

Proskauer on International Litigation and Dispute Resolution: 2009 Trends and Developments in International Legal Practice

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Editors' Introduction

Proskauer's [International Practice Group](#) is pleased to present this interdisciplinary 2009 Trends Report — the latest annual supplement to our popular e-Guide, [Proskauer on International Litigation and Dispute Resolution](#). (Links to the Guide and other on-line resources appear in [blue underscore](#)) Since its 2007 launch, the Guide has become among the most visited websites on international practice, serving clients and readers in more than 100 countries (and counting).

Following on our [2008 Trends Report](#) (and Spring 2008 Major Trends Conference in Paris), the International Practice Group has once again identified what we believe to be among the most significant legal and practical trends in international practice as evidenced by judicial, legislative, and commercial developments in the past year. The current report shows that we did fairly well in our 2008 predictions and that there has been significant activity in each of the areas that we previously reviewed. These legal issues present global businesses with challenges — and with opportunities.

As with the Guide generally, our Trends Reports focus on issues most affecting companies with: (1) property (real, intangible, intellectual) or businesses involving or impacting multiple countries; (2) disputes/deals implicating the laws, legal practices, or regulatory regimes of different jurisdictions; and (3) disputes/deals where different venues are available around the world to pursue, defend, and resolve actual or potential disputes. In each of these aspects of international practice, there are three major areas of focus in the cases, practice, the Guide, and the Trends Reports:

- International litigation and its alternatives;
- Regulatory and investigative proceedings; and
- Transactional and corporate practice.

As an overview to the 2009 Trends Report, we see the following occurring:

1. Increased litigation in the US of multi-national controversies and increased resistance by US courts to unrestricted expansion of access to US discovery, trial, juries, and damages awards, particularly where there is clear guidance from non-US tribunals — judicial or arbitral — showing a definite, prejudicial overlap in the exercise of competing sovereignties. Now more than ever, these trends present companies faced with international disputes with very specific and interesting strategic options.
2. The continued, if halting, “Americanization” of non-US legal systems, including the advent of collective litigation (class actions) in Europe.
3. Greater involvement of sovereign entities in commercial and other litigation – and greater attention by US courts to the protections and limits of sovereign and other immunities.
4. Increased use and protections for alternative dispute resolution techniques, including, but not simply, international arbitration.
5. Increased risks to international companies of simultaneous, coordinated regulatory or enforcement proceedings in multiple countries.
6. A continuation of the veritable explosion in prosecutions and penalties under the US Foreign Corrupt Practices Act, including continued aggressive expansion of FCPA jurisdictions.
7. Significant ramifications in international M&A and transactional practice as a result of the economic downturn and turmoil in the international markets.

Proskauer’s International Practice Group intends to address these Trends in 2009 in:

- Updates to the Guide;
- Our Spring 2009 Major Trends Conference, again likely in Paris; and
- Webinars in the same popular format that we used in 2007 and 2008.

The Editors wholeheartedly thank our IPG colleagues, and [Sarah Reisman](#) in particular, for their valuable assistance with and contributions to this report. We also thank Lissette Feliciano for her help in making this report readily available and navigable to all on the internet.

We wish all our clients and friends a prosperous 2009.

[Louis M. Solomon](#)
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Editors

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I. Litigation of International Controversies in the US: Toward a *Balanced* Approach to Expanding/Contracting Jurisdiction and Enforcement

By [Louis M. Solomon*](#)

A. Overview

1. [As we reported last year](#), there continues to be an increase in attempts by parties operating in the international sphere to gain access to US courts to resolve disputes. Despite some noteworthy developments to the contrary discussed below, we forecast that this trend will continue, particularly in relation to forum-related issues (such as [personal](#) and [subject matter jurisdiction](#) and [venue](#)), [choice of law](#), and enforcement of judicial or [arbitral awards](#) or [judgments](#), each of which we have discussed at length in the Guide.
2. On the other hand, the case summaries below evidence the very clear chord being sounded that US courts do not want interfere with clear expressions of policy by non-US tribunals.
3. We believe it is imperative that companies operating internationally consider the complex issues of simultaneously managing litigation in the US and elsewhere, including issues of [privilege](#), [evidence-gathering and taking](#), and [going to trial in the US](#).
4. As recent developments in the US confirm, a keen eye must continue to be placed on drafting operative legal documents and litigating disputes in a way that will enhance such companies' ability to enforce awards and judgments and avoid efforts by adversaries to enforce inappropriate awards and judgments.

B. Extending/Contracting US Personal and Subject Matter Jurisdiction

1. [Personal jurisdiction](#): Two cases indicated that US courts would narrowly construe personal jurisdiction in cases involving non-US defendants.
 - (a) In *Technology Patents, L.L.C. v. Deutsche Telekom AG*, Case 8:07-cv-03012-AW (D. Md. 8/29/08), Dkt. No. 1082, the District Court in Maryland denied personal jurisdiction over international wireless suppliers that did not supply wireless services to the United States. The district court observed that the international defendants' alleged actions did not occur in or target Maryland but rather actions of those defendants' subscribers. The international defendants did not have complete control over how messages got to Maryland, and the district court found that the "roaming agreements" between Telecom carriers were not enough to be considered purposeful activity directed towards Maryland.

* The author gratefully acknowledges the able assistance of colleagues [Bettina Chin](#) and [Evan Citron](#) in the preparation of this Section.

(b) In *In re Terrorist Attacks on September 11, 2001*, Dkt. No. 06-0319 (2d Cir. 8/14/08), the Second Circuit applied the state court doctrine of “fiduciary shield” to deny personal jurisdiction over a representative of a non-US bank. The Second Circuit stated, the “fiduciary shield doctrine deems it ‘unfair to subject the corporate employee personally to suit in a foreign jurisdiction where his only contacts with that jurisdiction have been undertaken on behalf of his corporate employer’” 531 F.3d at 96, quoting *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467-68 (1988).

- (i) In *In re Terrorist Attacks*, several individuals who incurred losses in the September 11, 2001 terrorist attacks brought tort claims against various non-US parties who had provided financial and logistical support to al Qaeda. The Second Circuit affirmed the Southern District of New York decision to dismiss the plaintiffs’ claims against, *inter alia*, a Saudi banker due to the lack of personal jurisdiction.
- (ii) The plaintiffs argued that personal jurisdiction was proper because the actions of the Saudi bank, which allegedly provided material financial support to terrorists, could be imputed to the banker as a corporate employee. The plaintiffs relied on *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460 (1988), which found jurisdiction over an individual who was a “primary actor” engaging in “purposeful corporate” acts in that state on behalf of a corporate employer. *Kreutter* held that the “fiduciary shield doctrine,” does not defeat personal jurisdiction under New York’s long-arm statute. Here, the Second Circuit found *Kreutter* to be inapposite, since the bank transactions that the Saudi banker allegedly supervised had no direct contact with the US and the Saudi banker himself was not a “primary actor” that would cause him to be subject to the jurisdiction of US courts.

2. Subject matter jurisdiction: The decisions of 2008 related to subject matter jurisdiction were quite important and in more than one instance, unprecedented. The cases were described variously as implicating principles of subject matter jurisdiction or stating a cognizable cause of action. Theoretically, the two concepts are quite different, but in practice, they often lead to the same result.

(a) Prudential or judicially-imposed exhaustion requirement before suing in US

- (i) In *Sarei v. Rio Tinto, PLC*, 2008 WL 5220286 (9th Cir. 2008) (en banc), the Ninth Circuit held that Alien Tort Statute actions were subject to exhaustion requirements and that the defendant had the burden to establish that legal remedies in the host country were not exhausted.
- (ii) In *Sarei*, residents of Bougainville, Papua New Guinea, sued the coal mining company Rio Tinto in a California district court for various crimes and environmental torts arising from Rio Tinto’s copper mining operations in Papua New Guinea. The plaintiffs claimed that the defendant was liable under the Alien Tort Statute (“ATS”), which

grants jurisdiction to a US district court over civil actions by aliens for torts committed in violation of international law or a US treaty.

- (iii) The Ninth Circuit court noted that, under international law, a state is ordinarily not required to consider a non-US claim until domestic remedies have been exhausted, “unless such remedies are clearly sham or inadequate or their application is unreasonably prolonged.” (quoting Restatement (Third) § 713 cmt. f). To determine whether the exhaustion rule applied to ATS claims, the Ninth Circuit looked to *Sosa v. Alvarez Machain*, 542 US 692 (2004), in which the Supreme Court stated that “a prudential or judicially-imposed exhaustion requirement for ATS claims ‘would certainly [be considered] in an appropriate case.’” *Id.* at 733 n.21.
- (iv) The Ninth Circuit found that certain ATS claims may be appropriately considered for exhaustion based on prudential standards and core principles of international law, particularly where the claim’s “nexus” to the US is weak and where the claim does not involve matters in which a state may exercise jurisdiction regardless of territoriality or the nationality of the offenders.
- (v) The Ninth Circuit held that *Sarei* was indeed an “appropriate case” to consider whether to invoke the exhaustion analysis, and that the defendant bears the burden to plead and justify an exhaustion requirement in an ATS claim.

(b) **Contrast** the Ninth Circuit’s decision in *Sarei* with the decision of the Second Circuit in *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), in which the Supreme Court denied a petition for certiorari review in 2008. In *Khulumani*, the Second Circuit held that a corporation could be sued under the ATS in the US for their alleged role in aiding and abetting violations of international law by a foreign government (in that case the government of South Africa). See generally the discussion in Proskauer’s alert [Businesses Ask Supreme Court To Limit "Aiding and Abetting" Liability for Foreign Government Violations of International Law.](#)

(c) Also consider *Liquidation Commission of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1352 (11th Cir. 2008) (upholding \$177 million judgment and applying RICO to extraterritorial conduct where “the conduct occurring in, or directed at, the United States in this case was not an insubstantial or preparatory part of the overall looting scheme, but the actual means of its consummation”).

3. Denying Access to US Courts by Interpreting Treaties Not to Provide Cause of Action

- (a) In *McKesson Corp. v. Islamic Rep. of Iran*, 539 F.3d 485 (D.C. Cir. 2008), the DC Court of Appeals held that violations of the Treaty of Amity do not give rise to a private cause of action against non-US countries in US courts.
 - (i) In this never-ending saga (this was the fifth time the case had been before the DC Circuit), McKesson, an American corporate

shareholder in an Iranian dairy company, alleged that Iran unlawfully expropriated the plaintiff's equity interest in the Iranian company and wrongfully withheld the plaintiff's dividend payments. The district court concluded that the Treaty of Amity did provide a private plaintiff with a cause of action. The DC Circuit reversed and held that the Treaty of Amity *did not* in fact provide for a private right of action.

