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A. COMMERCIAL LAW: UNCITRAL

1. Review of Work


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…The United States remains a strong supporter of UNCITRAL, its programs and work achievements, and commends the Secretariat for its continued hard work, its focus on technical and complex economic and commerce issues, and its attention to the concerns of States at all levels of economic development and in all regions.

The 44th Session was highly productive. Working efficiently on the basis of substantial preparatory efforts by Working Groups I and V, the Commission adopted two final texts.

We are pleased to favorably note the adoption of the revised UNCITRAL Model Law on Public Procurement, which updates and expands upon the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services. The revised Model Law will be extremely valuable to countries seeking to modernize their government procurement systems, and we note that its use has been supported by a number of international financial institutions. The Working Group is preparing a Guide to Enactment that will assist them, and we look forward to its early completion.

We also favorably note the adoption of the “judicial deskbook” collating prior completed work of the Commission in the economically important area of corporate insolvency matters, especially involving cross-border trade and commerce. This compilation makes the Commission’s work readily accessible to officials and practitioners worldwide. We note in this regard that the United States has adopted the UNCITRAL Model Law on cross-border insolvency cases as a new chapter of the US Bankruptcy Code, and we recommend that other States consider such action so as to limit existing cross-border risk.

The Commission’s report describes important progress in the area of investor-State arbitration in Working Group II; consideration of possible new instruments on on-line dispute resolution in Working Group III; new work initiated on managing cross-border insolvency cases as well as liabilities of corporate officers and directors in Working Group V, and continuing progress in Working Group VI in developing a registration system to implement the UNCITRAL Model Law on secured transactions. Moreover, authorization was granted for a reactivated Working Group IV to begin work on electronic transferability of rights. We are pleased to
support all these activities, as they have great potential to promote commerce, trade and the rule of law throughout the regions of the world.

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2. UN General Assembly Resolutions


B. INTERNATIONAL CIVIL LITIGATION

1. Forum Non Conveniens Dismissal of Suit to Enforce Arbitral Award

As discussed in Chapter 10.A.2.c., in February 2011, the United States submitted an amicus brief in the U.S. Court of Appeals for the Second Circuit after the district court’s denial of a motion to dismiss a case against the Republic of Peru and one of its ministries. Figueiredo v. Peru, No. 10-0214(CON) (2d. Cir. 2011). In addition to the section on the Foreign Sovereign Immunities Act (FSIA) discussed in Chapter 10, the U.S. brief also contained a section arguing that the district court had properly denied the motion to dismiss on forum non conveniens grounds. Excerpts from the discussion on forum non conveniens follow (with footnotes and citations to the record omitted). The brief is available in full at www.state.gov/s/l/c8183.htm. On December 14, 2011, the U.S. Court of Appeals for the Second Circuit decided the appeal, reversing the district court’s denial of the motion to dismiss on forum non conveniens grounds. Figueiredo v. Peru, 665 F.3d 384 (2d Cir. 2011).

*   *   *   *

The district court correctly held that forum non conveniens is an available ground for dismissal in proceedings brought pursuant to the Panama Convention. …

Article 4 of the Panama Convention provides that “execution and enforcement” under the Convention should occur “in accordance with the procedural laws of the country where it is to be
executed.” Panama Convention Art 4. As the Supreme Court has explained, the doctrine of *forum non conveniens* is among the “procedural laws” of general applicability in the United States. *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) (*forum non conveniens* is “procedural rather than substantive”). *Forum non conveniens* is therefore properly considered pursuant to Article 4 of the Convention.

