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International Litigation News

Newsletter of the International Bar Association Legal Practice Division

MAY 2012





INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE

DUBLIN 30 SEPTEMBER – 5 OCTOBER 2012



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IN THIS ISSUE

From the Co-Chairs	4
IBA Annual Conference, Dubai 2011: Editors' report	7
IBA Annual Conference, Dublin – 30 September – 5 October 2012: Our Committee's sessions	9
Focus: US discovery and its implications internationally	
Who's afraid of pre-trial discovery? – US discovery: purposes, rules and suggestions for survival <i>Birgit Kurtz</i>	11
German parties in US discovery <i>Anke Meier</i>	18
Be careful what you write: attorney–client privilege for international businesses <i>Mark Kachner and Irfan Lateef</i>	22
Arbitration discovery in Spain <i>Gonzalo Stampa</i>	24
Taking US discovery in Luxembourg through Mutual Legal Assistance requests <i>Paulo Da Silva and Laurent Fisch</i>	26
Addressing the challenge of cross-border discovery in US Courts: the ABA weighs in with a new resolution <i>David Kroeger</i>	29
Country updates	
England	
Recent English case law developments on privilege <i>Neil Jamieson and Michelle Radom</i>	31
Finland	
Supreme Court Guidance concerning typical pitfalls in private international law: forum selection, choice of law and enforcement of foreign judgments <i>Marko Hentunen and Ilona Aro</i>	34
Germany	
Moral and religious conflicts in German employment litigation <i>Christian Arnold, Stephan Wilske and Andreas von Medem</i>	36

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This newsletter is intended to provide general information regarding recent developments in international litigation. The views expressed are not necessarily those of the International Bar Association.

Russia

The discovery process in Russia: will the new era come?
Anna Grishchenkova 40

Russian Supreme Arbitrazh Court rules on jurisdiction in cases involving Russian establishments of foreign companies
Andrey A Panov 42

Switzerland

Enforcement of worldwide freezing orders in Switzerland
Simone Nadelhofer and Sandrine Giroud 44

Discovery is sneaking into Swiss litigation
Patrick Rohn 46

Revision of the Swiss Federal Act on Unfair Competition
Philipp Groz and Aileen Truttmann 46

UAE

Mortgage default and foreclosure process in the UAE
Ludmila Yamalova 51

United States

US Supreme Court rejects expansive approaches to exercising personal jurisdiction over foreign companies based on a 'stream of commerce' theory
Robert A Schwinger and Jonathan C Cross 53

Anti-enforcement injunctions in the US? – the second circuit says 'no'
J Chad Mitchell 55

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From the Co-Chairs

This issue of *International Litigation News*, thanks to the Co-Editors Tim Strong and Félix Montero, demonstrates how international the world of litigation has become, and how active the IBA Litigation Committee and its members are in promoting the development of litigation in an international context. Committee members from many different jurisdictions have contributed to this edition, covering a broad variety of themes, from discovery and privilege to enforcement issues. The Committee's success depends on the exchange of information and experience amongst the widespread community of readers of this newsletter. If you would like to contribute an article for a future edition, please contact the two Co-Editors, who will assist you in your publication project.

Another essential element of the Committee's life are the conferences, which not only offer opportunities to socialise with practitioners from many different jurisdictions, but also are an inspiring source of new ideas. Whenever possible, we look out for unique locations to host our spring conferences, hoping that the venue contributes to a friendly and collegial atmosphere. This year, the Athletic Club, New York, provided a magnificent setting, and the views across Central Park have certainly inspired the presentations and discussions. Thanks to our cooperation with the Corporate Counsel Forum and the IBA North American Regional Forum, the Annual Litigation Forum developed into a successful gathering of advocates, in-house counsel, academics and members of the judiciary. Our next mid-year conference will be held in Istanbul. If you are interested

in supporting us in preparing the Annual Litigation Forum 2013, please contact any of the Committee officers.

The next conference you should not miss is the IBA Annual Conference in Dublin (30 September to 5 October 2012). We have prepared several sessions on much-debated topics such as attorney-client privilege, 'class actions' or 'mass actions', piercing the corporate veil, and dealing with witnesses. Other committees have also asked us to provide input and speakers for their sessions. The topics of these sessions will cover litigation-related issues that reach from the international sale of goods to disputes in antitrust, IP, and family law disputes. Before the conference, there will be an open business meeting of the Committee officers – in case you are interested in participating in the Committee's work, please show up! We will email Committee members with details of the meeting once we have them. In any case, please book early for the conference, and do not forget to secure your seat at the litigation lunch.

We would like to take this opportunity to thoroughly thank all officers and all active members for their contributions to the dynamic life of our Committee. All of us have experienced litigation becoming an increasingly international business. Despite the fact that our procedural laws are often regarded as a shrine for a jurisdiction's legal culture, it will be up to us, the litigators of our global legal community, to achieve harmonisation where required and to develop best practices where necessary. We believe that it is our Committee's vocation to remain at the cutting edge of these developments.

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IBA Annual Conference, Dubai 2011 Editors' report



At the annual conference held in Dubai between 30 October and 4 November 2011, the Litigation Committee hosted five sessions. As has now become tradition, one of the sessions was jointly organised and hosted together with the Barristers and Advocates/Judges Forum. This session dealt with advocacy in commercial litigation (*'What do judges want from advocates and what do advocates want from judges?'*) with the panel including both commercial court judges and litigators, who discussed the issue of how to reconcile the interests of both the parties and advocates, particularly the ability to fully argue one's case with the need to limit both time and costs. The panelists included members of the judiciary (Ireland, Denmark, and UAE), officers of national bar associations (Paris, England and Wales and South Africa) and counsel including Ulrike Gantenberg of Heuking Kühn Lüer Wojtek and Ira Nishisato of Borden Ladner Gervais.

A joint session also took place with the Intellectual Property and Entertainment Law Committee. The topic addressed referred to courts specialised in intellectual property matters. Amongst other things, the aim of the session was to review the experiences collected in the 2005 IBA survey on this topic regarding the differences between jurisdictions with specialist courts and those jurisdictions without such courts.

