Dear Members of the International Arbitration, International Litigation, and International Mediation Committees of the Section of International Law:

We are pleased to announce that our Newsletter is starting a new feature, a series entitled “Explaining to the Non-US Litigant.” Our Editorial Board recognizes that many of our members practice outside of the United States and/or did not receive their legal training in the United States. In order to enhance their understanding of “uniquely” American concepts and procedures, starting with this edition, every edition of our Newsletter will include one article that focuses on a uniquely American litigation procedure/concept.

The first article in this series is by Ed Mullins (Miami), and it deals with removal to federal court.

We anticipate that future articles in this series will address the following:
A. Litigation holds/Electronic discovery;
B. Daubert motions;
C. Section 1782 discovery;
D. Joint defense agreements;
E. Nondisclosure agreements (in litigation);
F. 30(b)(6) depositions
G. MDL proceedings;
H. Exceptions to the “American Rule” – When (generally) will attorneys’ fees be available to the prevailing party?

Some, but not all, of the above topics have already been assigned to specific authors. If you are interested in possibly writing on one of these topics, please contact Sylvana Sinha, the Editor from the International Litigation Committee.

Guy S. Lipe
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Editor-in-Chief
Hague Convention on Choice of Court Agreement Comes Into Effect

By Theodore J. Folkman

The Hague Convention on Choice of Court Agreement, which was drafted just more than ten years ago, finally came into effect on October 1, 2015. The Convention, sometimes referred to as “COCA,” is a rough analogue to the New York Convention. Just as the New York Convention allows parties to choose to bind themselves to arbitration and generally requires states to enforce the parties’ agreement and recognize the resulting award when they have done so, COCA allows parties to choose to commit themselves to litigation in a particular court in civil and commercial matters and generally requires states to enforce the parties’ commitment and recognize the resulting judgment when they have done so.

The Convention has three main operative parts.

• First, when the parties designate the courts of a contracting state in an exclusive choice of court agreement, the Convention provides that those courts have jurisdiction to decide the dispute to which the agreement applies, unless the agreement is void under the law of that state. However, the Convention does not interfere with the manner in which each state allocates jurisdiction among its courts. Thus, for example, the Convention will not (and could not, for constitutional reasons) vest a federal court in the United States with subject-matter jurisdiction when none existed. Under the Convention, the chosen court cannot decline to exercise jurisdiction on the grounds that the dispute should be decided in the courts of some other state.

• Second, courts in contracting states other than the chosen court must suspend or dismiss proceedings that should have been brought in the chosen court, with exceptions in unusual cases such as manifest injustice, lack of capacity to contract, and so forth.

• Third, when the chosen court has rendered a judgment, the courts of other contracting states generally must recognize and enforce it without reviewing the merits of the decision. There are exceptions to the rule requiring recognition and enforcement in several cases. Notably, in cases where the judgment was obtained by fraud “in connection with a matter of procedure,” the defendant was not properly notified of the action, recognition and enforcement would be manifestly incompatible with public policy (as when, for example, the proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness), and the like.

Mexico, the first state to adopt COCA, acceded to it in 2007. The United States and the European Union both signed the Convention in early 2009. The EU did not approve the Convention until June 2015, and the United States still has not ratified it. As a result of the EU’s ratification, COCA is now in force between Mexico and the EU (except for Denmark). However, because Europe has its own mechanism for enforcement of choice of court agreements, namely the Recast Brussels I regulation, the Convention is not likely to see much use until it becomes effective in other states.

Prospects for U.S. ratification of COCA are murky in the short term, because the United States will have to enact implementing legislation, and the form that legislation should take has gotten caught up in the politics of federalism. There are three basic views. One view is that Congress should enact implementing legislation similar to Chapter 2 of the Federal Arbitration Act with the aim of federalizing the law of judgment recognition and enforcement in cases subject to the Convention. This view is based on the strong analogy between COCA and the New York Convention. Another view is that the Uniform Law Commission should promulgate a model act for enactment by each of the states. This view is based on the traditional primacy of state law on the issues of recognition and enforcement of foreign judgments. There are various “cooperative federalism” approaches, as well. One of the main difficulties with the “cooperative

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federalism” approaches, which would involve both state and federal implementing legislation, is the difficulty of deciding the extent to which the federal statute should preempt the state statute. It is somewhat striking that ratification has been easier in the EU than in the U.S., given our longer experience of federalism and our centuries-old constitutional assignment of the treaty-making power to the national government. Once these federalism issues get worked out, however, prospects for consent to ratification in the Senate are said to be favorable.

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Removing the Mystery of Removal

By Edward M. Mullins and Sujey S. Herrera

I. Introduction

The United States judicial system is a dual federal system, whereby each state has ceded certain jurisdictional authority to the federal courts through Article III, Section 2 of the U.S. Constitution. Thus, although state courts are courts of general jurisdiction, i.e., they have the authority to hear all types of cases, federal courts are courts of limited jurisdiction. Accordingly, federal courts hear only those cases that the Congress of the United States has authorized them to hear through various statutes granting jurisdiction to district courts under specifically enumerated circumstances pursuant to the Constitution. The most common are the Federal Subject Matter Jurisdiction Statute and the Diversity Jurisdiction Statute, explained below.

Recognizing that certain causes of action filed in state court arising from disputes can implicate federal court jurisdiction, the federal government has developed a procedure for defendants to transfer or “remove” a case from state to federal courts. However, since “[r]emoval is a statutory privilege, rather than a right, [] the removing party must comply with the procedural requirements mandated in the statute when desirous of availing the privilege.”

Thus, for example, to remove an action from state to federal court, the action must be removed within 30 days of the receipt of the initial pleading or “an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable,” unless a statute provides a different period for the filing of the petition for removal. Receipt is defined as service of the actual complaint.