Under the governing standard, in considering whether dismissal on *forum non conveniens* grounds is appropriate, “a court determines the degree of deference properly accorded the plaintiff’s choice of forum” and “whether the alternative forum proposed by the defendants is adequate to adjudicate the parties’ dispute,” and then “balances the private and public interests implicated in the choice of forum.” *Norex Petroleum Ltd. v. Access Indus.*, 416 F.3d 146, 153 (2d Cir. 2005). In the United States’ view, the determinative consideration in this case, and one that implicates U.S. policy interests, is the balancing of the public and private interest factors. Even assuming the availability of another adequate forum and that Figueiredo’s choice of forum should get little if any weight, the public policy interest in favor of enforcing arbitral awards under the Panama Convention weighs heavily against dismissal here.

**B. Public Interest Factors**

* * * * *

The United States has a significant interest in allowing U.S. courts to enforce international arbitration awards pursuant to the Panama Convention, as the district court recognized. Accordingly, the public interest factors will generally weigh against *forum non conveniens* dismissal and the doctrine should only be employed to dismiss an action if compelling countervailing interests are present. In recommending ratification of the Panama Convention, the Deputy Secretary of State observed that “[a]rbitration agreements have become an increasingly prevalent feature of international commercial transactions, as parties have sought the advantages of efficiency and flexibility which arbitration can provide.” S. Treaty Doc. No. 97-12, at 3 (1981). The State Department also determined that “[t]he recognition and enforcement of international arbitration agreements and awards by national courts, as provided for in this Convention, is necessary to support this development.” *Id.*; see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (noting that the New York Convention evinces a “strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes”).

If on remand the district court here finds that there is subject matter jurisdiction over Figueiredo’s claims against Peru and the Ministry, the presence of Peru’s assets in New York provides strong support for the district court’s decision not to grant dismissal under the doctrine of *forum non conveniens*. A purpose of the Panama Convention was not only to permit “recognition” of foreign arbitration awards, but also to facilitate “execution” of such awards “in the same manner as that of decisions handed down by national or foreign ordinary courts.” Panama Convention, Art. 4. Congress implemented this provision by directing that foreign arbitration awards “shall . . . be recognized and enforced under” the Federal Arbitration Act. 9 U.S.C. § 304 (emphasis added); *cf.* 28 U.S.C. § 1606 (where an exception to foreign sovereign immunity exists, a foreign state “shall be liable in the same manner and to the same extent as a private individual under like circumstances”). Congress’s evident intent was thus to permit those with foreign arbitration awards to enforce those awards against assets that may be within the jurisdiction of United States courts. Indeed, the very point of registering and enforcing an
arbitration award in a foreign forum is to satisfy the award with the debtor’s assets located in the forum.

On the other hand, this Court has held that considerations of international comity are relevant to the weighing of public interest factors in forum non conveniens analysis. Blanco v. Banco Industrial de Venezuela, S.A., 997 F.2d 974, 983 (2d Cir. 1993). Accordingly, another relevant public interest factor may therefore be the Peruvian three-percent cap law, which Peru argues provides an independent basis to dismiss this action. In this case, however, considerations of international comity should not carry much weight in the forum non conveniens balancing because, as described in more detail below, Peru’s comity argument is undermined by the lack of demonstrated direct conflict between Peruvian law and these confirmation and enforcement proceedings.*

Other relevant public interest factors include “administrative difficulties associated with court congestion; the imposition of jury duty upon those whose community bears no relationship to the litigation; the local interest in resolving local disputes; and the problems implicated in the application of foreign law.” Monde Re, 311 F.3d at 500 (citing Gilbert, 330 U.S. at 508-09). These factors do not weigh strongly against adjudication in this case. The district court did not raise any concerns of court congestion, and FSIA litigation is conducted without a jury. 28 U.S.C. § 1330(a). Any interest Peru had in adjudicating this matter in Peru is outweighed by the United States’ interest in enforcing arbitration awards and the presence of Peruvian assets in New York. And while the district court may have to consider some aspects of Peruvian law in determining the Program’s status, that is not uncommon in FSIA litigation. Moreover, U.S. law, not Peruvian law, controls whether to enforce the arbitration agreement.