The abovementioned session, in addition to the session dealing with the latest developments in specialised courts around the globe (*'My court is better than your court'*), dealt with one of the main themes that the Litigation Committee wanted to tackle at the annual conference: specialised courts. In this session, apart from discussing the promotion of such courts by certain jurisdictions and the trend to build a 'legal industry', a mock negotiation of a contractual jurisdictional

clause was conducted, with the audience invited to participate. These types of mock cases can also now be considered one of the Litigation Committee's landmark initiatives, and so far have revealed a way in which to enrich discussions and reach conclusions from which both the panelists and the audience can benefit. The session was co-chaired by Alexander Foerster of Mannheimer Swartling and by Christopher Tahbaz of Debevoise & Plimpton. Taking into account the topic and the mock case, panelists from several jurisdictions were included (including India, Ireland, Malaysia, USA, Qatar, Canada, Romania, Poland and South Africa).

The other main theme addressed by the Litigation Committee at the annual conference was forum selection and forum shopping. Again, at the Tuesday 1 November afternoon session a mock case presentation was undertaken, where various jurisdictional and procedural issues (*forum non conveniens*, *lis pendens* and the like) were discussed on the basis of a fictitious aircraft accident which gave rise to court proceedings in several jurisdictions in North America, Europe and Asia. Denis Chemla and Thomas Claassens, officers of the Litigation Committee, co-chaired the session. Panelists were Deborah Barker of KhattarWong, Philip Clifford of Latham & Watkins, Beatrice Hamza Bassey of Hughes Hubbard & Reed, Daan Lunsingh Scheurleer of NautaDutilh, Sylvie Rodriguez of Norton Rose and Durval de Noronha Goyos Jr of Noronha Advogados.

Taking into account the venue, it made good sense to have a session dealing with litigation in the Middle East and Islamic worlds and to have a panel of experts in litigation and arbitration in the region (Mohammed Al-Dhabaan of D&P Dhabaan & Partners, Hassan Arab of Al Tamimi & Company, Mahmood Awan of Awan Raza,

Ziad Najm of Albert Najm & Ziad Najm Law Firm, Shelia Shadmand of Jones Day, Anne Katherine Toomey of Baach Robinson & Lewis PLLC) which included jurisdictions such as the UAE, Saudi Arabia, Lebanon and Pakistan, amongst others,

Finally, the Litigation Committee participated in a joint session led by the Dispute Resolution Section, where the Arbitration, Consumer Litigation, Mediation, Negligence and Damages Committees collaborated to undertake further work on the session on the *Art and Science of Persuasion*. This was the second part of this initiative

which was launched at the Vancouver annual conference and we can say that it was similarly successful. The session was co-chaired by José Astigarraga, Vice-Chair of the North American Regional Forum, and Florian Kremslehner Senior Vice-Chair of the Litigation Committee. Panelists included Cecil Abraham of Zul Rafique & Partners, Manuel Conthe of Bird & Bird, Gabrielle Kaufmann-Kohler of Levy Kaufmann-Kohler, Sophie Nappert of 3 VB, Philippe Pinsolle of Shearman & Sterling and David W Rivkin, IBA Secretary-General.



INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE

DUBLIN 30 SEPTEMBER – 5 OCTOBER 2012

LITIGATION COMMITTEE SESSIONS

MONDAY 0930 – 1230

The role of arbitration in banking and finance

Joint session with the Dispute Resolution Section and the Financial Services Section.

This session will discuss the benefits and efficacy of arbitration in banking and finance disputes and inter-bank disputes, as well as securities claims and recent investment awards dealing with debt rescheduling and bondholders' claims against sovereigns.

TUESDAY 0930 – 1230

Private antitrust actions

Joint session with the Antitrust Committee and the Litigation Committee.

This panel will discuss new trends in civil antitrust actions in several jurisdictions, including efforts to expand private litigation in Europe, issues concerning discovery/disclosure, confidentiality of leniency applications in the US and Europe, which jurisdictions are emerging as forums of choice for litigation and why, passing-on, class actions/collective redress, and punitive damages.

TUESDAY 1430 – 1730

Piercing the corporate veil

Joint session with the Insolvency, Restructuring and Creditors' Rights Section (SIRC) and the Litigation Committee.

What can be done to enforce judgments against financial institutions holding assets in offshore jurisdictions? The session will deal with directors' liability, corporate criminal liability, asset forfeiture and regulatory actions as means to obtain payment.

WEDNESDAY 0930 – 1230

Litigation lessons for securities lawyers

Joint session with the Litigation Committee and the Securities Law Committee.

A broad range of transactional and public company issues will be examined through the lens of key litigation drivers. Facilitators will lead parallel group discussions which will dissect disputes involving business combinations, disclosure and insider trading, employing recent examples.

Continued overleaf

WEDNESDAY 0930 – 1230

The truth, the whole truth and nothing but the truth – the obligations and responsibilities of lawyers when dealing with witnesses

Joint session with the Litigation Committee and the Professional Ethics Committee.

Lawyers have a duty to act professionally and honestly in their dealings with their court. This duty must be balanced with their duty to their clients and this need for balance often creates practical and ethical dilemmas in dealing with witnesses in preparation for and in the course of trial.

This session will examine and discuss some of those dilemmas in the context of:

- expert witnesses;
- witnesses as to fact; and
- lawyers as expert witnesses.

It will also discuss:

- Are there circumstances in which a lawyer's duty to the court overrides his/her duty to the client?
- Is there merit in a general rule that prohibits lawyers acting as expert witnesses in areas where they practise?
- What confidentiality issues arise if a lawyer withdraws as a result of perjured evidence?
- When might aggressive cross examination become bullying?
- What constitutes 'coaching' of witnesses?
- What issues arise in advising on discovery documentation?

The session will be interactive and the audience will be encouraged to participate fully.

WEDNESDAY 1430 – 1730

Attorney-client privilege: how strong is it?

Presented by the Litigation Committee.

This session will explore the amount of protection which the attorney-client privilege can provide, exploring in particular its limits. When and how can it be circumvented? Are specific matters, such as fraud cases, treated differently? The session will focus on cross-border matters and how to deal with the differences of various jurisdictions across the globe.