Additionally, in multi-defendant cases, all of the properly joined and served defendants must consent to removal at the time of removal. If a defendant is fraudulently joined (a sham claim to defeat jurisdiction) or not served, that defendant’s consent is not necessary for removal to be effective. However, a later-served, non-fraudulently joined defendant must consent to removal within 30 days of service, and if a later-served defendant files a notice of removal, earlier-served defendants may consent to the removal even though they did not previously initiate or consent to removal.

This article will address certain considerations that should be analyzed before a case is removed and briefly discuss certain other statutes that could be used by defendants to remove the cases against them to federal court in international cases.

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2 U.S. Const., Art. III, §§ 1-2
7 Jerrell v. Kardoes Rubber Co., 348 F. Supp. 2d 1278, 1283 (M.D. Ala. 2004); see also Scimone v. Carnival Corp., 720 F.3d 876, 882 (11th Cir. 2013) (“when we evaluate whether the particular factual circumstances of a case give rise to removal jurisdiction, we strictly construe the right to remove and apply a general presumption against the exercise of federal jurisdiction, such that all uncertainties as to removal jurisdiction are to be resolved in favor of remand.” (citing Russell Corp., 264 F.3d at 1050)).
11 Emrich v. Touche Ross & Co., 846 F.2d 1190, 1193 (9th Cir. 1988) (“under 28 U.S.C. § 1446(a), all defendants in a state action must join in the petition for removal, except for nominal, unknown or fraudulently joined parties. ... This general rule applies, however, only to defendants properly joined and served in the action.”).
II. Considerations that Should be Taken into Account before Removing

Before a removal petition is filed, there is one very important question that every defendant must ask: Do I want to be in federal court? The answer to this question will be different for every defendant and will depend on the particular facts surrounding the dispute.

Defendants have touted federal court as the preferred forum when defendants would like, for example, to eliminate perceived plaintiff bias in a plaintiff’s home state; have their cases resolved quickly; avail themselves of defined federal procedures which might expedite the resolution of the dispute; minimize runaway juries; and reduce litigation costs. Other factors include better resources in federal court (federal law clerks) and, often, a more favorable standard for summary judgment.

However, at least one of these—the reduced litigation costs consideration—can backfire since the cost of litigating a case in federal court can be staggering if taken to trial. Accordingly, defendants should consider the increased cost possibility when removing. Furthermore, whether a case will be faster in federal court varies widely by the location. For example, a case in the Eastern District of Virginia will move very quickly, while cases in the federal courts of New York, especially the Western District, are much slower.

Another consideration that defendants should take into account before removing is whether there is negative law on a known and determinative point of law in the state or federal jurisdiction. For example, defendants may want to give pause before removing if the corresponding federal trial or appellate court has made a definitive ruling to a point of law in the case that goes against the defendants’ theory of the case. Likewise, if there has been a positive determination (for the defendants) by the corresponding federal court, removal would be advisable.

Another consideration is the judge assigned to the state action. Before removing, defendants know exactly who the state judge adjudicating their case will be. This gives defendants an opportunity to investigate that judge and, potentially, the judge’s prior rulings on similar issues, if known. On the other hand, upon removal, defendants will not know to which federal judge their case will be assigned and, thus, will not be able to gauge whether that judge previously has ruled on similar issues.

Therefore, the decision to remove to federal court is not simply based on whether there is a basis to do so. It is a strategic decision that clients should analyze with counsel for a determination of its potential benefits and disadvantages.

Assuming removal to federal court is considered beneficial, the following section sets out certain bases to remove to federal court.

III. Bases for Removal from State Court to Federal Court

A. Diversity Jurisdiction

Federal district courts have original jurisdiction over causes of action between citizens of different states pursuant to the Diversity Jurisdiction Statute, where the amount in controversy exceeds $75,000, exclusive of interest and costs, and is between:

1. citizens of different States;
2. citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state . . . who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;
3. citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
4. a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

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16 Rice, supra note 13, at 443.
A full discussion of this statute is beyond the scope of this article. Generally, diversity jurisdiction is available when all plaintiffs are from different states than all defendants (for a corporation, that means the states of incorporation and the principal places of business18) — known as “complete diversity”;19 foreign parties are adverse to domestic parties; or domestic parties are completely adverse from each other and there are also foreign parties to the dispute.

However, for a case to be removable pursuant to the Diversity Jurisdiction Statute, no defendant can be a resident of the state where the action was brought (“Home State Rule”).20 However, a district court will retain jurisdiction if the plaintiff did not object to the defendant being a resident of the forum state and seek remand within 30 days.21 In contrast, unlike with the “Home State Rule,” complete diversity is a subject matter jurisdictional requirement that cannot be waived, even if the plaintiff does not seek remand.22

Another particularity of the Diversity Jurisdiction Statute is that at least one of the parties must be a citizen of a U.S. state.23 Thus, in a single plaintiff, single defendant case, if both parties are aliens, then the case cannot be removed. However, if there are multiple plaintiffs and defendants, and at least one of the parties is a U.S. citizen, removal is still feasible provided there is complete diversity.24 For purposes of the complete diversity analysis, the existence of aliens on both sides of the dispute does not defeat diversity jurisdiction as long as there is otherwise complete diversity.25

Finally, to invoke the Diversity Jurisdiction Statute, diversity must exist both at the time of the filing of the state court action and at the time of removal.26

**B. Federal Subject Matter Jurisdiction Statute**

Generally, federal subject matter jurisdiction exists when a claim is based upon a federal statute; these claims are known as “federal question” claims.27 Some common federal statutes include the Sherman Act (antitrust), the Patent Act, the Copyright Act, the Lanham Act (federal trademark), Section 1983 (civil rights), and Title VII (federal employment claims).

