.[77]

Similarly, the defendant should weigh the merits of challenging personal jurisdiction against the time and effort that may be required to adjudicate the issue. Challenging personal jurisdiction may lead to "several positive results" for defendants:

> Notably, it can create an opportunity for the court to postpone review of the merits and damages, permitting discovery and briefing to proceed on the jurisdictional "case within the case." Challenging jurisdiction, if successful, could also short-circuit the case, or provide an opportunity for settlement. Even if unsuccessful, moving to dismiss on credible grounds of lack of jurisdiction could provide a basis for the defendant to later challenge enforcement of any resulting judgment in a foreign country.[78]

On the other hand, a personal jurisdiction challenge may require the expenditure of a substantial amount of time and resources; therefore, a personal jurisdiction challenge based on tenuous grounds may not justify the costs.[79] Of course, the plaintiff may also need to expend a significant amount of time and effort to prove the propriety of exercising personal jurisdiction. In turn, this may induce the plaintiff to enter into a settlement on less-than-favorable terms,[80] thus increasing the desirability of filing suit in a forum in which the exercise of personal jurisdiction will be relatively uncontroversial.

The same rules governing the exercise of personal jurisdiction over domestic defendants govern its exercise over foreign defendants.[81] Furthermore, virtually all U.S. courts assume that the

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Compagnie des Bauxites de Guinee, 456 U.S. 694, 703–04 (1982), and the discussion *infra* Part C.1.a.

77. *See* discussion *infra* Part C.1.a.

78. Reisenfeld, *supra* note 13, at 78.

79. *See* BELL, *supra* note 1, at 147.

80. *Cf. supra* Part B.3.

81. Strauss, *supra* note 18, at 1237 ("[W]ith minor variation, the Court applies the constitutionally-derived minimum contacts test to international cases."); *see also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105 (1987) (framing the personal jurisdiction issue in a transnational dispute in terms of minimum contacts); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415–16 (1984) (applying the minimum contacts test to a transnational dispute and holding that the defendant was not subject to the general personal jurisdiction of the district court). However, "[u]nlike with domestic defendants, a federal court may exercise

Due Process Clause applies to and governs the exercise of personal jurisdiction over foreign defendants."[82] Nevertheless, "[g]reat care and reserve should be exercised when extending [American] notions of personal jurisdiction into the international field"[83] because the exercise of personal jurisdiction in transnational cases carries with it distinct considerations and implications that are absent from diversity suits involving parties from different states.[84]

First, the issue of personal jurisdiction is closely connected to the recognition and enforcement of foreign judgments.[85] The manner in which a court exercises personal jurisdiction over the defendant may have a direct impact on whether the court's judgment is recognized abroad.[86] Foreign courts typically will not recognize judgments rendered by U.S. courts if they deem that the U.S. court's exercise of personal jurisdiction was improper or "exorbitant."[87]

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personal jurisdiction over a foreign defendant [also] based on an aggregation of contacts with the United States as a whole, rather than based on the defendant's contacts with the state in which the court sits." Parrish, *supra* note 5, at 21 (citing FED. R. CIV. P. 4(k)(2)). Notably, should the United States ratify the Hague Convention on Choice of Court Agreements, U.S. personal jurisdiction doctrine will no longer apply to transnational disputes between U.S. and foreign businesses that are governed by exclusive contractual choice-of-court provisions. *See infra* Part E.1.b.

82. Parrish, *supra* note 5, at 4–5 ("Th[e] focus on the Due Process Clause, and the jurisdictional principles derived from it, is [sic] *universally* assumed appropriate whether the case involves a domestic or foreign defendant. . . . The assumption—now firmly entrenched—is that the personal jurisdiction standards for domestic defendants and nonresident, alien defendants are the same." (emphasis added)); *see, e.g.*, Fortis Corporate Ins. v. Viken Ship Mgmt., 2006 FED App. 0192P at 4–9 (6th Cir.) (applying the minimum contacts test to a foreign defendant); Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1205–11 (9th Cir. 2006) (en banc), *cert. denied*, 126 S. Ct. 2332 (2006) (same).

83. *Asahi*, 480 U.S. at 115 (quoting United States v. First Nat'l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

84. *See generally* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 22–25 (1987) (asserting that transnational litigation differs from domestic litigation in the areas of personal jurisdiction, enforcement of judgments, and burden of litigation). Indeed, some have questioned whether the due process standard established in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), "plays out differently when foreign defendants are involved" despite its common applicability to domestic and transnational disputes. Silberman, *supra* note 38, at 505–06. Professor Silberman posits that federal courts may apply "a more protective jurisdictional standard for foreign defendants" to promote, or at least to prevent damaging, international trade and commercial relations. *Id.* at 506–09.

85. *See* Strauss, *supra* note 18, at 1238; Born, *supra* note 84, at 23. This point is explored in greater detail *infra* Part E.

86. *See* Clermont & Palmer, *supra* note 75, at 475; Parrish, *supra* note 5, at 50–54.

87. Parrish, *supra* note 5, at 5–6 ("[M]ost countries refuse to recognize U.S. judgments based on what they perceive to be exorbitant jurisdictional assertions."); Strauss, *supra* note 18, at 1238 ("National courts have refused to execute foreign judgments in cases in which they consider the foreign court to have asserted its jurisdiction too broadly."). "Exorbitant" jurisdiction may be

Consequently, before filing suit in the United States against a defendant whose assets lie abroad, a plaintiff should evaluate the potential exorbitance of the forum's exercise of personal jurisdiction. In this regard, the plaintiff should not merely determine whether it could meet the burden of establishing minimum contacts and reasonableness, but how the forum in which the defendant's assets are located will view the exercise of personal jurisdiction by the court rendering judgment.[88]

Second, as Professor Parrish has noted, the exercise of personal jurisdiction over foreign defendants may affect U.S. foreign relations and international trade:

> Extraterritorial jurisdictional assertions can affect United States foreign relations in ways that domestic claims of jurisdiction cannot. An exorbitant jurisdictional assertion . . . can readily arouse foreign resentment, provoke diplomatic protests, trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields.
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> . . . .
>
> . . . U.S. trade relations can be particularly harmed as well.[89]

In *Asahi Metal Industry Co. v. Superior Court*,[90] the Supreme Court considered the potential impact that exercising personal jurisdiction might have on foreign relations in holding that the exercise of personal jurisdiction over the defendant was "unreasonable and unfair."[91] Accordingly, to the extent that they can do so legitimately,

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defined as "jurisdiction exercised validly under a country's rules that nevertheless appears . . . [to be] unfair to the defendant because of a lack of significant connection between the sovereign and either the parties or the dispute." Clermont & Palmer, *supra* note 75, at 476; *see also* Amin Rasheed Shipping Corp. v. Kuwait Ins. Co., [1984] A.C. 50, 65 (H.L.) (appeal taken from Eng.) (defining "exorbitant" jurisdiction as that "which, under general English conflict rules, an English court would not recognise as possessed by any foreign court in the absence of some treaty providing for such recognition").

88. *See infra* Part E.

89. Parrish, *supra* note 5, at 47–48 (internal quotation marks omitted) (quoting Born, *supra* note 84, at 28–29); *accord* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987) (stating that the reasonableness inquiry in cases involving foreign defendants serves the federal government's interest in "foreign relations policies").

90. 480 U.S. 102.

91. *Id.* at 115–16. Unfortunately, the Court did not enunciate the specific ways in which exercising jurisdiction might affect foreign relations. *See id.*

defendants should consider making similar arguments in U.S. courts when challenging personal jurisdiction. Defendants should be aware, however, that in *Asahi*, the Court's willingness to consider the potential effects on foreign relations of exercising personal jurisdiction may have stemmed from the fact that the only parties remaining in the action were foreign companies.[92] Furthermore, the Court had already determined that the defendant lacked minimum contacts with the forum when it inquired into the reasonableness of exercising personal jurisdiction.[93] Absent similar showings, lower courts might not be willing to hold foreign policy concerns above the individual liberty interest of having one's day in court.

Lastly, considerations of comity and sovereignty may continue to inform the reasonableness of exercising personal jurisdiction over foreign defendants.[94] Despite the commonly held belief[95] that *International Shoe Co. v. Washington*[96] effectively ended the so-called "era of territorial jurisdiction,"[97] neither the decision nor its progeny removed concerns of territoriality and sovereignty from the personal jurisdiction equation.[98] Indeed, the reasonableness factors

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92. *Id.* at 106.

93. *Id.* at 113–14.

94. *See* discussion *infra* Part C.1.b. "Comity" can signify different things to different courts. For instance some courts "'use the term comity . . . to refer to the doctrine of judicial deference to pending foreign proceedings . . . although [this] term[] technically is [not] appropriate. *Comity refers to deference to another sovereign's definitive law or judicial decision . . . not to its preliminary decision to enact a law or issue a judgment.*'" Fellas & Warne, *supra* note 13, at 355 (emphasis added) (second and final alterations in original) (quoting Advantage Int'l Mgmt., Inc. v. Martinez, No. 93 (CIV) 6227 (MBM), 1994 WL 482114, at *4 n.2 (S.D.N.Y. Sept. 7, 1994)). This is the definition of comity to which this article adheres.

95. *See, e.g.*, H. Beau Baez III, *The Rush to the Goblin Market: The Blurring of* Quill*'s Two Nexus Tests*, 29 SEATTLE U. L. REV. 581, 608 n.170 (2006). *See generally* sources cited *infra* note 98.

96. 326 U.S. 310 (1945).

97. According to Professor Strauss, "[t]he hallmark of the territorial era was an understanding that nation-states possessed absolute sovereignty over their territories and conversely were excluded from exercising sovereign powers in the territories of other nation-states." Strauss, *supra* note 18, at 1251.

98. *See* Parrish, *supra* note 5, at 10–12, 38 (arguing that "sovereignty remains the governing principle under international law limiting jurisdictional assertions"); Strauss, *supra* note 18, at 1254 & n.85 (stating that the Court's decision expanded personal jurisdiction but did not remove territoriality as the "primary basis" for personal jurisdiction); *see also* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1228–29 (9th Cir. 2006) (en banc) (O'Scannlain, J., concurring) ("The question in every personal jurisdiction case . . . is whether an individual's contacts with the forum State are so substantial that they render the extension of sovereign power just, notwithstanding his lack of physical presence there."), *cert. denied*, 126 S. Ct. 2332 (2006). *But see* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694,

established in *World-Wide Volkswagen Corp. v. Woodson*,[99] and the Court's subsequent application of those factors in *Asahi*,[100] reflect the Court's concerns with comity and sovereignty by mandating the weighing of judicial interests.[101] Nevertheless, "[t]he extent to which these . . . criteria . . . are important remains unclear in Supreme Court jurisprudence."[102] Perhaps as a result, some lower U.S. courts may not give any real deference to the sovereignty concerns of other nations, though they may purport to do so.[103] In addition, some U.S. courts have deemed a foreign nation's interests in the resolution of a dispute to be stronger where that nation has expressly declared its interest in adjudicating the case.[104]

Personal jurisdiction in transnational litigation is by no means a "hot button" issue in contemporary U.S. jurisprudence.[105] But given the increasing significance of transnational litigation in U.S. courts,[106] personal jurisdiction will continue to be an important sovereignty issue with which U.S. courts must grapple, as well as a common forum shopping consideration for parties. The remainder of this section explores two recent cases that have addressed the issue of personal jurisdiction within the context of transnational litigation.

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702 (1982) ("The personal jurisdiction requirement . . . represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.").

99. 444 U.S. 286 (1980); *see also supra* note 56.

100. 480 U.S. at 113–16.

101. Strauss, *supra* note 18, at 1262 n.110.

102. *Id.*

103. Professor Parrish, for instance, argues that "[p]eculiarly absent from serious consideration in international cases are comity concerns, or whether the exercise of jurisdiction would offend another nation's sovereignty. . . . To the extent that a court recognizes that a foreign state's sovereignty is relevant at all, sovereignty concerns usually receive only a passing mention without analysis." Parrish, *supra* note 5, at 25 (citing Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd., 328 F.3d 1122, 1133 (9th Cir. 2003); Jet Wine & Spirits, Inc. v. Bacardi & Co., 298 F.3d 1, 12 (1st Cir. 2002); Ballard v. Savage, 65 F.3d 1495, 1501 (9th Cir. 1995); Sinatra v. Nat'l Enquirer, Inc., 854 F.2d 1191, 1199 (9th Cir. 1988); Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1333 (9th Cir. 1984)).

104. *See e.g.*, Raffaele v. Compagnie Generale Mar., 707 F.2d 395, 398 (9th Cir. 1983) ("Normally a court should refrain from exercising jurisdiction when another state has expressed a substantially stronger sovereignty interest and that state's courts will take jurisdiction.").

105. *See* Parrish, *supra* note 5, at 3 (noting that the Court has not decided a personal jurisdiction case for over fifteen years).

106. *See supra* Part A.

a. The "effects" test and the Ninth Circuit

The issue of "exorbitant" jurisdiction[107] is central to a clear understanding of the transnational litigation landscape. As explained above, some nations' courts are unlikely to enforce a judgment rendered by a foreign court if they deem that court to have exceeded its jurisdictional authority.[108] Professors Clermont and Palmer affirm this notion when they write that "[t]he concept of exorbitant jurisdiction is fundamental to private international law, affecting . . . the question of whether a court's judgment will receive recognition outside the rendering country."[109] But even if the importance of personal jurisdiction partly derives from its ultimate impact on recognition and enforcement, it also retains substantial importance as a separate threshold issue in litigation. Parties must therefore be prepared to litigate personal jurisdiction at the onset of a dispute, long before the trier of fact issues a final judgment.

The Ninth Circuit's recent decision in *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*[110] exemplifies the extent to which some U.S. courts may be willing to stretch traditional personal jurisdiction doctrine to fit it within the contours of modern-day business transactions.[111] The decision may have important consequences on forum selection for plaintiffs and defendants, and should encourage plaintiffs to give the Ninth Circuit a hard look when a case involves novel questions of personal jurisdiction.

In *Yahoo!*, the plaintiff, Yahoo!, filed a declaratory judgment suit against the defendants, La Ligue Contre le Racisme et L'Antisemitisme ("LICRA") and L'Union des Etudiants Juifs de France ("UEJF"), to have two interim orders issued against Yahoo! by a French court declared unrecognizable and unenforceable.[112] In

107. *See* definitions *supra* note 87.

108. *See supra* Part C.

109. Clermont & Palmer, *supra* note 75, at 475.

110. 433 F.3d 1199 (9th Cir. 2006) (en banc), *cert. denied*, 126 S. Ct. 2332 (2006).

111. *Yahoo!*'s impact on private business litigation may be particularly significant considering that the Ninth Circuit's decisions bind the district courts of California, a state that represents the world's sixth largest economy. Legislative Analyst's Office, Cal Facts 2004 State Economy, http://www.lao.ca.gov/2004/cal_facts/2004_calfacts_econ.htm (last visited Feb. 19, 2007).

112. 433 F.3d at 1201. *Yahoo!*'s procedural posture was as follows: In April 2000, LICRA filed suit against Yahoo! to compel the latter to prevent French users from accessing Nazi auction memorabilia and related information on Yahoo!'s website. *Id.* at 1202. UEJF joined the action shortly thereafter. *Id.* In May 2000, the French court issued an interim order in which it required

its panoptic opinion, a majority of the *en banc* Ninth Circuit Court of Appeals held that the district court acted properly in exercising specific personal jurisdiction[113] over the defendants.[114] In beginning its personal jurisdiction analysis, the court noted that under the "purposeful availment" prong of the minimum contacts test,[115]

> [i]n tort cases, we typically inquire whether a defendant "purposefully direct[ed] his activities" at the forum state, applying an "effects" test that focuses on the forum in which the defendant's actions were felt, whether or not the actions themselves occurred within the forum. By contrast, in contract cases, we typically inquire whether a defendant "purposefully avail[ed] itself of the privilege of conducting activities" or "consummate[d] [a] transaction" in the forum . . . .[116]

Yet, although the defendants' act of filing a legitimate suit against Yahoo! in the French court did not constitute a tort, the court nevertheless applied the "effects" test established in *Calder v. Jones*[117] on the ground that the French lawsuit constituted intentional

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Yahoo! to take affirmative steps to restrict French users' access to websites that deny the occurrence of the Holocaust, a "Nazi artifact auction service" available via Yahoo!'s website, and "any other site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes." *Id.* at 1202–03 (internal quotation marks omitted). After Yahoo! challenged the first interim order, the French court issued a second interim order against Yahoo! in November 2000, reaffirming the May 2000 order and establishing a three-month window for compliance. *Id.* at 1203–04. Yahoo! subsequently filed its declaratory judgment suit in federal district court in December 2000. *Id.* at 1204.

113. Both sides agreed that the facts of the case did not implicate general personal jurisdiction. *Id.* at 1205.

114. Eight of eleven judges held that the district court properly exercised personal jurisdiction over LICRA and UEJF. *Id.* at 1224.

115. See *supra* note 56 for a brief description of the minimum contacts test.

116. *Yahoo!*, 433 F.3d at 1206 (fifth alteration in original) (citation omitted) (quoting Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802–03 (9th Cir. 2004)).