- (ii) The Court of Appeals noted that there is a general presumption that international agreements do not provide for a private cause of action in US courts. Looking at the text of the Treaty of Amity, the court did not find anything that would overcome the presumption. Nor did the court recognize an implied cause of action in federal common law — akin, for example, to implying a cause of action from the Constitution, which “stands apart from other texts.” The court stated that inferring a treaty-based cause of action would “embroil[] the judiciary in matters outside its competence and authority.”

4. Expanding Jurisdiction to Hear Claims of non-US Entities, but with Enforcement to Occur Only in the non-US Jurisdiction

(a) In *Bondi v. Capital & Fin. Asset Mgmt., S.A.*, 535 F.3d 87 (2d Cir. 2008), the Second Circuit refused to bar US securities fraud actions against an Italian successor to a company in Italian bankruptcy proceedings but, importantly, left the enforcement of any US judgment against the company to the Italian courts.

- (i) Parmalat Finanziaria, S.p.A. (“Old Parmalat”), an Italian dairy and food conglomerate, filed for bankruptcy after the corporation collapsed when reports of its financial fraud became public. Debt and equity investors of Old Parmalat filed class action securities-based lawsuits in the US against Old Parmalat and other alleged financial participants in the fraud.
- (ii) Meanwhile, the Extraordinary Commissioner of the Old Parmalat bankruptcy (analogous to a US bankruptcy trustee) transferred all of Old Parmalat's assets to a newly formed entity, Parmalat, S.p.A. (“New Parmalat”). Assuming all legal liabilities of its predecessor companies, New Parmalat moved the US district court to bar the securities fraud plaintiffs in the US class actions from bringing direct claims against the new entity.
- (iii) The district court denied New Parmalat's motion and issued an order subjecting New Parmalat to any direct or contribution claims that may arise in that court. On appeal, the Second Circuit affirmed the district court's ruling, rejecting New Parmalat argument that decision violated Bankruptcy Code § 304's directive to assure “economical and expeditious administration of the foreign estate” as well as principles of international comity and fairness. Otherwise, the Second Circuit reasoned, securities fraud litigation would be conducted in Italy, forcing an Italian court to confront “a foreign legal and regulatory scheme to which . . . there is no Italian analog.”

- (iv) The Second Circuit also held that the district court's order respected international comity and deference since, importantly (and inventively), it left the enforcement of any judgment for the securities fraud plaintiffs against New Parmalat to the Italian courts.

5. Denying Jurisdiction in "Foreign Cubed" Securities Case.

(a) In *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167 (2d Cir. 2008), the Second Circuit for the first time reviewed a so-called "foreign-cubed" securities action. Although the court found a lack of subject matter jurisdiction over the particular claims in *Morrison*, it refused to create a bright line rule prohibiting all such actions in the future.

- (i) A "foreign-cubed" securities action is one in which (i) non-US plaintiffs; (ii) sued a non-US issuer; (iii) based on securities transactions in countries other than the US.
- (ii) In *Morrison*, non-US investors brought a securities fraud action against an Australian banking corporation, alleging, *inter alia*, that the bank's subsidiary in Florida manipulated its corporate records. As a result, the issuer (the Australian bank) (1) made materially false filings with the foreign securities markets and (2) indirectly interfered with ADRs trading in the US. Following dismissal by the Southern District of New York, the investors appealed to the Second Circuit.
- (iii) The Second Circuit rejected calls from the defendant and several *amici curiae* to create a bright line rule that US courts did not have jurisdiction in any foreign-cubed claims. Instead, the court relied on the "conduct and effect" tests to determine whether there was sufficient US involvement to justify the exercise of jurisdiction by an American court. The Second Circuit stated that subject matter jurisdiction would exist only if (1) the potentially infringing US activity was "more than merely preparatory" to the fraud *and* (2) if the particular acts or failures to act within US territory directly caused losses to non-US investors.
- (iv) Applying the conduct test (the "effects" issue was not part of the suit), the Second Circuit concluded that the federal court lacked subject matter jurisdiction over the action because the activity of the Australian bank in Australia was significantly more central to the fraud and more directly responsible for harm inured by investors than the activity that occurred in Florida.
- (v) In language that signals a clear change in attitude the Second Circuit said, "we are an American court, not the world's court, and we cannot and should not expend our resources resolving cases that do not affect Americans or involve fraud emanating from America." 547 F.3d at 175.

C. Zealously Protecting US Court Jurisdiction Against Gamesmanship in non-US Tribunals

1. In *Telenor Mobile Comm. AS v. Storm LLC*, 2008 WL 4950970, (S.D.N.Y. 2008), the Southern District of New York held that a Ukrainian court's order invalidating an arbitration provision did not make it "impossible" for the company to comply with a US arbitration award under the same agreement and held the company in contempt for failing to comply with the US arbitration award.

(a) In *Telenor*, a Norwegian corporate shareholder of the Ukrainian mobile telecommunications company, Kyivstar, initiated arbitration proceedings in the US, pursuant to an arbitration clause in the shareholders' agreement, to redress various violations of the shareholders' agreement by Storm, a Ukrainian company and Kyivstar's other shareholder. Storm, however, attempted to prevent the arbitration proceedings by obtaining a ruling from a Ukrainian court that declared the shareholders' agreement — specifically the arbitration clause — to be invalid.

(b) Despite the Ukrainian court's holding, the arbitration panel heard the case and determined that it had jurisdiction to hear the dispute. Specifically, the panel refused to give conclusive effect to the Ukrainian decision because of "the collusive nature of the Ukrainian litigation and because Telenor was not named as a party to [the Ukrainian] litigation or notified of it until [later.]" In 2007, the Southern District of New York confirmed the arbitration award ("2007 Order").

(c) In the 2008 case, Storm argued that, given the Ukrainian order, it was impossible to comply with the 2007 Order. The Southern District of New York disagreed and held that a non-US court order prohibiting compliance with a US court order does not constitute an "impossibility" against compliance. Accordingly, finding Storm's noncompliance with the 2007 Order to be willful and ongoing, the district court imposed, *inter alia*, substantial sanctions and fines that would double every 30 days until the contempt was cured.

D. Restricting Direct and Collateral Challenges in US to Arbitration Awards

1. US Supreme Court Narrowing Grounds to Challenge Arbitration Awards

(a) In *Hall St. Assocs., LLC v. Mattel, Inc.*, 128 S.Ct. 1396 (2008), the US Supreme Court ruled that statutory grounds for vacating or modifying an arbitration award were exclusive and could not be expanded by contractual agreement.

(i) Although the decision involved domestic conduct and review, the US Supreme Court's decision will undoubtedly find applicability in international settings.

(ii) Mattel was awarded damages in an arbitration between Mattel and Hall Street over the indemnification costs to clean a leased site. The Oregon District Court vacated the award on the grounds that the parties' arbitration agreement required the court to vacate an award if the arbitrator's conclusions of law were erroneous. However, the

Federal Arbitration Act's list of grounds for vacating or modifying an award did not include erroneous conclusions of law. On appeal, the Supreme Court held that the statutory grounds for vacating or modifying an award were exclusive and could not be expanded through contractual agreement.

2. Unwillingness to Permit Collateral Attack in US on non-US Arbitral Award

(a) In *Gulf Petro Trading v. Nigerian Nat'l Petrol. Corp.*, 512 F.3d 742 (5th Cir. 2008), the Fifth Circuit rejected a Texas oil company's challenge to a Swiss arbitration, holding that US courts could only review arbitration awards from other countries to determine whether the award should be enforced, not whether it was valid.

(i) An arbitration panel in Switzerland held that a Texas oil company, Petrec, lacked the capacity to maintain its claims against a Nigerian oil company, NNPC. Petrec subsequently brought suit alleging that the arbitration award was procured by fraud, bribery, and corruption. The Fifth Circuit concluded that US federal courts lacked subject matter jurisdiction over the suit, which it identified as a collateral attack on a non-US arbitral award.

(ii) The Fifth Circuit noted the distinction made by the New York Convention between a country of primary jurisdiction (the country where an arbitral award is made) and a country of secondary jurisdiction (all other countries), and explained that the New York Convention essentially limited the review of awards in courts of secondary jurisdiction to whether such awards should be enforced. The fraud, bribery, and corruption claims constituted collateral attacks on the award because the purported harm suffered was not caused by the alleged acts, but rather by the impact of the alleged acts on the award.

(b) Despite its holding, the court acknowledged, in dictum, that a claim of a civil rights violation that occurred during an arbitration proceeding may not constitute a collateral attack.

E. US Courts Deferring to Findings and Proceedings in non-US Courts

1. The US courts are showing greater willingness to defer to non-US decisions. See the cases cited below, especially *Telecom Argentina*. And see the discussion of *Four Seasons* and *Pepsi-Cola* below demonstrating that US courts are willing to hear and react to clear pronouncements from non-US jurisdictions.

2. In *In re Bd. of Dirs. of Telecom Argentina, S.A.*, 528 F.3d 162 (2d Cir. 2008) the Second Circuit recognized an Argentine bankruptcy plan under the US Bankruptcy Code, even though US and Argentine bankruptcy protections differ.

(a) An Argentine court approved Debtor Telecom's proposed acuerdo preventivo extrajudicial ("APE") plan. Although the APE was approved by a majority of Telecom's creditors and accepted by the court, an American creditor, Argo,

instructed its bank not to cancel any of its Telecom notes. Telecom initiated a case in the US, and the US bankruptcy court held that the APE should be recognized under §304 of the Bankruptcy Code (the “Code”).

- (b) On appeal, the Second Circuit upheld the bankruptcy court’s decision to extend comity to the Argentine proceedings, based on the finding that those proceedings did not violate US public policy considerations embodied in the Trust Indenture Act (“TIA”), the best interests creditor test, or the good-faith requirement in the Code. The court reasoned that enforcement of non-US insolvency proceedings that restructure TIA-protected bonds was appropriate so long as recognition of the proceedings was appropriate under the Code, and emphasized that comity did not require non-US proceedings to afford a creditor identical protections as under US law.
- (c) Further, the Second Circuit held that the bankruptcy court did not err in denying Argo’s objections to the APE on *res judicata* grounds, as Argo neglected to raise any objections in Argentina’s courts.
- (d) Practice Note: Whether the Court of Appeals actually means *res judicata*, as opposed to a more general refusal to permit relitigation based on notions of comity, is something we intend to explore in an update to the Guide.

3. In *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.*, 533 F.3d 1349 (11th Cir. 2008), the Eleventh Circuit upheld a US arbitration award despite parallel non-US proceedings on the grounds that there was no direct evidence that the arbitration agreement had been held invalid in the non-US proceeding.