Some federal question claims are particularly relevant for international disputes. Thus, for example, federal district courts have original jurisdiction over causes of action arising out of the Foreign Sovereign Immunities Act (claims against foreign governments or their agents and instrumentalities),28 the Edge Act (international banking), and cases involving international arbitration.30

However, it should be noted that plaintiffs, as the masters of their complaint, can avoid federal subject matter jurisdiction by not bringing any cause of action under these federal statutes or seeking a remedy pursuant to these statutes (“Well-Pleaded Complaint Rule”).31 For example, if a plaintiff formulates a complaint in such a way as to claim only for acts, omissions, and remedies arising under state law, removal can be avoided. If the claim is completely preempted by federal law, such as copyright infringement, however, the Well-Pleaded Complaint Rule is not a defense.32

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18 This rule applies only to corporations. For partnerships and limited liability companies, the courts look at the citizenship of the members. *Rolling Greens MHP, L.P. v. Comcast SCH Holdings LLC*, 374 F.3d 1020, 1022 (11th Cir. 2004).
21 28 U.S.C. § 1447(c); *Plunket Inc. v. TBC Retail Grp., Inc.*, No. 13-81026-CIV, 2013 WL 5863571, at *2 (S.D. Fla. Oct. 31, 2013) (citing circuit court of appeals cases that have ruled that “[a] plaintiff may either waive the procedural defect stemming from a resident defendant’s removal or may file a motion to remand within 30 days of removal.”).
22 *Probus v. Charter Commun’s, LLC*, 234 F. App’x 404, 406 (6th Cir. 2007) (“no plaintiff can ‘create’ diversity jurisdiction by failing to move to remand when it is clear that complete diversity does not exist!”) (internal citations omitted).
23 *Sanfeliz v. Bank of Nova Scotia*, 74 F.3d 358, 358 (1st Cir. 1994) (“at least one of the parties must be a citizen of the United States”).
25 See, e.g., *Zenith Elec. Corp. v. Rimball Intl Mfg., Inc.*, 114 F. Supp. 2d 764, 768 (N.D. Ill. 2000) (“virtually every authority that has construed § 1332(a)(3) has held that the presence of aliens as additional parties on both sides of the action does not destroy diversity jurisdiction (provided there are diverse domestic citizens on both sides of the action who are legitimately interested parties in the dispute”).
26 *Kellam v. Keith*, 144 U.S. 568 (1892) (it must affirmatively appear from the removal petition, or elsewhere in the record that diversity existed at the commencement of suit, not merely at the time of removal).
27 28 U.S.C. § 1331 (“district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).
30 9 U.S.C. §§ 201 et seq.
The Foreign Sovereign Immunities Act ("FSIA") “governs all litigation in both state and federal courts against foreign states and governments, including their agencies and instrumentalities.” The FSIA recognizes immunity for “public acts, that is to say, acts of a governmental nature typically performed by a foreign state, but not for acts of a private nature even though undertaken by a foreign state.”

Accordingly, section 1441(d) grants federal district courts subject matter jurisdiction over “actions brought in a State court against a foreign state.” Specifically, to remove under the FSIA, a defendant must show that: (1) the action is of a civil nature; (2) the action is against a foreign state as defined in 28 U.S.C. § 1603(a); and (3) the court to which the action is being removed is in the district and division within which the state action is pending.

For purposes of the second jurisdictional element, the FSIA defines a “foreign state” as a “political subdivision[s] of a foreign state or an agency or instrumentality of a foreign state.” In turn, an “agency or instrumentality of a foreign state” is defined in subsection (b) as “any entity” that:

1. is a separate legal person, corporate or otherwise, and

2. is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

Further, the defendant state does not have to qualify as a “foreign state” at the time suit is filed. A final consideration that defendants should keep in mind when deciding whether to remove pursuant to the FSIA is that there are no juries in any FSIA action.

ii. Edge Act

The Edge Act “provide[s] for the establishment of international banking and financial corporations operating under Federal supervision with powers sufficiently broad to enable them to compete effectively with similar foreign-owned institutions in the United States and abroad” and to “facilitate and stimulate the export of United States goods, wares, merchandise, commodities, and services to achieve a sound United States international trade position.”

In connection with this, Congress has provided federal courts non-exclusive jurisdiction over suits brought against national banks in the United States that involve “international or foreign banking.”

Under the Edge Act, three elements must be satisfied for a district court to have jurisdiction: (1) there has to be an action that is of a civil nature; (2) at least one of the parties has to be a federally chartered corporation; and (3) the suit had to have arisen out of either international banking or financial operations.

The first and the third jurisdictional elements are relatively uncontroversial. With respect to the second jurisdictional element, however, issues have arisen in connection with successor entities that are not federally

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32 Strong v. Telecronics Pacing Sys., Inc., 78 F.3d 256, 259 (6th Cir. 1996) (A corollary of the well-pleaded complaint rule, the 'complete preemption' doctrine, holds that when Congress intends the preemptive force of a statute to be so extraordinary that it completely preempts an area of state law, 'any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.' . . . Currently, the Supreme Court has found only two federal statutes to have this broad preemptive scope: § 301 of the Labor Management Relations Act, . . . and § 502(a)(1)(B) of the Employee Retirement Income and Security Act..) (internal citations omitted).
35 Id. at 1-2 (citing Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1026 (9th Cir. 2010).
chartered banks themselves. In this factual circumstance, the courts have determined that a successor to a federally chartered bank that is not itself federally chartered cannot invoke the Edge Act. 46