117. 465 U.S. 783, 789–90 (1984); *see Yahoo!*, 433 F.3d at 1207 (agreeing that "the *Calder* effects test is appropriately applied to the interim orders of the French court"). Under *Calder*'s "effects" test, the exercise of personal jurisdiction over a foreign defendant is appropriate where the defendant (1) committed an intentional tort; (2) expressly aimed the conduct at the forum; and (3) caused injury, the brunt of which was felt and which the defendant knew would be felt in the forum. *Calder*, 465 U.S. at 789–90. Although *Calder* itself involved a libel suit, *id.* at 784–85, many courts now apply it to other types of suits. *See, e.g.*, Silent Drive, Inc. v. Strong Indus., Inc., 326 F.3d 1194, 1205 n.4 (Fed. Cir. 2003) (stating that "*Calder* is not limited to torts"). *But see* United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 624 (1st Cir. 2001) (stating that "whether *Calder* was ever intended to apply to numerous other torts . . . is unclear"). Recently, courts have applied the "effects" test in cases involving the Internet, combining it with the "sliding scale" analysis of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119,

conduct expressly aimed at California.[118] Upon holding that *Calder* provided the correct analytical framework, the court stated:

> In any personal jurisdiction case we must evaluate all of a defendant's contacts with the forum state, whether or not those contacts involve wrongful activity by the defendant. . . . [W]e do not read *Calder* necessarily to require in purposeful direction cases that all (or even any) jurisdictionally relevant effects have been caused by wrongful acts.[119]

Additionally, the court held that, despite some case law to the contrary, the "effects" test does not require a showing that the "brunt" of the harm occurred in the forum[120]: "If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state."[121]

1123–24 (W.D. Pa. 1997); *see* Adams, Jr., *supra* note 71, at 124–26 (identifying the combined test as one of the "two main frameworks used in determining what type of presence on the Internet is sufficient to lead to personal jurisdiction").

118. *See Yahoo!*, 433 F.3d at 1225 (Ferguson, J., concurring).

119. *Id.* at 1207–08 (majority opinion) (citations omitted).

120. *Id.* at 1207.

121. *Id.* In disavowing the brunt-of-the-harm formulation, the Ninth Circuit purported to align itself with the Court's holding in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). *Yahoo!*, 433 F.3d at 1207. The court's position, however, runs contrary to the majority view among the circuit courts. *See, e.g.*, Scotts Co. v. Aventis S.A., 2005 FED App. 0661N at 8–10 (6th Cir.) (supporting a finding of specific personal jurisdiction by noting that the defendants "knew that the brunt of the harm would be felt in [the forum]"); Fielding v. Hubert Burda Media, Inc., 415 F.3d 419, 427 (5th Cir. 2005) ("'[K]nowledge of the particular forum in which a potential plaintiff will bear the brunt of the harm forms an essential part of the *Calder* test.'" (quoting Revell v. Lidov, 317 F.3d 467, 475 (5th Cir. 2002))); Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 398 n.7 (4th Cir. 2003) (stating that one of the requirements of the "effects" test is that "the plaintiff felt the brunt of the harm in the forum, such that the forum can be said to be the focal point of the harm"); Oriental Trading Co. v. Firetti, 236 F.3d 938, 943 (8th Cir. 2001) (supporting a finding of personal jurisdiction by noting that, "[b]y purposely directing their fraudulent communications at residents of [the forum], the defendants should have realized that the brunt of the harm would be felt there, and they should have reasonably anticipated being haled into court there" (citation omitted)); IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265–66 (3d Cir. 1998) (holding that one of the requirements of the "effects" test is that "[t]he plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff"); Chaiken v. VV Publ'g Corp., 119 F.3d 1018, 1028–29 (2d Cir. 1997) (supporting a finding of insufficient contacts with the forum by noting that the defendant "had no reason to think that the 'brunt of the harm' would be felt there"). Interestingly, the Ninth Circuit has framed the "effects" test using the brunt-of-the-harm formulation since deciding *Yahoo!*. *See* Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1156 (9th Cir. 2006). *Pebble Beach* indicates that, despite *Yahoo!*, the location of the brunt of the plaintiff's injury may yet influence the personal jurisdiction inquiry in the Ninth Circuit.

In applying the "effects" test, the court stated that three "contacts" were at issue: (1) a cease and desist letter that LICRA sent to Yahoo! prior to filing suit; (2) the service of process and of the interim orders on Yahoo! in California; and (3) the French court's issuance of the interim orders.[122] The court found that "it [was] obvious" that the first two requirements of the "effects" test had been satisfied[123]: "LICRA intentionally filed suit in the French court[, and] . . . [the] suit was expressly aimed at California."[124] The third requirement, however, was "somewhat problematic" for the court, because it was not clear whether Yahoo! had suffered any actual harm.[125] Although the French court had issued the orders, neither LICRA nor UEJF had sought to enforce them.[126] Furthermore, as the court itself conceded, enforcement of the French court's orders in the United States was "extremely unlikely."[127] Nevertheless, the court found that the third requirement of the "effects" test was satisfied, stating that "even if the French court's orders are not enforced against Yahoo!, the very existence of those orders may be thought to cast a shadow on the legality of Yahoo!'s current policy."[128] Ultimately, although it was a "close question," the Ninth Circuit upheld the district court's exercise of personal jurisdiction over LICRA and UEJF.[129]

Several important procedural implications emerge from the dust of the Ninth Circuit's decision in *Yahoo!*. First, under a reasonable interpretation of the court's decision, a foreign defendant may automatically waive personal jurisdiction simply by suing and receiving a favorable judgment against a U.S. party in a foreign forum.[130] The court's holding is unprecedented in this regard, as "[t]he Supreme Court has never approved such a radical extension of

122. *Yahoo!*, 433 F.3d at 1208–09. The court held that the cease and desist letter was not a sufficient basis for personal jurisdiction on its own, nor was it sufficient in combination with the acts of serving Yahoo! in California. *Id.* at 1208. However, the court was careful to point out that "[t]his is not to say that a cease and desist letter can never be the basis for personal jurisdiction." *Id.*

123. *Id.* at 1209.

124. *Id.*

125. *Id.* at 1209.

126. *Id.* at 1210–11.

127. *Id.* at 1211.

128. *Id.*

129. *Id.*

130. *Id.* at 1229 (O'Scannlain, J., concurring).

personal jurisdiction."[131] In addition, under *Yahoo!*, conduct that the defendant expressly aims at the forum need not necessarily constitute a "contact" between the defendant and the forum to satisfy the minimum contacts test.[132] Because a foreign party's filing of a suit against a U.S. defendant may be a sufficient ground upon which to base the exercise of personal jurisdiction, a foreign party's actions may satisfy the minimum contacts test even though those actions do not involve any actual communications, transactions, or other interactions within the U.S. forum itself.

As a result, a foreign party who sues a U.S. defendant in a foreign court should weigh the benefits of filing suit in the foreign forum against the possibility of automatically waiving personal jurisdiction in related proceedings brought by that defendant in the United States. If the foreign plaintiff anticipates that the U.S. defendant will file a parallel proceeding in a U.S. forum, it may prove to be less time-consuming and more cost-efficient for the foreign plaintiff simply to file in the U.S. forum in the first place. By contrast, U.S. defendants may now have greater incentive to initiate parallel proceedings in the United States while they are embroiled in litigation abroad, because personal jurisdiction may no longer serve as a hurdle to reaching the merits of the suit.[133] In addition, the Ninth Circuit's decision may open the door to future expansion of courts' jurisdictional reach. For instance, if a foreign plaintiff submits to the personal jurisdiction of a U.S. court upon filing a lawsuit abroad, then in theory, a U.S. court could hold that waiver also occurs where the defendant appears in a foreign proceeding that is related to a pending U.S. proceeding.[134]

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131. *Id.*

132. *Id.* at 1232 (Tashima, J., concurring).

133. *Yahoo!* itself is illustrative of this point: once the court found that the trial court did not err in exercising personal jurisdiction over LICRA and UEJF, it addressed the merits of Yahoo!'s request for a declaratory judgment. *Id.* at 1211–12 (majority opinion). Of course, comity and sovereignty concerns on the part of the U.S. court might still affect the court's willingness to address the merits of the U.S. suit, at least while the foreign suit is still pending. *See* Teitz, *Both Sides of the Coin*, *supra* note 13, at 9; *see also supra* Part C.1.; sources cited *supra* note 98.

134. However, at least one circuit court that has addressed this issue has held otherwise. *See* Foster v. Arletty 3 Sarl, 278 F.3d 409, 413–14 (4th Cir. 2002) (finding that the defendant's appearance in French court to contest enforcement of a default judgment rendered by a U.S. court did not constitute waiver of personal jurisdiction in the latter where the defendant had not yet appeared in the U.S. forum).

Relatedly, and more generally, *Yahoo!* stands for the proposition that a plaintiff need not prove "wrongful activity" by the defendant to invoke the "effects" test in the Ninth Circuit.[135] Under this conceptualization, *any* conduct on the part of a defendant who causes a jurisdictionally sufficient amount of harm in the forum, whether wrongful or not, will afford the court personal jurisdiction over the defendant.[136] Judge O'Scannlain captures the potential significance of this holding in his concurring opinion:

> The majority's statement [that a court must evaluate all of a defendant's contacts with the forum state, whether wrongful or not] is, quite literally, unprecedented. With a stroke of its pen, the majority extends the analysis previously applied only to commercial and contract cases to all assertions of personal jurisdiction. Tellingly, the only cases that the majority musters in support of its novel assertion are commercial or contract-related "purposeful availment" cases. . . . In sharp contrast, every "purposeful direction" case that the majority cites in its opinion involved tortious or otherwise wrongful acts by the defendants.
>
> Given our long line of precedent applying the "purposeful availment" test only in contract and commercial cases, and the majority's concession that this case should be analyzed under *Calder*'s "purposeful direction" test, the majority's conflation of the elements of these two tests is an unseemly act of judicial slight of hand.[137]

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135. *Yahoo!*, 433 F.3d at 1207–08.

136. *Id.* at 1231 (O'Scannlain, J., concurring).

137. *Id.* (citations omitted). Judge O'Scannlain also pointed out that the court's "conclusion is undermined by the language of *Calder* itself and requires the majority to divorce that case's holding from its fact." *Id.* at 1230.

Some might suggest, of course, that Judge O'Scannlain was indulging in a bit of hyperbole in his criticisms of the majority. Indeed, *Yahoo!* implicated serious First Amendment concerns that are not present in all cases, and which may have tilted the proverbial scales in Yahoo!'s favor with respect to the personal jurisdiction issue. Nevertheless, the majority downplayed the significance of the First Amendment issues on more than one occasion. First, it stated that enforcement of the French court's orders "[was] unlikely not because of the First Amendment, but rather because of the general principle of comity under which American courts do not enforce monetary fines or penalties awarded by foreign courts." *Id.* at 1211 (majority opinion). Later on, the court stated that while it was "acutely aware" of the First Amendment implications of the case, "the harm to First Amendment interests—if such harm exists at all—

The absence of a wrongful-activity requirement, combined with the court's rejection of the brunt-of-the-harm formulation,[138] may make it substantially more difficult for defendants haled to district courts within the Ninth Circuit to challenge personal jurisdiction. Plaintiffs who file suit in these district courts may find that establishing purposeful direction will require substantially less litigation, discovery, and cost, because plaintiffs need only focus on the forum adjudicating the dispute to satisfy the test.[139] As a result, the courts ruling will likely encourage both plaintiffs and defendants to forum shop.

To be sure, the strong divisions that *Yahoo!* produced among the Ninth Circuit judges suggests that *Yahoo!*'s ultimate impact on subsequent personal jurisdiction cases remains to be seen. Certainly, the possibility exists that the Ninth Circuit will be less willing to extend personal jurisdiction doctrine in such a potentially radical manner outside the context of foreign judgments. But at the very least, *Yahoo!* will likely render somewhat easier plaintiffs' task of withstanding a personal jurisdiction challenge and reaching the merits of the claim. Thus, plaintiffs should almost certainly look to the Ninth Circuit if they intend to file a lawsuit in which questions of personal jurisdiction are likely to arise. Defendants who plan on raising a personal jurisdiction challenge, on the other hand, should fight to remain outside the Ninth Circuit to the extent that it is reasonable to do so, especially where application of the "effects" test is likely.

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may be nowhere near as great as Yahoo! would have us believe." *Id.* at 1220. Thus, there is, at the very least, a reason-able possibility that the Ninth Circuit will apply the personal jurisdiction framework it adopted in *Yahoo!* in subsequent cases, notwithstanding the absence of any First Amendment considerations.

138. *Id.* at 1207.

139. *Id.* A simple hypothetical is helpful here: Suppose the defendant is a specialty toy manufacturing company based out of Florida that lacks any independent contacts with California. The plaintiff is also a specialty toy manufacturing company, but is based out of France and does substantial business in California. The defendant would like to expand its business into California. In an effort to undermine the plaintiff's business in California, the defendant publishes and circulates a false article about the plaintiff's employment of child laborers. As a result of the negative publicity that the defendant's article generates, the plaintiff suffers damages in the amount of $10 million. However, the plaintiff incurs the bulk of its losses in France; in fact, the plaintiff sustains only $250,000 of its losses in California. Because the Ninth Circuit's gloss on the "effects" test does not adhere to the brunt-of-the-harm formulation, and $250,000 is a substantial amount of money (even in California), the plaintiff would likely withstand a motion to dismiss for lack of personal jurisdiction in federal district court in California.

b. The Tenth Circuit's sliding scale of reasonableness

As demonstrated above, some U.S. courts are willing to expand the traditional definition of "contacts" to adapt personal jurisdiction doctrine to the particulars of conducting business in today's globalized and technology-driven marketplace.[140] But even where minimum contacts exist, the court may not exercise personal jurisdiction if doing so would be unreasonable.[141] Consequently, the reasonableness factors under the minimum contacts test serve an essential function in that they may often serve as the most effective ground upon which to raise a personal jurisdiction challenge.[142] Undoubtedly, the reasonableness inquiry provides defendants with greater room for creativity, and a wider pool of arguments from which to draw. Not only can defendants offer evidence of hardship and inconvenience, but they can also raise issues of comity, sovereignty, and public policy.

Defendants who challenge the exercise of personal jurisdiction on the basis of unreasonableness should be prepared to "present a compelling case" to the court.[143] The most "compelling" reasonableness factor on which foreign defendants may establish a personal jurisdiction challenge may be the burden of litigating in the United States.[144] Defendants should almost always emphasize the inconvenience of litigating in the United States when challenging personal jurisdiction on grounds of reasonableness. Defendants ought to be aware, however, that in recent decades, U.S. courts' views on the inconvenience of litigating in a foreign forum have

140. *See* discussion *supra* Part C.1.a.

141. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

142. Personal jurisdiction challenges based on reasonableness are inherently related to the doctrine of forum non conveniens. As explained below, the doctrine of forum non conveniens requires U.S. courts to weigh the plaintiff's interests against the inconvenience to the defendant in adjudicating the dispute in the plaintiff's chosen forum. *See infra* Part D.1. Nevertheless, the reasonableness factors under the minimum contacts analysis are not identical to the factors courts must consider under the doctrine of forum non conveniens, as evidenced by the fact that a defendant may move to dismiss for forum non conveniens where the court's exercise of personal jurisdiction is lawful. *See* Reisenfeld, *supra* note 13, at 82.

143. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985); *see also* Parrish, *supra* note 5, at 15.

144. As Professor Parrish notes, "many believe that '[t]he "burden on the defendant" may be the most influential of the reasonableness factors in international litigation.'" Parrish, *supra* note 5, at 20 (alteration in original) (quoting Walter W. Heiser, *Toward Reasonable Limitations on the Exercise of General Jurisdiction*, 41 SAN DIEGO L. REV. 1035, 1043 (2004)); *see also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987).

varied considerably. Some courts have downplayed issues of convenience when analyzing reasonableness, largely as a result of technological advancements in transportation and telecommunications.[145] Others, meanwhile, have continued to emphasize the burdens placed on defendants.

In *Benton v. Cameco Corp.*,[146] the plaintiff, Benton, filed suit in the District Court for the District of Colorado alleging breach of contract and interference with existing and prospective business relationships.[147] The district court granted the defendant Cameco's motion to dismiss for lack of personal jurisdiction, holding that Cameco did not have sufficient contacts with Colorado.[148] The Tenth Circuit, however, disagreed with the lower court's finding.[149] Although the court called the inquiry "a very close case,"[150] the court found "enough contacts between Cameco and Colorado to establish what may be accurately termed 'minimum' contacts."[151] Nevertheless, the court affirmed the lower court's dismissal for lack of jurisdiction because it found that subjecting Cameco to personal jurisdiction would be unreasonable.[152]

After identifying the reasonableness factors set forth in *World-Wide Volkswagen Corp. v. Woodson*,[153] the court framed its reasonableness inquiry as follows:

> The analyses of minimum contacts and reasonableness are complementary, such that "[T]he reasonableness prong of the due process inquiry evokes a *sliding scale*: the weaker the plaintiff's showing on [minimum contacts], the less a

145. *See, e.g.*, Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 615 (8th Cir. 1994) ("acceleration in the internationalization of commerce"); *see also* Dever v. Hentzen Coatings, Inc., 380 F.3d 1070, 1073–74 (8th Cir. 2004) (giving "significant weight" to factors other than convenience to the parties). *See generally* Fortis Corporate Ins. v. Viken Ship Mgmt., 2006 FED App. 0192P at 9 (6th Cir.) (stating that only the "unusual case" will not satisfy the reasonableness inquiry where the defendant has minimum contacts with the forum and the action arises from the defendant's activities in the forum (internal quotation marks omitted) (quoting Aristech Chem. Int'l Ltd. v. Acrylic Fabricators Ltd., 1998 FED App. 0082P at 7 (6th Cir.))).

146. 375 F.3d 1070 (10th Cir. 2004).

147. *Id.* at 1073.

148. *Id.* at 1074.

149. *Id.* at 1076–77.

150. *Id.* at 1076.

151. *Id.* at 1077.

152. *Id.* at 1080–81.

153. 444 U.S. 286, 292 (1980); *see supra* note 56.