C. Private Interest Factors

The “private interest” factors that a court should consider in a forum non conveniens analysis include “relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses . . . and all other practical problems that make a trial of a case easy, expeditious and inexpensive.” Monde Re, 311 F.3d at 500.

The record in this case already contains evidence from Peru’s expert concerning the Program’s status. Although, as described above, the district court’s assessment of subject matter jurisdiction may require additional evidence and fact finding, the challenges faced by the parties in presenting such evidence do not generally weigh in favor of dismissal on forum non conveniens grounds. U.S. courts have routinely considered the same jurisdictional question presented here, i.e., whether governmental entities are agencies or instrumentalities of a foreign state, based on evidence submitted by the parties. See, e.g., Garb, 440 F.3d at 591; Noga, 361 F.3d at 684-90. Where “extensive discovery” and a probable “trial of the factual issues implicating and establishing” the liability of a nonsigner to an arbitration agreement are necessary, the private interest factors may be substantial. Monde Re, 311 F.3d at 500. But even then, those considerations would have to be weighed against the strong public interest in enforcing international arbitration agreements under an applicable treaty, especially where the debtor has assets in the forum in which registration and enforcement is sought.

* Editor’s note: See discussion in Section B.4. infra of the portion of the United States brief addressing comity.
In this case, there is no indication that the burden on the parties to present evidence regarding the legal relationship between the Program and Peru and the Ministry will be so extensive as to conclude that the district court abused its discretion in denying forum non conveniens dismissal.

* * * *

2. Removal from State Court of Case Related to an Arbitration

On February 7, 2011 in the case *Infuturia Global Ltd. v. Sequus Pharmaceuticals, Inc.*., the U.S. Court of Appeals for the Ninth Circuit affirmed the district court’s decision that the case had properly been removed from state court because it was related to an arbitration award. 631 F.3d 1133 (9th Cir. 2011). The case arose out of a dispute over a license agreement between Infuturia, a citizen of the British Virgin Islands, and Yissum, a citizen of Israel. Infuturia sued a third-party, Sequus, a citizen of California, in California state court alleging that Sequus had tortiously interfered with the license agreement. Yissum was not a party to the state court case, but successfully obtained a stay in that case pending an arbitration under the license agreement in Israel. After the arbitration concluded, the state court lifted the stay and the case was removed to federal court pursuant to 9 U.S.C. § 205 of the Federal Arbitration Act, which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“Convention”). Infuturia argued that removal was improper. In federal district court, Sequus raised collateral estoppel as an affirmative defense, arguing that the issues had been resolved in the arbitration in Israel. Excerpts below from the court’s decision discuss the basis for holding that the court properly exercised removal jurisdiction under the Federal Arbitration Act. (Footnotes have been omitted.)

* * * *

III. Removal Jurisdiction

We review de novo a district court's denial of a motion to remand for lack of removal jurisdiction. *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir.2007). We also review de novo questions of statutory interpretation. *Beeman v. TDI Managed Care Servs., Inc.*, 449 F.3d 1035, 1038 (9th Cir.2006).

Title 9 U.S.C. § 205 provides that federal courts have removal jurisdiction where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention.... The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal.

(emphasis added). When interpreting the meaning of this statute, we “look first to its plain language.” *United States v. Juvenile Male*, 595 F.3d 885, 898 (9th Cir.2010) (citation and alteration omitted). The critical language here is the phrase “relates to.” The Fifth Circuit, which
is the first and only circuit court to address the meaning of “relates to” in § 205, construed this language to mean that “whenever an arbitration agreement falling under the Convention could conceivably affect the outcome of the plaintiff’s case, the agreement ‘relates to’ the plaintiff’s suit.” Beiser v. Weyler, 284 F.3d 665, 669 (5th Cir.2002). We agree with this interpretation. The phrase “relates to” is plainly broad, and has been interpreted to convey sweeping removal jurisdiction in analogous statutes. See Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96–97, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) (holding that under § 514(a) of the Employee Retirement Income Security Act, “[a] law ‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan”); McGuire v. United States, 550 F.3d 903, 911–12 (9th Cir.2008) (holding that under the bankruptcy jurisdiction statute, 28 U.S.C. § 1334(b), “[a] civil proceeding is ‘related to’ a [bankruptcy] case if the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy” (emphasis added) (citation and internal quotation marks omitted)).