THURSDAY 0930 – 1230

Class actions or mass actions – the experience of litigators and financial institutions

Joint session with the Banking Law Committee and the Litigation Committee.

This session will discuss the lessons to be learned by banks and litigators five years after the financial crisis. The panel will discuss the comparison of class actions and 'mass actions' in regard to timing, costs and results.

THURSDAY 0930 – 1230

Kidding around? Children's rights and legal representation

Joint session with the Family Law Committee, the Judges' Forum and the Litigation Committee.

This session will discuss the legal representation of a child as an aspect of children's rights, how it can be achieved, and the challenges faced when representing a child in litigation.

THURSDAY 1430 – 1730

Follow the money – monetary compensation in intellectual property cases

Joint session with the Intellectual Property and Entertainment Law Committee and the Litigation Committee.

Lawyers with an international intellectual property practice must have some knowledge of the risks and rewards associated with IP litigation in jurisdictions of interest to their clients. This session will seek to inform practitioners on the availability and nature of compensation for the infringement of patents, trademarks, copyrights and designs in addition to damages arising out of the violation of a licence on IP rights.

The type of compensation to be discussed will range from proven damages of the IP owner, the profits of the infringers, pre and post judgment interest, legal fees and disbursements, punitive damages, etc. This session will consider strategies for the management of client expectations as clients or their instructing counsel may mistakenly presume they are entitled to remedies and quantum of damages similar to that available in their home jurisdiction.

FRIDAY 0930 – 1230

A battle of perspectives: transactional lawyers v litigators for international sales and related commercial transactions

Joint session with the Arbitration Committee, the International Sales Committee and the Litigation Committee.

In the run up to an international transaction, a negotiating lawyer pursues closure, and uses (and misuses) 'boilerplate' clauses. They compromise with a careful eye on business considerations and open-ended liabilities. When the same agreement is dissected by a court, an arbitrator or arguing counsel, unexpected twists and pitfalls emerge that often decide the outcome of a dispute. This lively and interactive session will explore the conflict with a mock negotiation over common difficult aspects of a deal which will then be 'torn apart' by two dispute resolution teams, each one instructed by the lawyers who authored the relevant clauses.

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Focus: US discovery and its implications internationally

Who's afraid of pre-trial discovery? – US discovery: purposes, rules and suggestions for survival

'The only thing we have to fear is fear itself' – Franklin D Roosevelt, 1933

Introduction

Civil litigation in the US is unique in many respects. For example, jury trials, punitive damages and contingency fees are important parts of the US litigation system, but they do not exist (at least not in that form) in most other countries. The different stages through which a civil case advances in a US court are also not common in proceedings pending elsewhere. One of those stages is known as 'pre-trial discovery'.

Discovery can be rather unpleasant. Parties to civil litigation in the US may be required to locate, review and hand over thousands (if not millions) of documents. Employees are expected to give testimony – under oath and outside the presence of a judge. And non-compliance can lead to serious sanctions for the parties and even their attorneys!

Lawyers and parties from civil law countries frequently denounce US-style discovery as a 'fishing expedition', arguing that it is costly, intrusive and wasteful. US lawyers on the other hand contend that discovery is the only way to get to the 'real truth' of the matter. Whether you like it or hate it, the reality is that discovery is an integral part of the US legal system and will not go away any time soon. Thus, any company doing or wishing to do business in the US is well advised to familiarise itself with the basics of this procedure and to take some precautionary steps now to prevent avoidable problems in the future.

Timing

Pre-trial discovery is one of the most important stages of a civil case in the United States. In most cases, 'pre-trial' does *not* mean

'pre-case'. Rather, discovery usually proceeds only after a number of other procedural steps have been taken. The following is a typical timeline of a civil case:

- The plaintiff files the complaint with the court;
- the plaintiff serves the complaint on the defendant;
- the defendant files a motion to dismiss;
- the defendant files an answer;
- **pre-trial discovery**;
- the parties file motions for summary judgment;
- the parties make pre-trial motions;
- **trial**.

In some cases, discovery takes place only after months or even years of extensive motion practice, while in some, there is no discovery at all.

Courts can impose timetables for the completion of pre-trial discovery. Shortly after a suit is commenced, the judge may require a conference with the attorneys to ascertain the extent of pre-trial discovery they intend to pursue. At this point, the judge may require that all discovery be completed within, for example, six months, so that the case can be scheduled for trial. Such initial timetables are often not met in practice, and are routinely adjusted by the judge upon the request of the parties.

Purposes

Pre-trial discovery is an integral part of the civil litigation system in the US and serves a number of important purposes. It is based on the fundamental goal that each party shall have the opportunity to become fully informed of all of the evidence of the other parties before the actual trial of the case in order to ensure that the trial itself proceeds

as quickly and smoothly as possible. At the trial, the evidence of each party and non-party witness is presented during one continuous period of time.

Another reason for pre-trial discovery is to permit each party to evaluate the strengths and weaknesses of its own case and, thus, to evaluate the desirability of settling. In fact, a large number of lawsuits in the US are concluded by settlement before ever reaching trial. But few settlements are entered into before the parties have engaged in at least some pre-trial discovery or have filed various motions with the court, so that the lawyers and their clients are able to evaluate the positions of all the parties and the preliminary views of the judge.

A further purpose of discovery is to preserve the testimony of parties and witnesses for use at trial. If, for example, a party or witness dies before the trial or otherwise becomes unavailable to testify, the transcript of the deposition taken during the course of pre-trial discovery may be used at trial in lieu of live testimony.

Finally, pre-trial discovery permits the attorney to force other parties and the witnesses to take specific positions on facts relevant to the case. If a party or witness later gives testimony that is different from what was given during pre-trial discovery, the 'finder of fact' (judge or jury) may be informed of the difference in testimony, and such a change in testimony is often used in cross-examination to challenge ('impeach') the credibility of the witness.

