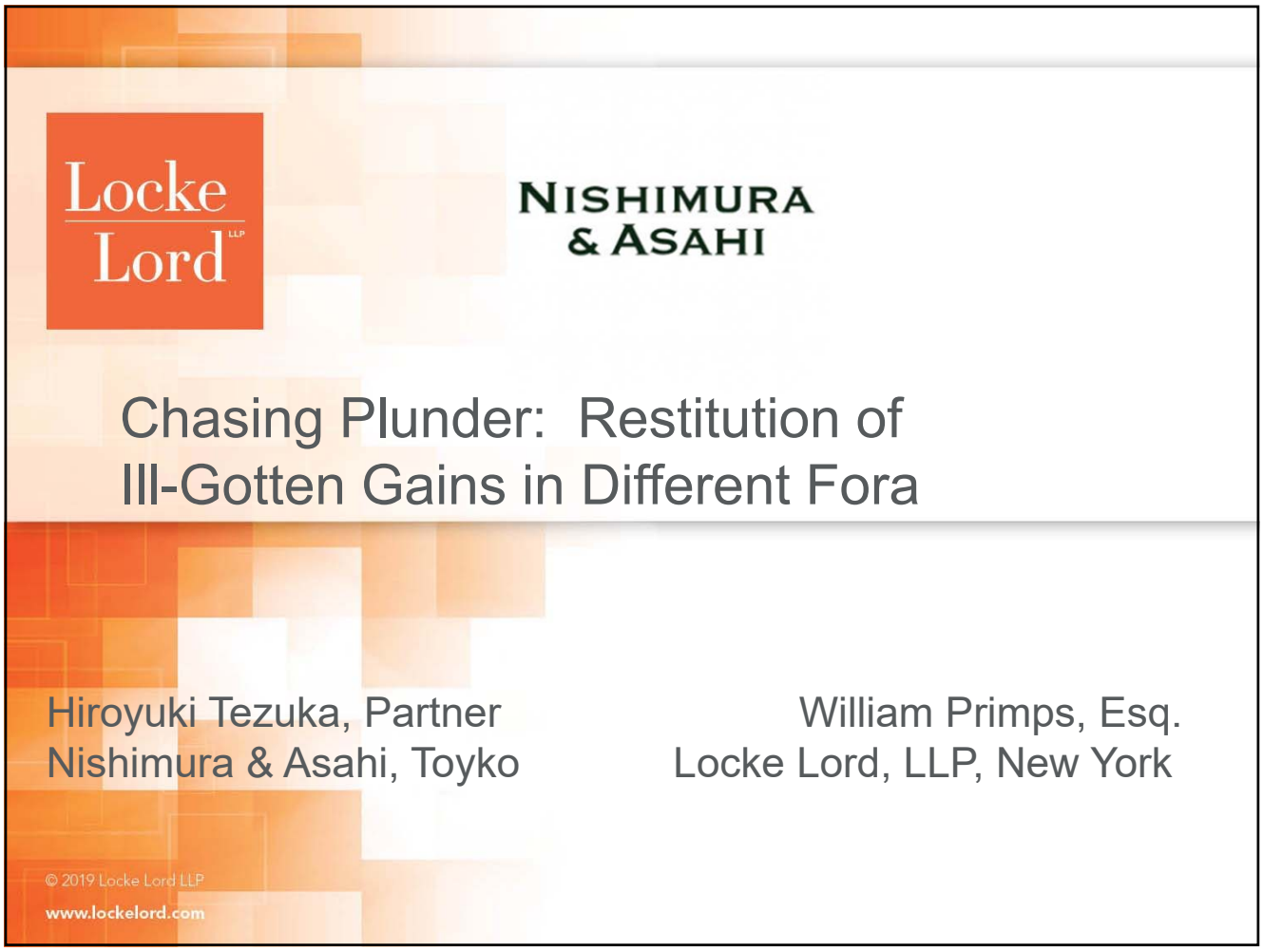
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The Use of Arbitration to Recover Ill-Gotten Gains

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New York State Bar Association, Global Conference |Tokyo, Japan November 2019

The Sixth Circuit's Sensible Decisions on Foreign Claimants' Asset Recoveries

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Foreign Claimants' Ability to Use U.S. Courts and Pretrial Procedures

Forum Non Conveniens – Can Foreign Plaintiffs Maintain Claims in U.S. Courts?