Additionally, any defendant seeking to invoke the Edge Act should consult the case law in their jurisdiction to determine the time limit for filing for removal. Specifically, section 632 provides that a defendant may remove the action to a federal district court “at any time before trial.” Some courts have interpreted this to supplant the 30-day requirement of removal from service in 28 U.S.C. § 1446(b)(1).47 Even courts that have held that section 632 supplants the 30-day notice requirement hold that service removal must be accomplished before there is a motion on the merits.48

ii. International Cases Under the Federal Arbitration Act 49

The Federal Arbitration Act (“FAA”) was enacted “to overcome judicial resistance to arbitration . . . and to declare ‘a national policy favoring arbitration’ of claims that parties contract to settle in that manner.”50 The FAA itself is separated into three (3) chapters. The first chapter governs arbitration agreements in “maritime transaction[s]” and transactions “involving commerce.”51 The second chapter provides for the enforcement by U.S. courts of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), which the United States has signed and ratified.52 Finally, Chapter 3 provides for the enforcement by U.S. courts of the Inter-American Convention on International Commercial Arbitration of January 30, 1975, which the United States also has signed and ratified.53

Thus, defendants can rely on the FAA to remove their cases from state to federal court where they are being sued upon a contract containing an arbitration provision and the contract involves interstate commerce (Chapter 1) and is either between parties from States that are signatories to the New York Convention or involves performance in a State signatory (Chapter 2);54 or between parties from States that are signatories to the Inter-American Convention or involves performance in a State signatory (Chapter 3).

To effectuate the purpose of the FAA, courts have interpreted removal under section 205 broadly to permit removal when arbitration agreements falling under the New York Convention could “conceivably” affect the outcome of the plaintiff’s case.55 The FAA, however, does not create subject matter jurisdiction. Rather, to be able to remove the action, there must be an independent jurisdictional basis to do so.56 Thus, only cases involving international arbitration can be removed solely due to the fact that the matter involves arbitration.

Like the Edge Act, there is a split of authority as to whether removal must be sought within 30 days or whether it can be sought at any time before trial. The majority view is that removal can be sought any time before trial,57 but in the event federal jurisdiction is sought to compel arbitration, delays in seeking removal have been interpreted by courts as a waiver of the right to seek arbitration.58

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46 Creaciones Con Idea, S.A. de C.V. v. Mashreqbank PSC, 232 F.3d 79, 82 (2d Cir. 2000) (“statute is clear in limiting its reach to cases in which a federally chartered corporation is a ‘party’”).

47 Hill v. Citicorp, 804 F. Supp. 514, 515-16 (S.D.N.Y. 1992) (“[T]he time limit set forth in Section 632 ‘before the trial,’ would be rendered almost meaningless if the thirty-day limit from Section 1446 were incorporated.”)

48 Aktiebolaget Svenska Handelsbanken v. Chase Nat’l Bank, 69 F. Supp. 833, 834 (S.D.N.Y. 1947) (ruling on motion for judgment on the pleadings was found equivalent to trial for purposes of the Edge Act).

49 9 U.S.C. § 1 et seq.


55 Beiser v. Wydey, 284 F.3d 665 (5th Cir. 2002) (“whenever an arbitration agreement falling under the Convention could conceivably affect the outcome of the plaintiff’s case, the agreement ‘relates to’ [sic] the plaintiff’s suit”).

56 556 U.S. at 59.
As major world economies continue to globalize, cross-border insolvencies have become more prevalent. Since its passage in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act, Chapter 15 of the United States Bankruptcy Code has become a useful tool for foreign debtors to seek assistance of the United States courts and, ultimately, protect their assets located within the United States. As a threshold requirement for obtaining judicial assistance pursuant to Chapter 15, a foreign representative of the foreign debtor must obtain an order granting recognition of a foreign proceeding. This article discusses the fundamentals of the Chapter 15 recognition process.

In an effort to modernize and harmonize cross-border insolvencies throughout the world, in 1997, the United Nations Commission on International Trade Law adopted the Model Law on Cross-Border Insolvency (the “Model Law”). The Model Law offers guidance and solutions for foreign insolvency proceedings through their recognition by other countries’ courts, cross-border cooperation, and coordination of concurrent insolvency proceedings in various countries. The following countries have adopted the Model Law: Australia, British Virgin Islands, Canada, Chile, Colombia, Greece, Japan, Mauritius, Mexico, Montenegro, New Zealand, Philippines, Poland, Republic of Korea, Romania, Serbia, Seychelles, Slovenia, South Africa, Uganda, United Kingdom, United States, and Vanuatu.

Chapter 15 adopted and implemented virtually all of the substantive provisions of the Model Law. Chapter 15’s main objectives are to advance:

(i) cooperation between United States and foreign courts;

(ii) greater legal certainty for trade and investment;

(iii) efficient administration of cross-border insolvencies that protect the interests of stakeholders;

(iv) protection and maximization of the value of foreign debtors’ assets; and


The threshold requirements for commencing a Chapter 15 case are the existence of a pending foreign insolvency proceeding, and a duly authorized representative of that foreign proceeding seeking recognition of that proceeding in the United States. See 11 U.S.C. § 1517. Often, the authorized foreign representative is a critical player.

57 See, e.g., Dale Metals Corp. v. KIWA Chem. Indus. Co., 442 F. Supp. 78, 81 (S.D.N.Y. 1977) (“the notion that the [30-day] time provision of 28 U.S.C. § 1446(b) applies is totally without merit.”); Sheinberg v. Princess Cruise Lines, Ltd., 269 F. Supp. 2d 1349, 1352 (S.D. Fla. 2003) (“the thirty-day time limit … [of] Section 1446(b) … does not apply to actions removed pursuant to the Convention.”); Dahiya v. Talmidge Int’l, Ltd., 371 F.3d 207, 212 (5th Cir. 2004) (“removals under the Convention are not subject to the 30-day and one-year time limitations and can occur ‘at any time before the trial’”).