> defendant need show in terms of unreasonableness to defeat jurisdiction. The reverse is equally true: an especially strong showing of reasonableness may serve to fortify a borderline showing of [minimum contacts]."[154]

The court then went on to apply the reasonableness factors, holding that the burden on Cameco was "significant,"[155] and partly basing its determination on the fact that Cameco's contacts with the forum were tenuous.[156] The court also held that the fact that Cameco's employees would have to travel to Colorado and "litigate the dispute in a foreign forum unfamiliar with the Canadian law governing the dispute" added to the weight of the burden on Cameco.[157] Conversely, the court concluded that the burden on Benton of litigating in Canada was minimal.[158]

In addition, the court took into consideration the potential sovereignty issues that may arise when a U.S. court exercises personal jurisdiction over a foreign defendant.[159] The court acknowledged the Supreme Court's admonition in *Asahi Metal Industry Co. v. Superior Court* that "great care and reserve should be exercised before personal jurisdiction is exercised over [a foreign] defendant."[160] The court stated:

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154. *Benton*, 375 F.3d at 1078–79 (quoting OMI Holdings, Inc. v. Royal Ins. Co. of Can., 149 F.3d 1086, 1092 (10th Cir. 1998) (emphasis added) (alterations in original)). Several other circuits use the "sliding scale" or similar formulations when engaging in the reasonableness inquiry. *See, e.g.*, Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994); *see also* Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568–69 (2d Cir. 1996); Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1488 (9th Cir. 1993), *modified on other grounds*, Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (en banc), *cert. denied*, 126 S. Ct. 2332 (2006); Ellicott Mach. Corp. v. John Holland Party Ltd., 995 F.2d 474, 479 (4th Cir. 1993).

155. Benton, 375 F.3d at 1079.

156. The court stated that "Cameco is a Canadian corporation with principal offices in Saskatchewan, and it has no office or property in Colorado, is not licensed to do business in Colorado, and has no employees in Colorado." *Id.*

157. *Id.*

158. The court found that "[b]ecause Canadian law govern[ed] the suit and because Mr. Benton ha[d] not established that litigating the matter in Canada would cause undue hardship to him, . . . Mr. Benton would be able to receive convenient and effective relief by bringing suit in Canada." *Id.*

159. *Id.* at 1080; *see also supra* Part C.1.

160. *Benton*, 375 F.3d at 1079 (internal quotation marks omitted) (quoting OMI Holdings, Inc. v. Royal Ins. Co. of Can., 149 F.3d 1086, 1096 (10th Cir. 1998) (quoting Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987))).

> [W]e must look closely at the extent to which an exercise of personal jurisdiction by Colorado over Cameco interferes with Canada's sovereignty. Relevant facts include "whether one of the parties is a citizen of the foreign nation, whether the foreign nation's law governs the dispute, and whether the foreign nation's citizen chose to conduct business with a forum resident." Cameco did chose [sic] to conduct business with Mr. Benton, a resident of Colorado. However, Cameco is a Canadian corporation, Canadian law will govern the dispute, and we are *required to give deference to the international nature of this case.* Therefore, we find that an exercise of personal jurisdiction would affect Canada's policy interests.[161]

The court concluded the reasonableness inquiry by reiterating that, because Cameco's contacts with Colorado "barely satisf[ied] the minimum contacts standard . . . Cameco [did not] need [to] make a particularly strong showing in order to defeat jurisdiction under this reasonableness inquiry."[162] Accordingly, because the reasonableness factors substantially weighed in favor of declining jurisdiction and Cameco's contacts with Colorado were minimal, the court affirmed the lower court's ruling that it lacked personal jurisdiction over Cameco.[163]

From a forum shopper's perspective, the Tenth Circuit's decision in *Benton* is noteworthy for several reasons. First, the fact that Cameco is a *Canadian* corporation that was haled into court in Colorado should not go unnoticed. Arguably, a Canadian defendant who will likely not face a language barrier and need not travel across oceans to litigate in the United States is burdened substantially less than a defendant who must travel long distances to reach the United States.[164] Consequently, courts that are willing to follow the rationale set forth in *Benton* may be even more willing to do so for a foreign defendant who does not reside in Canada.

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161. *Id.* at 1080 (emphasis added) (citations omitted) (quoting *OMI Holdings*, 149 F.3d at 1098).

162. *Id.*

163. *Id.* The court went on to hold that the trial court's exercise of general personal jurisdiction was also improper. *Id.* at 1081.

164. *See id.* at 1083–84 (Holloway, J., concurring in part and dissenting in part) (citing Sculptchair, Inc. v. Century Arts, 94 F.3d 623, 632 (11th Cir. 1996); Aristech Chem. Int'l Ltd. v. Acrylic Fabricators Ltd., 1998 FED App. 0082P at 8 (6th Cir.)).

Second, the court placed substantial emphasis on the fact that Canadian law governed the dispute, citing it throughout its discussion of the reasonableness factors.[165] Specifically, the court stated that the need to litigate Canadian law in a foreign forum unfamiliar with that law contributed to the burden on the defendant.[166] The court also found that Colorado's interest in adjudicating the dispute was neutralized, and the deference owed to Canada heightened, as a result of the applicability of Canadian law.[167] Accordingly, because courts that follow *Benton* might deem the applicable substantive law to be a central component of the reasonableness inquiry, parties should be prepared to litigate the issue when levying or arguing against personal jurisdiction challenges, especially in the Tenth Circuit.

Finally, foreign defendants raising personal jurisdiction challenges in the Tenth Circuit should take note of the substantial deference the court exhibited to Canada. Indeed, *Benton* suggests that the Tenth Circuit appears willing to give considerable weight to the sovereignty and comity concerns of foreign nations when conducting the reasonableness inquiry.[168] Defendants who are haled into district courts falling under the Tenth Circuit should certainly bear this consideration in mind.[169] In addition, defendants should note that the Tenth Circuit's willingness to entertain the sovereignty concerns of other nations in the personal jurisdiction inquiry may transfer over to the forum non conveniens inquiry as well.[170] In this

165. *Id.* at 1079–80.

166. *Id.* at 1079. On the other hand, the fact that the judicial systems of the United States and Canada are "rooted in the same common law traditions" is a factor that might reduce the burden on the defendant. *See id.* at 1083 (Holloway, J., concurring in part and dissenting in part) (internal quotation marks omitted) (quoting *Aristech Chem.*, 1998 FED App. 0082P at 8).

167. *Id.* The parties in *Benton* agreed that Canadian law applied. *Id.*

168. As mentioned above, this may not always be the case in U.S. courts. *See supra* note 103.

169. When raising sovereignty-based challenges, defendants may be well-served by avoiding run-of-the-mill arguments and focusing instead on specific facts and circumstances that convey the foreign forum's strong interest in resolving the dispute in its own courts. For instance, to support its position in favor of dismissing for lack of personal jurisdiction, Cameco noted in its brief to the court that the company was previously government-owned, and that the Province of Saskatchewan still owned ten percent of Cameco's stock at the time of Benton's suit. Brief of Appellee Cameco Corp. at 39, Benton v. Cameco Corp., 375 F.3d 1070, No. 02-1548 (10th Cir. Mar. 7, 2003). Although trying to assess the value that the court gave this evidence would involve imprudent speculation (the court did not mention these facts in its opinion), the evidence seems compelling from an objective standpoint because of its specificity.

170. As explained below, one of the factors U.S. courts must consider in motions to dismiss for forum non conveniens is the local interest in adjudicating the matter. *See infra* Part D.1.

regard, the courts of the Tenth Circuit may be particularly appealing to defendants who intend to move to dismiss on forum non conveniens grounds.

2. Personal Jurisdiction over Foreign Defendants in England

English courts' exercise of personal jurisdiction over foreign defendants who are not signatories to Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters[171] ("Judgments Regulation") or the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[172] ("Lugano Convention") is governed by common law principles.[173] Under English common law, a court may exercise personal jurisdiction over the defendant where (1) the defendant is physically present and amenable to service within the jurisdiction; (2) the defendant consents to the English court's jurisdiction; or (3) despite the absence of physical presence and consent, the court finds "appropriate grounds" for permitting service upon the defendant "out of the jurisdiction."[174] "Corporations and other legal entities are deemed present if they 'carry on business' within the jurisdiction."[175] To serve a defendant out of the jurisdiction, the plaintiff carries the burden[176] of showing that Civil Procedure Rule 6.20[177] provides a

171. Dec. 22, 2000, 2001 O.J. (L 12) 1 [hereinafter Judgments Regulation]. The Judgments Regulation superseded its predecessor, the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32 (EC) (as amended 1990 O.J. (C 189) 1) [hereinafter Brussels Convention]; *see* Matthew H. Adler & Michele Crimaldi Zarychta, *The Hague Convention on Choice of Court Agreements: The United States Joins the Judgment Enforcement Band*, 27 NW. J. INT'L L. & BUS. 1, 6 & n.22 (2006); *see also* Mayer & Sigler, *supra* note 68, at 111.

172. Sept. 16, 1988, 1988 O.J. (L 319) 9 (EC). The Lugano Convention extended the Brussels Convention to non-European Union countries. Adler & Zarychta, *supra* note 171, at 6.

173. Mayer & Sigler, *supra* note 68, at 109; *see also* Judgments Regulation, *supra* note 171, art. 4 ("If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State."); Fellas & Warne, *supra* note 13, at 369–70. "In cases where the defendant is a U.S. citizen [and a] full-time resident within the U.S., or a U.S. corporation whose business is centered within the U.S., . . . the [common law] rules of jurisdiction . . . will apply." Mayer & Sigler, *supra* note 68, at 109. However, a U.S. defendant who is sued along with other defendants, one of whom is a domiciliary of a state that is a member of one of the Conventions, will be subject to the personal jurisdiction rules of that Convention. *See infra* Part D.2.

174. Mayer & Sigler, *supra* note 68, at 109; *see also infra* Part E.2.

175. Born, *supra* note 84, at 12 (footnote omitted).

176. Spiliada Maritime Corp. v. Cansulex Ltd., [1987] A.C. 460, 481 (H.L.) (appeal taken from Eng.).

statutory basis for doing so, and demonstrating a "good arguable case"[178] that the claim has a reasonable prospect of success and that England is the proper forum in which to bring the claim.[179]

English judges, like their American counterparts, may take into consideration issues pertaining to comity and convenience when adjudicating jurisdictional challenges.[180] In fact, international comity often colors the requirements of Rule 6.20[181] for service out of the jurisdiction.[182] For instance,

> if there is any doubt or uncertainty in the construction of particular sections of the Civil Procedure Rules, [there exists] authority for the proposition that such doubt or uncertainty ought to be resolved *in favour of the foreign defendant.* [Some] have [even] suggested that a foreign defendant should be given the benefit of the doubt not solely in relation to matters of construction but also "quite generally." Nothing in the relatively new English Civil Procedure Rules indicates any revision to this approach.[183]

Moreover, English courts' deference to foreign defendants is tied to "the overriding consideration that it is a very serious question

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177. Civil Procedure Rules, 1998, S.I. 1998/3132, r. 6.20 (U.K.). The provisions under section 6.20 are sometimes referred to as "gateways." *See, e.g.*, Dornoch Ltd. v. Mauritius Union Assurance Co., [2005] EWHC (Comm) 1887, [35] (Eng.).

178. "'Good arguable case' reflects . . . that one side has a much better argument on the material available." Can. Trust Co. v. Stolzenberg (No. 2), [1998] 1 W.L.R. 547, 555 (C.A.) (appeal taken from Eng.); *accord Dornoch*, [2005] EWHC at [57].

179. Bear Sterns Plc v. Forum Global Equity Ltd., [2006] EWHC (Comm) 1666, [2] (Eng.); *see also* Seaconsar Far E. Ltd. v. Bank Markazi Jomhouri Islami Iran, [1993] 3 W.L.R. 756, 766–68 (H.L.) (appeal taken from Eng.); Civil Procedure Rules, 1998, S.I. 1998/3132, r. 6.21 (U.K.); BELL, *supra* note 1, at 138–42; *see also infra* notes 189–93 and accompanying text.

180. BELL, *supra* note 1, at 140 ("Considerations of comity have traditionally informed various canons of construction and principles of practice which a defendant wishing to challenge the court's jurisdiction may seek to [exploit].").

181. Civil Procedure Rules, 1998, S.I. 1998/3132, r. 6.20 (U.K.).

182. *See, e.g.*, Cadre SA v. Astra Asigurari, [2005] EWHC (Comm) 2504, [14] (Eng.).

183. BELL, *supra* note 1, at 140–41 (emphasis added) (footnotes omitted) (quoting G.A.F. Corp. v. Amchem Products Inc., [1975] 1 Lloyd's Rep. 601, 605 (Eng.)). Judge Prescott shed further light on the meaning and purpose of international comity in *R Griggs Group Ltd v. Evans*:

> [W]hen our courts say that they intend to refrain from making a particular order because it would be a breach of international comity, they mean that, in their judgment, a foreign court would reasonably construe it as an invasion of the sovereignty of its country, and to resent it, accordingly. *We do not mean to offend foreign courts, as by seeming to undermine their jurisdiction and authority, and expect a similar degree of self-imposed judicial restraint on their side.*

[2004] EWHC (Ch) 1088, [2005] 2 W.L.R. 513, [24] (Eng.) (emphasis added).

whether a foreigner ought to be subjected to the inconvenience of having to come to [England] in order to defend his rights."[184] In turn, this "overriding consideration" seems to suggest that a convenience-based argument in support of a personal jurisdiction challenge may hold considerable weight in English courts, like it does in some U.S. courts.[185] A foreign defendant may thus be benefited by invoking arguments of comity and convenience to counter the plaintiff's application for service out of the jurisdiction.[186]

Yet despite the common bases of personal jurisdiction in the United States and England, namely, jurisdictional presence and consent, foreign defendants who challenge the exercise of personal jurisdiction in English courts may invoke substantially different arguments than they would in U.S. courts. For instance, a foreign defendant may challenge an English court's exercise of jurisdiction on the ground that the plaintiff has failed to demonstrate a "good arguable case" on the merits.[187] The defendant who makes this argument contends that the court should "set aside service on the basis of the manifest weakness of the [plaintiff's] case."[188]

Perhaps the strongest argument a defendant can make in challenging an English court's exercise of personal jurisdiction is that the court is not the "natural forum" for the dispute.[189] The natural forum has been described as the forum "with which the action ha[s] the most real and substantial connection."[190] For all intents and purposes, "natural" means "more appropriate."[191] Thus,

184. *Amchem*, 1 Lloyd's Rep. at 604.

185. *See* discussion *supra* Part C.2.

186. On the other hand, some English courts may find that comity considerations may be best evaluated under the doctrine of forum non conveniens. *See* BELL, *supra* note 1, at 140. A comity-based personal jurisdiction challenge in these courts may therefore be less efficacious.

187. *Id.* at 138, 140–42.

188. *Id.* at 142.

189. *See* Fellas & Warne, *supra* note 13, at 369 (stating that proving the natural forum is the "main requirement" when a party seeks to stay English proceedings or enjoin foreign proceedings).

190. The Abidin Daver, [1984] A.C. 398, 415 (H.L.) (appeal taken from Eng.).

191. *See, e.g.*, Dornoch Ltd. v. Mauritius Union Assurance Co., [2005] EWHC (Comm) 1887, [117]–[129] (Eng.). The natural forum doctrine was first espoused by the House of Lords in the seminal forum non conveniens case of *Spiliada Maritime Corporation v. Cansulex Limited.* [1987] A.C. 460 (H.L.) (appeal taken from Eng.). BELL, *supra* note 1, at 88. However, in subsequent English case law, the concept of natural forum has become a key component of English common law personal jurisdiction doctrine in general. *See, e.g.*, Trafigura Beheer B.V. v. Kookmin Bank Co., [2005] EWHC (Comm) 2350 (Eng.); Cadre SA v. Astra Asigurari, [2005] EWHC (Comm) 2504 (Eng.). Forum shopping in England has been characterized as the practice

under the natural forum doctrine, a plaintiff who wishes to serve a defendant out of the jurisdiction carries the burden of showing that England is the appropriate forum in which to bring the claim.[192]

> The evidence adduced in support of [the] application [for permission to serve out of the jurisdiction] must set out sufficient facts to show that England indeed constitutes "the forum conveniens.". . . "The effect is, not merely that the burden of proof rests on the [Claimant] to persuade the Court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so."[193]

English courts may evaluate a variety of factors when determining whether England is clearly the appropriate forum for adjudicating a given dispute. The remainder of this section looks at two recent cases to give practitioners a sense of what those factors may involve.

In *Cadre SA v. Astra Asigurari*,[194] a business dispute arose after Astra, the defendant insurer and a Romanian domiciliary, refused to award an insurance claim to Cadre, the plaintiff, after Cadre lost one of its insured vessels at sea.[195] Cadre threatened to sue Astra in the courts of England or Turkey, prompting Astra to file an action seeking "negative declaratory relief" in a Romanian court.[196] Cadre then initiated proceedings in England against Astra and sought permission to serve out of the jurisdiction.[197] At issue in the English proceeding was whether the English court was the natural forum for the dispute.[198] The court found in favor of Cadre and held that England was "the appropriate natural forum for this trial."[199]

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of "'a plaintiff by-passing his natural forum and bringing his action in some alien forum which would give him relief or benefits which would not be available to him in his natural forum.'" BELL, *supra* note 1, at 89 (quoting Boys v. Chaplin, [1971] A.C. 356, 401 (H.L.) (appeal taken from Eng.) (emphasis omitted) (second alteration in original)).

192. *Trafigura*, [2005] EWHC 2350 at [18]; *see also* BELL, *supra* note 1, at 142; Mayer & Sigler, *supra* note 68, at 129.

193. Mayer & Sigler, *supra* note 68, at 129 (footnotes omitted) (quoting Civil Procedure Rules, 1998, S.I. 1998/3132, r. 6.21.6 (U.K.); Spiliada Maritime Corp. v. Cansulex Ltd., [1987] A.C. 460, 481 (H.L.) (appeal taken from Eng.)).

194. [2005] EWHC 2504 (Comm) (Eng.).

195. *Id.* at [1].

196. *Id.* at [3].

197. *Id.* at [2], [5].

198. *See id.* at [1]. Both parties offered various contentions in support of their respective positions on the issue. Among other things, Astra argued that Romania was the natural forum because (1) witnesses and relevant documents were held there, (2) England had "no connection

Cadre provides excellent insight into the variety of factors upon which English courts may focus in a natural forum inquiry. Perhaps the most fitting factor, for purposes of this article, is Astra's forum shopping and its impact on the court's holding.[200] The court did not expressly analyze or explain the effect of Astra's forum shopping on the natural forum inquiry. The court implied, however, that Astra's "avowed purpose of seeking to prevent either the English or Turkish courts from taking jurisdiction" was improper (though apparently not "outlandish"), and used this to support its finding that England was the natural forum.[201] Parties litigating in English courts ought therefore consider the impact that a court's disdain for and wariness of forum shopping may have on the natural forum inquiry.