Nothing in § 205 urges a narrower construction. Indeed, the statute invites removal of cases whose relation to an agreement or award under the Convention is based on an affirmative defense by expressly abrogating the “well-pleaded complaint” rule. See 9 U.S.C. § 205 (“[T]he ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal.”); Beiser, 284 F.3d at 669 (“[Federal courts] will have jurisdiction under § 205 over just about any suit in which a defendant contends that an arbitration clause falling under the Convention provides a defense. As long as the defendant’s assertion is not completely absurd or impossible, it is at least conceivable that the arbitration clause will impact the disposition of the case. That is all that is required to meet the low bar of ‘relates to’. ”).

Infuturia argues for a narrower interpretation of the statute by citing AtGames Holdings Ltd. v. Radica Games, Ltd., 394 F.Supp.2d 1252 (C.D.Cal.2005). In AtGames, the district court held that “a state court action is [only] removable if (1) the parties to the action have entered into an arbitration agreement, and (2) the action relates to that agreement.” Id. at 1255. AtGames narrows the class of actions removable under § 205 by adding privity of contract to the prerequisites for removal jurisdiction. This holding finds no support in the language of the statute. While AtGames would hinge jurisdiction on the relatedness of the parties, § 205 focuses only on the relatedness of the “subject matter of [the] action ... to an arbitration agreement.” Further, although AtGames claims to be consistent with Beiser, nothing in Beiser suggests that only parties privy to an arbitration agreement or award falling under the Convention may seek removal under § 205. Rather, Beiser confers removal jurisdiction “whenever an arbitration agreement ... could conceivably affect the outcome of the plaintiff’s case....” 284 F.3d at 669. In a case such as this, where the defendant relies on the affirmative defense of collateral estoppel regarding issues already resolved against the plaintiff in arbitration, the arbitral award “could conceivably affect the outcome” of the case. Id.

We find AtGames unpersuasive and decline to add any prerequisites to removal jurisdiction not expressed in the language of the statute. Because Sequus raised an affirmative defense “relat[ing] to” the Infuturia–Yissum arbitral award (which neither party disputes “falls under” the Convention), the district court had removal jurisdiction under 9 U.S.C. § 205.

*   *   *   *
3. Enforceability of Arbitration Clauses

On October 18, 2011, the U.S. Court of Appeals for the Ninth Circuit affirmed a lower court’s denial of a motion to compel arbitration. *Smallwood v. Allied Van Lines*, 660 F.3d 1115 (9th Cir. 2011). The Court of Appeals held that foreign arbitration clause in the contract at issue was unenforceable in light of the exception to arbitration created by Congress in the Carmack amendment. The case was brought by Mr. Smallwood after Allied Van Lines (“AVL”) shipped certain of his property—including firearms and ammunitions—to the United Arab Emirates (“UAE”) when he intended that property to be stored in the United States. This misdirection led to Smallwood’s arrest and imprisonment in the UAE. AVL sought to compel arbitration under the foreign arbitration clause in the shipping contract. The interaction of the Carmack Amendment, 49 U.S.C. § 14706, with federal arbitration law is discussed in the opinion of the Court of Appeals, excerpted below with footnotes omitted.

* * *

III. Discussion

AVL argues that the district court erred for either of two reasons: (1) the Carmack Amendment permits foreign arbitration clauses; or (2) the Federal Arbitration Act requires enforcement of the arbitration clause even if it conflicts with the Carmack Amendment. We reject both arguments.