Scope

The scope of discovery is quite broad. The Federal Rules of Civil Procedure, which govern discovery in cases pending in federal courts, and the rules in most states, allow discovery of any matter that is relevant to the pending lawsuit, whether it relates to a claim or a defence of the party seeking the discovery or to a claim or defence of any other party. For example, Federal Rule of Civil Procedure 26(b)(1) states in relevant part:

'Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and

location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence [...]'. [Emphasis added]

Thus even if the information sought would not itself be admissible at the trial, discovery is allowed if the information requested may arguably lead to the discovery of admissible evidence. For example, deposition questions or written interrogatories may involve issues as to which the questioned party can only provide hearsay information. Such hearsay evidence is generally not admissible at trial but is nonetheless often pursued in great detail during pre-trial discovery in the hope that it will lead to admissible evidence.

Pre-trial discovery is not, however, without limitations. Each party may ask the court to rule on the appropriateness of specific document requests, deposition questions or interrogatories. When a dispute regarding the scope of pre-trial discovery arises, the party seeking the discovery can file a 'motion to compel' the other party to comply with the discovery demand; conversely, the party opposing certain discovery demands can file a 'motion for protective order', asking the court to disallow or limit the other party's discovery demand.

Privileges

There are certain privileges to withhold evidence that parties and witnesses may assert during pre-trial discovery and during the trial. The most important of these are (i) the 'attorney-client' privilege, (ii) the 'work product' protection, (iii) the 'doctor-patient' privilege, and (iv) the 'spousal' privilege.

Attorney-client privilege

No party may be required to provide information regarding confidential conversations or correspondence between himself and his attorney, if these communications deal with the seeking or receiving of legal advice. The necessary elements for the attorney-client protection are:

- a communication;
- between privileged persons;
- in confidence; and

- for the purpose of seeking, obtaining or providing legal assistance to the client. The attorney–client privilege is designed to ensure the open exchange of information and advice between the client and his attorney. It is interpreted narrowly, and there are various qualifications and numerous refinements that require careful consideration in a particular case.

[*Caution:* a party can inadvertently waive the attorney–client privilege by, for example, forwarding a protected email to a person outside the protected circle of people, or by carelessly discussing confidential matters in public places (eg, elevators, planes, trains or restaurants)].

'Work product' doctrine

This doctrine recognises that the attorney should very seldom be required to hand over notes or other documents that she or those working for her prepared in connection with the dispute. The work product doctrine covers:

- documents and tangible things otherwise discoverable;
- prepared in anticipation of litigation or trial; and
- prepared by or for a party or that party's representative.

The doctrine protects the mental impressions, conclusions, opinions and legal theories of an attorney and others working with her concerning the litigation. This is, however, a limited protection; when another party has a substantial need for the material and is unable to obtain the substantial equivalent of the information without undue hardship, the document at issue may have to be turned over. That is the case, for example, where a party seeks a copy of a statement obtained immediately after an event from a witness who no longer remembers what happened or has since died. In such a case, the party may have to turn over the witness statement; but it is not obligated to hand over the attorney's mental impressions or her legal analysis of the witness's statement.

Doctor–patient privilege

Like lawyers, doctors must also keep confidential information regarding their patients' diagnosis and treatment unless their patients have specifically released them from that obligation, which they are usually required to do in personal injury or product liability cases.

Spousal privilege

In most states, a spouse may not be required to disclose confidential communications with the other spouse that occurred during their marriage.

Confidential business information

If a party refuses to provide information regarding commercial or technical matters based on the argument that disclosure would jeopardise its business or competitive position in its industry, the court will try to find a resolution that will protect the legitimate interests of the party seeking to protect the information. If the judge considers the requested information important for the litigation, he/she may order that the information be provided but that it be held under seal and that access to the information be limited, for example, to only the attorneys, and not to the parties themselves ('attorneys' eyes only').

Types of discovery

The most common discovery devices are (i) written interrogatories, (ii) requests for admission, (iii) the exchange of documents and (iv) the taking of depositions.

Interrogatories

Interrogatories are written questions that must be answered under oath (or objected to) by the party who receives them, usually within 30 days, although an extension of time is often possible. Examples of typical interrogatories are:

- Identify any and all products marketed or sold by defendant in the US under the brand name XYZ.
- Identify any and all persons involved in the marketing or sale in the US of products bearing the brand name XYZ.

It is the obligation of the party that receives the interrogatories to review all relevant documents and obtain responsive information from all of its employees (and possibly from other sources) in order to answer the questions completely and truthfully.

The gathering of such information can entail much time, effort and expense. Some courts have, however, taken steps to limit the use of written interrogatories. Several courts limit the number of written interrogatories that may be served on a party. In a case

pending in a federal court, interrogatories are initially limited to 25, although the judge may permit a larger number of interrogatories. The US District Court for the Southern District of New York (the federal trial court in Manhattan), for example, has further enacted a rule generally prohibiting, in the early stages of discovery, written interrogatories that ask anything except the identity of relevant witnesses (whose depositions may then be taken) or the custodians of relevant documents (upon whom a demand for documents may then be served).

Requests for Admission

Requests for Admission (RfAs) are a discovery device with which one party can force the other party to take a definitive position on a specific fact by requesting that the other party admit that fact. Examples are:

- Admit that defendant marketed or sold in the US products under the brand name XYZ.
- Admit that defendant recalled products sold under the brand name XYZ.

The effect of an admission is that the fact admitted becomes part of the evidence in the case. If a fact is denied in a response to an RfA, but it is proven to be true later in the case, then the denying party must pay the other party's attorneys' fees associated with proving that fact.

Production of documents

Each party can require that another party produce¹ all documents potentially relevant to the issues in the lawsuit. Examples of typical document requests are:

- Produce any and all documents concerning defendant's marketing or sales in the US of products under the brand name XYZ.
- Produce any and all documents concerning the research for and development of the products marketed or sold in the US under the brand name XYZ.

The definition of 'document(s)' is very broad and includes hard copies as well as information existing only in electronic form. In federal proceedings, Federal Rule of Civil Procedure 34(a) (1) (A) proscribes what must be handed over:

'any designated documents or electronically stored information – including writings, drawings, graphs, charts, photographs, sound recordings,

images, and other data or data compilations – stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form [...].'

[Emphasis added]

In practice, this includes letters, faxes, emails, contracts, memoranda, PowerPoint presentations, Excel spreadsheets, financial records, minutes of board meetings, handwritten notes, calendars, diaries, as well as information stored on computer hard drives, CD ROMs, DVDs, floppy disks, thumb drives, servers, laptops, mobile phones, etc. All non-identical copies and all drafts are considered separate documents and must also be produced.