The *Cadre* court also addressed the issue of comity, recognizing "the sensitivities involved by way of international comity in cases

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with the contract," (3) proceedings in England would be more expensive, (4) Romania would not enforce a judgment by an English court, and (5) considerations of international comity weighed in favor of declining jurisdiction in England. *Id.* at [9]. Cadre countered by arguing that England was the appropriate and natural forum because, among other things, (1) English law governed any disputes arising from the insurance contract; (2) English courts were in the best position to adjudicate issues of English law; (3) the defendant had not sufficiently shown that Romania was the appropriate forum; (4) the costs of litigating in England were, on balance, only "marginally more expensive"; and (5) Astra had engaged in forum shopping when it filed its action for declaratory judgment in Romania. *Id.* at [10].

199. *Id.* at [11], [17].

200. As part of its claim, Astra admitted that it was filing the declaratory judgment action in order to effectively prevent Cadre from filing suit in England or Turkey. *Id.* at [3]. The court acknowledged that Astra was forum shopping when it characterized Astra's actions as "an apparent attempt . . . to avoid the courts in England or Turkey . . . [from] taking jurisdiction." *Id.*

201. *Id.* at [14]–[15]. In its evaluation of Astra's forum shopping, the court appeared to rely on two cases, both of which involved actions for declaratory relief in which the parties' respective acts of forum shopping *substantially weighed against them* in the courts' rulings. *See id.* at [10] (citing Saipem S.p.A. v. Dredging VO2 B.V. (The "Volvox Hollandia"), [1988] 2 Lloyd's Rep. 361, 371–73 (C.A.) (appeal taken from Eng.); HIB Ltd. v. Guardian Ins. Co. Inc., [1997] 1 Lloyd's Rep. 412, 417 (Q.B.) (Eng.)).

In *Saipem*, the court excluded claims for negative declaratory relief from both plaintiffs' writs, effectively declining jurisdiction over the claims. [1988] 2 Lloyd's Rep. at 373. In so doing, the court stated that "[t]o say that the plaintiffs are anxious to wrest th[e] advantage from the [defendants], and to subject them to the *dis*advantage of subsequent English proceedings served upon them extra-territorially, is a plain case of forum shopping and quite unjustifiable." *Id.* at 369.

In *Guardian Insurance*, the court found that the plaintiff had engaged in "unashamed" and unacceptable forum shopping where it filed its claim in the Virgin Islands instead of England to avoid arbitration and "to obtain relief which [was] not permitted by the proper law of the contract." [1997] 1 Lloyd's Rep. at 417. The court stated, "[i]t is in the end *this consideration* which persuades me that [the defendant has] shown . . . that England is clearly the forum in which the case can most suitably be tried for the interests of all parties and for the ends of justice." *Id.* (emphasis added) (citation omitted).

where there are competing jurisdictions involved."[202] The court acknowledged that Romania had taken steps to become a member state of the European Union and "to comply with the requirements of reciprocity in relation to legal proceedings in the courts of member states." However, the court ultimately held that, because Romania was not yet a member state and no reciprocity of judgments existed between England and Romania, the court's exercise of exorbitant jurisdiction over the Romanian defendant did not require the level of "circumspection" that would be appropriate were the opposite true.[203]

Finally, the court expressly emphasized that English law's governance of the disputed contract supported the argument that England was the natural forum for the dispute.[204] The court stated, "the issues in this case are essentially concerned with the application of English law principles . . . . This factor *greatly strengthens* the case for saying that England is the appropriate forum."[205] Relatedly, the court acknowledged that Cadre had reason "to be apprehensive about the outcome of th[e] dispute were it to be tried in Romania [because Cadre would] be deprived of the benefit of having [its] contractual relations with Astra determined in the courts by the application of English law, that being the choice under the contract."[206] The key takeaway for practitioners, accordingly, is that the law that governs the dispute may largely contribute to the court's determination of the natural forum.[207] The defendant should focus on

202. *Cadre*, [2005] EWHC at [14].

203. *Id.* at [9], [14].

204. *Id.* at [12]–[13]. The parties' contract contained a choice-of-law clause specifying that the agreement was "subject to English law and practice." *Id.* at [12] (internal quotation marks omitted). The court concluded that English law governed because the clause was "clear and represent[ed], since the . . . conditions were agreed [upon by] the parties, a clear choice, such that the choice can be described to be made with reasonable certainty." *Id.*

205. *Id.* at [13] (emphasis added). At the same time, however, the court warned that "[o]ften, the mere choice of English law in a contract will not carry much weight." *Id.* This apparent contradiction may be explained by interpreting the court's latter statement as signifying one of two things: (1) the *choice* of English law itself is not what should be considered, but whether English legal principles actually govern the contract; or (2) the mere choice of English law *alone* will not carry much weight.

206. *Id.* at [16].

207. *See* Dornoch Ltd. v. Mauritius Union Assurance Co., [2005] EWHC (Comm) 1887, [86] (Eng.) (stating that the conclusion that the contract was governed by English law was, "in the circumstances of this case, a powerful factor in favour of England being the most appropriate forum in which to decide the . . . dispute"). Practitioners should note also that where the underlying claim is not a contract dispute but a claim for damages arising from an alleged tort, sections 11 and 12 of part III of the Private International Law (Miscellaneous Provisions) Act

attacking this element of the plaintiff's natural forum argument, especially in light of the plaintiff's burden of making a "good arguable case" that English law applies.[208] Practitioners must remain aware, however, that whether English law governs the dispute will not always be an important factor in the natural forum inquiry.[209]

1995 will govern the applicable law. *Dornoch*, [2005] EWHC at [101] (citing Private International Law (Miscellaneous Provisions) Act, 1995, c. 42, §§ 11–12 (U.K.) [hereinafter PILA]). Section 11 of the PILA states:

> (1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.
>
> (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—
>
> > (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;
> >
> > (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and
> >
> > (c) in any other case, the law of the country in which the most significant element or elements of those events occurred.
>
> (3) In this section "personal injury" includes disease or any impairment of physical or mental condition.

PILA § 11. Section 12 of the PILA states:

> (1) If it appears, in all the circumstances, from a comparison of—
>
> > (a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and
> >
> > (b) the significance of any factors connecting the tort or delict with another country,
>
> that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.
>
> (2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.

PILA § 12.

208. *See supra* notes 176–79 and accompanying text. As the court held in *Dornoch*,

> [i]f part of the Claimant's case in showing that England is clearly the appropriate forum is that the proper law of the contract concerned is English law, *then it must be for the Claimant to show, on the material available, that he has a much better argument on that point.*

[2005] EWHC at [58] (emphasis added).

209. Indeed, "[t]he fact that English law is (or may well be) the proper law of the relevant contract may be of very great importance or it may be of little in the context of the inquiry as to which is the most suitable forum for the determination of the case." *Dornoch*, [2005] EWHC at [72] (footnote omitted) (citing Spiliada Maritime Corp. v. Cansulex Ltd., [1987] A.C. 460, 481 (H.L.) (appeal taken from Eng.)). As a result, litigants must be prepared to persuade the court, if

The importance of the applicability of English law to the natural forum inquiry was reiterated in *Bear Sterns Plc v. Forum Global Equity Ltd.*[210] In *Bear Sterns*, the underlying issue was whether the parties had entered into a valid contract in which they agreed to be governed by English law and submitted to the jurisdiction of the English courts.[211] The court determined that a valid contract existed for the purposes of Civil Procedure Rule 6.20,[212] and that the contract contained an express choice-of-law clause.[213] The court then held that "there is no doubt that England is the appropriate forum for this matter to be heard," and that the plaintiff had met its burden of showing that England was "clearly the more appropriate forum."[214] The court partly based its decision on the fact that the transaction was governed by English law on its face, thus affording the English court a "distinct advantage in determining issues between the parties."[215] In addition, the court reasoned that adjudication in the alternative forum could potentially require English lawyers to give evidence of English law, which would presumably prolong litigation and increase the parties' litigation costs.[216]

As an additional basis for identifying England as the natural forum for the dispute, the court found that the alternative forum would not be substantially more convenient for the parties and witnesses. The court stated that "whichever forum is the forum selected, it will be necessary for a witness or more than one witness to leave his home country to give evidence in the other."[217] The court also found that the English forum was more convenient because all relevant documents were written, and the contract negotiations were conducted, in English.[218] As a result, like the minimum contacts test in the United States,[219] the natural forum inquiry may be partly

necessary, that the applicability (or inapplicability) of English law informs the natural forum inquiry.

210. [2006] EWHC 1666 (Comm) (Eng.).

211. *Id.* at [1].

212. Civil Procedure Rules, 1998, S.I. 1998/3132, r. 6.20 (U.K.).

213. *Bear Sterns*, [2006] EWHC at [20].

214. *Id.* at [22].

215. *Id.* at [21].

216. *Id.*

217. *Id.*

218. *Id.*

219. *See supra* note 56.

informed by considerations of convenience.[220] At the very least, a plaintiff who can combine convenience-based arguments with a showing that English law governs the dispute may stand a better chance of establishing that England is the natural forum.[221]

D. Forum Non Conveniens in Transnational Disputes

Inherently connected to the issue of personal jurisdiction is the doctrine of forum non conveniens, under which a court may dismiss or stay an action for purposes of convenience even though it is legally entitled to exercise jurisdiction over the parties and the cause of action.[222] In transnational proceedings occurring in the United States and England, forum non conveniens may provide the defendant with the most effective method of defeating the plaintiff's suit without adjudicating the merits of the plaintiff's claims.[223] In addition, the doctrine places a great deal of discretion in the hands of the court,[224] and may give the defendant an opportunity to present a broader range and variety of arguments in support of its position.[225]

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220. *See* BELL, *supra* note 1, at 92–95 (stating that neutrality and fairness, rather than convenience, are the primary purposes of the natural forum inquiry, but conceding that "the indicia of the natural forum . . . will point to a venue which is convenient both for the parties and the court") (internal quotation marks omitted).

221. Indeed, such a plaintiff can argue that any convenience afforded by litigating in England contributes to the fairness of that forum. *See* The Abidin Daver, [1984] A.C. 398, 415 (H.L.) (appeal taken from Eng.); MacShannon v. Rockware Glass Ltd., [1978] A.C. 795, 812 (H.L.) (appeal taken from Eng.). *See generally* BELL, *supra* note 1, at 93–95 (discussing how considerations of fairness and convenience influence the natural forum inquiry).

222. *See* Reisenfeld, *supra* note 13, at 82.

223. *See* David W. Robertson, Forum Non Conveniens *in America and England: "A Rather Fantastic Fiction,"* 103 LAW Q. REV. 398, 418–20 (1987) (citing statistics that show that cases dismissed in the United States on forum non conveniens grounds "hardly ever make it to trial in a foreign forum"); discussion *infra* Part D.1. In the United States, a party invokes the forum non conveniens doctrine in a motion to dismiss, while in England, a motion to stay typically serves as the correct procedural instrument. *See* Case C-281/02, Owusu v. Jackson, [2005] Q.B. 801, 804 (ECJ) (appeal taken from Eng.); *see also* Am. Dredging Co. v. Miller, 510 U.S. 443, 465–66 (1994) (Kennedy & Thomas, JJ., dissenting) (citing The Atlantic Star, [1974] A.C. 436 (H.L.) (appeal taken from Eng.)). *But see* BELL, *supra* note 1, at 90 (noting that English courts may stay *or* dismiss proceedings on forum non conveniens grounds).

224. *See* Reisenfeld, *supra* note 13, at 82 (noting that "U.S. courts have broad discretion" to dismiss cases on forum non conveniens grounds, notwithstanding the presumption in favor of the plaintiff's choice of forum); Spiliada Maritime Corp. v. Cansulex Ltd., [1987] A.C. 460, 486 (H.L.) (appeal taken from Eng.) (holding that the Court of Appeal improperly interfered with the exercise of the trial judge's discretion to refuse to stay the proceedings on forum non conveniens grounds where the Court of Appeal's reversal was based solely on its disagreement with the trial judge's assessment of the forum non conveniens issue). *But see infra* note 239 and accompanying text.

225. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 723 (1996).

Understanding the contours of forum non conveniens as well as the specific ways in which U.S. and English courts apply the doctrine may thus be essential to many foreign litigants in those courts.

1. Forum Non Conveniens in the United States

In the United States, a party may invoke the doctrine of forum non conveniens in federal court and most state courts,[226] "although some state courts limit application of the doctrine in significant ways."[227] The U.S. Supreme Court adopted the doctrine of forum non conveniens in *Gulf Oil Corp. v. Gilbert*,[228] although it had acknowledged the validity of the doctrine in prior cases.[229] Under the U.S. formulation of forum non conveniens,

> when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would "establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience," or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems," the court may, in the exercise of its sound discretion, dismiss the case.[230]

Because 28 U.S.C. § 1404(a) governs motions to transfer on grounds of convenience in federal courts, "the federal doctrine of *forum non conveniens* has continuing application only in cases where the alternative forum is abroad."[231]

To determine whether dismissal on forum non conveniens grounds is appropriate, a court must first determine whether an

226. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981) (summarizing the history of the forum non conveniens doctrine).

227. Reisenfeld, *supra* note 13, at 82; *see also* Georgene M. Vairo, Forum Non Conveniens, NAT'L L.J., Apr. 28, 2003, at B7 (stating that attorneys for foreign plaintiffs who plan to sue U.S. defendants and who seek to avoid dismissal on forum non conveniens grounds should, if possible, file suit in state courts in which such a dismissal is less likely). This article focuses exclusively on the application of forum non conveniens in U.S. federal courts.

228. 330 U.S. 501 (1947), *superseded by statute*, 28 U.S.C. § 1404(a) (2000), *as recognized in* Am. Dredging Co. v. Miller, 510 U.S. 443 (1994); *see Reyno*, 454 U.S. at 248 n.13.

229. *See Reyno*, 454 U.S. at 247–48 (citing and discussing Can. Malting Co. v. Patterson Steamships, Ltd., 285 U.S. 413 (1932)); *see also Gulf Oil*, 330 U.S. at 507 & n.6.

230. *Reyno*, 454 U.S. at 241 (alterations in original) (quoting Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947)).

231. *Am. Dredging*, 510 U.S. at 449 n.2.

adequate alternative forum exists.[232] Then, the court must use its discretion[233] and apply a balancing test[234] in which it weighs the private interests of the litigants[235] and the public interest in resolving the matter.[236] The court must afford the plaintiff's choice of forum "substantial deference,"[237] although a domestic plaintiff's choice of forum is not necessarily dispositive.[238] The court should therefore

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232. *Reyno*, 454 U.S. at 254 n.22. "Ordinarily, [the alternative forum] requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction." *Id.* (quoting *Gulf Oil*, 330 U.S. at 506–07); *see also* Dominguez-Cota v. Cooper Tire & Rubber Co., 396 F.3d 650, 653 (5th Cir. 2005) (per curiam) (stating that an alternative forum is available and adequate "where the case and all the parties can come within its jurisdiction" (emphasis omitted)).

233. District courts have less discretion to dismiss suits on grounds of forum non conveniens than to transfer suits under 28 U.S.C. § 1404(a). *Reyno*, 454 U.S. at 253.

234. *See id.* at 241. The purpose of the *Gulf Oil* balancing test is to provide trial courts with flexibility in deciding forum non conveniens motions. *Id.* at 249–50.

235. The private interest factors include

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained.

Gulf Oil, 330 U.S. at 508. In addition, "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Reyno*, 454 U.S. at 247. However, a change in substantive law may be one of the many factors that the court considers, and the court may afford it substantial weight "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Id.* at 254 & n.22.

236. The public interest factors include

> the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Reyno, 454 U.S. at 241 n.6 (quoting *Gulf Oil*, 330 U.S. at 509).

237. *Id.* at 242, 255–56 & n.23; *accord Gulf Oil*, 330 U.S. at 508 ("[T]he plaintiff's choice of forum should rarely be disturbed."). *But see* Hyatt Int'l Corp. v. Coco, 302 F.3d 707, 718 (7th Cir. 2002) (stating that the principle of deferring to the plaintiff's choice of forum carries "less force" in declaratory judgment actions).

238. *Reyno*, 454 U.S. at 255 n.23. The Second Circuit, which encompasses federal district courts sitting in New York, uses a "sliding scale" to determine how much deference to afford the foreign plaintiff's choice of forum. *See* Iragorri v. United Techs. Corp., 274 F.3d 65, 71 (2d Cir. 2001). In that jurisdiction,

> the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons—such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum—the less deference the plaintiff's choice commands and, consequently, the

grant the motion to dismiss for forum non conveniens only where it finds that "the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice."[239] A foreign plaintiff is entitled to *less deference* than a domestic plaintiff.[240] If the court finds that forum non conveniens warrants dismissal of the action, it may condition dismissal by requiring the defendant to submit to the jurisdiction of the alternative forum.[241]

Few would disagree that the doctrine of forum non conveniens is an anti-forum-shopping tool for U.S. defendants.[242] Under certain circumstances, it may serve as defendants' best means of counteracting plaintiffs' forum shopping and of leveling out the litigation playing field.[243] But much like other Supreme Court decisions that constitute attempts to curb forum shopping,[244] the doctrine engenders the practice at the same time that it aims to

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> easier it becomes for the defendant to succeed on a *forum non conveniens* motion by showing that convenience would be better served by litigating in another country's courts.

Id. at 72. In essence, "*Iragorri* instructs courts to consider the totality of circumstances supporting a plaintiff's choice of forum." Norex Petroleum Ltd. v. Access Indus., 416 F.3d 146, 154 (2d Cir. 2005).

239. *Reyno*, 454 U.S. at 249; *accord Gulf Oil*, 330 U.S. at 508 ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.").