A. The Carmack Amendment

The Carmack Amendment governs the terms of interstate shipment by domestic rail and motor carriers. See *Regal–Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, 557 F.3d 985, 990 (9th Cir.2009), rev’d on other grounds, — U.S. ——, 130 S.Ct. 2433, 177 L.Ed.2d 424 (2010). Carmack was enacted in 1906 as an amendment to the Interstate Commerce Act. *See id.* It has since been amended repeatedly, but its purpose has always been “to relieve cargo owners ‘of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods.’ ” *Kawasaki*, 130 S.Ct. at 2441 (quoting *Reider v. Thompson*, 339 U.S. 113, 119, 70 S.Ct. 499, 94 L.Ed. 698 (1950)). Part of the relief guaranteed to shippers was “the right of the shipper to sue the carrier in a convenient forum of the shipper’s choice.” *Aaacon Auto Transp., Inc. v. State Farm Mut. Auto. Ins. Co.*, 537 F.2d 648, 654 (2d Cir.1976).

When interpreting Carmack:

Our analysis begins, as it must, with the text of the statute in question. *Azarte v. Ashcroft*, 394 F.3d 1278, 1285 (9th Cir.2005). Under the “plain meaning” rule, “[w]here the language [of a statute] is plain and admits of no more than one meaning the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.” *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 878 (9th Cir.2001) (en banc) (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917)).

*Campbell v. Allied Van Lines Inc.*, 410 F.3d 618, 620–21 (9th Cir.2005) (alteration in original).

Carmack’s statutory scheme is clearly intended to protect shippers from being forced to
submit to foreign arbitration as a condition of contracting with a carrier of household goods. To begin with, Carmack expressly prohibits carriers of household goods from contracting around the statute’s requirements. See 49 U.S.C. § 14101(b)(1) (“A carrier providing transportation or service subject to jurisdiction under chapter 135 may enter into a contract with a shipper, other than for the movement of household goods described in section 13102(10)(A), to provide specified services under specified rates and conditions.”). It is undisputed that AVL is a carrier of household goods and therefore prohibited from contracting around Carmack’s conditions.

AVL’s foreign arbitration clause would allow AVL to compel Smallwood to arbitrate, probably in the UAE. We have held that “foreign arbitration clauses are but a subset of foreign forum selection clauses in general.” See Fireman’s Fund Ins. Co. v. M.V. DSR Atl., 131 F.3d 1336, 1339 (9th Cir. 1997) (internal quotation marks omitted). The parties’ foreign arbitration clause plainly contravenes Carmack’s directive that Smallwood have recourse in the enumerated venues unless he agrees to arbitrate elsewhere after the dispute arises.

AVL raises a final argument based on analogy to the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 30701. COGSA is a regulatory regime for ocean carriage akin to the Carmack regime for motor and rail carriage. The Supreme Court has held that COGSA permits foreign forum selection clauses, see Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 541, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995), and we have extended that rule to foreign arbitration clauses, see Fireman’s Fund, 131 F.3d at 1339. Sky Reefer and COGSA, however, are inapposite here. Whereas Carmack explicitly guarantees shippers certain venues to seek recourse against their carriers, COGSA only generally prohibits ocean carriers from using contracts “relieving [their] liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability.” COGSA, § 3(8), 46 U.S.C. § 30701 note (quoted by Sky Reefer, 515 U.S. at 534, 115 S.Ct. 2322). Sky Reefer interpreted COGSA’s prohibition on contracts lessening liability to apply only to the liability explicitly articulated in COGSA and not to extend to procedural issues affecting the shipper’s ease of recovery. See 515 U.S. at 534–35, 115 S.Ct. 2322 (emphasizing the phrase “duties and obligations provided in this section”). Because Carmack expressly prohibits carriers of household goods from contracting around its venue provisions, and because Smallwood does not rely on a general prohibition on lessening carriers’ liability, Sky Reefer and its interpretation of COGSA § 3(8) are inapposite to our interpretation of Carmack.