In federal practice, as in many states, a response must be served within 30 days (or longer, by agreement or order of the court), stating whether the documents requested will be produced. If an objection is made to a document request, or a part thereof, the party seeking the documents may move the court for an order overruling the objections and compelling the document production. The party who has objected to the document request is equally entitled to be heard by the court as to why the document request is improper. Disputes regarding document production are common in US civil litigation, and sometimes require extended negotiations and/or court proceedings to resolve them.

With respect to witnesses who are not parties to the litigation, documents may be required by a so-called 'subpoena duces tecum' served on the non-party witness. Such a subpoena requires the production of documents described in the subpoena. In federal practice, as in many states, a non-party witness may have his or her attorney object in writing to the document production, thus requiring the party issuing the subpoena to move the court for an order deciding whether the demand for documents is proper. A person on whom a subpoena is served may also move the court to limit or totally nullify ('quash') such a subpoena.

'E-discovery'

In 2006 new 'e-discovery' rules came into effect. These new rules govern the discovery of 'electronically stored information' (ESI) and require, among other things, that parties disclose early in the litigation (1) where their data is, and (2) in what format that data exists.

Thereafter, an important question becomes whether that data is 'reasonably accessible' or whether the production of the data will cause 'undue burden and/or cost'. Courts in the US are still developing workable procedures to guide litigants through this new area of law.

In the meantime it is important that any company that does business in the US, or that might conceivably be involved in a lawsuit in the US, develops and implements a 'Document Retention Policy', setting forth important information and rules regarding the retention of data by the company and its employees, agents, etc. It is essential that the Document Retention Policy be specifically tailored to the company's circumstances and needs. To that end, the following questions, among others, should be asked of the company:

- *Existing policies:* Does the company already have any policies, guidelines, rules or procedures regarding the retention of documents, and what do they provide?
- *Requirements:* What are the business requirements and legal obligations of the company? What can be deleted and when? Under the applicable laws, how long must certain information be retained? How long must information be stored for business, technical or other purposes?
- *Purposes:* How well do existing policies, etc. meet their purposes and the company's needs?
- *Implementation:* How are existing policies implemented in reality? Is there one person or group in charge of and responsible for the implementation? Are employees, agents, etc made aware of the policies and their purposes? Are they periodically reminded of them?
- *Litigation:* What are the company's policies regarding civil and criminal litigation and government investigations?
- *Location of data:* In which countries is the data? In which physical locations (headquarters, subsidiaries, branches, plants, employees' homes) is the data? Is the data on hard drives, servers, personal laptops, computer tablets, smart phones, mobile phones, fax machine hard drives, floppy disks, microfiche, back-up tapes, etc?
- *Format of data:* Is the data printed on paper, or does it exist merely in electronic form as TIFF, PDF, Word, WordPerfect, Excel documents, etc? Is private employee data stored on company equipment? Consider implementing policies prohibiting employees from using company equipment for private purposes.

- *Deletions in the ordinary course of business:*

Consider deleting certain classes of documents after certain time periods.

Consider implementing automatic deletion rules (eg, delete emails in inboxes after 90 days, in outboxes after 60 days, etc).

[*Caution:* as soon as a company 'reasonably anticipates' litigation, it must immediately take steps to stop any deletion of relevant information. In most cases, that includes the dissemination of a 'litigation hold' memo to all relevant employees, agents, etc, as well as the (temporary) suspension of any automatic email deletion rules until the litigation is completed.

Depositions

A deposition is a pre-trial examination of a witness in which the witness is placed under oath and asked questions by an attorney, and a written record is made of the questions and answers. The deposition is taken in the presence of the attorneys for all parties, usually in the offices of the attorney who has requested the deposition. Depositions are almost never conducted in the presence of a judge.

The deposition is conducted in a relatively informal atmosphere, usually in a conference room, and breaks may be requested by the witness or the attorneys. All of the attorneys have the right to ask questions. In a case pending in federal court, a deposition is limited to seven hours, unless otherwise agreed to by the parties or authorised by the court.

An officially licensed court reporter places the witness under oath and stenographically, or mechanically, records all of the questions and answers. These are then typed up as a verbatim transcript of the deposition, and the witness receives a copy of this transcript a few days or weeks afterwards. The witness is usually required to sign the deposition transcript, and he or she has an opportunity to make any changes, for example, to correct typos, to correct errors of English, and even to correct answers he or she considers incorrect in retrospect either because the question was not understood, the witness misspoke, or because he or she simply failed to remember the true answer. Upon notice, the deposition can also be video-taped. The party conducting the deposition usually pays for the costs of the court reporter, the transcript and the video-taping.

The deposition of a witness who is a party to the litigation may be required by a simple written notice to his or her attorney to appear for the deposition at a specific place, date and time. If a party does not know specifically which person at the other party's company has relevant knowledge, the party can issue a so-called '30(b)(6)' deposition notice to the company; such a notice lists a number of areas of inquiry and requests that the company designate as witnesses one or more persons who are knowledgeable in those areas of inquiry.

Each party can also require the presence of non-party witnesses by the issuance of a subpoena. A subpoena, however, can be served only upon witnesses within the territorial jurisdiction of a court or within a certain distance from the court. Such witnesses must be paid a modest witness fee and the expenses of their travel to the place of deposition. If a witness refuses to appear, he or she may be held in contempt of court, may be required to pay a money penalty, and may even be put in jail. If the witness has good reasons for his or her refusal to appear, he or she may present a motion to the court to nullify ('quash') the subpoena. If the court determines that the witness must nonetheless give evidence, the court will order the deposition to proceed.

The attorney for the party or witness who is being questioned may object to questions. Many such objections relate only to the form of the question, based on the rules of evidence that govern the presentation of evidence at trial. Such objections do not prevent the witness from answering the question, but preserve the formal evidentiary objection if the question and answer are later offered as evidence at trial. There may also be questions that the witness refuses to answer or which his or her attorney instructs him or her not to answer; in such instances, the attorney who is seeking the information must ask the court to issue an order requiring an answer to the question.