240. As the Court stated in *Reyno*,

> [w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

454 U.S. at 255–56. The reason for affording a domestic plaintiff's choice of a U.S. forum greater weight may stem from a reluctance to apply the doctrine of forum non conveniens where its application "'would force an American citizen to seek redress in a foreign court.'" Paper Operations Consultants Int'l, Ltd. v. SS H.K. Amber, 513 F.2d 667, 672 (9th Cir. 1975) (quoting Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 646 (2d Cir. 1956)). Nevertheless, the Court's ruling in this regard makes complete sense from an anti-forum-shopping standpoint. In essence, the Court's holding implicitly accounts for foreign plaintiffs' attraction to U.S. courts, and the notion that foreign plaintiffs will often sacrifice convenience and efficiency for the more favorable laws, increased chance of winning, and higher damages awards that U.S. courts are known to provide.

241. *See infra* note 287 and accompanying text.

242. *See Reyno*, 454 U.S. at 240 (citing the plaintiff's candid admission that it was forum shopping when it filed suit in the United States); *Gulf Oil*, 330 U.S. at 507 (noting that forum non conveniens allows courts to counteract forum shopping that is aimed toward harassing defendants); *see also* sources cited *supra* note 13.

243. *See infra* note 247 and accompanying text.

244. *See supra* Part B.3.

prevent it. Indeed, the Court itself recognized in *Reyno* that forum non conveniens creates "reverse forum-shopping" opportunities for defendants, but dismissed its importance as a factor in the balancing of private interests.[245] The Court held that "[i]f the defendant is able to overcome the presumption in favor of [the] plaintiff by showing that trial in the chosen forum would be unnecessarily burdensome, dismissal is appropriate—regardless of the fact that [the] defendant may also be motivated by a desire to obtain a more favorable forum."[246]

What is particularly significant about forum non conveniens as a forum shopping strategy for defendants is its apparent effectiveness. "In a survey of plaintiffs' lawyers in the 180 reported transnational cases that the federal courts dismissed on forum non conveniens grounds from 1947 to 1984, responses covered 85 cases[, none of which] resulted in a plaintiff's win in the foreign court; most cases were abandoned or settled for little."[247] As a result, if the facts of a case support such action, defendants involved in transnational litigation in U.S. federal courts should explore the possibility of moving to dismiss on non-frivolous forum non conveniens grounds before attacking the merits of the plaintiff's claims.[248] Of course, defendants should remain aware of the possibility of becoming exposed to greater liability in the foreign forum. For instance, some nations, such as Nicaragua, have begun to attack forum non conveniens by providing more favorable laws for plaintiffs and thereby removing much of the incentive U.S. defendants typically have in invoking the doctrine.[249]

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245. 454 U.S. at 252 n.19.

246. *Id.*

247. Clermont & Eisenberg, *Exorcising Evil*, *supra* note 1, at 1514 n.18 (citing Robertson, *supra* note 223, at 418–20).

248. Even in state court, a defendant should be cognizant of the potential for dismissing a case on forum non conveniens grounds in federal court. For instance, if the plaintiff files suit in a state that does not recognize the doctrine of forum non conveniens or that restricts its application in some meaningful way, the defendant might be able to remove the case to U.S. federal court and have the case dismissed on grounds of inconvenience under the doctrine of forum non conveniens. In fact, this is precisely what occurred in *Reyno*, where the defendant removed the case to federal court under 28 U.S.C. § 1404(a) on grounds of inconvenience, and then successfully moved to dismiss in federal court on forum non conveniens grounds. 454 U.S. at 240–41.

249. *See* Paul Santoyo, Comment, *Bananas of Wrath: How Nicaragua May Have Dealt* Forum Non Conveniens *a Fatal Blow Removing the Doctrine as an Obstacle to Achieving Corporate Accountability*, 27 HOUS. J. INT'L L. 703, 724–25, 729–34 (2005) (discussing Latin

Before the current Term, the last major Supreme Court decision on the issue of forum non conveniens came in 1994, when the Court decided *American Dredging Co. v. Miller*.[250] Very recently, in *Sinochem International Co. v. Malaysia International Shipping Corp.*,[251] the Court addressed "[w]hether a district court must first conclusively establish [its own] jurisdiction before dismissing a suit on the ground of *forum non conveniens*,"[252] an issue on which the circuit courts had split.[253]

In *Sinochem*, the defendant, Sinochem International Company ("Sinochem"), a Chinese corporation, had entered into a contractual agreement with a U.S. company, Triorient Trading Inc. ("Triorient"),[254] for the purchase of a large quantity of steel coils.[255] To transport the steel coils to China, Triorient sub-chartered a vessel belonging to the plaintiff, Malaysia International Shipping Corporation ("MISC").[256] Under Sinochem's agreement with Triorient, the coils had to be loaded for shipment to China by April

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American countries' anti-*forum-non-conveniens* legislation, and the Nicaraguan banana workers' lawsuit against Shell Oil, Dole, and Dow Chemical, which resulted in a $489 million judgment for the plaintiffs). Another example is the famous case of *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 809 F.2d 195 (2d Cir. 1987). In *Union Carbide*, the parties were close to reaching a settlement in the amount of $350 million when the district court granted the defendant's motion to dismiss on forum non conveniens grounds. *See id.* at 203. After the plaintiffs re-filed their case in India, the case settled for $470 million. *See* Bano v. Union Carbide Corp., 273 F.3d 120, 123 (2d Cir. 2001).

250. 510 U.S. 443 (1994). The question presented in *American Dredging* was whether federal law preempted state law with regard to the doctrine of forum non conveniens and its application in admiralty cases filed in a state court under the Jones Act, 46 U.S.C. app. § 688 (2000). *American Dredging*, 510 U.S. at 445. The Court held that it did not. *Id.* at 456–57.

251. 127 S. Ct. 1184 (2007).

252. *Id.* at 1188 (second alteration in original) (internal quotation marks omitted).

253. *Compare* Malay. Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349, 363–64 (3d Cir. 2006), *rev'd*, 127 S. Ct. 1184 (2007) (holding that courts must establish jurisdiction before ruling on motions to dismiss on forum non conveniens grounds), *and* Dominguez-Cota v. Cooper Tire & Rubber Co., 396 F.3d 650, 652–54 (5th Cir. 2005) (per curiam) (same), *with* Intec USA, LLC v. Engle, 467 F.3d 1038, 1041 (7th Cir. 2006) (holding that courts need not resolve jurisdictional issues before ruling on forum non conveniens motions), *In re* Arbitration Between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr., 311 F.3d 488, 497–98 (2d Cir. 2002) (same), *and In re* Papandreou, 139 F.3d 247, 255–56 (D.C. Cir. 1998), *superseded by statute on other grounds*, 28 U.S.C. § 1605(a)(7), *as recognized in* Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 90 (D.C. Cir. 2002) (same).

254. Triorient was not a party to the action. *Sinochem*, 127 S. Ct. at 1188.

255. *Id.*

256. *Id.*

30, 2003, and MISC issued a bill of lading that specified that the coils had been loaded onto the vessel on that date.[257]

In early June 2003, Sinochem petitioned a Chinese court to arrest MISC's vessel upon its arrival to China, and to preserve a maritime claim against MISC for falsely backdating the bill of lading.[258] MISC posted a $9,000,000 bond to release the vessel,[259] and filed suit against Sinochem in the District Court for the Eastern District of Pennsylvania for negligent misrepresentation.[260] In early July 2003, Sinochem preserved its petition by filing a complaint in the Chinese Admiralty Court seeking damages caused by MISC's alleged backdating.[261] MISC subsequently challenged the Chinese court's exercise of jurisdiction, but the Chinese High Court affirmed.[262]

Meanwhile, in the United States, the district court dismissed MISC's claim on forum non conveniens grounds after finding that an adequate alternative forum existed and that the relevant private and public interest factors compelled dismissal.[263] Before dismissing the case, the district court did not completely resolve the issue of whether it could exercise personal jurisdiction over Sinochem.[264] Although the court concluded that it could not exercise personal jurisdiction under Pennsylvania's long-arm statute,[265] the court did not determine whether the federal long-arm statute[266] provided a lawful basis for personal jurisdiction.[267]

On appeal, the Third Circuit addressed the question of whether the district court should have adjudged the personal jurisdiction issue

257. *Id.*

258. *Id.*

259. Malay. Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349, 351 (3d Cir. 2006), *rev'd*, 127 S. Ct. 1184 (2007).

260. *Sinochem*, 127 S. Ct. at 1189.

261. *Id.* at 1188–89; *see also* Petition for Writ of Certiorari at 22, *Sinochem*, 127 S. Ct. 1184 (2007) (No. 06-102) [hereinafter Pet. for Cert.].

262. *Sinochem*, 127 S. Ct. at 1189.

263. *Id.*

264. *See id.* The court did, however, determine that it had subject matter jurisdiction over the action. *Id.*

265. *Id.*

266. Rule 4(k)(2) of the Federal Rules of Civil Procedure is commonly referred to as the federal long-arm statute. *See* Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1155 (9th Cir. 2006).

267. *Sinochem*, 127 S. Ct. at 1189.

before dismissing the case on forum non conveniens grounds.[268] The court held that district courts "must have jurisdiction before they can rule on which forum, otherwise available, is more convenient to decide the merits."[269] In doing so, the court aligned itself on the issue with the Fifth, Seventh, and Ninth Circuits and rejected the approach adopted by the Second and D.C. Circuits.[270] The court expressly recognized that its holding "may not seem to comport with the general interests of judicial economy and may, in this case, ultimately result in a waste of resources."[271] The court believed, however, that "precedent, logic, and the very terms of the *forum non conveniens* doctrine dictate[d]" the court's result.[272]

The Supreme Court reversed the Third Circuit's decision, holding that "*forum non conveniens* may justify dismissal of an action [even] though jurisdictional issues remain unresolved."[273] The Court based its decision on the well-established principle that "a federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'"[274] Because "'[j]urisdiction is vital only if the court proposes to issue a judgment on the merits,'"[275] and "[a] *forum non conveniens* dismissal . . . is a determination that the merits should be adjudicated elsewhere,"[276] a court "may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant."[277]

The Court's decision in *Sinochem* may have a significant impact on how parties involved in transnational disputes in U.S. federal courts litigate threshold issues. In particular, it will likely minimize the incidence of reverse forum shopping by defendants in transnational cases. Before *Sinochem*, defendants had an incentive to

268. Malay. Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349, 358 (3d Cir. 2006), *rev'd*, 127 S. Ct. 1184 (2007).

269. *Id.* at 363–64.

270. *See* cases cited *supra* note 253.

271. *Sinochem*, 436 F.3d at 364.

272. *Id.*

273. *Sinochem*, 127 S. Ct. at 1190.

274. *Id.* at 1191 (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999)).

275. *Id.* at 1191–92 (quoting Intec USA, LLC v. Engle, 467 F.3d 1038, 1041 (7th Cir. 2006)).

276. *Id.* at 1192 (citation omitted).

277. *Id.*

shop for fora that were required to establish personal (and subject-matter) jurisdiction before ruling on issues pertaining to forum non conveniens. In its petition, Sinochem argued that if the Court required lower courts to establish personal jurisdiction over defendants before ruling on issues regarding forum non conveniens, defendants would be required to expend a substantial amount of time and money merely to reach the forum non conveniens issue.[278] This, Sinochem implied, would hold true irrespective of the strength of a particular defendant's forum non conveniens arguments.[279] However, Sinochem's line of reasoning overlooked one important fact that undermined the validity of Sinochem's argument: a defendant may waive personal jurisdiction.[280] Thus, a defendant who intends to move to dismiss on forum non conveniens grounds is not necessarily required to expend "time, effort, and resources on affirmatively establishing the existence of jurisdiction prior to [doing so]," as Sinochem had contended.[281] Quite to the contrary, a defendant may choose to waive personal jurisdiction, thereby allowing the court to reach the issue of forum non conveniens without having to incur any additional expenses. The Third Circuit expressly recognized this in its opinion: "There was no waiver of personal jurisdiction in this case, but such a waiver could substitute for the Court's determination on personal jurisdiction."[282] Of course, a defendant who has a strong personal jurisdiction challenge and a compelling case for forum non conveniens will presumably not waive personal jurisdiction and will likely assert both defenses.

Consequently, a decision requiring courts to establish personal jurisdiction before dismissing suits on forum non conveniens grounds would have afforded defendants an advantage in litigating these threshold issues by giving defendants a choice. On the one hand, a defendant who intended to move to dismiss on forum non conveniens grounds but did not want to incur expenses in litigating personal jurisdiction could simply waive the latter. On the other hand, the same defendant could choose to challenge personal

278. Pet. for Cert., *supra* note 261, at 22.

279. *See id.*

280. *Supra* note 76.

281. Pet. for Cert., *supra* note 261, at 22.

282. *Sinochem*, 436 F.3d at 364 n.22 (citing Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982)).

jurisdiction, thus requiring *both* parties to expend time, effort, and resources. The point is, this decision would have rested with the defendant; the plaintiff would have had no such choice and would have had to incur the costs of litigating personal jurisdiction if the defendant so mandated.

Furthermore, the implications of this outcome would have been particularly beneficial to the defendant who possesses substantially greater financial resources and bargaining power than the plaintiff. In these circumstances, a defendant might choose to challenge personal jurisdiction to dry out the plaintiff's resources before the case reached trial. Moreover, because the plaintiff carries the burden of proving that the exercise of personal jurisdiction comports with due process,[283] a defendant might be particularly compelled to challenge personal jurisdiction where jurisdictional discovery was necessary, which would likely lead to additional costs. Challenging personal jurisdiction might also have allowed the defendant to delay proceedings, whether to buy more time to formulate arguments and strategies, or simply to cause undue delay.[284] Finally, and perhaps most importantly, the defendant who chose to challenge personal jurisdiction for any of these reasons may have been able to acquire substantial leverage in settlement negotiations. To be sure, the possibility of expending a large amount of time and money to establish personal jurisdiction might have compelled some plaintiffs to settle for less-than-favorable terms. The fact that resolution of forum non conveniens issues would also require substantial expenditure of time and money[285] would only add to plaintiffs' concerns.

For these reasons, a contrary decision by the Court in *Sinochem* would have promoted reverse forum shopping in transnational disputes, and might ultimately have discouraged some plaintiffs from filing in U.S. federal courts—especially where litigating a motion to dismiss for forum non conveniens seemed likely. As a result, from the perspective of the anti-forum-shopping advocate, the Court in *Sinochem* decided the case correctly.

283. McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936).

284. Practitioners ought to bear in mind that causing undue delay is unethical and sanctionable conduct. *See* FED. R. CIV. P. 11(b)(1).

285. *See* Brief in Opposition at 5, *Sinochem*, 127 S. Ct. 1184 (2007) (No. 06-102).

One question that the Court did not resolve in *Sinochem* was the question of "whether a court conditioning a *forum non conveniens* dismissal on the waiver of jurisdictional or limitations defenses in the foreign forum must first determine its own authority to adjudicate the case."[286] Typically, district courts may dismiss suits on forum non conveniens grounds subject to certain conditions in order to ensure that a particular case will be heard in the alternative forum, and to afford the plaintiff an opportunity to re-file in the U.S. court should the alternative forum reject jurisdiction.[287] However, the Third Circuit held in *Sinochem* that a court that lacks personal jurisdiction over a defendant may not issue a conditional dismissal on forum non conveniens grounds.[288] Whether the Court will resolve this question

286. *Sinochem*, 127 S. Ct. at 1193–94.

287. *See* Ford v. Brown, 319 F.3d 1302, 1307 (11th Cir. 2003) ("'In order to avoid unnecessary prejudice to [plaintiffs],' the district court can attach conditions to a dismissal with which the defendants must agree." (alteration in original) (quoting Magnin v. Teledyne Cont'l Motors, 91 F.3d 1424, 1430 (11th Cir. 2002))); *see also* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 n.25 (1981) (permitting district courts to dismiss actions on forum non conveniens grounds "subject to the condition that [the] defendant . . . agree to provide the records relevant to the plaintiff's claims"); *see, e.g.*, Gschwind v. Cessna Aircraft Co., 161 F.3d 602, 605, 610 (10th Cir. 1998) (affirming the district court's forum non conveniens dismissal, which was subject to the defendants' agreement to "(1) produce their respective employees, officers and records in France [the alternative forum], at their own cost; (2) make good faith and reasonable efforts to obtain the attendance of former employees and officers; (3) waive any limitations defenses that would not have been available to them had plaintiff initiated her litigation in France on the same day she filed her complaint in Ohio; (4) transport all physical evidence brought from Europe back to France; (5) voluntarily enter their appearance before the court when plaintiff initiates her litigation in France; and (6) consent to reinstatement of this case in its present posture in the event that the French courts refuse to accept jurisdiction over the matter"); *Magnin*, 91 F.3d at 1430–31 (stating that the defendant agreed to waive all statute of limitations and jurisdictional defenses in the alternative forum, satisfy any final judgment, and conduct discovery in accordance with the Federal Rules of Civil Procedure). As the Eleventh Circuit stated in *Brown*,

> we approve[] of conditional dismissals, in which the district court dismisses the case only if the defendant waives jurisdiction and limitations defenses, and only if it turns out that another court ultimately exercises jurisdiction over the case. . . . Since the district court's dismissal is conditional, it may reassert jurisdiction in the event that the foreign court refuses to entertain the suit.

319 F.3d at 1310; *see also* Schertenleib v. Traum, 589 F.2d 1156, 1163 (2d Cir. 1978) (stating that if the alternative forum refused jurisdiction despite the defendant's consent, the "plaintiff [was] still protected by the conditional nature of the dismissal"). Of course, conditions imposed as part of dismissals on forum non conveniens grounds are not insulated from appellate review. *See, e.g.*, *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 809 F.2d 195, 203–06 (2d Cir. 1987) (removing one of the three conditions imposed by the district court upon its forum non conveniens dismissal).