58 Compare Restoration Prod. Mfrs., Inc. v. Grove Europe Ltd., 325 F.3d 54, 61 (1st Cir. 2003) (defendants waived arbitration right by waiting four years to remove from state court, during which period defendants were actively engaged in state court litigation) and Skordilis v. Celebrity Cruises, Inc., No. 08-22934-CIV, 2009 WL 129383, at *3 (S.D. Fla. Jan. 16, 2009) (defendant waived right to arbitrate when it had engaged in extensive state court litigation before it moved to remove the case and compel arbitration) with Hodgson v. Royal Caribbean Cruises, Ltd., 706 F. Supp. 2d 1248, 1257 (S.D. Fla. 2009) (removal and motion to compel three months before trial did not constitute waiver of right to arbitrate where the parties had not engaged in discovery or other litigation since the case was removed.).
A foreign representative must obtain recognition of the foreign proceeding in order to obtain the rights and benefits of Chapter 15, including protecting the foreign debtor’s assets within the United States from creditor action and obtaining access to and relief from the United States courts on most matters. Bankruptcy Code section 1517 sets forth the requirements for recognition, namely, that (i) the foreign proceeding is a main or nonmain proceeding, (ii) the petition was brought by a foreign representative, and (iii) the petition satisfies the procedural requirements set forth in Bankruptcy Code section 1515. See 11 U.S.C. § 1517. The procedural requirements of section 1515 provide that the Chapter 15 petition should be accompanied with evidence of the existence of the foreign proceeding and foreign representative and a statement identifying all foreign proceedings of the Chapter 15 debtor. See 11 U.S.C. § 1515. It is important to note that, although not required for recognition, Rule 1007 of the Federal Rules of Bankruptcy Procedure requires the Chapter 15 petition to provide additional documentation, including a corporate ownership statement, names of all persons or bodies authorized to administer the foreign proceedings of the debtor, all litigations pending in the United States in which the debtor is a party, and a list of all entities against whom provisional relief is being sought under Bankruptcy Code section 1519. See Fed. R. Bankr. P. 1007.

Chapter 15 recognizes two types of “foreign proceedings” pending in another country: (i) “foreign main proceedings” and (ii) “foreign nonmain proceedings.” See 11 U.S.C. §§ 1502(4) and (5). While these proceedings, at first blush, may appear somewhat identical, there is an important distinction that must be noted. If a bankruptcy court recognizes a foreign proceeding as a foreign main proceeding, certain relief and rights become readily available. For instance, the “automatic stay” imposed pursuant to Bankruptcy Code section 362 is immediately available upon the bankruptcy court’s recognition of a foreign main proceeding. See 11 U.S.C. § 1520. The stay precludes creditors or other parties in interest from seizing the foreign debtor’s assets within the United States or otherwise continuing any litigation efforts against the debtor. In contrast, however, in a foreign nonmain proceeding (discussed below), no such stay automatically arises, and the Chapter 15 petitioner must specifically request and obtain such relief from the bankruptcy court, and the granting of such relief is left to the discretion of the bankruptcy judge.

Upon the filing of a Chapter 15 petition, certain parties are notified of the Chapter 15 filing and the relief sought in the case. The bankruptcy court will typically hold a hearing within 30 days of the Chapter 15 filing to determine whether the foreign proceeding should be recognized as a “foreign main” or a “foreign nonmain” proceeding. This hearing is usually referred to as the “recognition hearing.”

During the time period between the filing of the Chapter 15 petition and the recognition hearing, frequently referred to as the “Chapter 15 gap period,” the foreign debtor is not protected by any provisions of the Bankruptcy Code, such as the automatic stay. Thus, absent the intervention of the bankruptcy court, creditors are able to take action against the foreign debtor’s United States assets — but creditors should not be collecting their debts quite so fast. In cases where a foreign debtor believes that a stakeholder may take action against the debtor or its U.S. assets, a foreign representative may seek protection by requesting “provisional relief” (usually in the form of injunctive relief) from the bankruptcy court, pending a determination of recognition. For instance, a foreign representative may request immediate implementation of the automatic stay to protect against any attack on the foreign debtor’s U.S. assets. “Provisional relief” is not granted without the foreign representative satisfying the usual standards for injunctive relief: (i) a reasonable probability of success on the merits; (ii) irreparable injury by denial of the relief; (iii) whether granting preliminary relief will result in even greater harm to the non-moving party; and (iv) whether granting the preliminary relief will be in the public interest. See 11 U.S.C. § 1519(e).
Even if there were no provisional relief during the Chapter 15 gap period, any debt collected by creditors during that time could later be subject to avoidance under foreign law, as determined by the Fifth Circuit Court of Appeals in *In re Condor Insurance Ltd.*, 601 F.3d 319 (5th Cir 2006). When asked whether the exceptions listed in section 1521(a)(7) to the relief available in the ancillary proceeding excluded avoidance actions not only under U.S. law but also under foreign law, the Fifth Circuit found that “[t]he stated purpose and overall structure of Chapter 15 reflects its international origin and strongly suggests the answer – section 1521(a)(7) does not exclude avoidance actions under foreign law.” *In re Condor*, 601 F.3d at 324. Accordingly, as part of their recognized Chapter 15 rights, the foreign representatives were permitted to commence an adversary proceeding pursuant to their foreign law seeking to avoid a transfer to a U.S. creditor.

