1997

Discovery in International Legal Developments Year in Review: 1996

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he termed a "systemic interest" in preserving and furthering the "high level of international cooperation and a significant degree of harmonization of the laws of the two countries."[118]

Having first completed this comity analysis, Judge Cardamone then addressed the plaintiffs' argument that, under *Hartford Fire Insurance*, the use of comity was improper because English law did not require anything that violated American law. A strict interpretation of *Hartford Fire Insurance* would have suggested that no true conflict existed since English law did not *mandate* the distribution of the debtor's assets in a particular way, but simply prescribed rules by which the assets should be distributed if that debtor chose to petition the court for avoidance of the transfers. Recognizing that such a literal interpretation would completely undermine the purpose of the English law rule, Judge Cardamone found that a conflict did exist because it was not possible to distribute the debtor's assets in a manner consistent with the English and American rules. Equally importantly, Judge Cardamone took advantage of Justice Souter's advocacy in *Hartford Fire Insurance* of the use of international comity in the event of a true conflict to justify his prior use of an international comity analysis.[119]

Judge Cardamone's approach thus restores common sense to an area that has been in a state of confusion since *Hartford Fire Insurance.* Only a system of international judicial cooperation can efficiently resolve the issues raised by transactions affecting the markets of several different countries. Hopefully, such judicial cooperation is simply a first stage towards establishing a set of international principles on competition law regulation.[120] Ultimately, what is required is the convergence of competition rules within the framework of an organization, such as the World Trade Organization, capable of enforcing those rules.[121] There are some draft proposals for the convergence of competition rules, such as The Draft International Antitrust Code prepared by a group called the International Antitrust Code Working Group.[122] However, no such proposal can be taken seriously if the U.S. courts do not first take the lead in adopting a cooperative approach to the extraterritorial application of its competition laws as exemplified in *In re Maxwell Communication.*

V. Discovery*

A. Introduction

American procedure regarding international discovery stems from 28 U.S.C. §§ 1781-83, and Federal Rule of Civil Procedure (FRCP or Rule) 28(b). Broadly speaking, these rules are concerned with the mechanics of assessing requests for discovery in the United States to assist a proceeding in a foreign country and attempts by one or more parties before a U.S. court to obtain evidence located in another country.

118. *Id.* at 1053.

119. *Id.* at 1050.

120. As Judge Cardamone recognized: "[C]omity analysis admittedly does not yield the commercial predictability that might eventually be achieved through uniform rules, it permits the courts to reach workable solutions and to overcome some of the problems of a disordered international system." *Id.* at 1053.

121. *See* Mitsuo Matsushita, *Cultural Conceptions of Competition: Competition Law and Policy in the Context of the WTO System,* 44 DePaul L. Rev. 1097 (1995) (advocating formulation of a set of principles for competition policy into a code under auspices of WTO, at least in areas exhibiting strong need for convergence).

122. 65 *Antitrust & Trade Reg. Rep.* (BNA) No. 1628, S-20, 259 (Special Supp. August 19, 1993).

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B. Discoverability in Foreign Jurisdictions

Regarding assistance to foreigners seeking discovery in the United States, the Circuits are split as to whether material sought through section 1782 must be "discoverable" in the country in which the underlying proceeding is taking place.[123] Numerous courts have addressed this question in the last year.

1. *In re Letter of Request from the Amtsgericht Ingolstadt, Federal Republic of Germany*[124] *(United States v. Morris)*

The Fourth Circuit touched briefly upon the issue of discoverability in *In re Letter of Request from the Amtsgericht Ingolstadt, Federal Republic of Germany*.[125] Regarding a request for assistance in obtaining a blood sample in connection with a paternity suit, the Court stated that discoverability concerns are not implicated when the request comes from a foreign court since that court is the arbiter of what is discoverable under its own rules.[126]

2. *In re Application of Alvaro Noboa*[127]

The Second Circuit, in contrast with other circuits, has held that "section 1782 does not impose the requirement that the material sought in the United States be discoverable under the laws of the foreign jurisdiction."[128] In *In re Application of Alvaro Noboa*, a district court in the Southern District of New York stayed discovery requests arising out of a foreign action.[129] The court based its ruling on logistical concerns such as the imminent addition of new parties and the risk of duplication of depositions. However, the court explicitly stated that absent clear guidance from the foreign jurisdiction, it would not be concerned with whether such discovery would be allowable under that jurisdiction's rules.