- (a) Barr appealed a decision confirming a partial arbitration award entered against him by an international arbitral panel sitting in Florida. He argued that there was an on-going parallel proceeding in Venezuela that rendered the arbitration agreement invalid.
- (b) The Eleventh Circuit affirmed the district court’s decision to recognize the arbitration agreement as valid and confirm the award. The Eleventh Circuit reasoned that Barr neither demonstrated on remand nor argued on appeal that the arbitration agreement was invalid by virtue of the parallel proceeding. Consequently, Barr waived his right to challenge the award on the grounds that a Venezuelan court had determined the dispute to be non-arbitrable.
- (c) On this last point, the Eleventh Circuit observed that “[i]t is unclear from the record whether there has been a final decision from any Venezuelan court that squarely holds the arbitration agreement invalid. Rather, it appears that the Venezuelan courts have allowed [the parties] to engage in parallel litigation in Venezuelan courts and before the arbitral tribunal [in the US]”. *Id.* at 1351, n.1.
- (d) In this regard, it is instructive to see a similar expression in a different case made by the Second Circuit Court of Appeals, *Compania Emotelladora Del Pacifico, S.A. v. Pepsi-Cola Company*, Dkt. 03-7979-cv (2d Cir. 7/17/08) (Summary Order). The Court, at page 4 n.1, could not find a clear expression of law from Peruvian courts, and stated, “[s]hould the Peruvian courts render

any future decisions to the contrary, of course, our courts may address such developments as they occur.” (The author and his Firm represent the defendant in this matter).

4. In *Belize Telecom, Ltd. v. Gov't of Belize*, 528 F.3d 1298 (11th Cir. 2008), the Eleventh Circuit granted comity to a Belizean court's decision in a parallel case.
 - (a) A stock purchaser brought an action in the District Court of Florida against the government of Belize, a stock seller, alleging the government breached an agreement when it replaced six board directors. After parallel proceedings were initiated in Belize, the Belizean court interpreted a key provision in the agreement in a manner favorable to the stock purchaser. The district court did not recognize the Belizean decision, however, and interpreted the provision in a manner favorable to the government.
 - (b) On appeal, the Eleventh Circuit held that concerns of international comity, fairness, and judicial efficiency warranted deference to the Belizean decision. In explaining its reasoning, the Eleventh Circuit emphasized that the Belizean decision did not violate the public policy of the forum state (Florida), and that the Belizean interests in the litigation far outweighed the American interests.

F. Increasing Attention to Discovery in the US for non-US Proceedings

1. There was a flurry of judicial activity in 2008 interpreting and applying [28 USC § 1782](#). This important discovery device, which allows parties in non-US proceedings to obtain discovery in the US, was discussed in the 2008 Trends Report and is [treated at length in the Guide](#).
2. The bulk of the § 1782 activity in 2008 was at the district court level and principally included two important issues, which are highlighted below.
3. First, the cases emphasize the holding in the US Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) that § 1782 discovery is not mandatory, even the three applicability requirements are met.
 - (a) It is common ground that, even when each of the three requisites for § 1782 applicability are met — (1) the discovery is sought from a person who resides or is found in the same district as the court where the application is made; (2) the discovery is for use in a proceeding before a foreign tribunal; and (3) the applicant is a foreign or international tribunal or an “interested person” — the statute nonetheless merely authorizes but does not require the district court to grant the application for discovery.
 - (b) In *In re Application of Babcock Borsig AG*, 2008 WL 4748208 (D. Mass. 10/30/08), the District Court of Massachusetts denied a § 1782 discovery request until the requesting party provided some indication that the non-US tribunal would be receptive the requested material.
 - (i) The district court identified the concern, addressed by in *Intel*, that discovery sought might “conceal an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or

the United States” (quoting *Intel* at 265). The district court relied on the two general facts identified in *Intel* that district courts should consider in determining whether an application satisfying the § 1782 requisites should be granted: (i) whether the person from whom discovery is sought is a participant in the foreign proceedings; and (ii) the nature of the foreign tribunal, the character of the proceedings under way abroad, and the receptivity of the foreign tribunal to judicial assistance.

(ii) See also *In re Intel Corp. Micro Processor Anti Trust Litigation*, 2008 WL4861544 (D. Del 11/7/08) (adopting the report of a special master and denying requested discovery).

4. The second important issue addressed in 2008 is what constitutes a “tribunal” for purposes of invoking the discovery provisions of § 1782(a). In *Intel*, the Court held that the Commission of the European communities constituted such a “tribunal”.

(a) That was not a difficult conclusion to draw. But what about other less formal “tribunals”? What about arbitral tribunals?

(i) In *In re Application of Babcock Borsig AG*, 2008 WL 4748208 (D. Mass. 10/30/08), the district court held that a “private arbitral” body, like the ICC, qualified as a “tribunal” under § 1782. In that regard, the district court followed two other district court cases decided after *Intel*, which held that private arbitral panels were “tribunals” sufficient to invoke the provisions of § 1782.

(ii) *Accord Comision Ejecutiva, Hidroelectrica Del Rio Lempa v. Nejapa Power Co.*, 2008 WL 4809035 (D. Del. 10/14/08) (“Section 1782 does indeed apply to private foreign arbitrations”).

(b) The conclusion reached in *Babcock Borsig*, however, is not universally shared. See, e.g., *La Comision Ejecutiva Hidroelectrica del Rio Lempa v. El Paso Corp.*, 2008 WL5070119 (S.D. Tex. 11/20/08). (holding that *Intel* did not change the prior law that private arbitral tribunals are not “tribunals” for purposes of § 1782).

II. American-Style Litigation Reforms In Europe: To Be or Not To Be

By [Louis M. Solomon](#) (New York) and [Christophe Lapp](#) (Paris)*

A. Overview

1. To epitomize the overall “Americanization” of European law, one could hardly think of three more “American-style” legal reforms than permitting private damage remedies for violations of public laws and regulations; permitting the enhancement of those remedies — allowing, for example, punitive damages; or permitting “class” or “collective” actions.
2. Is the landscape changing? Has it already changed? The view from here and there is — well — mixed.
3. US plaintiffs firms have set up shop in Europe or have joined forces with European law firms.
4. The benefits of private damage remedies are even now being bruited by senior EU officials. And the point is no longer theoretical.
5. Enhancing private remedies with relief such as punitive damages, once the bane of any sensible civil law regime, is now being opening considered in various countries. France, for example, has been examining a proposal for contract law reform that would, among other things, introduce punitive damages where wrongful acts are “manifestly premeditated, particularly a fault whose purpose is monetary gain.”
6. As to class or collective actions, there are over 500 million consumers in the EU. When they are faced with generally applicable conduct that harms them, they may have, or believe they have, legitimate claims. These claims will be similar. In the past, the significant hurdles to bringing an individual claim — cost, the loser pays rule in some jurisdictions, and the overall uncertainty of the outcome — discouraged plaintiffs. Yet this is exactly the environment in which a class action model can be made to work — both for plaintiffs and for defendants (who can get class-wide relief).
 - (a) The concept of collective litigation is not as foreign to European law as it has been to European authors. France, Spain, Germany, Austria, The Netherlands, Denmark, and Finland, to name a few, already have laws or practices that accommodate class or collective actions in one form or another. The differences among these rules or practices are ones of degree, not kind.
 - (b) Similarly, EU officials openly express the need for a unified means of collective redress. Neelie Kroes, European Commissioner for Competition Policy, has said that a system of collective redress is a must for antitrust or competition policy to be effective. To be sure, she has also stressed that the

* The authors gratefully acknowledge the able assistance of colleagues [Ana Marchiani](#) and [Jonathan Ellison](#) in the preparation of this Section.

EU should not simply import the US system wholesale but rather should follow its own cultures and traditions. Respectfully, that is what the bandaid said to the bursting dyke.

(c) In November of 2007, Meglena Kuneva, the EU's Commissioner for Consumer Protection, stated that collective redress goes hand-in-hand with the EU's mission to establish "an open and fully functioning single market that brings tangible benefits for consumers." Indeed, the EU is currently studying whether differences in the legislation, rules, and regulations of various European countries regarding collective redress constitute barriers to the carrying out of this mission or create an anticompetitive landscape.

(d) It seems almost inevitable that the EU will establish some form of collective redress for claims brought by both consumers and businesses (a topic that addressed in March 2008 at the seminar co-hosted in Paris by Proskauer and the Cercle Montesquieu).

7. We believe that European companies, or global companies doing business in Europe, can and must begin to focus on the various aspects of corporate life affected by US-style laws and litigation. Their legal structure, how their goods are distributed, how they have (or have failed to) protect company privileges and employees, how they have structured their legal relations with other companies and with the ultimate consumer, how to avoid or reduce risks flowing from a culture that increasingly is looking to private legal redress rather than social programs and public regulation — all of these must be addressed. It is our view that companies act at their peril by failing to come to grips with the new reality and taking steps that do exist and can be employed in light of the paradigm shift that has occurred.

8. Yet the tidal wave has not yet hit.

B. Collective Redress in Europe

1. Redress for Violation of Competition Law

(a) The EC has published a [White Paper](#) on damages actions for breach of EC antitrust/competition rules. The paper analyzes measures, including collective redress instruments, addressed to the specific problems experienced in the area of competition law.

(b) The Commission suggests a combination of two complementary mechanisms of collective redress:

- (i) Opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action and
- (ii) Representative actions, which are brought on behalf of the victims by qualified entities, such as consumer associations, state bodies or trade associations. Member state authorities could either designate those qualified entities in advance or certify them on an ad hoc basis for a particular antitrust infringement.

2. Consumer Collective Redress

- (a) We also note with interest the “Green Paper” titled “[On Consumer Collective Redress](#)” (Commission of the European Communities, COM (2008) 794 final (Brussels 11/27/08). The paper echoes many of the points above, but does not go as far as we do in declaring the matter over, and seeks comments by March 1, 2009.
- (b) This second initiative is more general in suggesting diverging collective redress options which may be appropriate to address harm caused by breaches of a wide range of consumer protection laws. The Green Paper only concerns harm suffered by consumers, while the White Paper concerns both consumers and businesses. See generally the [EU initiative working papers and supporting documents](#) (press releases/staff reports, etc).
- (c) A related development has concerned litigation funding, which is discussed below.

3. Legislative Initiatives: A country by country summary can be found at the EU’s useful [Consumer Protection website](#). To take a few examples:

- (a) Netherlands: There are proposals on encouraging more settlement, but there has been no swift move to fill the gap by introducing a front-end class action procedure.
- (b) Italy: In July 2008 the new Berlusconi government delayed of introduction of the Class Action Act until January, 2009. It is unclear will happen then. The Act has been criticized by scholars, and various changes to it are being considered.
- (c) France: The government has delayed introduction of any proposals, which is of some significance given that France currently holds the EU Presidency and has chosen not to lead or push this issue. The new Sarkozy government appears interested in limiting any impact on business.
- (d) Poland: A draft Act has been developed. But it provides for an opt-in in approach.
- (e) Germany: It is noteworthy that the largest European national economy has taken no steps to introduce any reform or new class action procedure. Indeed, the Federal competition authority has strongly opposed implications of the Commission’s White Paper. But the government has introduced a new law permitting contingency fees where no alternative funding exists, albeit with restrictions.
- (f) Sweden: A government report has been published based on five years experience of their Class Action Act. It proposes various amendments to tighten the procedure, and also suggests an introduction of contingency fee arrangements in certain circumstances. The government is, however, not keen on introducing contingency fees.