288. 436 F.3d at 363 (stating that a forum non conveniens dismissal "'[decided without first establishing jurisdiction] could not . . . be subject to conditions, e.g., a condition that defendants promise to submit to the jurisdiction of another court, for exaction of such a condition would

in the future and narrow its holding in *Sinochem* to unconditional forum non conveniens dismissals remain to be seen. A personal jurisdiction requirement for courts that dismiss actions on forum non conveniens grounds may indeed ensure that the plaintiffs in those actions are able to argue the merits of their claims in *some* forum, albeit not their chosen forum.[289] Of course, the possibility always remains that, in practice, whether a forum non conveniens dismissal is conditional or unconditional will ultimately constitute an academic distinction, given that the majority of forum non conveniens dismissals may lead to eventual victory for the defendant.[290]

2. Forum Non Conveniens in England

In England, the House of Lords formally adopted the doctrine of forum non conveniens in *Spiliada Maritime Corporation v. Cansulex Limited*,[291] though the House had applied a similar standard in a series of cases dating back to 1974.[292] The House articulated the "basic principle" of forum non conveniens in England when it wrote:

> [A] stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e.[,] in which the case may be tried more suitably for the interests of all the parties and the ends of justice.[293]

In this regard, the primary purpose of forum non conveniens is virtually the same in England as it is in the United States.[294]

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appear inescapably to constitute an exercise of jurisdiction.'" (first alteration in original) (footnote omitted) (quoting *In re* Papandreou, 139 F.3d 247, 256 n.6 (D.C. Cir. 1998))).

289. *See id.* at 363 n.21 ("If a court is not able to grant a conditional dismissal, the plaintiff could find itself without any guaranteed forum.").

290. *See* Robertson, *supra* note 223, at 418–20.

291. [1987] A.C. 460 (H.L.) (appeal taken from Eng.).

292. Fellas & Warne, *supra* note 13, at 373.

293. *Spiliada*, [1987] A.C. at 476.

294. *Compare* Case C-281/02, Owusu v. Jackson, [2005] Q.B. 801, 804 (ECJ) (appeal taken from Eng.) (stating that an English court "may decline to exercise jurisdiction on the ground that a court in another state, which also has jurisdiction, would objectively be a more appropriate forum for the trial of the action, that is to say, a forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice"), *with* Nolan v. Boeing Co., 919 F.2d 1058, 1070 (5th Cir. 1990) ("The primary purpose of *forum non conveniens* is to allow a court to resist impositions upon its jurisdiction and to protect the interests of parties to the litigation by adjudicating the claim in the most suitable and convenient forum.").

Under the forum non conveniens test adopted by the House of Lords, "in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay," but each party carries the burden of proving "certain matters which will assist him in persuading the court to exercise its discretion in his favour.[295] The burden on the defendant is "two-fold:"[296] the defendant must not only show that "England is not the natural or appropriate forum,"[297] but also that "there is another available forum [that] is clearly or distinctly more appropriate than the English forum."[298] If the court concludes that "there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay" on forum non conveniens grounds.[299] By contrast, if the court is satisfied that the defendant has met the burden of proving the existence of an alternative forum that is prima facie the appropriate forum for adjudication of the dispute, the burden shifts to the plaintiff "to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in [England]."[300]

> In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those

295. *Spiliada*, [1987] A.C. at 476.

296. Fellas & Warne, *supra* note 13, at 375.

297. *Spiliada*, [1987] A.C. at 477. When determining the propriety of the English forum, the court must focus on such "connecting factors" as convenience or expense, the law governing the relevant transaction, and the places where the parties reside or transact business, *id.* at 478, "giv[ing] to such factors the weight which, in all the circumstances of the case, [the court] considers to be appropriate," *id.* at 482. Thus, some of the same "natural forum" arguments that parties might put forth when litigating the court's exercise of personal jurisdiction apply in the context of forum non conveniens.

298. *Spiliada*, [1987] A.C. at 477; *see also* Fellas & Warne, *supra* note 13, at 375. The availability of an alternative appropriate forum depends on whether the foreign forum is available "in practice," Fellas & Warne, *supra* note 13, at 376 (citing Mohammed v. Bank of Kuwait & the Middle East K.S.C., [1996] 1 W.L.R. 1483 (C.A.) (appeal taken from Eng.)), i.e., whether it is practical for the plaintiff to file suit in the alternative forum. *See Mohammed*, [1996] 1 W.L.R. at 1490–91. A foreign forum becomes available when the defendant undertakes to submit to the jurisdiction of that forum. Lubbe v. Cape Plc (No. 2), [2000] 1 W.L.R. 1545, 1563, 1565–66 (H.L.) (appeal taken from Eng.); Fellas & Warne, *supra* note 13, at 376.

By requiring a showing of a more appropriate forum than England, the English courts are able to afford some deference to the plaintiff's choice of forum, thus engendering "broad consensus among major common law jurisdictions." *See Spiliada*, [1987] A.C. at 477. This consensus only goes so far, however, as English courts do not give nearly the degree of deference to the plaintiff's choice of forum as their counterparts in the United States. *Id.* at 482–83.

299. *Spiliada*, [1987] A.C. at 478.

300. *Id.* at 476; *see also* Fellas & Warne, *supra* note 13, at 375.

> taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction . . . .[301]

If the plaintiff cannot meet the burden of proving the existence of circumstances that militate against granting a stay, then the court will ordinarily stay the proceedings on forum non conveniens grounds.[302]

Just as it serves as a potent anti-forum-shopping device for defendants in U.S. courts, forum non conveniens gives defendants in English courts a means of counteracting plaintiffs' forum shopping.[303] In fact, the doctrine of forum non conveniens may serve as an even more powerful tool for defendants in England, given that the plaintiff's choice of forum typically receives less deference from English courts than U.S. courts.[304]

For instance, suppose that a plaintiff files suit in an English court to take advantage of the various benefits offered by that forum.[305] At the same time, the plaintiff unreasonably allows the limitations periods to elapse in all other fora that could also adjudicate the plaintiff's claims. In such a scenario, the plaintiff's argument—that granting a stay of the English proceedings on forum non conveniens grounds will deprive the plaintiff of any chance of recovery—may not be persuasive in the eyes of the court if the court finds that England is not the more appropriate forum for the dispute.[306] However, because the underlying purpose of forum non conveniens in England is to serve the interests of all parties to the suit and to further the ends of justice,[307] a plaintiff who acts reasonably but nevertheless forgoes and forfeits the opportunity to file suit in alternative fora may be able to defeat a forum non conveniens motion to stay on a deprivation argument alone, even

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301. *Spiliada*, [1987] A.C. at 478.

302. *Id.* at 476, 478.

303. "[T]he development of a jurisdictional test that permits the staying of proceedings when, in broad terms, they are not commenced in the natural forum has the salutary effect of also acting to prevent forum shopping." BELL, *supra* note 1, at 89 (citing Voth v. Manildra Flour Mills Pty. Ltd. (1989) 15 N.S.W.L.R. 513, 526 (Austl.)); *see also id.* at 91; *Spiliada*, [1987] A.C. at 483–84.

304. *See supra* note 298.

305. *See supra* note 23.

306. *See Spiliada*, [1987] A.C. at 483.

307. *See supra* note 294.

where England is not the more appropriate forum.[308] As a result, a plaintiff filing suit in England should generally be aware of other fora that could also adjudicate the dispute, and should take reasonable aims to prevent forfeiting the chance to file suit there.

As noted in the previous section, English procedural rules governing transnational disputes are derived from the Judgments Regulation[309] and Lugano Convention[310] when the conflict involves parties that are member nations to those Conventions.[311] Because the United States is not a signatory to any of these Conventions, English courts' exercise of personal jurisdiction over U.S. defendants is governed by English common law.[312] But as the recent case of *Owusu v. Jackson*[313] indicates, not all U.S. defendants are subject to English common law rules of personal jurisdiction, and this may have a crippling impact on U.S. defendants' ability to invoke the doctrine of forum non conveniens in England.

In *Owusu*, the plaintiff brought a breach of contract claim against a British domiciliary and tort claims against several Jamaican companies, among others.[314] The four British and Jamaican defendants petitioned the court to decline jurisdiction on the basis of forum non conveniens, arguing that Jamaica was the more appropriate forum for adjudication of the dispute.[315] The lower court held that it lacked the power to stay the action against the British defendant on forum non conveniens grounds because of Article 2 of the Brussels Convention[316] ("Article 2").[317] The lower court also held that it could not stay the action as to the three Jamaican defendants,

308. *Spiliada*, [1987] A.C. at 483–84.

309. *Supra* note 171.

310. *Supra* note 172.

311. *See supra* Part C.2.

312. *See supra* note 173 and accompanying text.

313. Case C-281/02, Owusu v. Jackson, [2005] Q.B. 801 (ECJ) (appeal taken from Eng.).

314. *Id.* at 804–05.

315. *Id.* at 805.

316. Brussels Convention, *supra* note 171, art. 2.

317. *Owusu*, [2005] Q.B. 801 at 805. Although the Judgments Regulation superseded the Brussels Convention when it entered into force in 2002, *supra* note 171, the *Owusu* court nevertheless applied Article 2 of the Brussels Convention. *Owusu*, Q.B. 801 at 803–04. However, Article 2 of the Judgments Regulation is nearly identical to Article 2 of the Brussels Convention. *Compare* Judgments Regulation, *supra* note 171, art. 2, *with* Brussels Convention, *supra* note 171, art. 2. Thus, the *Owusu* court's analysis of Article 2 of the Brussels Convention applies equally to Article 2 of the Judgments Regulation.

notwithstanding the presence of substantial "connecting factors" with Jamaica, because doing so would create "a risk that the courts in two jurisdictions would end up trying the same factual issues on the same or similar evidence and [would] reach different conclusions."[318]

On appeal, the European Court of Justice ("ECJ") first decided the threshold issue of whether Article 2 is applicable where the plaintiff and one of the defendants are domiciled in the same member state where the action was filed, and the case has certain "connecting factors" with only a non-member state.[319] After looking to the purposes of the Brussels Convention and weighing the parties' arguments, the court held that Article 2 governed its exercise of personal jurisdiction because the "international element"[320] necessary for Article 2 to be triggered was present.[321] The court then addressed the forum non conveniens issue at the heart of the matter: whether a court of a member state may invoke forum non conveniens to decline Article 2 jurisdiction in favor of the courts of a non-member state, when one defendant is domiciled in a member state but the others are not.[322]

In its analysis, the court cited several factors militating against the application of forum non conveniens. First, the drafters of the Brussels Convention had previously discussed the implementation of a forum non conveniens exception but had not adopted one.[323] Second, the court stated that "[r]espect for the principle of legal certainty, which is one of the objectives of the Brussels Convention, would not be fully guaranteed if the court having jurisdiction under the Convention had to be allowed to apply the forum non conveniens doctrine."[324] Third, "[t]he legal protection of persons established in the Community would also be undermined;" defendants would not be able to reasonably foresee where they might be sued, and plaintiffs would carry a heavy burden of proving the existence of circumstances justifying denial of a stay.[325] Finally, because only a

318. *Owusu*, [2005] Q.B. 801 at 805.

319. *Id.* at 806.

320. *Id.* at 807.

321. *Id.* at 808. For the court's full analysis regarding the applicability of Article 2 to the case, see *id.* at 807–08.

322. *Id.* at 806.

323. *Id.* at 809.

324. *Id.* (citations omitted).

325. *Id.* at 809–10.

limited number of member states recognize the doctrine, application of forum non conveniens would further constrain the uniform application of the Convention's jurisdictional rules.[326] On these grounds, the court held that a court of a member state cannot decline jurisdiction conferred upon it by Article 2 on forum non conveniens grounds.[327] The court acknowledged the inconvenience and expense that its holding might cause some defendants to sustain, but held that "those difficulties . . . are not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in article 2."[328]

In terms of forum shopping, the ECJ's decision may have potentially far-reaching ramifications for transnational litigants of non-member states haled to English courts, and should considerably elevate English courts' appeal to plaintiffs.[329] First, the court's decision severely restricts the ability of defendants from non-member states to challenge English courts' exercise of personal jurisdiction

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326. *Id.* at 810.

327. *Id.*

328. *Id.*

329. The ECJ refused to decide the second part of the forum non conveniens question, namely, whether "[the doctrine's] application is ruled out in all circumstances or only in certain circumstances." *Id.* at 810–11. This issue was pertinent because the lower court had been unsure whether to allow defendants to invoke forum non conveniens where a risk of identical or related proceedings occurring in non-member states does not exist. *Id.* at 810. The ECJ, however, concluded that the facts did not implicate this question, and indicated that it would not issue a ruling on the issue because it would constitute an "advisory opinion[] on [a] general or hypothetical question[]" that was not necessary "for the effective resolution of [the] dispute." *Id.* at 811.

Accordingly, *Owusu* does not expressly impose an absolute prohibition on forum non conveniens such that a defendant from a non-member state would necessarily be precluded from invoking the doctrine under all circumstances. Nevertheless, at least one English court has suggested an absolute exclusion of the doctrine after *Owusu* was rendered. *See* Grovit v. De Nederlandsche Bank [2005] EWHC 2944 (QB), [2006] 1 W.L.R. 3323, 3342 (Q.B.) (Eng.) (noting that forum non conveniens "has no place in the scheme of the Judgments Regulation"). More importantly,

> [c]oincident with the emergence of the concept of the natural forum, common law judges have displayed a markedly heightened sensitivity in recent years to the need to resolve and the desirability of resolving all litigation arising out of the same set of events in the same court. The cases in which this observation has been made are now legion.

BELL, *supra* note 1, 106–07 (citing Du Pont de Nemours & Co. v. Agnew, [1987] 2 Lloyd's Rep. 585, 589 (C.A.) (appeal taken from Eng.); First Nat'l Bank of Boston v. Union Bank of Switz., [1990] 1 Lloyd's Rep. 32, 39 (C.A.) (appeal taken from Eng.)). As a result, until a court expressly decides the issue, parties, and defendants in particular, should be prepared to litigate the issue of whether forum non conveniens can ever serve as a proper basis for dismissal in international disputes governed by Article 2.

over them. Article 4 of the Judgments Regulation ("Article 4") mandates that the courts of a member state may exercise personal jurisdiction over defendants from non-member states according to the laws of the member state.[330] However, under *Owusu*, a plaintiff can preempt the application of Article 4 by suing multiple defendants, only one of whom need be a domiciliary of a member state. By doing so, the plaintiff triggers application of Article 2, which confers *mandatory jurisdiction*[331] over every defendant, not only those domiciled in member states.[332] Thus, the plaintiff can, in effect, preclude the application of English common law principles of personal jurisdiction over defendants from non-member states by also suing a defendant who hails from a member state.[333] This fact alone should be a major forum shopping consideration for plaintiffs domiciled in member states who intend to sue U.S. defendants and are concerned about litigating jurisdictional issues.

Second, and just as importantly, the court's decision prohibits defendants from non-member states from petitioning English courts for stays on forum non conveniens grounds where the alternative forum lies in a non-member state. In this way, the holding constitutes a "double-whammy" against defendants from non-member states: not only may defendants not challenge jurisdiction on English common law or comity grounds, but they also may not petition the court to exercise its discretion and decline jurisdiction on convenience grounds.

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330. Judgments Regulation, *supra* note 171, art. 4; *accord* Brussels Convention, *supra* note 171, art. 4.

331. *See Owusu*, [2005] Q.B. 801 at 809 (stating that Article 2 of the Brussels Convention "is mandatory in nature").

332. *See id.* at 808.

333. Of course, the dispute must be one with an "international element," but the *Owusu* court's formulation demonstrates that this element will often not be difficult to prove. *Id.* at 807. In the court's own words,

> the international nature of the legal relationship at issue need not necessarily derive, for the purposes of the application of article 2, from the involvement, either because of the subject matter of the proceedings or the respective domiciles of the parties, of a number of [member] states. The involvement of a [member] state and a non-[member] state, for example because the claimant and one defendant are domiciled in the first state and the events at issue occurred in the second, would also make the legal relationship at issue international in nature. That situation is *such as to raise questions in the [member] state . . . relating to the determination of international jurisdiction*, which is precisely one of the objectives of the Brussels Convention . . . .

Id. (emphasis added). In other words, under *Owusu*, an action may be deemed to possess an international element anytime issues of international jurisdiction arise in a member state's courts.

Practitioners ought not overlook the potential adverse consequences of the *Owusu* court's decision on defendants, particularly with respect to settlement value. A plaintiff domiciled in a member state may be able to gain substantial settlement leverage over a U.S. defendant by filing suit in England (so long as it can also sue a defendant from a member state). This is especially true if litigating in England would be particularly costly for the U.S. defendant, such as when the United States is the natural forum for the dispute. What's more, the U.S. defendant will be completely foreclosed from raising a personal jurisdiction defense on English common law principles, or a forum non conveniens defense. Because the U.S. defendant may not be willing to endure the high costs of litigating in England when the bulk of the witnesses are located in the United States, or when litigating in England would require explanations of U.S. legal principles, the plaintiff may obtain a distinct settlement advantage by filing suit in England.

E. Recognition and Enforcement of Foreign Judgments

The recognition and enforcement of money judgments may be paramount to any other procedural consideration in transnational litigation.[334] Indeed, an unenforceable judgment is really no judgment at all. Thus, whether the particular judgment of one nation is likely to be recognized and enforced by the courts of another is an extremely important factor for plaintiffs.[335]

Considerations regarding recognition and enforcement will vary depending on the plaintiff's awareness of the location of the defendant's assets. If the location of the defendant's assets is not known prior to filing suit, the plaintiff may be better off simply not considering enforcement when selecting a forum. If, however, the plaintiff is aware that the defendant's assets are located in a country other than that in which the plaintiff intends to file suit, the plaintiff should consider the enforcing jurisdiction's general rules regarding the recognition and enforcement of foreign judgments when selecting a forum. The plaintiff should also consider the enforcing jurisdiction's procedural requirements to reduce or eliminate

334. Teitz, *Where to Sue*, *supra* note 25, at 49, 60.

335. The same holds true for cross-complainants, but for simplicity's sake, this section refers only to plaintiffs.

enforcement challenges.[336] Throughout the litigation, the plaintiff should remain cognizant that enforcement of any judgments rendered in the plaintiff's favor may require the expenditure of a substantial amount of time and money, should the defendant contest enforcement.[337] Finally, the plaintiff should bear in mind that filing suit in the country in which the defendant's assets are located will eliminate the issue of recognizing a foreign judgment, and will likely increase the plaintiff's chances of successfully enforcing a favorable judgment.