3. *In re Application of Mats Wilander and Karel Novacek*[130]

Based on dicta in Third Circuit opinions and the "weight of authority from other courts of appeals," a district court in the Eastern District of Pennsylvania concluded, in *In re Application of Mats Wilander and Karel Novacek*, that "the Third Circuit would likely find a discoverability requirement inherent in § 1782."[131]

4. *In re Honda American Motor Co, Inc. Dealership Relations Litigation*[132]

In *In re Honda American Motor Co, Inc. Dealership Relations Litigation*,[133] a court of the District of Maryland addressed the issue of whether compelling the deposition in the United

123. *See In re* Application of Mats Wilander and Karel Novacek, No. 96 Misc. 98, 1996 U.S. Dist. LEXIS 10357, n.4 (E.D. Pa. July 24, 1996).

124. 82 F.3d 590 (4th Cir. 1996).

125. *Id.*

126. *Id.* at 592.

127. No. 3:96MC34 (JBA), 1996 WL 648885 (D. Conn. Oct. 23, 1996).

128. *Id.* at *4 citing *In re* Application of Aldunate, 3 F.3d 54, 58 (2d Cir. 1993). The Second Circuit has distilled § 1782 into the following basic requirements: (1) that the person from whom discovery is sought resides in (or is found) in the district of the district court to which the application is made; (2) that the discovery be for use in a proceeding before a foreign tribunal; and (3) that the application be made by a foreign or international tribunal or any interested person. *See, e.g., In re* Esses, infra note 145.

129. Misc. Nos. M18-302, M19-111, 1995 U.S. Dist. LEXIS 14402 (S.D.N.Y. Oct. 3, 1995).

130. 168 F.R.D. 535 (D. Md. 1996).

131. *Id.* at *11.

132. No. 96 Misc. 98, 1996 U.S. Dist. LEXIS 10357 (E.D. Pa. July 24, 1996).

133. *Id.*

States of the citizens of a foreign nation, in this case Japan, could be considered an infringement of that nation's sovereignty. The court reasoned that discovery requests only implicate foreign sovereignty in certain contexts, such as compelling discovery on foreign soil, but that compelling discovery on foreign nationals on American or neutral soil does not raise issues of comity.[134] Consequently, a full comity analysis was unnecessary and depositions could proceed.

5. *Elm Energy and Recycling (U.K.) Ltd. v. John Basic Sr.*[135]

A district court in the Eastern District of Illinois stated in *Elm Energy and Recycling (U.K.) Ltd. v. John Basic Sr.*,[136] that the Seventh Circuit has not yet addressed the applicability of the rule that U.S. courts must assess the discoverability of the request under the law of the forum of the proceeding. "However, a plain reading of the statute does not require a district court to explore whether the discovery is allowed in the foreign forum."[137] Moreover, the court concluded that discovery was allowable with certain modifications based on two considerations: first, the Second Circuit and a district court in the Northern District of Illinois[138] have held that discovery could proceed at the district court's discretion and second, 26(b)(1) "indicates that the court should be permissive."[139]

C. The Existence of a Foreign Proceeding

Another topic related to Section 1782 is whether or not the American court recognizes the existence of a foreign "proceeding."

1. *Lancaster Factoring Co. Ltd. v. Mangone*[140]

The Second Circuit stated in *Lancaster Factoring Co. Ltd. v. Mangone*[141] that the term "proceeding" has been given an increasingly broad reading by courts. The Second Circuit here reiterated its interpretation of section 1782 "to mean a proceeding in which an adjudicative function is being exercised" and went on to conclude that a bankruptcy proceeding clearly falls within this area.[142]

2. *In re Application of Mats Wilander and Karel Novacek*[143]

The Eastern District of Pennsylvania, however, found in *In re Application of Mats Wilander and Karel Novacek*[144] that nothing in the statute or legislative history of section 1782 suggests that completely nongovernmental private agencies such as the Appeals Committee of the International Tennis Federation meet the requirements of being a tribunal.

134. *Id.* at 540.
135. No. 96-C-1220, 1996 U.S. Dist. LEXIS 15255 (E.D. Ill. Oct. 8, 1996).
136. *Id.*
137. *Id.* at *27.
138. *See* Verson Int'l Ltd. v. Allied Prod. Corp., No. 87C-7549, 1987 WL 17837 (N.D. Ill. Sept. 25, 1987).
139. *Elm Energy*, 1996 U.S. Dist. LEXIS 15255 at *26-*30.
140. 90 F.3d 38, 41 (2d Cir. 1996).
141. *Id.*
142. *Id.* at 41-42.
143. No. 96 Misc. 98, 1996 U.S. Dist. LEXIS 10357 (E.D. Pa. July 24, 1996) at *6.
144. *Id.* at *6.

D. Interested Parties and Their Rights

1. *In re Esses*[145]

The Second Circuit addressed the issue of who is an "interested person" in *In re Esses*,[146] a proceeding arising out of a familial dispute over the intestate death of a brother. The court found that the decedent's brother was an interested party due to his involvement in a proceeding in which he sought to be named as the estate's administrator. The court rejected an argument that the living brother should not be considered an interested party because, if he was considered an interested party, the result would increase inefficiency and perhaps prejudice. The court stated that "such arguments are misplaced: they go to the possible consequences of finding [the living brother] . . . within the reach of the statute, not to whether he is in fact within the reach."[147] Thus, while questions of effect "are properly dealt with under the statute by the district court in the exercise of its discretionary authority to fashion discovery orders,"[148] such questions should not be part of an analysis of who is or is not an interested party.