(g) UK: The government has enacted innovative powers for many public enforcement authorities to impose Restoration Requirements (which would include compensation) on infringers, as part of the armory of enforcement powers: Regulatory Enforcement and Sanctions Act 2008. The UK has embraced with apparent zeal third-party funding of contingent fee litigation, while nonetheless rejecting attempts to make UK's law on awarding compensatory damages more closely akin to US law. A lawsuit was brought by poultry farmers and animal feed manufacturers against several chemical companies, including Aventis, BASF and Roche, that allegedly operated an illegal cartel to fix the price and supply of vitamins. Specifically, although the plaintiff in this competition case could not prove that it had suffered a financial loss — in part because of incomplete documentation — it nonetheless argued that it was entitled to a share of the cartel's illegally gained profits. It also asked the court to impose exemplary, or punitive, damages against the vitamin suppliers in order to act as a deterrent against other cartelists. Both claims were rejected ultimately by the Court of Appeal, which ruled that the traditional system of compensatory damages was adequate. *Devenish Nutrition Ltd v. Sanofi-Aventis SA*, 2008 WL 4153573 (Ct. App. 10/14/08).

- (i) In our view, this ruling represents the state of the decisional law in the absence of any modification or amendment. It does not change our view, and we do not think its will is inevitable.
- (ii) Many are concerned that proposals put forward by the Civil Justice Council (which recently published proposals to make it easier for consumers and small businesses to seek redress through the courts) and the Office of Fair Trading to encourage so-called private enforcement of competition law will lead to an explosion of costly US-style class action lawsuits. In our view, they are right to be concerned.

C. Codification and Harmonization of Conflict of Laws Principles

1. On July 4, 2008 and January 1, 2009, respectively, the European Union introduced two important regulations harmonizing and clarifying the conflict of laws principles applicable in Europe: the Rome I Regulation on the Law Applicable to Contractual Obligations, and the Rome II Regulation on the Law Applicable to Non-Contractual Obligations.
2. The Rome II Regulation replaces the national patchwork of conflict of laws rules currently applied by the various Member States with a harmonized set of regulations. Rome II governs cross-border non-contractual (e.g. tort) claims not exceeding €2,000 and started to run as of December 17, 2008.
3. The Rome I Regulation effectively modifies and supplants the contractual conflict of laws rules contained in the 1980 Rome Convention, providing important clarifications and bringing several of the rules up to date. Rome I is based on the principle of party autonomy, and respects the choice of law that the parties to a contract make. Among the principal contributions of Rome I are the following:

- (a) Parties may choose any law, including laws with only a minimal connection to the contract, regardless of whether the chosen law is that of an EU Member State.
- (b) However, if the parties have not chosen a law applicable to their contract in accordance with Article 3 of Rome I, the law governing the contract will be determined following the rules set out in Article 4, and will depend on the parties to and the substance of the contract.
- (c) In contrast to the vague notion contained in Article 7 of the Rome Convention of 1980, Article 9 of the Rome I Regulation provides the following definition of “overriding mandatory laws” (“lois de police” in French): “provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.”

D. New Procedure in France to Bring Constitutional Challenges

1. On July 28, 2008, France introduced a new law that significantly modernizes the framework for challenging the constitutionality of national legislation. The new system bears a much greater resemblance to the one in place in the United States.
2. Under the previous regime, laws were required to be vetted by the Constitutional Council prior to their enactment. However, once enacted, laws were immune from further constitutional review. Pursuant to the new reform, where the enforcement or implementation of a law results in a violation of the rights and liberties protected by the constitution, the State Council or the Supreme Court may submit such law to the Constitutional Council for review. Upon a decision by the Council that a law is unconstitutional, such law will be repealed as of the date of the decision.
3. As this is the first time such recourse has been available in France, it is still too early to predict what consequences it will have. The reform may result in the invalidation of laws that contain overly broad provisions, such as laws dealing with environmental protection or laws allowing judges excessive discretion in their decision-making.

III. Sovereign Entities in US Commercial Litigation: New Challenges and Opportunities

By [Jennifer R. Scullion](#)

A. Overview

1. One aspect of international practice in which we expect to see considerable activity in the next few years is private litigation involving sovereign entities — especially in the US, where the courts are relatively hospitable to such disputes (although not without limit).
2. The wave of US litigation stemming from the crash of the Argentine economy in 2001 likely will serve as a model for the expected next wave of defaults on sovereign debt, moderate to draconian fiscal and monetary reforms, and nationalization schemes in the wake of the global financial crises. The experience of the lower level US courts with Argentina has, to some extent, emboldened them to question the wisdom, utility, and fairness of broad applications of sovereign immunity in this context. The signals from the US Supreme Court, however, continue to favor deference to traditional notions of comity and avoiding judicial interference in presumed non-US policy issues.
3. We also see issues of sovereign immunity and deference to sovereign actions coming to a head outside the sovereign debt arena, including as US courts come to grips with “choreographed” litigation (especially in former Soviet jurisdictions), private initiation of criminal proceedings to gain leverage in business disputes, sovereign/private joint ventures, and nationalization/privatization of commercial enterprises. (For example, in a decision handed down at the very end of 2008, a federal trial court in New Jersey noted that private US antitrust claims against 16 Chinese entities could embroil the court in difficult sovereign immunity and Act of State issues given the gradual transition of the Chinese economy from central planning to various levels of “privatization.” The court opted to avoid the issue altogether and dismissed for lack of subject matter jurisdiction under the Foreign Trade Antitrust Improvements Act. *Animal Science Products, Inc. v. China National Metals & Minerals Import & Export Corp.*, 2:05-cv-4376-GEB-ES (D. N.J. Dec. 30, 2008), Opinion, Dkt. No. 73.)
4. We expect that the increasing exposure to these phenomena will cause US courts to examine and reexamine the scope, nature, and application of sovereign immunity and related immunities, including the “Act of State” doctrine.

B. Expanding Immunity to Non-Sovereigns and Indirectly-Owned Commercial Enterprises

1. Two key decisions in 2008 – one from the US Supreme Court and the other from the Court of Appeals for the Ninth Circuit – broadened and strengthened the protections of sovereign immunity in US commercial litigation. Whether this signals a more general trend remains unclear, in part because other recent decisions, especially at the trial court level, have taken a more nuanced approach to sovereign immunity, arguably with more concern for the rights of the private litigants.

2. Sovereign Immunity Compelling Dismissal of Claims Against Non-Sovereign Entities

- (a) As discussed in the Guide, US courts seek, where possible, to [exercise jurisdiction, not to abstain from or decline it](#). [Sovereign immunity](#) can, in some instances, create a tension with this principle.
- (b) That tension is manifest in litigation in which a sovereign's interests arguably are at issue, but the sovereign has not been or cannot be joined in the action. Some courts resolve the issue by invoking the [Act of State Doctrine](#). See discussion below.
- (c) In 2008, the US Supreme Court took on the issue in the context of the FSIA and resolved the tension in favor of protecting the interests of the sovereign state over the interests of the private litigants in a US forum.
- (d) In *Republic of the Philippines v. Pimentel*, ___ US ___, 128 S.Ct. 2180 (2008) the Court held "where sovereign immunity is asserted" by parties whose joinder is "required" under Fed. R. Civ. P. 19(a), the entire action must be dismissed if the sovereign's substantive claims/defenses in the action are not "frivolous" and there is risk that the sovereign's interests would be injured by proceeding without it. *Id.* at 2191. The Court intimated that such injury was virtually presumed in any case in which a sovereign was such a "required" party and immune under the FSIA.
- (e) The Court recognized that its holding could deprive private litigants of a forum in some instances, but held that such result "is contemplated under the doctrine of sovereign immunity" and that any prejudice to the private litigants was outweighed by prejudice to the absent, immune sovereign entities.

3. Expanding Sovereign Immunity to Indirectly Held Commercial Enterprises

- (a) As discussed in the Guide, FSIA immunity applies not only to claims against sovereign states, but to their ["political subdivisions" and, critically, the "agencies and instrumentalities" of states and their subdivisions](#). "Agencies and instrumentalities" includes so-called "organs" of the state, as well as majority-owned entities. 28 USC § 1603(b).
- (b) In 2003, the US Supreme Court held that the "majority-owned" branch of § 1603(b) required direct ownership by the state or political subdivision, thereby restricting application of the FSIA. *Dole Food Co. v. Patrickson*, 538 US 468, 474 (2003).
- (c) This year, however, the Ninth Circuit Court of Appeals opened a potential new door to FSIA immunity for entities indirectly owned by a state or political subdivision. In *Cal. Dep't of Water Resources v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008), the Ninth Circuit held that the defendant, Powerex, was an "organ" of British Columbia, Canada for purposes of the FSIA based, in part, on the fact that British Columbia was the ultimate "beneficial owner" of Powerex, which BC held indirectly through another entity, BC Hydro. *Id.* at 1100.

(d) The Circuit also agreed that it was “irrelevant” that Powerex is a for-profit corporation because the profits are passed through to the public, not to private shareholders. *Id.* at 1101-02.

C. Defining the Limits of Immunity for Unlawful Expropriation

1. The global financial crisis (as well as continuing political changes in Africa, Latin America, and the former-Soviet Union) likely will result in an increase in claims of expropriation and other unlawful “takings,” whether through outright nationalization, *post facto* statutory changes, tariff restrictions, or otherwise. As discussed in the Guide, [the FSIA does not provide immunity for certain claims of unlawful expropriation](#), provided that there is requisite “commercial” nexus to the US. 28 USC § 1605(a)(3). The “expropriation” exception will see increased attention and development by US courts as claims of unlawful “takings” wind their way through litigation.
2. In 2008, some of the finer points of the “expropriation” exception were discussed in a case not about the current crisis, but reaching back to the first quarter of the last century, *Agudas Chasidei Chabad of the US v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008).
3. In *Agudas Chasidei*, plaintiffs filed suit in the US against the Russian Federation and Russian government agencies to regain possession of a religious Library and Archive that allegedly had been unlawfully taken — or “retaken” — through various means by the Bolshevik government in 1917, the Soviet government in later years, and the Russian Federation still later.
4. The district court dismissed the claims as to the Library — finding FSIA immunity — but not as to the Archive. On appeal, the DC Circuit clarified that:
 - (a) The “commercial nexus” requirement of the expropriation exception requires the plaintiff to carry an early burden of producing sufficient evidence of such a nexus. *Id.* at 940-41. If that burden is carried, the burden of *persuasion* is on the sovereign defendant to prove by a preponderance of the evidence that there is no requisite nexus. *Id.*
 - (b) As to the requirement of a “claim” in which “rights in property taken in violation of international law” are “in issue,” it is enough for the plaintiff to make a claim that is not “wholly insubstantial and frivolous.” *Id.* at 940-42. Whether the plaintiff succeeds on the merits of the claim is not a question of FSIA immunity. *Id.*
 - (c) A plaintiff can place such property “in issue” without making any claim of its own to rights in the property. *Id.* at 941, n.3.
 - (d) An unlawful “taking” may occur where court and government orders to return property are frustrated or nullified by practical or juridical circumstances — e.g. administrators refusing to obey orders, mobs threatening violence when retrieval is attempted, “secret” orders overturning or enjoining prior court orders, etc. *Id.* at 943-46.