- Stryker Decision - *Associação Brasileira de Medicina de Grupo v. Stryker Corporation*, 891 F.3d 615 (6th Cir. 2018) ("*Abramge v. Stryker*")
  - unanimous 2018 opinion, the Court of Appeals for the Sixth Circuit reversed the district court's decision that *forum non conveniens* dictated dismissal.
  - Sixth Circuit indicated that domestic defendants seeking *forum non conveniens* rulings must meet exacting standards, holding that the fact of a plaintiff's foreign residence "does not automatically mean that his choice of forum is owed little deference."
  - The court also found that any findings of the "adequacy" of the foreign forum must be fully supported and that an attorney's consent to a client being sued in a foreign jurisdiction is essentially meaningless in all but the most open and shut cases.

Ability to claim for overseas activity in U.S. Courts

At the outset, it should be observed that, in a federal court claim, any non-U.S. claimant believing it was defrauded must establish that, regardless of where it should be properly venued, can successfully survive a motion to dismiss. Not every improper practice in a non-U.S. jurisdiction will furnish the facts necessary to support a cause of action recognized by U.S. courts.

For example, it is well-recognized that not all settlements under the FCPA lead to valid claims under U.S. securities law. *See Employees Retirement System of the City of Providence, et al. v. Embraer S.A., et al.*, No. 16-CV-06277 (S.D.N.Y. 2018), dismissed with prejudice, finding that Embraer did not have a duty to disclose uncharged, unadjudicated wrongdoing, when the company had disclosed the pendency of the investigation in its filings with the SEC.

However, the famous "car wash" scandal in Brazil supported a recent $2.95 billion class action settlement that was approved by Judge Rakoff, *In re Petrobas Securities Lit*, No. 14-CV-9662 (S.D.N.Y. 2018). The substance of each case will have to be closely examined, with fact patterns often driving the determination of whether a claim can survive a motion under Rule 12(b)(6).

The Stryker Court's Three-Step Analysis

Determination of whether dismissal under *forum non conveniens* is appropriate: the Sixth Circuit laid out a three-step test: 1) a court determination of the degree of deference owed the plaintiff's forum choice; then 2) the defendant bearing the burden of "establishing an adequate alternative forum"; and 3) the further burden of showing the U.S. forum is "unnecessarily burdensome."

- Concerning step 1 above, the Sixth Circuit observed in Abramge v. Stryker:

> That a plaintiff's ties to the United States are weak—or even nonexistent—does not automatically mean that her choice of forum is owed little to no deference. A foreign plaintiff may decide to file suit in the United States because of "a legitimate reason such as convenience or the ability to obtain jurisdiction over the defendants rather than tactical advantage." *Hefferan,* 828 F.3d at 494 (citing *Iragorri*, 274 F.3d at 72–73). A foreign plaintiff might logically believe that a U.S. forum is the most "convenient" location in which to file her case if she doubts that any other court would be able to exercise jurisdiction over the defendant. In such a case, the deference owed to her choice of forum would increase.

- Following the above analytical outline, the Sixth Circuit determined that the district court's finding that plaintiff's choice of forum was owed "little deference" was not an abuse of discretion.

Step Two: "Available and Adequate"

Concerning factor 2, establishing that an alternative forum exists, prior to *Abramge v. Stryker*, it was undisputed that in order for a court to refuse to exercise its jurisdiction under the doctrine of *forum non conveniens* there needed to be an available and adequate foreign forum. *See Duha v. Agrium, Inc.*, 448 F.3d 867, 873 (6th Cir. 2006) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947)). It was also undisputed that the movant seeking a *forum non conveniens* dismissal bears the heavy burden of "establishing an adequate alternative forum." *Hefferan v. Ethicon Endo–Surgery Inc.*, 828 F.3d 488, 492 (6th Cir. 2016); *Deb*, 832 F.3d at 806.

- Some courts overlooked the above-cited standards for establishing adequacy and availability, and so watered down the concept of adequacy that they ruled that amenability to process in the alleged convenient forum demonstrated both availability and adequacy. *See Piper Aircraft*, 454 U.S., at 254 n. 23 and *Gulf Oil*, 330 U.S. at 506-07. The Sixth Circuit in *Stryker* reinforced the need for a higher standard:

> However, a foreign forum is not truly "available"—and a defendant is not meaningfully "amenable to process" there—if the foreign court cannot exercise jurisdiction over both parties. *See Watson*, 769 F.2d at 357. Similarly, the foreign forum is not adequate if the remedy it offers "is so clearly inadequate or unsatisfactory that it is no remedy at all," as, for example, if the other forum "does not permit litigation of the subject matter of the dispute." *Piper Aircraft*, 454 U.S. at 254 & n.22.