2. *Matos v. Reno*[149]

In *Matos v. Reno, et al.*,[150] a district court in the Southern District of New York found that although a party may be an interested party and consequently have standing to move to quash a subpoena, that right provides no basis for a suit against the Attorney General or a United States Attorney to enjoin them from cooperating with a foreign investigation.[151]

E. Obtaining Evidence from Foreign Countries

1. *United States v. Ruiz-Castro*[152]

Finally, in *United States v. Ruiz-Castro*,[153] the Tenth Circuit affirmed the denial of a telephonic deposition of a criminal defendant's parents, who were located in Mexico. The court noted the proposal did not satisfy Federal Rule 28(b) because it did not show that the father would testify before a person authorized to administer oaths.

2. *Alcan International, Ltd. v. The S.A. Day Mfg. Co.*[154]

Some cases this past year considered various issues in attempting to obtain evidence from overseas. In *Alcan International, Ltd., et al. v. The S.A. Day Mfg. Co.*, a district court in the Western District of New York examined whether information sought from a corporate party's foreign affiliate was under that party's "custody and control" so as to be discoverable under the Federal Rules. The district court stated that "the Federal Rules of Civil Procedure rather than the more complicated procedures of the Hague Convention, generally apply to the discovery of information in the custody and control of a party's foreign affiliate."[155] The court concluded

145. No. 96-9211, 1996 WL 692402 (2d Cir. Dec. 4, 1996).
146. *Id.*
147. *Id.* at *3.
148. *Id.*
149. No. 96 CIV 2974, 1996 WL 467519 (S.D.N.Y. Aug. 16, 1996).
150. *Id.*
151. *Id.* at *3.
152. 92 F.3d 1519 (10th Cir. 1996).
153. *Id.* at 1532-33.
154. No 94-CV-286C(H), 1996 U.S. Dist. LEXIS 15928 (W.D.N.Y. Sept. 13, 1996).
155. *Id.* at *7 (citing cases).

that "[d]efendant cannot be allowed to shield crucial documents from discovery by parties with whom it has dealt in the United States merely by storing them with its affiliate abroad."[156]

3. *Popular Imports, Inc. v. Wong's Int'l, Inc.*

A federal court in the Eastern District of New York considered what the proper procedure would be if a U.S. court allows depositions to be taken overseas pursuant to an underlying action in the United States, and on a later appeal, the appellant attacks the validity of the depositions. The court in *Popular Imports, Inc. v. Wong's Int'l, Inc.*[157] concluded that, if the objection to the form of the (in this case) Chinese depositions are not raised in the first instance when the court is deciding whether or not to allow such discovery, objections to form may not be brought up for the first time on appeal.[158]

VI. Personal Jurisdiction*

A. Introduction

No monumental developments appeared in the law of jurisdiction in 1996. Still, smaller-scale developments of interest continue, most notably in the areas of nationwide service of process and national contacts theory.

B. Nationwide Service/National Contacts

Considerable litigation has arisen in 1996 where plaintiffs have invoked nationwide service of process provisions in a cause of action arising under federal law and have asserted as a jurisdictional basis a foreign defendant's contacts with the entire United States. Plaintiffs may ground such assertions of jurisdiction on the service provisions of a substantive statute[159] or upon Federal Rules of Civil Procedure 4(k)(2),[160] adopted in 1993 at the prompting of the Supreme Court[161] to "correct a gap in the enforcement of federal law."[162]

1. *Bank Brussels Lambert v. Credit Lyonnais (Suisse)*[163]

In *Bank Brussels Lambert v. Credit Lyonnais (Suisse)*, a creditors' action for fraud, conversion, and civil RICO violations, the court found subject matter jurisdiction based on the RICO claim. Despite RICO's provision for nationwide service of process, however, the court based its analysis of personal jurisdiction on Rule 4(k)(2).[164] On Credit Lyonnais's motion to dismiss,

156. *Id.* (citation omitted).
157. 166 F.R.D. 276 (E.D.N.Y. 1996).
158. *Id.* at 278.
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159. Examples are the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1965(d), and federal securities law, 15 U.S.C. §§ 77v(a), 78aa.
160. Rule 4(k)(2), entitled Territorial Limits of Effective Service, provides:
> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

161. *See* Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97 (1987).
162. Fed. R. Civ. P. 4(k)(2) advisory committee's note.
163. 192 B.R. 73 (Banks. S.D.N.Y. 1996).
164. *Id.* at 79.