- (e) The expropriation exception provides two separate avenues to satisfy the “commercial” nexus requirement, only one of which actually requires the presence of the property (or its exchanged property) in the US. It is enough, for example, if the property at issue is owned or operated by an agency or instrumentality of the foreign sovereign and that agency or instrumentality happens to be “engaged in” commercial activity in the US — a relatively low threshold that does not, for example, require “substantial” contact. *Id.* at 946-48. In *Agudas Chasidei*, this standard was met by the commercial contracts that the various Russian agencies had for publication and broadcasts in the US, even though the contracts had no nexus to the property at issue itself. *Id.*
- (f) There is no requirement under the FSIA that the plaintiff “exhaust” local remedies before suing in the US. *Id.* at 948-49. The Court also questioned the suggestion by Justice Breyer in 2004 that US Constitutional principles should be extended to international law such that, to prove a “taking” in violation of international law, the plaintiff may need to show the absence of remedies available in the sovereign state. *Rep. of Austria v. Altmann*, 541 US 677, 714 (2004) (Breyer, J., concurring).
- (g) Even if there were an exhaustion requirement, it was plain that there was no effective remedy available to the plaintiff in Russia. Russia’s suggestion that the plaintiff could recover possession under Russian law by paying for the Archive and Library was found to be no “remedy” at all for the alleged unlawful taking. *Id.*

D. Enforcing Contractual Waivers of Immunity

1. As reported in the Guide, US courts are as zealous about [enforcing contractual agreements to waive sovereign immunity](#) as they are in enforcing the protections of immunity itself. The certainty of contract is seen as key to the vitality and operation of the financial markets in particular.
2. In the midst of the crises rolling through the global markets, litigants likely will seek broader interpretations and enforcement of waivers. Two recent decisions highlight this trend.
3. [Argentine Sovereign Debt Waiver Extends to Pension Funds: Aurelius Capital Partners. LP v. The Republic of Argentina](#), 07-CIV-2715 (TPG) (S.D.N.Y. 2008)
 - (a) The “main difficulty” in the US lawsuits seeking to recover from the Republic of Argentina on its defaulted sovereign debt has been finding a way for the plaintiff creditors to recover on the many judgments that have been and will be entered. The creditors found new hope in December 2008 when the US trial court agreed that plaintiffs could attach \$200 million in New York investment accounts belonging to certain private and public Argentine pension funds because those accounts had been transferred to an Argentine entity known as ANSES. See [Opinion, December 11, 2008](#) (Rulings of Special Interest).
 - (b) Although Argentine law expressly provided that ANSES assets could not be attached and could be used only for payments to the pensioners, the US court nonetheless found the attachment proper under the FSIA because:

- (i) Argentina itself had contractually agreed to a broad waiver of sovereign immunity when it issued the underlying debt.
 - (ii) ANSES was found to be nothing more than a subdivision of Argentina and, therefore, bound by Argentina's broad contractual waiver of immunity. Argentina had so abused, misused, and manipulated ANSES and its assets as to remove any semblance of independent existence for ANSES. Indeed, testimony and other evidence showed that Argentina had effectively nationalized private as well as public pension funds for the purpose of propping up its budget by investing the funds in more sovereign debt.
 - (iii) The FSIA also requires that, to attach sovereign assets, the assets must be "used for a commercial activity in the United States." 28 USC §§ 1610(a), (d). There was no serious dispute that the assets in question — investment accounts — met this requirement. As a matter of law, investment accounts are commercial in nature even if the ultimate use of the funds is governmental, as Argentina claimed.
4. Scope of Immunity Waiver Equal to Scope of Forum Waiver: In *Belize Telecom*, discussed above, the Circuit Court held that Belize had waived immunity for claims with respect to the appointment and removal of directors. The court found that such claims plainly were encompassed in the parties' contractual forum selection clause. The court rejected Belize's argument that the scope of its immunity waiver should be narrower than the forum waiver. 528 F. 3d at 1309, n. 13.

E. Clarifying Application of the Act of State Doctrine

1. As explained in the Guide, sovereign states enjoy not only the statutory protections of the FSIA, but also the largely non-statutory protections of the [Act of State Doctrine](#). The Act of State Doctrine generally precludes US courts from reviewing or questioning any action by a foreign sovereign that is lawful under that sovereign's laws, with the goal of preventing the judicial branch from becoming embroiled in non-US affairs deemed to be within the province of the political branches of the US government.
2. The increased role of sovereign states in commerce and related litigation will require US courts to further define and clarify the Act of State Doctrine and the respective roles of the US courts and non-judicial branches. We have seen the beginnings of this Trend in 2008.
3. Defining the Territorial and Policy Limits of the Doctrine
 - (a) In *Agudas Chasidei* (discussed above), the Russian Federation (defendant) sought to invoke the Act of State Doctrine to dismiss claims concerning the alleged expropriation of plaintiff's Library and Archive. The D.C. Circuit held that:
 - (b) It was Russia's burden to prove application of the Act of State doctrine and that Russia had not carried that burden with respect to the seizure of the archive. 528 F.3d at 951-52. The Act of State doctrine applies **only** to

seizures within a sovereign's own territory and Russia had not overcome the evidence that the seizure in question occurred in Poland, rather than in Soviet-occupied Germany (as Russia theorized). *Id.*

- (c) With respect to the alleged seizure of the Library by the Bolshevik government in 1917-25, the Circuit rejected the argument that the Act of State Doctrine could be ignored because of the various "changes in regime" from 1925 to present. *Id.* at 953. (Such a "change in regime" exception to the doctrine had been suggested by the US Supreme Court in 1964 and applied by other courts in the intervening decades.) The Circuit held that, to the extent that such an exception exists, it applies only where it is clear that the current regime does **not** seek to rely on or justify the prior regime's actions. Because Russia was actively opposing the plaintiff's claims of expropriation, the "change in regime" did not alleviate the foreign policy issues that the Act of State Doctrine seeks to avoid. *Id.* at 954.
- (d) The Court likewise rejected the suggestion that certain conduct could be so clearly egregious as to fall within a "consensus" of condemnation within the international community, obviating any foreign policy clashes. *Id.* at 955.
- (e) Finally, with respect to a supposed second or renewed seizure of the Library in 1991-92, the Court noted that a specific US statute — the "Second Hickenlooper Amendment," 22 USC § 2370(e)(2) — "normally bars application of the act of state doctrine to seizures occurring after January 1, 1959." *Id.* at 953.

4. Applying Act of State Doctrine to Privately Initiated Criminal Proceedings

- (a) In many countries outside the US, private parties can initiate criminal proceedings — a phenomenon open to potential abuse as parties seek to gain "leverage" in commercial settings (as has been seen in some matters in Latin America and the former Soviet Union.). Such potential for *private* abuse of *public* proceedings likely will require closer examination of the purpose, utility, and limits on the application of the Act of State Doctrine.
- (b) The Seventh Circuit Court of Appeals recently ventured into this area in *Nocula v. UGS Corp.*, 520 F.3d 719 (7th Cir. 2008). The plaintiff alleged, in part, that the defendants (a US entity and Polish subsidiary) had instituted a criminal complaint against the plaintiff's affiliate in Poland to put business pressure on the plaintiff. As a result, the Polish police allegedly had seized and destroyed the plaintiff's property (computers) in Poland. Plaintiff brought suit in the US against the private defendants — but not the Polish authorities — based, in part, on the theory that the defendants had caused the police investigation that led to plaintiff's injury.
- (c) The US district court dismissed the complaint for a number of reasons, including that the seizure by the Polish police was an act of state the legality and propriety of which could not be questioned by US courts. The Seventh Circuit affirmed, holding that the "decision of a foreign sovereign to exercise its police power through the enforcement of its criminal laws plainly qualifies as an act of state." 520 F.3d at 728. Although the plaintiff had alleged that

the private defendants had seized the computers, the Court agreed that other facts alleged showed that the seizure was “part and parcel” of the public criminal prosecution and, therefore, immune from review under the Act of State Doctrine regardless of any alleged private instigation of that prosecution. *Id.*

F. Vigilant Protection of Non-Governmental Organization Immunity

1. As sovereign state litigation increases, so too will the importance of the distinct **statutory** immunity for certain non-governmental organizations, including the World Bank and other international financing organization. The breadth and inviolable nature of so-called “IOIA” immunity was recently reconfirmed by the federal Court of Appeals for the DC Circuit in *Inversora Murten S.A. v. Energoprojekt-Niskogradnja Co., Ltd.*, 264 Fed. Appx. 13 (D.C. Cir. Feb. 14, 2008).
2. As explained in the Guide, the [International Organizations Immunities Act \(IOIA\) of 1945, 28 USC § 288a\(b\)](#) provides broad, “absolute” immunity not only from suit, but — critically — from provisional remedies such as garnishment, attachment, etc. to international organizations designated by the President by Executive Order. Currently, the IOIA organizations run the gamut from international water and commodity organizations to the World Bank to WIPO
3. In *Inversora Murten*, a creditor sought to garnish contract payments to be made by the World Bank to the debtor (a Serbian entity that had contracted with Nigeria on projects funded by the World Bank). The court reconfirmed that IOIA immunity is “absolute” absent an express waiver and that any such waivers are to be narrowly construed to apply only if enforcing the waiver would serve the organization’s broader mission. 264 Fed. Appx. at 15 (citing *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998)).
4. *Inversora* found that, although the World Bank’s governing documents contain a waiver of immunity, the waiver was not applicable to the requested garnishment because the World Bank had no material interest in giving its funds to a third party (the creditor), nor in the finances of the third party debtor, a contractor carrying out a project financed by the World Bank. Such careful parsing of IOIA organization waivers and their purpose will continue to restrict plaintiff access to IOIA funds and property.