Of course, long before any determination of whether or not a foreign debtor’s law may be applied in a Chapter 15, a recognition hearing must first be held in the U.S. bankruptcy court, during which the bankruptcy judge is asked to determine if the foreign proceeding should be recognized as a foreign main or foreign nonmain proceeding. In determining whether a proceeding is a foreign main proceeding, the bankruptcy court must consider whether the proceeding is pending in the country where the debtor has its “center of main interests.” See 11 U.S.C. § 1502(4). While the Bankruptcy Code does not define “center of main interests,” it contains a statutory presumption that, in the absence of evidence to the contrary, the country of the debtor’s registered office is presumed to be the center of the debtor’s main interests. See 11 U.S.C. § 1516(c).

Bankruptcy courts also examine other factors in determining whether a foreign proceeding is pending in a jurisdiction where the debtor has its center of main interests so as to be recognized as a foreign main proceeding. For instance, courts consider the location of the foreign debtor’s headquarters, management’s location, the location of the foreign debtor’s primary assets and creditors, and/or the jurisdiction whose law would apply to most disputes. See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008).

A foreign nonmain proceeding is one that is not a foreign main proceeding and is pending in the country where the foreign debtor has an “establishment.” See 11 U.S.C. § 1502(5). An establishment is any place of operations where the debtor carries out non-transitory economic activity. The presence of a foreign debtor’s assets in a jurisdiction, without more, is insufficient to create an establishment that would justify recognizing a foreign proceeding in that jurisdiction as a foreign nonmain proceeding. For example, in *In re SPhinX, Ltd.*, the bankruptcy court determined that the voluntary bankruptcy filing by a hedge fund in the Cayman Islands was merely a foreign nonmain proceeding because “[t]he only business done in the Cayman Islands apparently was limited to those steps necessary to maintain the [hedge fund] in good standing as registered Cayman Island companies...There were no employees or managers in the Cayman Islands, and the Debtors’ boards, which contained no Cayman Islands residents, never met in the Cayman Islands.” See *In re SPhinX, Ltd.*, 351 B.R. 103, 119 (Bankr. S.D.N.Y. 2006).

Upon a bankruptcy court’s recognition of a foreign main or nonmain proceeding in connection with a Chapter 15 filing, the petitioning foreign representative of the debtor is typically authorized to carry out the stated purpose of the debtor’s Chapter 15 case. That may include liquidation of the debtor’s U.S. assets, giving effect to a foreign plan of liquidation or reorganization or approving a sale of debtor’s assets and/or assignment of its leases located in the United States. Further, to the extent a foreign proceeding is recognized as a foreign main proceeding, the petitioning foreign representative is automatically given many of the powers that a Chapter 11 or 7 debtor/trustee has (see 11 U.S.C. § 1521) (other than pursuing avoidance claims, such as preferences, except when pursuing an avoidance action under foreign law as determined by the Fifth Circuit). The debtor’s foreign representative is also often given additional authority, such as the ability to operate the debtor’s business, use cash collateral, sell assets, etc. Conversely, to the extent that the proceeding is recognized as a foreign nonmain proceeding, the petitioning foreign representative is granted only those powers as are explicitly approved by the bankruptcy court (upon satisfaction of the injunctive relief standard in the case of a continued stay of creditors’ actions) and as reflected in the order granting recognition.
Conclusion

Chapter 15 is an important proceeding for foreign companies seeking to protect their assets located in the United States. However, the U.S. bankruptcy court is a court of equity and, as such, must weigh the interests and rights of all parties (debtors, creditors, foreign, or domestic). Accordingly, the protections afforded by U.S. bankruptcy law to U.S. debtors are not automatically given to a foreign debtor simply by filing a Chapter 15 petition. Instead, the recognition process assures that a foreign debtor is qualified to receive the rights and protections bestowed upon U.S. debtors under the bankruptcy code. Once recognized, foreign debtors and their U.S. assets will be given protection under the U.S. Bankruptcy Code but not without continued consideration of the rights and interests of all stakeholders involved in a Chapter 15.

The Views of In-House Counsel on International Dispute Resolution: A Case Study

By Eric S. Sherby

There is a dearth of empirical data concerning the views of in-house corporate counsel on international dispute resolution. The most comprehensive study of the views of in-house lawyers on dispute resolution, conducted by the RAND Institute for Civil Justice, was carried out in 2008-2009, and that study examined the views of American in-house counsel only. In 2013 and 2014, our law firm conducted two surveys of the views of in-house counsel at Israeli corporations engaged in international commerce. Although several of the questions in our surveys focused on uniquely Israeli issues, four non-Israel-specific questions concerned international dispute resolution generally, and the answers to those questions should be of interest to international dispute resolution practitioners regardless of where they live or work.

There are two additional reasons why the survey’s results (described below) should be of particular interest to American practitioners — (a) the marketplace/territory of the survey, and (b) the population of the survey respondents. After China, Israel leads all other non-U.S. countries in the number of its corporations that are traded on stock exchanges in the United States. Also, the population of Israeli in-house lawyers who responded to the survey is noticeably “American” — over 28% of the respondents had (previously) practiced law in the United States or another Western country, and over 41% studied outside of Israel in a Western university.

As described below, our 2014 survey demonstrates that:

1. it is possible to increase the likelihood of arriving at an agreement on the forum for international dispute resolution by the use of “loser pays” and videoconferencing contractual provisions;
2. the “specialization” of arbitrators is an overrated feature of arbitration; and
3. contrary to popular belief, it is generally the in-house counsel — not outside counsel — who decides as to whether to agree to an arbitration/forum selection clause.