Sanctions

If a party does not comply with its discovery obligations, it can face serious sanctions, including:

- certain facts will be deemed admitted;
- the sanctioned party may be prohibited from using certain evidence;
- certain pleadings may be struck;
- the jury may take a negative inference

(for example, the jury can take missing documents as evidence that those documents, if they had been produced, contained information harmful to the sanctioned party);

- the action may be dismissed in whole or in part as a sanction against the plaintiff;
- the judge may issue a default judgment as a sanction against the defendant; and
- the costs of a discovery motion (including attorneys' fees) can be awarded to the prevailing party.

In addition, under certain circumstances, the attorneys of the sanctioned party can be referred to the state bar for an ethical inquiry and possible suspension or loss of their law licenses.

The Hague Evidence Convention

In 1970, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the 'Hague Evidence Convention') was concluded. The US and about 50 other countries are signatories. The Hague Evidence Convention was intended to bridge the significant differences between the common law and civil law approaches to the taking of evidence and to allow the parties in civil suits in one country to obtain evidence located in another country without resorting to the former procedure of 'letters rogatory', which was time-consuming and uncertain. The Hague Evidence Convention deals with the taking of evidence by means of a 'Letter of Request' sent by a judicial authority in the country where the litigation is pending (the requesting country) to the Central Authority in the foreign country where assistance is sought in obtaining evidence. The Central Authority in the recipient country often refers the request to a local judge in the area where the witness is located or the documents are found, and the law of the recipient country is applied in deciding the methods and procedures to be followed (eg, testimony under oath, manner of recording of testimony, follow-up questions by attorneys, etc.) In certain circumstances, a diplomatic or consular official may take evidence without compulsion from persons who are nationals of his own state.

In many countries, however, pre-trial discovery is virtually unknown. Thus most countries have made a reservation under Article 23 of the Convention, which permits signatory countries to refuse to follow requests 'issued for the purpose of obtaining

pre-trial discovery of documents as known in Common Law countries'. Many countries, including Germany, have stated that they will not follow such requests at all. Other countries, like Switzerland, have stated that they will follow such requests only under very specific, narrow circumstances.

The fundamental differences in approach between the United States and civil law countries concerning document discovery – and the Hague Service Convention's role in bridging that gap – were explored by the US Supreme Court in 1987 in the *Societe Nationale* case.² To the disappointment (and even shock) of many, the Supreme Court decided in that case that the Hague Evidence Convention is 'not the exclusive means' for obtaining evidence located outside the US. Rather, the Court held that the Hague Evidence procedures are 'optional', that is, not mandatory, and thus only one of several methods of seeking evidence that parties may use to obtain evidence located abroad. But the Supreme Court cautioned that:

'American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses.' [Emphasis added]

In a later case, the Texas Supreme Court³ weighed the following five factors in deciding on the scope of discovery permitted against the foreign defendant:

- the importance to the investigation or litigation of the documents or other information requested;
- the degree of specificity of the request;
- whether the information originated in the US;
- the availability of alternative means of securing the information; and
- the extent to which noncompliance with the request would undermine important interests of the US, or compliance with the request would undermine important interests of the state or country where the information is located.

In that case, after balancing these factors, the Texas Supreme Court rejected the plaintiff's

demand for an internal company phone book listing names, job titles, positions and direct dial work numbers of more than 20,000 VW employees. Instead, the Court held that it was sufficient that plaintiff knew the names of the employees responsible for the design and construction of the product at issue in the case.

These and other cases can provide powerful precedents for foreign parties in US litigation arguing for the application of a balanced approach to what might otherwise be a daunting discovery procedure.

Discovery in the US for use in a foreign proceeding

US discovery can also be used to provide an advantage in proceedings pending outside the US. A federal statute, 28 USC § 1782, presents an efficient means for foreign parties to obtain documents and testimony in the US for use in a foreign or international proceeding. Section 1782(a) reads:

'The [federal] district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.' [Emphasis added]

In 2004, in the case of *Intel v AMD*,⁴ the US Supreme Court rejected many limitations that lower courts had previously imposed on the use of this statute. The Supreme Court ruled that a person trying to gather evidence in the US for use in a proceeding elsewhere must meet the following requirements, the four '*Intel* Elements':

- the target of discovery must 'reside' or be 'found' in the federal district court's area of jurisdiction;
- the purpose of discovery must be 'for use in a proceeding';
- the proceeding must take place before a 'foreign or international tribunal'; and
- the application must be made by the foreign or international tribunal or by an 'interested person'.

US courts are still developing the specific

meaning and scope of the four *Intel* Elements, and the following questions, among others, have not yet been finally resolved:

- Whether documents that are located *outside* of the US but are in the possession, custody or control of a person found *inside* the US must be handed over (first *Intel* Element).
- Whether a private international arbitration proceeding can be deemed a ‘foreign or international tribunal’ (third *Intel* Element).

If the request meets all four *Intel* Elements, the decision whether discovery will be ordered lies in the sound discretion of the judge, who will weigh the following factors, among others:

- whether the person from whom discovery is sought is a participant in the foreign proceeding;
- the nature of the foreign tribunal, the character of the proceedings underway, and the receptivity of the foreign government or court to US federal court judicial assistance;
- whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other important policies of the foreign government; and
- whether the request is unduly intrusive or burdensome.

Conclusion

While US pre-trial discovery can be an unpleasant (and expensive) experience, it can also provide powerful ammunition to help strengthen a party’s arguments in a US court proceeding – and even in a case pending in another country. Rather than focus their energies solely on fighting against discovery, parties to any dispute – anywhere – should carefully consider how they may be able to use discovery to their own advantage. In any event, companies doing business in the US are well advised to take stock of their data and implement a carefully drafted Document Retention Policy in order to prevent avoidable problems in (sometimes unavoidable) litigation in the US.

Notes

- 1 The (somewhat misleading) term ‘production’ here does not mean ‘creation’ of documents, but rather ‘handing over’.
- 2 *Société nationale industrielle aéronautique v US District Court*, 482 US 522 (1987).
- 3 *Volkswagen AG v Valdez*, 909 SW2d 900 (Tex 1995).
- 4 *Intel Corp v Advanced Micro Devices, Inc*, 542 US 241 (2004).