IV. Increased Use of Alternative Dispute Resolution Techniques

By [Louis M. Solomon](#)*

A. Overview

1. With in-court litigation being seen as too costly and protracted, many clients are increasingly turning to other systems of dispute resolution. We see this on a large scale for disputes affecting large numbers of businesses or individuals.
2. The rapid expansion of mediation techniques, staged claims procedures, and “rent-a-judge” programs will continue in 2008.

B. Protecting Contractual Agreements to Arbitrate

1. In last year’s Trends Report, we discussed *Venture Global Eng., LLC v. Satyam Computer Serv., Ltd.*, 233 Fed. Appx. 517 (6th Cir. 2007) (enforcing London Ct. of Arb. award and rejecting objection under Indian law and *forum non conveniens*), and *Championsworld v. USSF and Major League Soccer*, 487 F.Supp.2d 980 (N.D. Ill. 2007) (enforcing arbitration provision in international soccer regulations; no conflict with US forum selection clause). Both cases were handled by Proskauer.
2. The legal and practical aspects of [compelling and resisting arbitration](#), and [enforcing or objecting to arbitral awards](#), are also reviewed at length in the Guide.
3. Significant developments in 2008 include making it easier for parties to force other litigants out of court and into arbitration.
4. A good example is *Sourcing Unlimited, Inc. v. Asimco Int’l, Inc.*, 526 F.3d 38 (1st Cir. 2008). In *Sourcing Unlimited*:

(a) A signatory to a written partnership agreement that required international arbitration of commercial disputes brought suit against two non-signatories: (1) the partner’s subsidiary, and (2) an executive of the partner and the subsidiary. The defendants moved to dismiss the suit, arguing that, under equitable estoppel, the signatory should not be permitted to avoid arbitration when the issues the signatory sought to be litigated were intertwined with the arbitration agreement.

(b) After the federal District Court of Massachusetts denied the motion to dismiss, the defendants took an interlocutory appeal. The Court of Appeals for the First Circuit held that a non-signatory to an international arbitration agreement was entitled to take an interlocutory appeal from an order refusing to compel arbitration with a signatory party. The court explained that international commercial disputes, unlike domestic ones, are subject to the New York

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Convention and Chapter 2 of the FAA, neither of which precludes a non-signatory from bringing an appeal based on an estoppel theory. The First Circuit further noted that the national policy favoring arbitration has extra force when international arbitration is at issue, and non-signatories may be bound to arbitrate through doctrines of assumption, agency, estoppel, veil piercing, and incorporation by reference.

C. Increasing Use of and Protections for Mediation and Other ADR Proceedings

1. We continue to see many clients move in the direction of ADR proceedings, which may, for example, include mandatory mediation to resolve many of the claims before they get to a longer, larger, and more expensive forum.
2. The courts will enforce conditions precedent requiring mediation. *E.g. B & O Manufacturing, Inc. v. Home Depot USA., Inc.*, 2007 WL 3232276 (N.D. Cal. 2007) (dismissing claim for failure to mediate first). Careful drafting of such provisions is key, however, to their utility. *See, e.g., USA Flea Market, Inc. v. EVMC Real Estate Consultants, Inc.*, 2007 WL 2615887 (11th Cir. 2007) (mediation provision would not survive termination of contract; ordering further proceedings on whether contract had been terminated).
3. In our experience, more informal yet inventive and effective ADR techniques are being used in the areas of telecoms, products liability, and construction. We are seeing staged claim procedures in a great many cases where a defendant is trying to resolve hundreds or thousands of claims in a rapid and even-handed way. We see this mode of dispute resolution blossoming in 2009.

V. Increased Risk of Coordinated Regulatory/Enforcement Proceedings in Multiple Countries

By [Michael S. Lazaroff](#)

A. Overview

1. As we reported last year, the Antitrust Division of the US Department of Justice (DOJ) continues to be very active in investigating and prosecuting alleged international antitrust violations. There have been continued investigations and proceedings in coordination with other jurisdictions for antitrust violations. These coordinated investigations pose risks to companies operating in international and global markets.
2. We predict that these efforts will continue to intensify, as will the phenomenon of follow-on private or class action litigation in the US and associated internal investigations based on the same allegations as the regulators are investigating.

B. Trends in International US Antitrust Enforcement

1. DOJ has continued aggressively investigating, prosecuting, and punishing international cartels that target US markets. The DOJ has been particularly successful in using its amnesty and leniency program to obtain cooperation from international companies. This has resulted in large criminal fines upon international agreements and increased sentences and fines upon individuals.
 - (a) For example, in 2008, seven non-US air cargo airlines plead guilty for their role in the air cargo conspiracy. These companies including Air France, KLM, Japan Airlines and SAS Cargo group agreed to pay fines totaling over \$650 million.
 - (b) Two non-US companies, Dunlop & Oil Marine, Ltd. and Manuli Rubber Industries S.p.A. agreed to plead guilty for their role in the marine hose price fixing conspiracy. These companies collectively agreed to pay over \$6 million in fines.
 - (c) Three non-US electronics manufacturers agreed to plead guilty in the LCD panel price fixing conspiracy. These companies agreed to pay fines of over \$650 million dollars.
2. DOJ has also continued to pursue the individuals responsible for price fixing agreements even if they are non-US citizens.
 - (a) For example, three individuals including a non-US citizen, agreed to plead guilty for their role in the air cargo price fixing conspiracy. These individuals agreed to jail sentences of between 6 and 8 months and agreed to pay fines as high as \$20,000.
 - (b) Nine individuals including numerous non-US citizens agreed to plead guilty for their role in the marine hose price fixing conspiracy. These individuals agreed to jail sentences of up to thirty months in jail and fines of up to \$100,000.

- (c) Three of these individuals were also simultaneously sentenced to jail sentences in the United Kingdom and were allowed to serve their prison sentences in the UK rather than in the US. One individual was sentenced in the US for his role both in the marine hose price fixing conspiracy and also for his role in violations of the Foreign Corrupt Practices Act.
- (d) The DOJ had less success with those individuals who were indicted and with whom it did not reach plea bargains. In two separate trials, the DOJ failed to secure convictions for claims of an individual's role in a price fixing conspiracy.
 - (i) In February 2008, a senior sales executive of Hynix America challenged his indictment for conspiring to fix prices in the Dynamic Random Access Memory (DRAM) computer chip market. By the time of the trial, four companies including Hynix and fourteen individual had plead guilty resulting in fines and penalties of over \$731 million. The trial ended with a hung jury and a mistrial was declared. The DOJ announced its decision not to retry the case and the indictment was dismissed with prejudice. Interviews showed that the jury did not find the government's witnesses credible.
 - (ii) In November 2008, two executives from Manuli Rubber Industries S.p.A. challenged their indictment for conspiring to fix prices, rig bids and allocate market in the marine hose industry. By the time of trial, two companies and nine individuals had already plead guilty for their role in the conspiracy. Both of the executives were found not guilty.

C. Trends in the EU

1. The European Commission (EC) and competition authorities of the Member States of the European Union have also continued to aggressively investigate and fine international cartels that have targeted European markets.
2. In 2008, the EC has imposed fines of over €2 billion for illegal cartel activity. This includes fines of over €1.3 billion on various car glass producers for their role in a market sharing cartel and fines of over €646 million on various wax producers for their role in a price fixing and market sharing cartel.
3. The EC also introduced a new settlement procedure to simplify the procedure for companies to settle investigations. The EC anticipates that this will permit it to deal more quickly with cartel cases.
4. There was also significant activity at the national level.

- (a) In France, the French competition authority imposed record fines of over €575 million on 11 steel trading companies for price fixing and market sharing. This was also the first time that the French competition authority reduced a fine of a cartel member pursuant to its leniency program as a result of the company's cooperation in the investigation.

(b) In the United Kingdom, the Office of Fair Trading successfully reached a settlement with six companies for fixing the price of cigarettes whereby these companies agreed to pay £132 million.

D. Trends in Extradition and Leniency

1. Extradition of Individuals

(a) One of the important issues involved with any attempt to successfully prosecute non-US citizens is the ability to extradite such individuals.

(b) In one case, DOJ has been attempting to extradite a British citizen on charges of being involved in a conspiracy to fix the prices of carbon products from 1989-2000. This past year, the House of Lords blocked his extradition because price fixing was not a criminal offence in the United Kingdom. The House of Lords remanded to case to the lower court for further proceedings on whether he maybe extradited on other charges. A lower court then found that the individual could be extradited for obstruction of justice. This decision is now being appealed.

2. Leniency and Amnesty

(a) In November, 2008, DOJ released new Model Conditional Leniency Letters ("Model Letters") for those seeking amnesty for antitrust violations and also issued "[Frequently Asked Questions Regarding the Antitrust Division's Leniency Program](#)" ("Leniency FAQ") which clarified a number of policy issues related to the amnesty program. The noteworthy features of the Model Letters and the Leniency FAQ include:

- (i) An extensive discussion of the marker system under which a potential applicant may hold its position in line for leniency until counsel gathers sufficient information to support the application. In order to obtain a marker, the corporation must state, among other things, that it has uncovered some information or evidence suggesting it may have engaged in a criminal violation;
- (ii) To actually obtain a conditional leniency letter, an amnesty applicant must now admit to actually committing a criminal antitrust violation before receiving a conditional leniency letter. Under the prior model leniency letter, a company could begin the process by only reporting "possible" violations.
- (iii) The Model Corporation Conditional Leniency Letter now covers not only the antitrust activity but also any offense a corporation may have committed "in connection with" the anticompetitive activity. But, the Model Corporation Conditional Leniency Letter only binds the Antitrust Division of the DOJ, not other prosecuting agencies which could prosecute for other offenses (although this has not yet happened).

- (iv) The DOJ will not require any waiver of attorney-client or work product privileges, but the DOJ notes that some companies have found that voluntary disclosure of any such documents may be in the “best interest of the corporation”.
- (v) The leniency program generally has required an applicant to take “prompt and effective” action to terminate participation in the antitrust violation upon discovery of the violation. The DOJ has clarified that the “the fact that top executives, board members, or owners participated in the conspiracy does not necessarily bar the corporation from eligibility for leniency.” The DOJ generally “considers the corporation to have discovered the illegal activity at the earliest date on which either the board of directors or counsel for the corporation (either inside or outside) was first informed of the conduct at issue.”
- (vi) The DOJ clarifies that in considering whether a corporation has taken “prompt and effective” steps to terminate participation, the DOJ will take into consideration many case specific factors but a “primary consideration” will be the steps taken by management in response to the discovery of the anticompetitive activity. Thus, a company should not “use managers or executives who were involved in the activity” to formulate the response or determine disciplinary action.
- (vii) The DOJ explains that the requirement to make restitution to injured parties (a) ceases if the DOJ’s investigation reveals no criminal conduct; and (b) does not cease if the DOJ conditionally grants the leniency application or concludes that the applicant has not engaged in criminal activity but nonetheless closes the investigation without charging any other entity. In the latter case, the company remains obligated to make restitution unless it withdraws its leniency application.
- (viii) The DOJ explains that it will provide notice to counsel for a recipient of conditional leniency concerning any recommendation to revoke the applicant’s conditional leniency and will provide counsel an opportunity to meet with the DOJ concerning any such revocation.
- (ix) The Model Corporation Conditional Leniency Letter now has the applicant acknowledge and agree that it will not seek judicial review of any decision to revoke a conditional leniency unless and until the applicant has been charged.
- (x) If there is a substantial gap between the date of discovery of the illegal activity and the date the activity is reported to the Division, then DOJ reserves the right to grant conditional leniency only up to the date the applicant says that it terminated the activity.
- (xi) In accordance with *F. Hoffman-La Roche Ltd. V. Empagran S.A.*, 542 U.S. 155 (2004), the Model Corporation Conditional Leniency

Letter now states that the applicant is not required to pay restitution for injuries independent of any effects on US domestic commerce.