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1 The author specializes in international litigation and arbitration at the Israeli law firm that he founded in 2004, Sherby & Co., Adv., www.sherby.co.il. He also serves as a Vice Chair of the International Litigation Committee and as a Liaison to the Israeli Bar Association.
4 RAND Study at Appendix B.
5 RAND Study at Appendix B.
6 RAND Study at 3 (“[i]nternational business disputes were specifically excluded from this study because arbitration is a more common dispute resolution method in that context”).
I

Getting To “Yes” On An Arbitration/Forum Selection Clause: Using Cost-Shifting and Videoconferencing

Two questions from the 2014 survey were aimed at gauging the extent to which the use of certain contractual provisions could increase the willingness of Israeli companies to litigate/arbitrate outside of Israel. Specifically, respondents were asked to address the effect of a “loser pays” clause (Question 1) and a “videoconferencing” clause (Question 2) on the decision to litigate/arbitrate outside of Israel.

a) “Loser Pays”

Respondents were asked, in Question 1, the extent to which they agree with the following statement:

In negotiating an international contract, when my company is asked to agree to a clause providing for (future) litigation or arbitration abroad, my hesitation to agree to such a provision is reduced noticeably when the contract also provides that the loser pays the winner’s legal costs (including, as applicable, fees of the arbitrator).

Over 66% of the respondents stated that they agree with the above statement (approximately 58% mostly agree; 8% strongly agree; fewer than 34% of respondents disagree).

The lesson from the responses to Question 1 is that a “loser pays” clause in an international contract is likely to increase the chances that Israeli in-house counsel will agree to a dispute resolution mechanism outside of Israel.⁷

b) Video Conferencing

Question 2 asked about the use of a “videoconferencing” clause. However, unlike Question 1, which asked each respondent to describe his/her likelihood of recommending arbitration, Question 2 asked generally about the use by Israeli companies:

To what extent do you agree with the following statement: “Israeli companies would be noticeably less hesitant to agree to arbitration outside of Israel if there were certainty that arbitrators abroad would allow all witnesses to testify via video conferencing (as opposed to in-person testimony).”

The response rates to Question 2 were similar to those to Question 1. Sixty-three percent of the respondents stated that they agree — in other words, that Israeli companies would be noticeably less hesitant to agree to arbitration outside of Israel if there were certainty that arbitrators outside of Israel would allow all witnesses to testify via video conferencing. Only 36% stated that they disagree.

For outside lawyers who represent Israeli companies involved in international negotiations, the lessons from the answers to Questions 1 and 2 seem clear — if your client is asked to agree to litigate or arbitrate outside of Israel but is hesitant to do so because of costs/inconvenience considerations, it would be wise to consider both a “loser pays” clause and a videoconferencing clause.⁸

II

The Attractions of Arbitration: Speed, Yes. Specialization, Not So Much

The arbitration community likes to tout many advantages of arbitration — the expertise of arbitrators, confidentiality, and cost efficiency — but the responses to Question 4 indicate that all of the above attributes take a backseat to the issue of speed.

Respondents were asked as follows:

In connection with those disputes as to which there was no (pre-dispute) agreement to arbitrate, when your company has decided to refer an existing dispute to arbitration, the primary reason your company so agreed was . . .

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⁷ The above result is not surprising in light of one of the answers to a question in our 2013 Survey. In Question 3 from the 2013 survey, respondents were asked:

In those cases over the past five years in which your company has been involved in a business-to-business international negotiation, and the issue of including an arbitration clause in the contract was raised but ultimately rejected, the PRIMARY REASON that it was rejected was...

Approximately 37% of the respondents to that question in 2013 stated that the “expected costs” of international arbitration was the primary reason that there was no agreement to arbitrate. (That 37% response rate was more than 15% higher than any other response.)

⁸ The enforceability of a “loser pays” clause is generally presumed in the arbitration context; enforceability cannot be presumed in the litigation context but would need to be examined on a country-by-country basis.
Respondents were given seven possible reasons:

A. Pressure from the court;

B. A concern that, absent an agreement to arbitrate, the company might be required to litigate the specific dispute in more than one forum;

C. An expectation that arbitrating the specific dispute would be less costly than litigating it in court;

D. An expectation that the arbitrator appointed would have a relevant specialization that most judges do not have;

E. An expectation that arbitration would resolve the specific dispute more quickly than litigation;

F. An expectation that arbitration would reduce the chances of the disclosure of confidential or other sensitive information;

G. Not applicable because the company has not referred any such dispute to arbitration.

The most selected answer was G — not applicable because the company has not referred any dispute to arbitration.

When we factor out the “not applicable” responses, the breakdown of the primary reason for referring an existing dispute to arbitration was as follows:

<table>
<thead>
<tr>
<th>Reason</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court Pressure</td>
<td>21%</td>
</tr>
<tr>
<td>Prevent multi-forum litigation</td>
<td>10.5%</td>
</tr>
<tr>
<td>Less costly than litigation</td>
<td>10.5%</td>
</tr>
<tr>
<td>Specialized arbitrator (more than judge)</td>
<td>5%</td>
</tr>
<tr>
<td>Resolution achieved more quickly than litigation</td>
<td>31.5%</td>
</tr>
<tr>
<td>Confidentiality</td>
<td>21%</td>
</tr>
</tbody>
</table>

Over 31% of the respondents stated that the primary reason that an existing dispute was referred to arbitration was the expectation that arbitration would resolve the specific dispute more quickly than litigation.

Tied for second place were “court pressure” — hardly an attribute of arbitration — and “confidentiality,” both of which were selected by 21%. (Among Israeli litigators, it is well-known that Israeli trial judges encourage litigants to refer business-to-business disputes to arbitration; in the author’s experience, Israeli trial judges are noticeably more likely than their American counterparts to do so.) Tied for fourth place were “preventing multi-forum litigation” and “less costly,” both of which were identified by 10.5%.

Finishing last, at 5%, was “[a]n expectation that the arbitrator appointed would have a relevant specialization that most judges do not have.”