For the foregoing reasons we agree with the district court’s interpretation of § 14706. Foreign arbitration clauses, except as provided in § 14708, are unenforceable under Carmack because they necessarily involve limiting shippers’ choice of venues enumerated in the statute.

B. Federal Arbitration Law

AVL argues that our interpretation of Carmack conflicts with federal arbitration law. We have previously explained:


When Congress intends to create an exception to the FAA, “such an intent ‘will be deducible from [the statute’s] text or legislative history,’ or from an inherent conflict between arbitration and the statute’s underlying purposes.” Id. (quoting Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)) (alteration in original and citations omitted). As we have explained, the plain text of Carmack prohibits household carriers from forcing a shipper to agree to arbitrate his claims as a condition to contracting. Thus, there is “a contrary congressional command” that overrides the FAA’s mandate to enforce arbitration agreements.

* * * *

Conclusion

The parties’ arbitration clause is unenforceable under 49 U.S.C. § 14706 because it contravenes a shipper’s right to select his forum after the dispute arises, and thus violates the plain language of the Carmack Amendment.

* * * *

4. International Comity

The U.S. brief filed in the Second Circuit in Figueiredo (discussed in Section 1 above) also contained an argument that principles of international comity did not require dismissal. The brief asserted that it was not an abuse of discretion to deny the motion to dismiss because dismissal on comity grounds is appropriate only when there is a true conflict between domestic and foreign law and Peru had presented no evidence of such a conflict. Moreover, the strong U.S. policy interests in promoting confirmation and enforcement of arbitral awards covered by treaties weighed against dismissal. The brief is available in full at www.state.gov/s/l/c8183.htm. The decision of the Second Circuit Court of Appeals

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rendered in December 2011 was not based on comity. *Figueiredo v. Peru*, 665 F.3d 384 (2d Cir. 2011).

In *FG Hemisphere Associates*, discussed in Chapter 10.A.4., the United States argued based on principles of comity that contempt sanctions against a foreign government were improper in a case seeking to execute a judgment under the Foreign Sovereign Immunities Act (“FSIA”). *FG. Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373 (D.C. Cir. 2011). The U.S. Court of Appeals for the D.C. Circuit rejected the comity argument (footnotes omitted):

We turn to the government’s and the DRC’s comity arguments based on international practice and, as a separate although related matter, the government’s foreign relations concerns. Although it may be true, as the government contends, that at least several countries have explicitly prohibited monetary sanctions against a foreign state for refusal to comply with a court order, that seems quite irrelevant because our Congress has not. And we should bear in mind that our discovery process is extraordinarily extensive compared to that of most foreign legal systems. See Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* 652-53 (2d ed. 2003).

The government also suggests that we should be concerned about the consequences of affirming the district court’s order given possible reciprocal treatment of the United States in foreign courts. Although we often give consideration to the government’s assertion that a legal action involves sensitive diplomatic considerations, we only defer to these views if reasonably and specifically explained. See Altmann, 541 U.S. at 702. The government does not explain how the United States would be harmed if it were found in contempt under reciprocal circumstances. The broad, generic argument that the government offers here seems to us to be appropriately presented to Congress – not us. The government, moreover, did not present its foreign policy concerns to the district court. We do recognize that there could be circumstances in which particular pressing foreign policy concerns involving a defendant country could affect a court’s decision, and those concerns, depending on their timing, could justify the government’s presenting those matters first in an amicus brief in the court of appeals, but the government has not presented any such argument in this case.

5. Jurisdiction over foreign entities in U.S. courts


In *McIntyre*, the Supreme Court held by a 6-3 majority that the New Jersey court improperly exercised jurisdiction over a foreign manufacturer in a case arising out of an accident that occurred in New Jersey involving that manufacturer’s product. The majority, in two separate opinions, found that exercising jurisdiction would violate the Due Process
Clause of the Fourteenth Amendment of the Constitution because the foreign manufacturer never engaged in activity purposely directed at New Jersey. The dissenting opinion asserted that the nature of modern commerce, with products marketed nationwide and even worldwide, mitigated any unfairness of exercising jurisdiction over a foreign manufacturer in the state where its product caused an injury. The excerpt below from the plurality opinion explains the court’s weighing of the foreign manufacturer’s contacts with and activities in the state of New Jersey (with footnotes and references to the record in the case omitted).