- (b) The UK Office of Fair Trading also recently released a revised Leniency Guidance for businesses and individuals wishing to disclose information about their role in a cartel. The OFT reports that the guidance is intended to give “maximum predictability and transparency” for leniency applicants and their advisers.

VI. Vigorous, Expanded Enforcement of the US Foreign Corrupt Practices Act

By [Matthew S. Queler](#)

A. Overview

1. As explained in the Guide, the [US Foreign Corrupt Practices Act of 1977 \(“FCPA”\) broadly prohibits improper payments to foreign officials.](#)
2. In our FCPA work this year, we have observed a number of trends that we believe will have critical legal and practical implications for multinational entities with business touching on the US. These include:
 - (a) Heightened, aggressive enforcement by both the US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). The rate of cases has more than doubled in recent years – a trend that we expect will continue;
 - (b) Exponential increases in the fines being levied – including a recent, record-breaking \$1.3 billion fine levied against Siemens; and
 - (c) Increased international assistance in enforcing the FCPA.

B. Increased, Aggressive Enforcement

1. The number of investigations, prosecutions, and enforcement actions has dramatically increased in recent years.
 - (a) The DOJ
 - (i) From 2001 to 2004, the DOJ obtained resolutions or filed charges in seventeen FCPA cases. From 2005 to 2008, that number was forty-two.¹
 - (ii) Within the last four years, the numbers also have increased. As of February 2005, US authorities were handling thirty-five non-US bribery prosecutions and seventeen additional active investigations. By July 2007, these numbers were sixty-seven and sixty, respectively.²

¹ Press Release, Department of Justice, Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations (Dec. 15, 2008), <http://www.usdoj.gov/opa/pr/2008/December/08-opa-1112.html> (hereinafter “Siemens Press Conf.”).

² Joel M. Cohen, Michael P. Holland & Adam P. Wolf, *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 Bus. Law. 1243, 1247 (Aug. 2008).

- (iii) The sixteen criminal FCPA prosecutions brought by the DOJ in 2007 represents a 100% increase from 2006, when the DOJ brought eight cases, which was the DOJ's previous single-year record.³
 - (iv) Given the "significant number" of FCPA matters under investigation, the trend is expected to continue.⁴
 - (b) The SEC: The SEC has also ratcheted up its enforcement efforts. From 2006 through 2008, the SEC brought approximately three dozen FCPA cases. In the almost 30 year history of the FCPA prior to 2006, the SEC brought approximately six dozen cases.⁵
2. Causes for increased numbers: This increase is not simply the result of additional efforts and resources dedicated by the DOJ and the SEC. According to Mark Mendelsohn, Deputy Chief of the Fraud Section of the DOJ, the factors responsible for this uptick include:
- (a) Sarbanes-Oxley: Sarbanes Oxley has resulted in companies focusing on internal controls. It has also made officers and directors of corporations personally responsible for having such controls in place.⁶
 - (b) Globalization: More companies are competing on the international level. In addition, information moves globally and does so rapidly. So with now almost universal access to the internet, email, and search engines such as Google, incidents in what were once remote corners of the planet are more likely to become discovered by the U.S. authorities.⁷
 - (c) Creative resolutions combined with incentives to make voluntary disclosures: Mendelsohn has argued that the increased use of non-prosecution agreements, deferred prosecution agreements, and corporate compliance monitors has provided "positive incentives for responsible companies to self-disclose, to self-investigate, [and] to remediate appropriately."⁸
 - (d) Increase in anti-corruption efforts across the globe: *See Section D*, below.

³ *Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007*, 22 *Corporate Crime Reporter* 36(1), Sept. 16, 2008, available at <http://www.corporatecrimereporter.com/mendelsohn091608.htm> (hereinafter "CCR").

⁴ *Id.*

⁵ Siemens Press Conf., *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

3. Prosecution of Individuals: Another trend appears to be an increased emphasis in the prosecution of individuals (as opposed to corporations). This is an “intentional” effort by the DOJ to increase the deterrent effect of its enforcement activities.⁹

C. Explosion in Monetary Penalties

1. The size of the penalties imposed following successful enforcement actions had been growing in recent years, but exploded last month when the Siemens matter was resolved.
2. Prior to 2007, the largest total fine paid to the DOJ and the SEC was \$28.5 million (in the Titan case, resolved in 2005).¹⁰
3. In April 2007, a subsidiary of Baker Hughes Inc., a major oilfield services company, pled guilty to violating the anti-bribery provisions of the FCPA, conspiracy to violate the FCPA, and aiding and abetting the falsification of its parent company’s books and records.¹¹ The subsidiary agreed to pay \$44 million in combined fines and penalties as part of a plea agreement with the DOJ and a civil settlement with the SEC.
4. Also in 2007, the DOJ obtained what was then the largest criminal fine for FCPA violations, \$26 million,¹² and the SEC obtained what was its largest FCPA settlement, \$33 million.¹³
5. All these records, however, were shattered by the recent Siemens resolution.

(a) In December 2008, Siemens agreed to pay more than \$1.3 billion in additional fines and penalties, beyond the \$274 million it previously paid to German authorities, after it and some of its subsidiaries were accused of paying anywhere from \$800 million to \$1.4 billion in bribes.¹⁴

(i) As part of this resolution, Siemens pled guilty to one count of failure to maintain internal controls and one count of failure to maintain

⁹ CCR, *supra* note 3.

¹⁰ Cohen *et al.*, *supra* note 2.

¹¹ Press Release, Department of Justice, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay \$11 million Criminal Fines as Part of Largest Combined Sanction Ever Imposed in FCPA Case, http://usdoj.gov/opa/pr/2007/April/07_crm_296.html.

¹² Press Release, Department of Justice, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay \$ 26 million in Criminal Fines,” http://www.usdoj.gov/opa/pr/2007/February/07_crm_075.html; Cohen *et al.*, *supra* note 2.

¹³ Siemens Press Conf., *supra* note 1.

¹⁴ Jack Ewing, *Siemens Settlement: Relief, But Is It Over?* BusinessWeek, Dec. 15, 2008; Siemens Press Conf., *supra* note 1.

adequate books and records. In addition, three of its subsidiaries pled guilty to conspiring to violate the FCPA.¹⁵

- (ii) In terms of the \$1.3 billion, Siemens agreed to pay a criminal fine of \$450 million. It also agreed to disgorge \$350 million to resolve the civil action brought by the SEC. Finally, Siemens agreed to pay an additional \$540 million to German authorities.¹⁶

(b) Incredibly, the authorities have made clear that they would not have been so *lenient* had it not been for Siemens' "exceptional" cooperation, "significant remediation," and its massive, "thorough" internal investigation.¹⁷ For example, US authorities could have sought to ban Siemens from competing for government contracts, but did not do so.¹⁸

D. Agency Efforts to Expand FCPA Jurisdiction

1. The DOJ and SEC also continue to aggressively stretch the reach of the FCPA.
2. In late December 2008, the DOJ and the SEC announced that Fiat agreed to pay \$17.8 million to settle alleged FCPA violations arising out of its participation in the UN Oil-for-Food Program. This case represents an excellent example of just how aggressive the US has been in terms of expanding the jurisdictional reach of the FCPA, by prosecuting cases that do not squarely fall within its scope.¹⁹

(a) Fiat and the subsidiaries that were directly involved in the misconduct were non-US companies and almost all of the relevant conduct happened outside the US. The subsidiaries that were in fact responsible for the improper payments were neither issuers nor domestic concerns and, therefore, technically not subject to the proscriptions in the FCPA.

(b) The payments were made to Iraqi ministries and not Iraqi officials. The conduct, therefore, does not violate the anti-bribery provisions of the FCPA.

(c) To avoid these obstacles, the DOJ charged the subsidiaries with conspiracy to commit wire fraud and violations of the FCPA books and records provisions.²⁰

¹⁵ Siemens Press Conf., *supra* note 1.

¹⁶ *Id.*

¹⁷ *Id.* It has been estimated that Siemens spent billions of dollars on its internal investigation; Ewing, *supra* note 13; and its lawyers billed an estimated 1.5 million hours; Siemens Press Conf., *supra* note 1.

¹⁸ Ewing, *supra* note 13.

¹⁹ Press release, Department of Justice, Fiat Agrees to \$7 Million Fine in Connection with Payment of \$4.4 Million in Kickbacks by Three Subsidiaries Under the U.N. Oil for Food Program, <http://www.usdoj.gov/opa/pr/2008/December/08-crm-1140.html>.

²⁰ See Fulbright Briefing - White Collar Crime and Government Investigations, *Fiat To Pay \$17.8 million In Oil For Food Settlement* (Fulbright & Jaworski LLP, Washington, DC & Houston, TX), Jan. 2, 2009.

E. Increasing International Assistance in FCPA Enforcement

1. The international community has increased its efforts to combat corruption in international business transactions.

(a) Increased law enforcement efforts by non-US countries.

- (i) There are more and more cases being brought – not just by the US authorities – but also by non-US authorities, as we have seen with respect to cases involving Siemens, Pacific Consultants International, and Statoil.²¹
- (ii) Acting Assistant Attorney General Friedrich recently stated that other nations have “significantly step[ped] up their anti-corruption efforts” through instruments such as the OECD convention and the UN convention against corruption, and that she expects that this trend will continue.²²

(b) Increased cooperation and assistance from foreign countries.

- (i) The US has been increasingly effective in gathering evidence overseas through treaties as well as informal arrangements with law enforcement in other countries.²³
- (ii) The recent success by the US authorities in the Siemens matter was attributed to the very extensive coordination between US and German authorities. The extensiveness of their cooperation was to a degree never previously achieved.²⁴

(c) Assistance by Non-Governmental Organizations (“NGOs”): Another significant trend in the international anti-corruption movement is the continued growth and influence of NGOs in efforts to combat corruption and bribery.²⁵

²¹ Siemens Press Conf., *supra* note 1; *see also* CCR, *supra* note 3.