German parties in US discovery

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Today’s global trade and business relationships make cross-border litigation inevitable. When cross-border litigation affects parties, or even non-parties, of the Federal Republic of Germany on the one hand and the US on the other, the Continental-European legal system clashes with the Anglo-American legal system. The fundamental differences between the two legal systems often cause difficulty. The litigation culture is different in civil law and common law jurisdictions, but it is clearly not only the culture. The German term ‘*deutsch-amerikanischer Justizkonflikt*’ has been used for decades now to describe particularly prominent areas of conflict, such as:

- service of US litigation papers on German parties;
- taking of evidence for US proceedings on German territory, especially with regard to pre-trial discovery;

- excessive interpretation of international jurisdiction by US courts; and
- enforcement of US judgments against German parties.¹

The practice of the taking of evidence, in particular the US discovery, is the origin of controversies and conflicts over and over again. Whilst US-style discovery prompts the production of a wide scope of potentially relevant documents, procedure in civil law countries such as Germany contains only very limited possibilities to obtain documents that are in the possession of the opponent or third parties. US parties often cannot imagine that there are legal systems without pre-trial discovery. German parties, however, are overwhelmed by the scope, and the costs, of US-style discovery.

The Hague Evidence Convention

Designed as the key to facilitate the cross-border taking of evidence, the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 (the 'Hague Evidence Convention') is the leading multilateral treaty. Under the procedure of the Hague Evidence Convention a judicial authority of one contracting state may request the assistance of the competent authority of another contracting state 'to obtain evidence, or to perform some other judicial act.'¹² Pursuant to Article 9 of the Hague Evidence Convention, the judicial authority that executes the request 'shall apply its own law as to the methods and procedures to be followed' unless the requesting authority asks that a special method or procedure be followed.

The Hague Evidence Convention entered into force in relation to Germany on 27 June 1979³ and in relation to the US on 7 October 1972.⁴ It is, however, still in dispute whether the Hague Evidence Convention is the exclusive basis for the international taking of evidence in cross-border litigation with parties from two or more contracting states:

- It is the German position that the Hague Evidence Convention is mandatory for the judicial authority of one contracting state to apply the Hague Evidence Convention in order to obtain evidence located in another contracting state.
- Courts in the US tend to allow other direct means of obtaining evidence besides the Hague Evidence Convention, specifically the Federal Rules of Civil Procedure (FRCP).⁵

This clash obviously caused and continues to cause frustration on the side of German parties.⁶

The impact of Germany's reservation regarding pre-trial discovery of documents

According to Article 23 of the Hague Evidence Convention:

'A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.'

This allows contracting states to declare reservations with regard to the pre-trial discovery of documents.

Just like the large majority of the contracting states, Germany has made a

reservation to Article 23.⁷ Pursuant to § 14(2) of the German Act on the Execution of the Hague Evidence Convention (*Ausführungsgesetz*, or German Execution Act) of 22 December 1977,⁸ a regulation may be issued to allow for the execution of requests for the purpose of obtaining pre-trial discovery of documents unless fundamental principles of German procedural law are not opposed thereto.⁹ At the time of writing, Germany has not yet issued a respective regulation.

German courts have taken the view that Germany's reservation prohibits any type of legal aid with regard to the pre-trial discovery of documents,¹⁰ even if the documents sought are specified precisely. There is, however, a discussion about whether documents can be obtained through the channel of the Hague Evidence Convention if the request is narrowly defined and limited to the production of specific documents. One of the main arguments for this position is that the aim of the reservation is to prevent fishing expeditions (*unzulässige Ausforschungsbeweise*). Hence it is suggested that German authorities execute requests for the production of specifically defined documents.¹¹ Furthermore, in 2002 the German Code of Civil Procedure (*Zivilprozessordnung*, or ZPO) was amended with regard to the obligations of parties and non-parties to produce documents. Pursuant to the new ZPO § 142, the court can order the production of precisely defined documents in the course of civil litigation procedure.¹² Hence the argument is made that production of documents under the Hague Evidence Convention should not be more restrictive than under German domestic law.¹³

Even if one allowed the execution of requests for the production of precisely specified documents it can be expected that US courts would still consider the procedure under the Hague Evidence Convention insufficient, excessively complicated and tardy. In fact, from the US perspective, the Hague Evidence Convention is not considered as an efficient means of obtaining pre-trial discovery of documents. This became evident in *First American Corp v Price Waterhouse*. The court expressly noted that the process under the Hague Evidence Convention is insufficient because it required a precise specification of the requested documents.¹⁴

As a consequence, the US courts are likely to pursue the means of the FRCP. German

parties will not have much leeway to avoid discovery requests under the FRCP. It is widely accepted that the mere fact that pre-trial discovery took place in US proceedings does not exclude recognition and enforcement of a subsequent judgment in Germany.¹⁵ Frequently, German parties are well-advised to cooperate in the pre-trial discovery of document in order to avoid sanctions in the US proceedings or negative inferences by the US court when considering the evidence.¹⁶

Depositions of German nationals in Germany

It is well recognised that Germany's reservation to Article 23 of the Hague Evidence Convention does not exclude the pre-trial discovery in forms other than the production of documents, most notably, witness testimony.¹⁷ Pursuant to the wording of Article 23 of the Hague Evidence Convention its scope of application is limited to the 'pre-trial discovery of documents'. German courts have confirmed that Germany's reservation to Article 23 of the Hague Evidence Convention does not restrict the taking of witness testimony, even if a witness is asked to testify to the content of a certain document.¹⁸ Hence, the German authorities will execute requests that aim at the questioning of witnesses even in the context of a pre-trial discovery.

The Hague Evidence Convention does not, however, set forth the details of the procedure to be followed when executing the most common type of pre-trial witness testimony in US litigation, the taking of depositions. Chapter II of the Hague Evidence Convention provides for the taking of evidence by diplomatic officers, consular agents and commissioners. Germany, however, has made a general reservation with respect to Chapter II: pursuant to § 11 of the German Execution Act, the taking of evidence through diplomatic officers or consular agents is not admissible if it relates to German nationals. It is possible to make an exception to this reservation through a bilateral agreement with a contracting state. This is the case between Germany and the US.