1. Recognition and Enforcement of Foreign Judgments in the United States

In general, a U.S. court will not enforce a foreign judgment unless it first recognizes that judgment.[338] "'A foreign judgment is recognized when a court concludes that a certain matter has already been decided by the judgment and therefore need not be litigated further.'"[339] "The degree to which a domestic court recognizes a foreign judgment and the criteria utilized to do so form the crux of foreign judgments jurisprudence."[340]

No federal statute governing the recognition and enforcement of foreign judgments currently exists.[341] Although the U.S. Constitution

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336. *See* Carolyn B. Lamm et al., *Recognition and Enforcement of Foreign Judgments in the United States and England*, *in* TRANSATLANTIC COMMERCIAL LITIGATION AND ARBITRATION, *supra* note 13, at 537, 537.

337. *See* Edward H. Davis Jr. & Annette C. Escobar, *A Practitioner's Guide to Enforcement of Foreign Country Money Judgments in the United States*, *in* INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE, *supra* note 13, at 131, 140.

338. Lamm et al., *supra* note 336, at 537.

339. George B. Murr, *Enforcing and Resisting Judgments*, *in* INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS, *supra* note 5, at 341, 343 (quoting Robert B. von Mehren & Michael E. Patterson, *Recognition and Enforcement of Foreign-Country Judgments in the United States*, 6 LAW & POL'Y INT'L BUS. 37, 38 (1974)). A foreign judgment, by contrast, is enforced when a party is accorded the relief to which that party is entitled. *Id.* at 344.

340. Murr, *supra* note 339, at 344. Thus, this section is exclusively concerned with the *recognition* of foreign judgments. For a comprehensive review of procedural requirements concerning the enforcement of foreign judgments after recognition, see *id.* at 344–46.

341. Lamm et al., *supra* note 336, at 540. The American Legal Institute is, however, in the process of promulgating a proposed federal statute that would federalize the recognition and enforcement of foreign judgments were Congress to adopt it. *See* Adler & Zarychta, *supra* note 171, at 7 n.26; *see also* Murr, *supra* note 339, at 342 n.3 (quoting Jonathan H. Pittman, *The Public Policy Exception to the Recognition of Foreign Judgments*, 22 VAND. J. TRANSNAT'L L. 969, 972–73 (1989)); Davis Jr. & Escobar, *supra* note 337, at 140 n.3. If enacted, the proposed federal statute will preempt the UFMJRA. William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1, 28 (2006).

requires each state to give "Full Faith and Credit" to the judgments of sister states,[342] the requirement does not extend to the enforcement of foreign judgments.[343] Accordingly, state law typically governs the recognition and enforcement of foreign judgments in U.S. courts.[344] A majority of the states have adopted the Uniform Foreign Money-Judgments Recognition Act ("UFMJRA"),[345] which governs all aspects of recognition and enforcement of foreign judgments in those states. A number of states, however, continue to follow the common law rules of international comity as set forth by the Supreme Court in *Hilton v. Guyot*[346]—principles that have traditionally governed the recognition and enforcement of foreign judgments in the United States.[347]

Under *Hilton*, a state court may recognize a foreign judgment where (1) the judgment was rendered in a fair trial before a court of competent jurisdiction, (2) the defendant received proper notice of the proceedings or appeared voluntarily, (3) the foreign court is part of a legal system that is "likely to secure an impartial administration of justice," (4) no evidence exists showing prejudice on the part of the court or fraud in the procurement of the judgment, and (5) no other reason for non-recognition exists.[348] *Hilton* also established a requirement of reciprocity for the recognition and enforcement of foreign judgments.[349] Reciprocity is no longer a requirement of recognition in most of the states that have not adopted the

342. U.S. CONST. art. IV, § 1.

343. *See* Hilton v. Guyot, 159 U.S. 113, 181–82 (1895).

344. Lamm et al., *supra* note 336, at 537–38.

345. 13 U.L.A. 261 (1962) [hereinafter UFMJRA]. Thirty-one states and the District of Columbia have adopted the UFMJRA in one form or another. *See* Davis Jr. & Escobar, *supra* note 337, at 151 app. B (citing state statutes). Some states' versions of the UFMJRA are not entirely identical to the original text as promulgated by the National Conference of Commissioners on Uniform State Laws. *See, e.g.*, IOWA CODE ANN. §§ 626B.1 to B.8 (West 1999); TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001–.008 (Vernon 1997). Most notably, some states that have adopted the UFMJRA still adhere to a reciprocity requirement (Georgia, Idaho, Massachusetts, and Texas), but the majority of states do not impose such a requirement. *See* Lamm et al., *supra* note 336, at 543 n.29; *see also* Murr, *supra* note 339, at 347 n.25.

346. 159 U.S. 113 (1895).

347. *See* Lamm et al., *supra* note 336, at 538, 541.

348. *Hilton*, 159 U.S. at 202–03, 205–06; *see also* Murr, *supra* note 339, at 347 (restating the test).

349. *Hilton*, 159 U.S. at 227–28.

UFMJRA,[350] but lack of reciprocity remains "a permissive ground for refusal to enforce a foreign country money judgment in several states."[351] Reciprocity notwithstanding, the *Hilton* standard "still applies today substantially unchanged" in those states that have not adopted the UFMJRA.[352]

a. The Uniform Foreign-Country Money Judgments Recognition Act

The UFMJRA is, in essence, a codification of the *Hilton* doctrine.[353] However, as its name suggests, the UFMJRA applies only to foreign money judgments.[354] Thus, *Hilton* continues to govern the enforcement of non-money judgments, even in those states that have adopted the UFMJRA.[355] In short, "[t]he UFMJRA provides for the [recognition and] enforcement of final foreign country money judgments that are enforceable in the foreign country in which they were rendered."[356]

Under the UFMJRA, courts may recognize only those foreign judgments that are "final and conclusive and enforceable where rendered."[357] A foreign money judgment is not conclusive, and therefore not recognizable, in U.S. courts, where (1) the legal system to which the rendering court belongs is incompatible with the

350. Davis Jr. & Escobar, *supra* note 337, at 132; *see also* RESTATEMENT (THIRD) OF FOREIGN REL. § 481 rep. n. 1 (1987); *cf. supra* note 345 (referring to states that have adopted the UFMJRA).

351. Davis Jr. & Escobar, *supra* note 337, at 141 n.9. "The . . . Second Circuit articulated the modern law of comity . . . as follows: '[f]ederal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy.'" Lamm et al., *supra* note 336, at 543 (quoting Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713 (2d Cir. 1987) (final alteration in original) (footnote omitted)).

352. Davis Jr. & Escobar, *supra* note 337, at 132.

353. Murr, *supra* note 339, at 347.

354. UFMJRA § 1(2); *see also* Murr, *supra* note 339, at 347. The UFMJRA does not apply to judgments for taxes, penal judgments, or judgments for support in matrimonial or family matters. UFMJRA § 1(2).

355. *See, e.g.*, Overseas Dev. Bank in Liquidation v. Nothmann, 480 N.Y.S.2d 735, 738 (N.Y. App. Div. 1984), *rev'd on other grounds*, 477 N.E.2d 1086 (N.Y. 1985) (stating that the enforcement of non-money judgments continues to be governed by *Hilton* despite New York's adoption of the UFMJRA).

356. Davis Jr. & Escobar, *supra* note 337, at 133 (endnotes omitted).

357. UFMJRA § 2; *see also* Murr, *supra* note 339, at 348 ("the foreign judgment cannot be interlocutory or subject to reversal or modification"). A pending appeal, however, will not affect the finality or conclusiveness of a particular judgment. *See* UFMJRA § 2.

requirements of (procedural) due process, (2) "the foreign court did not have personal jurisdiction over the defendant," or (3) the foreign court lacked subject matter jurisdiction.[358] When determining whether the rendering court had personal jurisdiction over the defendant, U.S. courts apply U.S. principles of personal jurisdiction.[359] As a result, a plaintiff who plans on filing suit in a foreign forum against a defendant with substantial assets in the United States should first determine whether the U.S. forum or fora in which those assets are located could exercise personal jurisdiction over the defendant. Additionally, a court may, at its discretion, refuse to recognize a foreign money judgment where (1) the defendant did not receive adequate notice of the foreign proceeding; (2) "the judgment was obtained by fraud;" (3) the cause of action upon which the judgment was rendered is repugnant to public policy; (4) "the judgment conflicts with another final and conclusive judgment;" (5) the foreign proceeding violated an agreement between the parties to settle disputes out of court; or (6) the foreign court was "a seriously inconvenient forum for the trial of the action," but only if jurisdiction was based solely on personal service.[360]

The National Conference of Commissioners on Uniform State Laws recently revised the UFMJRA, drafting the Uniform Foreign-Country Money Judgments Recognition Act ("Revised Act").[361]

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358. UFMJRA § 4(a).

359. Murr, *supra* note 339, at 348. "U.S. courts will not enforce a foreign judgment without a showing of personal jurisdiction under U.S. principles *even if the foreign judgment was obtained with proper personal jurisdiction under the principles of the foreign country*." *Id.* (emphasis added); *accord* Davis Jr. & Escobar, *supra* note 337, at 133 ("U.S. courts generally apply U.S. minimum contacts standards"). A court may not, however, refuse recognition for lack of personal jurisdiction if (1) the defendant was served personally in the foreign forum; (2) the defendant voluntarily appeared for the proceedings, except where the defendant appeared to contest personal jurisdiction or to protect property seized or threatened with seizure; (3) the defendant waived personal jurisdiction in the foreign forum; (4) the defendant is domiciled or incorporated, or has its principle place of business in the foreign forum; (5) the defendant has a business office in the foreign forum and the cause of action arose from the defendant's business conducted through that office; or (6) the cause of action arose from the defendant's operation of a motor vehicle or airplane in the foreign forum. UFMJRA § 5(a). In addition, courts "may recognize other bases of jurisdiction." *Id.* § 5(b).

360. UFMJRA § 4(b). "The last ground for non-recognition under subsection (b) authorizes a court to refuse recognition and enforcement of a [foreign] judgment . . . on the basis only of personal service when it believes the original action should have been dismissed . . . on grounds of forum non conveniens." *Id.* § 4 cmt.

361. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (2005), *available at* http://www.law.pitt.edu/brand/2005%20NCCUSL%20UFCJRA%20text.pdf [hereinafter REVISED UFMJRA].

States are expected to begin adopting the Revised Act in the near future.[362] The Revised Act institutes a number of important changes to the original UFMJRA. First, it expressly places the burden of proving the applicability of the Revised Act on the party seeking recognition.[363] In other words, the party seeking recognition carries the burden of proving that the foreign judgment grants or denies the recovery of a sum of money and that the judgment is final, conclusive, and enforceable under the laws of the rendering forum.[364] In addition, the Revised Act specifies that the party challenging recognition carries the burden of proving a valid ground for non-enforcement once the party seeking recognition has shown that the Revised Act applies.[365] The original UFMJRA did not contain these provisions, often making the issue of burden of proof a matter of contention among parties to a suit.[366]

Second, the Revised Act adds a limitations period for the recognition of all foreign money judgments.[367] A party seeking recognition of a foreign money judgment under the Revised Act must file an action for recognition "within the earlier of the time during which the foreign-country judgment is effective in the foreign country or fifteen years from the date that the foreign-country judgment became effective in the foreign country."[368] Under the original UFMJRA, courts often take the statutes of limitations of rendering fora into account when determining whether a foreign judgment is "enforceable where rendered," a prerequisite for recognition under the UFMJRA.[369] Thus, the new provision's main

362. *See* Linda J. Silberman & Martin Lipton, *Enforcement and Recognition of Foreign Country Money Judgments in the United States*, *in* 1 INTERNATIONAL BUSINESS LITIGATION & ARBITRATION 2006, at 351, 354 (2006).

363. *See* REVISED UFMJRA § 3(c).

364. *See id.* § 3.

365. *Id.* § 4(d). Courts that have reached similar conclusions on this issue under the original UFMJRA have held defendants to an elevated burden of clear and convincing evidence. *See* Davis Jr. & Escobar, *supra* note 337, at 133; Murr, *supra* note 339, at 345.

366. *See, e.g.*, Bridgeway Corp. v. Citibank, 201 F.3d 134, 141–42 (2d Cir. 2000).

367. *See* REVISED UFMJRA § 9.

368. *Id.*

369. *See, e.g.*, Soc'y of Lloyd's v. Shell, No. C-1-04-188, 2005 U.S. Dist. LEXIS 22104, at *28–31 (S.D. Ohio Sept. 30, 2005) (refusing to recognize an English judgment on the ground that the judgment was not "enforceable where rendered" pursuant to the UFMJRA where England's six-year time limit for the enforcement of judgments had expired); *see also* Overseas Dev. Bank in Liquidation v. Nothmann, 480 N.Y.S.2d 735, 740–41 (1984), *rev'd on other grounds*, 477 N.E.2d 1086 (N.Y. 1985).

contribution in this regard is the fairly generous fifteen-year limitations period, which will apply any time a foreign judgment is subject to either a limitations period greater than fifteen years, or no limitations period at all.

Third, and most importantly, the Revised Act establishes two *additional* grounds for discretionary non-recognition of foreign judgments: (1) "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to" *the specific foreign-country judgment* in question, or (2) the *specific foreign proceeding* leading to the foreign-country judgment "was not compatible with the requirements of due process of law."[370] These provisions help resolve the question of whether a court may consider the procedural fairness of the particular foreign proceedings leading up to the foreign judgment in question.[371]

Under the original UFMJRA, a court may not recognize a foreign judgment that "was rendered under a [judicial] *system* which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."[372] Many courts, however, have refused to extend this provision to allow them to focus on the procedures employed in a particular proceeding.[373] As a result, under the original UFMJRA, a party challenging the recognition of a foreign judgment is unable to do so on the ground that the foreign court rendered that judgment in a proceeding that was procedurally unfair.

The Revised Act, by contrast, expressly provides courts with discretion to consider the procedural fairness of the specific proceeding in which the foreign court rendered its judgment.[374] The Revised Act may therefore preclude the prevailing party in a foreign proceeding from enforcing a favorable judgment if the foreign tribunal's procedures were procedurally unfair or otherwise unsound. For example, if a foreign court commits errors that infringe upon the

370. REVISED UFMJRA §§ 4(c)(7)–(8).

371. *See id.* § 4, cmts. 11–12.

372. UFMJRA § 4(a)(1) (emphasis added). The Revised Act contains the same provision. *See* REVISED UFMJRA § 4(b)(1).

373. For instance, in *Society of Lloyd's v. Reinhart*, 402 F.3d 982 (10th Cir. 2005), the court interpreted New Mexico's version of the UFMJRA as requiring courts to focus on the procedural fairness of the English system as a whole, not on the specific foreign judgment in question. *Id.* at 994 (citing N.M. STAT. §§ 39-4B-5 (2005)).

374. REVISED UFMJRA §§ 4(7)–(8).

due process rights of the party challenging recognition, a court may, in its discretion, refuse to enforce the judgment, even where the prevailing party committed no wrong of its own.[375] The possibility of such an outcome may compel some plaintiffs to file suit in the United States instead of a foreign nation to avoid litigating the issue of procedural fairness, perhaps even where the foreign forum affords a better chance of prevailing.

Of course, parties should bear in mind that the U.S. court may exercise its discretion in favor of the party seeking recognition, despite the existence of procedural unfairness. For instance, a court may decide not to exercise its discretion to deny recognition despite evidence of procedural unfairness "because the party resisting recognition failed to raise the issue on appeal from the foreign-country judgment in the foreign country, and the evidence establishes that . . . appeal would have been an adequate mechanism for correcting the transgressions of the lower court."[376] Moreover, if the Revised Act is truly meant to continue the spirit of the original UFMJRA and the *Hilton* doctrine upon which the latter is based, courts faced with the issue of procedural fairness should remember that the mere fact that the procedural rules of a foreign court differ from those of U.S. courts is not, "of itself, a sufficient ground for impeaching the foreign judgment."[377]

The Revised Act is by no means a radical departure from the original UFMJRA. Indeed, it "continues the basic policies and approach of the [original Act]; its main purpose is to correct problems created by the interpretation of the provisions of that Act by the courts over the years since its promulgation."[378] Consequently, the Revised Act will likely not lead to drastically different results with respect to the recognition and enforcement of foreign judgments. Still, the Revised Act is destined to have a significant impact on transnational litigation once states begin to adopt it, especially in light of the additional grounds for discretionary non-recognition set forth in section 4(c) thereof. Because the

375. *Id.* § 4 cmt. 12.

376. *Id.*

377. Hilton v. Guyot, 159 U.S. 113, 205 (1895).

378. American Bar Association, Agenda, Potential Agenda Items for the 2006 Midyear Meeting of the House of Delegates of the American Bar Association, para. 20 (2005), http://www.abanet.org/leadership/2006/midyear/midyearpreview06.doc.

Revised Act allows U.S. courts to focus on the specific procedures employed by the rendering court, a party against whom that court may have used deficient or violative procedures will have a potent weapon with which to challenge recognition of that judgment in the United States.

b. The Hague Convention on Choice of Court Agreements

The United States is currently not a party to any multilateral convention or treaty on foreign judgments.[379] In 2005, the United States and other member nations of the Hague Conference on Private International Law, including England, signed the Hague Convention on Choice of Court Agreements ("HCCCA"),[380] a multilateral treaty governing the enforcement of foreign judgments arising from actions between businesses that are parties to international contracts containing exclusive choice-of-court clauses.[381] The HCCCA represents a "scaled-down version" of the failed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.[382] The United States signed the final draft of the HCCCA, but currently, the treaty carries no force in the United States[383] or in any other member nation.[384] Nevertheless, because the United States was a driving force behind the Hague Conference's attempt to produce a treaty on jurisdiction and judgments,[385] the question is

379. *See* Davis Jr. & Escobar, *supra* note 337, at 131. The United States has, however, been a member of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1970. Adler & Zarychta, *supra* note 171, at 1 n.2; *see* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

380. Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M 1294, *available at* http://www.cptech.org/ecom/jurisdiction/text06302005.pdf [hereinafter HCCCA].