* * * *

In this case, petitioner directed marketing and sales efforts at the United States. It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts. That circumstance is not presented in this case, however, and it is neither necessary nor appropriate to address here any constitutional concerns that might be attendant to that exercise of power. See *Asahi*, 480 U. S., at 113, n. Nor is it necessary to determine what substantive law might apply were Congress to authorize jurisdiction in a federal court in New Jersey. See *Hanson*, 357 U. S., at 254 (“The issue is personal jurisdiction, not choice of law”). A sovereign’s legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts. Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is petitioner’s purposeful contacts with New Jersey, not with the United States, that alone are relevant.

Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey. Recall that respondent’s claim of jurisdiction centers on three facts: The distributor agreed to sell J. McIntyre’s machines in the United States; J. McIntyre officials attended trade shows in several States but not in New Jersey; and up to four machines ended up in New Jersey. The British manufacturer had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State. Indeed, after discovery the trial court found that the “defendant does not have a single contact with New Jersey short of the machine in question ending up in this state.” These facts may reveal an intent to serve the U. S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.

It is notable that the New Jersey Supreme Court appears to agree, for it could “not find that J. McIntyre had a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case.” 201 N. J., at 61, 987 A. 2d, at 582. The court nonetheless held that petitioner could be sued in New Jersey based on a “stream-of-commerce theory of jurisdiction.” Ibid. As discussed, however, the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures. The New Jersey Supreme Court also cited “significant policy reasons” to justify its holding, including the State’s “strong interest in protecting its citizens from defective products.” Id., at 75, 987 A. 2d, at 590. That interest is doubtless strong, but the Constitution commands restraint before discarding liberty in the name of expediency.
Due process protects petitioner’s right to be subject only to lawful authority. At no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws. New Jersey is without power to adjudge the rights and liabilities of J. McIntyre, and its exercise of jurisdiction would violate due process. The contrary judgment of the New Jersey Supreme Court is Reversed

In Goodyear, the Court unanimously reversed the North Carolina court’s assertion of jurisdiction over Goodyear’s foreign subsidiaries in a case arising out of an accident that occurred in Paris involving Goodyear tires manufactured abroad. The facts of the case and the U.S. amicus brief supporting reversal are discussed in Digest 2010 at 611-19. Excerpts below from the Supreme Court’s opinion explain the error of the North Carolina courts in asserting general jurisdiction based on the notion of a product’s placement into the “stream of commerce.” Footnotes and citations to the state court’s decision in the case have been omitted.

To justify the exercise of general jurisdiction over petitioners, the North Carolina courts relied on the petitioners’ placement of their tires in the “stream of commerce.” The stream-of-commerce metaphor has been invoked frequently in lower court decisions permitting “jurisdiction in products liability cases in which the product has traveled through an extensive chain of distribution before reaching the ultimate consumer.” 18 W. Fletcher, Cyclopedia of the Law of Corporations §8640.40, p. 133 (rev. ed. 2007). Typically, in such cases, a nonresident defendant, acting outside the forum, places in the stream of commerce a product that ultimately causes harm inside the forum. …

Many States have enacted long-arm statutes authorizing courts to exercise specific jurisdiction over manufacturers when the events in suit, or some of them, occurred within the forum state. For example, the “Local Injury; Foreign Act” subsection of North Carolina’s long-arm statute authorizes North Carolina courts to exercise personal jurisdiction in “any action claiming injury to person or property within this State arising out of [the defendant’s] act or omission outside this State,” if, “in addition[,] at or about the time of the injury,” “[p]roducts . . . manufactured by the defendant were used or consumed, within this State in the ordinary course of trade.” N. C. Gen. Stat. Ann. §1–75.4(4)(b) (Lexis 2009). As the North Carolina Court of Appeals recognized, this provision of the State’s long-arm statute “does not apply to this case,” for both the act alleged to have caused injury (the fabrication of the allegedly defective tire) and its impact (the accident) occurred outside the forum.