Attorney's Consent Ineffective

In the Stryker case, defendant attempted to show availability by "consenting" to jurisdiction in Brazil, via the device of its attorney as stating part of a brief submitted in support of its *forum non conveniens* motion that it would submit to the jurisdiction of courts in Brazil. While the Sixth circuit conceded "In particularly clear cases, pleadings and preliminary submissions alone may suffice," it emphasized that "the nature of the showing required to carry the burden depends on the nature of the case at hand." *Id.*

- The Court ruled that an attorney's consent is inadequate.

Can parties to Arbitration Outside the U.S. Use U.S. – Discovery Procedures?

- Use of 28 U.S.C. § 1782 in Foreign-Situs Arbitrations – *Abdul Latif Jameel Transportation Company Ltd. v. FedEx Corp.* ("ALJT v. Fed Ex")
  - Under 28 U.S.C. § 1782(a), a federal district court may order discovery "for use in a proceeding in a foreign or international tribunal" upon application by "any interested person."
  - On September 19, 2019, in ALJT v. Fed Ex, the U.S. Court of Appeals for the Sixth Circuit ruled that a commercial arbitration panel presiding in a foreign country constituted a "foreign or international tribunal" as that phrase is used under § 1782(a) and that therefore discovery was available under the statute.
  - In so doing, the Sixth Circuit reversed the district court's denial of the appellant's § 1782(a) application and remanded for a determination as to which specific discovery demands should be granted.

Non U.S. Party to Pending Foreign Arbitrations May Use 28 U.S.C. 1782

- The dispute in ALJT v. Fed Ex arose from a contractual relationship between Abdul Latif Jameel Transportation Company Limited and FedEx International, a wholly owned subsidiary of its parent FedEx Corp., to provide transportation-related services in and around Saudi Arabia. ALJ entered into two separate transportation agreements with FEI, each with its own arbitration clause.
- In 2018, ALJ commenced two arbitrations in the Middle East. After commencing both arbitrations, ALJ commenced suit pursuant to § 1782(a) in the U.S. District Court for the Western District of Tennessee to compel production of documents and the testimony of a corporate representative from FedEx Corp. In April 2019, the district court denied ALJ's application, holding that a private arbitration was not included within the term "foreign and international tribunal" and therefore ALJ could not avail itself of discovery under § 1782(a).

Non U.S. Party to Pending Foreign Arbitrations May Use 28 U.S.C. 1782 (cont'd)

- The Sixth Circuit's decision in ALJT v. Fed Ex is significant because its ruling was contrary to decisions from the Second Circuit and the Fifth Circuit.
  - *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999); *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.* 165 F.3d 184 (2d Cir. 1999).
  - Both the Second and Fifth Circuits concluded that the word "tribunal" included only "governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies." Both circuit courts reached this outcome by ruling that the phrase "foreign and international tribunal" was ambiguous, they then analyzed the legislative history of the statute to conclude that the meaning of "tribunal" did not include private arbitration.

Sixth Circuit Reasoning

- The Sixth Circuit adopted a textual analysis, citing to the late Justice Scalia's guide to textual interpretation, Reading Law; the Interpretation of Legal Texts.
- In support of its Opinion, the Sixth Circuit also relied upon the Supreme Court's 2004 decision in *Intel Corp v. Advanced Micro Devices, Inc.*, 542 U.S. 241. It specifically rejected its sister circuits' reliance on legislative history.
- In *Intel*, the Supreme Court addressed the scope of section 1782's use of "tribunal" in a different factual context. Relying on that case, the Sixth Circuit concluded that "Intel determines that 1782(a) provides for discovery assistance in non-judicial proceedings." *ALJT v. Fed Ex* at 16.
    - It should be noted that *Intel* was decided in a majority opinion written by Justice Ginsburg, with a Scalia concurrence and a dissent by Justice Breyer. Justice O'Connor took no part in the decision of the case.

CONCLUSION

The Sixth Circuit's analysis of *forum non conveniens* law and the necessary requirements to deprive a foreign plaintiff of its choice of forum in *Stryker* is refreshing in its rigor and open-mindedness about allowing the use of U.S. Tribunals to right wrongs committed against overseas parties, in instances when many of the facts, as well as witnesses underlying the claim, may reside in the overseas locale. Whether other courts will follow is open to question. However, this writer will venture to say that the more recent Sixth Circuit decision in *ALJ v. FEI* is likely to win acceptance before the currently-constituted United States Supreme Court, where a working majority of justices favor the Scalia approach to Textualism and that approach's corresponding disdain for the kind of statutory history analysis used in prior leading § 1782 cases in the Second and Fifth Circuits.