381. HCCCA, *supra* note 380, art. 1, para. 1; art. 2, para. 1; art. 3.

382. Adler & Zarychta, *supra* note 171, at 2; Peter Winship & Louise Ellen Teitz, *Developments in Private International Law: Facilitating Cross-Border Transactions and Dispute Resolution*, 40 INT'L LAW. 505, 505–07 (2006).

383. *See* Adler & Zarychta, *supra* note 171, at 1.

384. *See* Andrea Schulz, *The 2005 Hague Convention on Choice of Court Clauses*, 12 ILSA J. INT'L & COMP. L. 433, 433 (2006) (noting that the HCCCA "is now open for signature and ratification, or accession").

385. *See* Adler & Zarychta, *supra* note 171, at 2–6. In pushing for a global treaty on jurisdiction and judgments, the United States "sought to find a means for private parties to enforce foreign judgments outside of the United States without relitigation and to 'level the playing field' for litigants in the United States." Winship & Teitz, *supra* note 382, at 506; *see also* AMERICAN BAR ASSOCIATION, REPORT (2006), http://www.abanet.org/intlaw/policy/investment/hcca0806.pdf, at 2.

likely not if, but when, the United States will formally adopt the HCCCA.[386]

The HCCCA sets out three basic rules. First, the forum chosen by the parties in a valid exclusive choice-of-court agreement has jurisdiction over any dispute covered by that agreement.[387] As a result, the chosen court may not refuse to exercise jurisdiction on the ground that the case should be decided by a court in another country (i.e., on forum non conveniens grounds).[388] Second, if an exclusive choice-of-court agreement exists, no other forum may exercise jurisdiction over any disputes covered by that agreement. All other fora must suspend or dismiss any pending proceedings to which the agreement applies, unless (1) the agreement is invalid under the laws of the chosen forum, (2) "a party lacked the capacity to conclude the agreement under the laws of the State of the court seised," (3) "giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised," (4) exceptional reasons beyond the control of the parties preclude reasonable performance of the agreement, or (5) the chosen forum has decided not to hear the case.[389] Third, other member states must recognize and enforce a judgment rendered by the chosen court without any independent review of the merits of the chosen forum's judgment,[390] so long as the judgment has effect and is enforceable in the chosen forum.[391] However, the court in which recognition and enforcement is sought has various grounds upon which it may refuse to recognize or enforce a judgment of the chosen

386. *Cf.* Schulz, *supra* note 384, at 441 (stating that the HCCCA's co-Reporters are preparing "an article-by-article commentary on the new Convention which is based on the deliberations that took place during the Diplomatic Session in June 2005," and that "as soon as the Report is final, it is expected that formal consultations with a view to signature and ratification or accession will begin in the States that participated in the negotiations").

387. HCCCA, *supra* note 380, art. 5, para. 1. The HCCCA does not apply to personal injury claims or tort claims for damage to tangible property not arising from a contractual relationship. *Id.* art. 2, para. 2. An exclusive choice-of-court agreement must be in writing or in some other accessible format for the HCCCA to apply. *Id.* art. 3(c). Importantly, the HCCCA allows member states to broaden the scope of the Convention by recognizing and enforcing judgments resulting from non-exclusive choice-of-court agreements. *Id.* art. 22; *see also* Thalia Kruger, *The 20th Session of the Hague Conference: A New Choice of Court Convention and the Issue of EC Membership*, 55 INT'L & COMP. L.Q. 447, 449 (2006).

388. HCCCA, *supra* note 380, art. 5, para. 2.

389. *Id.* art. 6.

390. *Id.* art. 8, para. 2.

391. *Id.* art. 8, para. 3.

forum, such as pending appellate review of the judgment or improper service of process in the underlying proceeding.[392]

The impact of the HCCCA on forum selection in transnational litigation remains to be seen. Because of the Convention's limited scope,[393] many transnational disputes, such as product liability actions, will likely not fall under the Convention's ambit. However, with regard to transnational disputes arising from contractual relationships between business entities, the HCCCA will likely limit the effectiveness of forum shopping, because both parties to a contract must agree on a choice-of-court provision for it to possess legal authority under the contract.[394] In other words, one party to a contract will not be able to unilaterally influence the outcome of potential contractual disputes by selecting a forum that is likely to yield more favorable results.[395] In addition, in those disputes that fall within its scope, the HCCCA may render pointless the practice of shopping for a forum with favorable recognition and enforcement rules by bringing uniformity to the recognition and enforcement of foreign judgments decided under choice-of-court agreements.[396]

Finally, the HCCCA may be the first step toward achieving an international system of recognition and enforcement guidelines for all transnational disputes. Indeed, if the HCCCA is successful in streamlining the recognition and enforcement process in disputes

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392. *Id.* art. 8, para. 4; art. 9.

393. *See supra* notes 381–82 and accompanying text.

394. *See* Jeffrey Talpis, *Comments on "Dispute Resolution Process and Enforcing the Rule of Law,"* 12 SW. J. L. & TRADE AM. 409, 422 (2006) ("Permitting parties to select the forum in which to resolve disputes enables them to efficiently allocate risks and minimize potential litigation costs by reducing expense and delay, avoiding duplicative proceedings, and eliminating costly disputes over jurisdiction."); *cf.* Strauss, *supra* note 18, at 1239 (discussing the attempted Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, and stating that "[a] treaty-based system of international jurisdictional rules, while unlikely to eliminate the potential for forum shopping completely, would provide that it only occur to the extent that it is not inconsistent with the intended functioning of an ordered international system").

395. Of course, as some commentators have acknowledged, the HCCCA may apply pursuant to choice-of-court provisions that appear in adhesion contracts between businesses. *See, e.g.*, Woodward, Jr., *supra* note 341, at 27 & n.84 (noting that the HCCCA's exclusion of contracts involving "consumers" excludes "a subset of contracts far narrower than 'form' or 'adhesion' contracts"). In an adhesion contract, the party with greater bargaining power may be able to shop for the most favorable forum in which to litigate any potential contractual disputes, thereby placing the other party at a distinct disadvantage in litigation.

396. *Cf. supra* notes 15–18 and accompanying text (discussing how disuniformity of laws across different jurisdictions engenders forum shopping).

arising under contracts containing choice-of-court provisions, member nations will have even greater incentive to produce a comprehensive multilateral jurisdiction and enforcement treaty.

2. Recognition and Enforcement of Foreign Judgments in England

England is a party to a number of bilateral and multilateral treaties that govern English courts' recognition and enforcement of foreign money judgments,[397] including the Judgments Regulation[398] and Lugano Convention.[399] Because the United States is not a signatory to any of these treaties, the recognition and enforcement of U.S. money judgments in English courts is governed by English common law rules.[400]

Under the common law of England, a U.S. judgment is not entitled to direct execution in England or to registration as an English judgment.[401] Rather, a party seeking recognition and enforcement of a U.S. judgment must commence an "action on the judgment," an independent proceeding in which the English court may treat the U.S. judgment as evidence of the enforcing party's entitlement to summary judgment.[402] Once the party against whom recognition and enforcement is sought acknowledges receiving service of process, the party seeking enforcement can apply for summary judgment on the ground that the opponent cannot contest enforcement and that re-litigation of the merits is unnecessary.[403] If the English court agrees that re-litigation is not warranted, it will render a judgment based upon the U.S. judgment; the court's judgment will carry the same legal force as any other English judgment.[404]

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397. *See* Lamm et al., *supra* note 336, at 567. English courts recognize and enforce only foreign money judgments, not injunctions or orders for specific performance. *Id.* at 569.

398. *Supra* note 171.

399. *Supra* note 172.

400. Lamm et al., *supra* note 336, at 567–68. Of course, once the United States and England both ratify the HCCCA, English common law principles will no longer govern the enforcement of money judgments rendered by U.S. courts with exclusive jurisdiction pursuant to choice-of-court clauses. *See supra* Part E.1.b.

401. Lamm et al., *supra* note 336, at 568.

402. *Id.*

403. *Id.*

404. *Id.*

Perhaps the most important factor affecting the recognition and enforcement of foreign judgments in England is whether the foreign court's exercise of personal jurisdiction over the defendant comports with English law, i.e., whether the foreign court is "a court of competent jurisdiction."[405] Like the standard employed by U.S. courts under the UFMJRA, "[i]t is . . . not sufficient that the foreign court had jurisdiction under its own rules to adjudicate on the merits of the case."[406] Rather, a foreign court is a court of competent jurisdiction only if the jurisdiction exercised by the foreign court comports with English law.[407]

"'Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained.'"[408] A defendant's obligation to pay may arise in two ways: First, a defendant is obligated to pay if the foreign court was entitled to exercise jurisdiction over the defendant on a territorial basis.[409] Second, the obligation arises where the defendant consented to the foreign court's jurisdiction.[410] Under well-established English common law principles,

> [t]erritorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of status or succession governed by domicil [sic], it may exist as to persons domiciled, or who when living were domiciled, within the territory.[411]

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405. Adams v. Cape Indus. Plc., [1990] 2 W.L.R. 657, 665 (appeal taken from Eng.); *see also* Lamm et al., *supra* note 336, at 568.

406. Lamm et al., *supra* note 336, at 569.

407. *Id.*

408. *Adams*, [1990] 2 W.L.R. at 679 (quoting Williams v. Jones, (1845) 13 M. & W. 628, 633 (Eng.)).

409. *Id.*

410. *Id.*

411. *Id.* (internal quotation marks omitted) (quoting Singh v. Rajah of Faridkote, [1894] A.C. 670, 683 (P.C.) (appeal taken from India)).

Moreover, a foreign court may exercise jurisdiction over a defendant corporation where the corporation has a "definite and, to some reasonable extent, permanent place" of business in the forum.[412] The defendant's presence in the forum is determined at the time at which the defendant was served with process.[413]

With regard to jurisdictional consent, English courts will treat a foreign defendant as having consented to the jurisdiction of a foreign forum where the defendant "makes a voluntary appearance without protest in the foreign court."[414] For instance, if the defendant contests the merits of the plaintiff's claim or brings a counterclaim in the foreign proceeding, an English court will likely deem the defendant as having consented to the foreign forum's jurisdiction.[415] However,

> the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely—
>
> (a) to contest the jurisdiction of the court;
>
> (b) to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country; [or]
>
> (c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings.[416]

A defendant in a foreign proceeding may also submit to the foreign forum's jurisdiction via contractual agreement, regardless of whether the defendant takes part in the foreign proceeding.[417] "Accordingly, the jurisdiction of a foreign court over a defendant may be established, on a consensual basis, either by the defendant's

412. *Id.* at 688 (quoting Littauer Glove Corp. v. F.W. Millington, (1928) 44 T.L.R. 746, 747 (Eng.)).

413. *See id.* (citing La Bourgogne, [1899] P. 1, 12 (C.A.) (appeal taken from Eng.)).

414. *Id.* at 680.

415. Lamm et al., *supra* note 336, at 575. A defendant's submission to the jurisdiction of a foreign court in one action does not automatically confer jurisdiction over the defendant in a related action in the same forum. *See Adams*, [1990] 2 W.L.R. at 680.

416. Civil Jurisdiction and Judgments Act, 1982, c. 27, § 33 (U.K.).

417. *Adams*, [1990] 2 W.L.R. at 680.

participation in the proceedings or by the defendant's agreement to submit to the jurisdiction."[418]

The recent and much-publicized case of *Motorola Credit Corp. v. Uzan*[419] illustrates English courts' application of common law principles to the issue of recognition of U.S. judgments. In *Uzan*, the plaintiff, Motorola Credit Corporation ("Motorola") filed an action on the judgment in England, seeking to enforce a U.S. judgment in excess of two billion dollars.[420] The issue in the English proceeding was whether the U.S. court was a court of competent jurisdiction, i.e., whether the U.S. court had exercised personal jurisdiction over the defendants in accordance with English common law.[421]

In rendering its decision, the English court first determined that the U.S. court's judgment was final and conclusive.[422] The court held that the finality of the U.S. judgment was not compromised by the fact that the plaintiff's claim for punitive damages had not yet been resolved in the U.S. court, because the issue did not affect the merits of the case and Motorola was not attempting to enforce the punitive damages award.[423]

The defendants argued that the U.S. court was not a court of competent jurisdiction as a matter of English law, and that, therefore, the English court should not recognize the U.S. judgment.[424] Among other things, the defendants maintained that neither of the defendants was physically present in the United States at the commencement of the U.S. proceedings,[425] and that the U.S. court had not exercised personal jurisdiction over the second defendant on the basis of consent, but under New York's long-arm statute.[426]

The English court rejected the defendants' contentions and held that the U.S. court was a court of competent jurisdiction, and that the U.S. court's judgment was entitled to recognition by the English court.[427] With regard to the first defendant, the English court held

418. *Id.*
419. [2004] EWHC 3169 (Comm) (Eng.).
420. *Id.* at [1]–[2].
421. *See id.* at [2].
422. *Id.* at [5]–[6].
423. *Id.*
424. *Id.* at [8].
425. *Id.* at [9].
426. *Id.* at [10].
427. *Id.* at [62]–[63].

that the defendant "clear[ly] and express[ly] submi[tted] to the jurisdiction" of the U.S. court during a preliminary injunction hearing at the onset of litigation.[428] With respect to the second defendant, the English court acknowledged that by failing to raise a timely personal jurisdiction challenge in the U.S. proceedings, the defendant submitted to the personal jurisdiction of the U.S. court.[429] The English court also agreed that the second defendant submitted to the U.S. court's jurisdiction by arguing the merits of a temporary restraining order and by acquiescing to a number of the restraining order's provisions.[430] Finally, the English court rejected the defendants' argument that section 33 of the Civil Jurisdiction and Judgments Act 1982[431] precluded recognition of the U.S. judgment.[432] The court found that the defendants' actions in the U.S. proceeding went well beyond merely challenging the U.S. court's jurisdiction or protecting their assets, thus removing the defendants from the protections afforded by section 33.[433] As a result, the English court held that "not only was there submission to the New York court by both the defendants but the New York court was a competent court for the purpose of recognition of its judgment by this court as a matter of application of principles of private international law in England."[434]

England's approach to the recognition and enforcement of U.S. judgments may have a particularly substantial impact on forum selection where a U.S. court bases its exercise of personal jurisdiction on the defendant's minimum contacts with the U.S. forum and issues a default judgment against that defendant.[435] Because the minimum contacts test is a substitute for the defendant's territorial presence in the forum or consent to personal jurisdiction,[436] an English court will likely not recognize a U.S. court as a court of

428. *Id.* at [18], [20]. The court also acknowledged the existence of evidence that the first defendant had resided in New York during the U.S. proceedings. *Id.* at [21], [30]–[34].

429. *Id.* at [40]. *See generally supra* note 76 (discussing waiver of personal jurisdiction in U.S. courts).

430. *Motorola*, [2004] EWHC 3169 at [40]–[41].

431. Civil Jurisdiction and Judgments Act, 1982, c. 27, § 33 (U.K.).

432. *Motorola*, [2004] EWHC 3169 at [61].

433. *Id.* at [57]–[60].

434. *Id.* at [62].

435. For a brief explanation of the minimum contacts test, see *supra* note 56.

436. Burnham v. Superior Court, 495 U.S. 604, 620 (1990) (plurality opinion).

competent jurisdiction where the latter's exercise of personal jurisdiction is premised on the defendant's contacts with the U.S. forum. Consequently, a defendant with substantial assets in England may be able to insulate those assets from an adverse U.S. judgment if the U.S. forum cannot exercise jurisdiction over the defendant on the basis of territorial presence, and the defendant does not consent to the court's jurisdiction. Indeed, as *Motorola* demonstrates, a defendant against whom a civil action is filed in a U.S. court may be substantially better off not appearing in the U.S. proceeding, except to levy a personal jurisdiction challenge, if the defendant's assets are located primarily in England and the defendant does not reside in the United States. If the English court does not recognize a default judgment rendered by a U.S. court on the ground that the U.S. court is not a court of competent jurisdiction, the plaintiff may be forced to file a separate action in England. Given the distinct litigation advantages that U.S. courts may afford,[437] adjudication in England may be particularly advantageous to some defendants. Moreover, like plaintiffs whose U.S. cases are dismissed under the doctrine of forum non conveniens, some plaintiffs may simply be unable or unwilling to file suit in England, thus allowing defendants with substantial assets in England to insulate themselves from liability altogether. Plaintiffs who intend to file suit in the United States against such defendants should therefore ensure that the U.S. court can exercise personal jurisdiction over the defendant on grounds other than the defendant's minimum contacts in the forum. Plaintiffs who are unable to do so should strongly consider filing suit either in England, or in a country that is a signatory to a treaty on jurisdiction and enforcement to which English courts are bound.

F. Conclusion

The amount of transnational litigation occurring in U.S. and English courts is likely to increase in the coming decades. Accordingly, issues related to jurisdiction, recognition, and enforcement will continue to intersect at the crossroads of transnational disputes, and factors such as sovereignty and comity will almost certainly influence how courts go about rendering decisions in transnational cases. Until the United States becomes a

437. *See* discussion *supra* Part B.2.

party to a comprehensive multilateral jurisdiction and enforcement treaty, differences among courts will continue to have some, and perhaps even a substantial, impact on the outcome of transnational disputes. As a result, practitioners should be aware of the advantages and disadvantages afforded by the various fora that may adjudicate a particular action, and should consider these factors when formulating their overall litigation strategies.