The North Carolina court’s stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction. Flow of a manufacturer’s products into the forum, we have explained, may bolster an affiliation germane to specific jurisdiction. See, e.g., World-Wide Volkswagen, 444 U. S., at 297 (where “the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve . . . the market for its product in [several] States, it is not unreasonable to subject it to suit.
in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others” (emphasis added)). But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant. See, e.g., Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd., 647 F. 2d 200, 203, n. 5 (CADC 1981) (defendants’ marketing arrangements, although “adequate to permit litigation of claims relating to [their] introduction of . . . wine into the United States stream of commerce, . . . would not be adequate to support general, ‘all purpose’ adjudicatory authority”).

A corporation’s “continuous activity of some sorts within a state,” International Shoe instructed, “is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.” 326 U. S., at 318. Our 1952 decision in Perkins v. Benguet Consol. Mining Co. remains “[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum.” Donahue v. Far Eastern Air Transport Corp., 652 F. 2d 1032, 1037 (CADC 1981).

Sued in Ohio, the defendant in Perkins was a Philippine mining corporation that had ceased activities in the Philippines during World War II. To the extent that the company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio: the corporation’s president maintained his office there, kept the company files in that office, and supervised from the Ohio office “the necessarily limited wartime activities of the company.” Perkins, 342 U. S., at 447–448. Although the claim-in-suit did not arise in Ohio, this Court ruled that it would not violate due process for Ohio to adjudicate the controversy. Ibid.; see Keeton v. Hustler Magazine, Inc., 465 U. S. 770, 779–780, n. 11 (1984) (Ohio’s exercise of general jurisdiction was permissible in Perkins because “Ohio was the corporation’s principal, if temporary, place of business”).

We next addressed the exercise of general jurisdiction over an out-of-state corporation over three decades later, in Helicopteros. In that case, survivors of United States citizens who died in a helicopter crash in Peru instituted wrongful-death actions in a Texas state court against the owner and operator of the helicopter, a Colombian corporation. The Colombian corporation had no place of business in Texas and was not licensed to do business there. “Basically, [the company’s] contacts with Texas consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from [a Texas enterprise] for substantial sums; and sending personnel to [Texas] for training.” 466 U. S., at 416. These links to Texas, we determined, did not “constitute the kind of continuous and systematic general business contacts . . . found to exist in Perkins,” and were insufficient to support the exercise of jurisdiction over a claim that neither“ar[o]se out of . . . no[r] related to” the defendant’s activities in Texas. Id., at 415–416 (internal quotation marks omitted).

Helicopteros concluded that “mere purchases [made in the forum State], even if occurring at regular intervals, are not enough to warrant a State’s assertion of [general] jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.” Id., at 418. We see no reason to differentiate from the ties to Texas held insufficient in Helicopteros, the sales of petitioners’ tires sporadically made in North Carolina through intermediaries. Under the sprawling view of general jurisdiction urged by respondents and embraced by the North Carolina Court of Appeals, any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed.
But cf. *World-Wide Volkswagen*, 444 U. S., at 296 (every seller of chattels does not, by virtue of the sale, “appoint the chattel his agent for service of process”).

Measuring against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction. Unlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina. Their attenuated connections to the State fall far short of the “the continuous and systematic general business contacts” necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State. *Helicopteros*, 466 U. S., at 416.

* * * *

**Cross References**

*Foreign Sovereign Immunities Act*, Chapter 10.A.