²² Siemens Press Conf., *supra* note 1.

²³ Ned Sebelius, Foreign Corrupt Practices Act, 45 Am. Crim. L. Rev. 579, 606 (Spring 2008); CCR, *supra* note 3.

²⁴ Siemens Press Conf., *supra* note 1.

²⁵ *See* Sebelius, *supra* note 23 at 605.

VII. Trends in US M&A: Lessons from a Difficult Year

By [Peter G. Samuels](#)

A. Overview

1. Our [2008 Trends Report](#) for US M&A surveyed what has turned out to be just the opening stages of a fundamental adjustment in M&A deal terms.
2. In the years leading up to 2007, an abundance of acquisition financing on “borrower friendly” terms, bulging coffers at private equity sponsors, generally high and rising stock prices, and strong economic fundamentals led to an economic and transactional environment highly favorable to sellers. Sellers took advantage, and merger agreements for the acquisition of public companies fell into a pro-seller pattern:
 - (a) Closing conditions giving buyers few walkways — aside from antitrust and other regulatory approvals, buyer closing conditions were largely limited to material adverse change (“MAC”) deteriorations in the seller’s business, and the accuracy of the seller’s representations (themselves subject to a MAC standard).
 - (b) MACs — inherently pro-seller (MACs have been held by the courts to require an unexpected downturn in the target’s business that is consequential to the company’s long-term earnings power over a period that would be expected to be measured in years not months). MACs were further weakened by sellers through negotiation of a lengthening list of carveouts from MAC definitions, putting an increasingly heavy burden on buyers to show that a MAC had occurred.
 - (c) No financing out — with lenders vying for business (and private equity buyers striving to level the playing field with strategic buyers), cash purchasers were either able to arrange financing or willing to assume the financing risk.
 - (d) Willingness of buyers to assume other deal risks — *e.g.*, agreement by buyers to “hell or high water” covenants under which they agreed to take any necessary actions (such as divestitures of businesses) to obtain antitrust or other regulatory approval.
3. The economic downturn and drying up of credit markets beginning in mid 2007 and gaining momentum since have radically changed perspectives:
 - (a) With worsened business prospects at target companies and tighter or non-existent acquisition financing, buyers made a rapid switch from bidding up prices and bidding down buyer deal protections, to insisting on more balanced terms in new deals and closely examining legal strategies to renegotiate and in some cases terminate already signed deals.

- (b) What was “market” in M&A deal terms became in many instances impossible to determine, as both buyers and sellers focused closely on deal-specific risks and circumstances.
 - (c) To a marked degree, well-established deal provisions — embodied in hundreds of agreements — failed to work, sometimes to the surprise of buyers, sometimes to the surprise of sellers.
4. With M&A deal volume plummeting in the US, many had looked to non-US transactions (particularly in emerging markets) to supply activity.
- (a) Nonetheless, in a late 2008 study, Dealogic reported that while declines were less striking than in the US, total deal values had fallen 73% in Latin America, 53% in Africa and the Middle East, and 36% in Asia.
 - (b) On the other hand, three large 2008 year-end deals were all non-US centric:
 - (i) The sale of Cadbury PLC of Schweppes Australia to Asahi Breweries.
 - (ii) SINA Corp.’s \$1.27 billion acquisition of Focus Media Holdings Ltd.
 - (iii) Asset purchase agreement between Companhia Vale do Rio Doce and Cementos Argos S.A.

B. What Have We Learned?

1. MAC Clauses: Sophisticated buyers have long known that Material Adverse Change walkaways provided only slim protection against business declines at merger targets. In *Hexion v. Huntsman*, the Delaware courts made clear that conventional MAC walkaways would almost never excuse buyer performance — noting that the Delaware courts had never found a MAC to have occurred in a merger context, and stating that this was “not a coincidence.”
- (a) Where this will leave buyers desiring protection against downturns in the target’s business or the economy or markets generally is by no means clear.
 - (b) A year ago it had seemed likely that buyers would negotiate for objective, quantitative walkway closing condition standards (e.g., minimum levels of EBITDA), but such provisions have remained relatively rare — perhaps because of strong seller resistance in a declining and highly unpredictable economic environment. (One example where purchase price adjustments and walkaways were keyed off EBITDA, run rate and S&P 500 levels — the agreement by Lehman Bros. to sell Neuberger Berman and other investment management assets to private equity buyers — may have been too wound up in its bankruptcy setting to provide general guidance as to future practice.)
 - (c) More likely than effectively supplanting MAC walkaways with EBITDA or other objective tests, is increased negotiation of classical MAC closing conditions — with buyers, for example, pushing back against lengthy lists of “MAC

carveouts” and attempting to define “economy wide” or “industry wide” downturns as MACs (contrary to current practice which generally includes such downturns as MACs if they “disproportionately” impact the seller). Whether such adjustments to traditional MAC formulations (even if they are achieved in negotiations) will alter the fundamental pro-seller slant of MAC clauses is open to question.

2. Deal Certainty: One striking feature of the last 18 months has been the degree to which merger agreement provisions have failed to work as expected, and, in particular, agreements which were believed to be pro-seller failed to result in closed deals on the original terms.

(a) Reverse Breakup Fees

- (i) Sometimes under the stress of the unexpected developments in the markets and economy of recent years, deal mechanisms seemed to have an effect the opposite of what was intended.
- (ii) Reverse break up fees were originally demanded by sellers in an environment where many buyers were chasing a limited pool of acquisition targets. Intended to provide a remedy against private equity buyers (who had traditionally resisted taking financing risks or allowing damage claims to be made against the PE sponsor for failures to close), the reverse breakup-fee promised the seller a termination fee (typically 2-3% of the purchase price — *i.e.*, matching the breakup fee payable by the seller in the event of a topping bid) if the PE sponsor’s financing fell through or the PE buyer defaulted in its obligation to close the acquisition.
- (iii) Seen by sellers (and their advisers) as a way of leveling the playing field with strategic buyers — sellers would now have a clear remedy if PE failed to close — when financing dried up and business conditions worsened reverse break-up fees instead allowed PE buyers to extricate themselves from unwanted deals for a fixed cash payment which while large in absolute dollar terms, often paled in comparison to the economic losses which could be suffered in closing a bad deal.

(b) Failure of Merger Agreements to Work as Expected

- (i) To a striking degree, and not limited to problems inherent in MAC clauses and reverse breakup fees, merger agreements which had been designed to assure sellers certainty of closing failed to work as sellers intended.
- (ii) Whether because of ambiguous language or mere complexity, buyers were able to use litigation or the threat of litigation to terminate deals at a modest cost or negotiate revised deals on favorable terms.

(c) Drafting is Key

- (i) Time and again, mundane issues of drafting were important. Contradictory (or arguably contradictory) clauses or ambiguous wording led to arguably unintended results.
- (ii) Clients would do well to ask basic questions about agreements — do they accomplish what is intended, is there any room for contrary arguments? Often simplicity is key — straightforward language that says in plain unambiguous English what the deal is intended to be.

(d) Deals Structured to Assure Completion

- (i) More and more deals are likely to be structured as much to assure deal certainty as to obtain the maximum purchase price:
 - (ii) A bid by Proskauer's clients, the senior management and portfolio managers of Neuberger Berman and other investment management businesses of Lehman Brothers, topped a previous bid from private equity buyers in a sale in a Bankruptcy Court auction. Notably, the winning bid had no cash component — consisting instead of 93% of the preferred equity and 49% of the common equity of a new independent investment management company — but was selected because it offered greater value and certainty of closing.
 - (iii) Antitrust and other regulatory risks to closing will undoubtedly be weighed heavily by seller boards seeking clear roadmaps to completion. Longs Drug Stores rejected a higher bid by Walgreens to accept a bid by CVS Caremark, as a result, according to Longs, of the higher antitrust risk inherent in the Walgreens offer and Walgreen's unwillingness to accept the regulatory risk. (Proskauer represented Longs stockholder Pershing Square Capital in connection with this transaction.)
3. Nothing is "Market": For several years, merger deal terms had been increasingly driven by what was "market." With so many "market" agreements having failed to work as expected, and with increased risks to both buyers (e.g., obtaining financing and financial performance of target companies) and sellers (e.g., deal completion), we expect a continuation of the current trend of highly individualized deal negotiations, where parties attempt to address deal-specific risks and issues.

(a) Strategic Deals with PE Terms

- (i) Rare before the financing crisis, there have been several deals that have permitted strategic buyers to terminate deals if financing was not obtained (or sometimes under any circumstances) by payment of a reverse breakup fee
- (ii) Examples are the Mars acquisition of Wrigley, Brocade Communications' acquisition of Foundry Works, Ashland's

acquisition of Hercules, and Excel Technology's acquisition by GSI Group.

(b) Creative Solutions to Financing and Valuation Issues

- (i) Other than purchases by deep-pocket strategic buyers, purchase of public companies for cash are problematic in the current financing environment. In the past, this issue was sometimes dealt with by payment of some or all of the purchase price in buyer preferred stock or debt. Structured so that these securities would trade at par post-closing, they were accepted as cash equivalents with a readily ascertainable value.
- (ii) The current turmoil in the financial markets makes this mechanism problematic — promising securities which will trade at par can, under market conditions which now seem an everyday occurrence, require astronomical dividend of interest rates. Collars (protecting against extreme swings in markets), put rights to security holders (assuring target company stockholders liquidity and an exit, perhaps over time), contingent value rights (allowing “earnout” features in public M&A, and thus helping to bridge valuation issues) are all features which were relatively rare in past deals, but which may be necessary to make deals in today's difficult environment.

C. Where Do We Go From Here?

1. Stick to the Basics. Simple, clear, unambiguous drafting of merger agreements is often key to dispute outcomes. Clients should ask their lawyers the basic questions — will the agreements work as expected. Lawyers should insist on the time to draft simple, unambiguous provisions (yes, it takes longer to draft simple provisions). All deal participants should be chastened by the recent striking lack of predictability regarding how common contractual provisions will be interpreted, and do their best to make sure their agreements will be interpreted as they intend.
2. Mundane Provisions Matter. The “back of the merger agreement” — supposedly “boilerplate” provisions such as governing law and choice of court — is always important when disputes arise. Litigating the merger agreement in Delaware, while the financing is litigated in New York (a not uncommon result of standard jurisdictional provisions), can have a major impact on outcome, as can the choice of whether a case is litigated in Delaware (which sees a constant stream of complex M&A cases) or a jurisdiction with less experience in these areas.
3. Careful Attention to Deal Specifics. A transactional world where nothing is “market” is an opportunity not a barrier. With a (relatively) clean slate, lawyers will be able to devise creative and practical solutions to deal-specific problems.