The arbitration community and, in particular, arbitral institutions frequently claim that the ability of the parties to select an arbitrator “with the requisite specialization/expertise” is one of the reasons to choose arbitration (whether at the contracting stage or after a dispute arises). But the answers to Question 4 indicate that “specialization” is far less important than other considerations. In particular, those answers indicate that respondents consider the expectation of a speedy adjudication to be more important than that of specialization — by a factor of six to one.

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9 Question 4 did not distinguish between domestic (Israeli) disputes and international disputes. It is possible that if the question had drawn such a distinction, more respondents would have identified “prevent multi-forum litigation.”
A corollary of that expectation is that, to the extent that arbitration is perceived as being as slow as litigation, companies will be less likely to opt for arbitration.

III

It’s The In-House Lawyer — Not Outside Counsel — Who Really Decides on The Inclusion of A Forum Selection/Arbitration Clause

Arbitral institutions devote significant resources toward convincing outside lawyers (those in private firms) that, when they draft contracts for their corporate clients, they (outside counsel) should include arbitration clauses calling for arbitration before that arbitral institution.

The answers to Question 10 indicate that, to a large extent, when the arbitral institutions make such sales pitches, they are wasting their time.

Question 10 asked the views of respondents concerning the issue of possible self-interest on the part of outside counsel in recommending litigation/arbitration in a particular forum. Several possible answers were suggested. Answer E was that possible concerns as to self-interest are not applicable to the respondent because “as a general matter, I decide as to forum selection clauses and arbitration clauses without the input of Israeli outside counsel.”

Forty percent of the respondents chose Answer E. In other words, 40% of the respondents — all of whom are in-house counsel at Israeli corporations — stated that, as a general matter, they decide as to forum selection and arbitration clauses without the input of outside counsel.

Among those respondents who have experience practicing law outside of Israel (in addition to practicing in Israel), the representation was even higher. Sixty percent of the respondents who had (at some time) practiced law outside of Israel stated that, as a general matter, they decide as to forum selection and arbitration clauses without the input of Israeli outside counsel.

With such a high percentage of experienced respondents stating that they do not even consider the input of outside counsel with respect to dispute resolution clauses, it appears that, when arbitral institutions “pitch” their services to outside law firms, the institutions are largely focusing on the wrong audience.

The arbitral institutions should market their services to the lawyers who actually decide whether to include a forum selection clause or an arbitration clause — namely, the in-house corporate attorneys.

IV

Conclusion

The data from the 2014 survey strongly indicate that the use of “loser pays” and videoconferencing provisions increases the likelihood of reaching agreement, at the contracting stage, concerning a dispute resolution mechanism. This conclusion is especially compelling given the significant percentage of respondents (all of whom are in-house counsel) who stated that they decide on issues concerning forum selection and arbitration without the input of outside counsel.

Furthermore, the 2014 data suggests that arbitral institutions need (i) to focus their marketing efforts more on in-house counsel, and (ii) to stress — where applicable — the speed of achieving resolution via arbitration.

In light of the fact that the two surveys (2013 and 2014) carried out by our law firm appear to be the only surveys of in-house counsel that focus on international dispute resolution, it would be worthwhile to pose these same questions to in-house corporate counsel in other population groups.

APPENDIX 1
(Survey Methodology)

The “Universe” of The Survey Population: Criteria for Inclusion of In-House Lawyers

The survey was sent, via email, to more than 300 in-house lawyers employed by Israeli companies that hold themselves out as active in international commerce.

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10 The fact that 40% stated expressly that they make such decisions without the input of Israeli outside counsel suggests that even among those respondents outside that subset, the decision as to whether to include a forum selection clause or an arbitration clause is made without great reliance upon Israeli outside counsel.

11 The hosting company for the survey was Survey Monkey, www.surveymonkey.com.
The in-house lawyers were identified regardless of title (General Counsel, Associate General Counsel, Legal Advisor, etc.).

Lawyers employed at companies that are unlikely to be involved in international commerce were excluded from the list of recipients for the survey. Examples of such fields: real estate development companies (unless their international activities are extensive), real estate brokerage companies, providers of healthcare to consumers, and labor unions.

In addition to certain types of companies being excluded, there were other grounds for excluding specific types of in-house lawyers:

A. those who work primarily in the immigration field or in the taxation field;

B. those employed by accounting firms; and

C. those who work both in-house and at a private law firm (due to the concern that the lawyer’s views might reflect those of a private law firm instead of in-house counsel).

The invitation to respond to the survey was sent to every lawyer fitting the criteria described herein and whose email address our law firm was able to obtain.

The Respondents, Their Industries, and Their Companies

Of the companies represented by the respondents to the survey, at least 15 are (by all accounts) industry leaders in Israel. More than half of the companies represented by the respondents are publicly traded (mostly in the United States).

The respondents included general counsel and other lawyers at major Israeli companies in the telecommunications, pharmaceutical, software, electronics, defense, aviation, jewelry, capital markets, financial services, and biotechnology fields (among others).

Of the more than 300 recipients of the invitation to respond to the survey, 36 responded. Of the respondents, 44% have the title “General Counsel” or the equivalent.

Of those respondents whose full educational biography is available online, 41% studied outside of Israel at the university level. Twenty-eight percent of the respondents have been employed, as lawyers, outside of Israel.
2016 CALENDAR OF EVENTS

February 3-9, 2016
ABA Midyear Meeting
San Diego, CA

February 28 – March 1, 2016
2016 Americas Forum — Section of International Law
Mandarin Oriental Miami — Miami, FL

April 12-16, 2016
2016 Spring Meeting — Section of International Law
Grand Hyatt New York — New York, NY

October 18-22, 2016
2016 Fall Meeting — Section of International Law
Hilton Tokyo – Tokyo, Japan

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Delissa Ridgway, Co-Chair
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