Pursuant to Article 9 of the Hague Evidence Convention, the German authority that executes the request 'shall apply its own law as to the methods and procedures to be followed' unless the requesting authority asks that a special method or procedure be followed. Unless other agreements have been made, the German judge poses the

questions and the lawyers have the right to ask additional questions. The court has the authority to summon a witness and apply coercive measures if the witness does not appear voluntarily.

However, there is another option besides the questioning of witnesses in the courtroom. In 1956, Germany and the US exchanged diplomatic notes verbal which provide for the legal framework of the taking of depositions for US civil/commercial litigation on German territory through US diplomatic officers and consular agents. This exchange of verbal notes still applies today. The Foreign Office notes dated 13 January 1956 and 8 October 1956 laid the foundation for 'the questioning of German or other non-American citizens' by specifying the requirements under which the questioning is admissible.¹⁹ Most importantly, no pressure may be imposed on the person to be questioned to make her appear or provide information.²⁰ This includes that the request to provide information is not called a 'summons' and that no coercive measures are threatened in the event that a person does not appear or refuses to provide information.²¹ Furthermore, it is emphasised that the person to be questioned has the right to be accompanied by a lawyer.²²

During the past years, Germany and the US developed the practice of allowing depositions on German territory with regard to German nationals if the German Ministry of Justice is informed and pre-approves the deposition.²³ Furthermore, it is required that the US Mission to Germany is involved. In response to the vast increase in the numbers of depositions taken in Germany every year, the German Ministry of Justice nowadays often insists on conducting the deposition at the premises of the US Consulate General and that the oath is administered by a US Consul.²⁴

Due to the involvement of the German Ministry of Justice as well as the US Consulate General, parties are well-advised to plan the taking of depositions in Germany well ahead. Based on information provided by the US Consulate General, space at the Consulate General is limited and an early scheduling is advisable.²⁵

The rather formal set-up frequently tempts parties to organise depositions on German territory without involvement of either the German or US authorities.²⁶ The parties and lawyers involved, however, could risk criminal prosecution.²⁷ German scholars opine that the questioning of witnesses may constitute an unlawful assumption of public authority (*Amtsmaßnahme*) pursuant to § 132 of the

German Criminal Code (*Strafgesetzbuch*).²⁸ It is argued that the questioning of witnesses is reserved to the German police, prosecutors and courts so that depositions by lawyers violate the German sovereignty.²⁹ This view is not undisputed. Other scholars emphasise that depositions have the purpose of simply preparing the taking of evidence without involvement of the courts. Hence, they would not conflict with any sovereign action.³⁰

Conclusion

The Hague Evidence Convention is the main multilateral treaty in the area of international judicial aid on the taking of evidence abroad. Unfortunately, the procedures offered by the Hague Evidence Convention too often do not match with the reality of comprehensive pre-trial discovery of documents, including e-discovery, and depositions. The US courts respond to this situation by avoiding the Hague Evidence Convention because it is perceived as inflexible and ineffective.

With regard to the taking of depositions, the praxes of the German Ministry of Justice and the US Consulate General are likewise rather formal and bureaucratic. Given the commonness of US–German cross-border litigation it would be desirable for the parties to obtain a more suitable legal foundation for efficient pre-trial discovery in accordance with today's needs.

Notes

- 1 See, for example, Schütze, *Zum Stand des deutsch-amerikanischen Justizkonfliktes*, RfW 2004, 162, listing four areas of conflict which are particularly relevant.
- 2 Article 1 of the Hague Evidence Convention.
- 3 The status table of the Hague Evidence Convention is available at www.hcch.net/index_en.php?act=conventions.status&cid=82. Germany adopted the Hague Evidence Convention by Act of 22 December 1997 (BGBl II 1452).
- 4 Schütze, see note 1 above.
- 5 For an overview of the discussion about the priority and exclusivity of the Hague Evidence Convention in the US on the one hand and continental Europe, specifically Germany, on the other hand see Heinrich in *Münchener Kommentar Zum Zivilprozessrecht* (3rd edn, Vol 2, 2008) Hague Evidence Convention, note 2.
- 6 Schütze, see note 1 above, 164.
- 7 The German reservation with regard to Article 23 of the Hague Evidence Convention is available at www.hcch.net/index_en.php?act=status.comment&csid=502&disp=resdn.
- 8 BGBl I 3105.
- 9 § 14 of the German Execution Act, BGBl I, 3105.
- 10 Higher Regional Court (Oberlandesgericht, OLG) Celle, Decision of 6 July 2007, case number 16 VA 5/07, at II.2.c) (1); Higher Regional Court (OLG) Munich, Decision of 27 November 1980, case number 9 VA 3/80. The position that Germany's reservation to Article 23 of the Hague Evidence Convention prohibits the execution

of any requests for pre-trial discovery of documents is further supported by the fact that contracting states may make limited reservations. For example the French reservation is not applicable if the requested documents are fully listed in the letter of request and there is a direct and clear connection between the requested documents and the matter at dispute

- 11 See, for example, Reufels, *Pre-trial discovery Maßnahmen in Deutschland: Neuauflage des deutsch-amerikanischen Justizkonflikts?* RfW 1999, 667, 670.
- 12 For a comprehensive description of the new § 142 of the ZPO see Kapoor, *Die neuen Vorlagepflichten für Urkunden und Augenscheinsgegenstände in der Zivilprozessordnung* (2009).
- 13 The German legislature, however, emphasised that the new § 142 of the ZPO does not aim at allowing any fishing expeditions as is common to US-style pre-trial discovery, Bundestags Drucksache 14/6036, 120.
- 14 *First American Corp v Price Waterhouse*, 154 F.3d 16, 23 (2d Cir 1998).
- 15 The German Federal Court (Bundesgerichtshof, BGH) held in a decision of 4 June 1992, case no IX ZR 149/91 that the conduct of pre-trial discovery does not constitute per se a violation of the *ordre public*, noting 'Bei Verfahrensverstößen ist nur dann von einer Verletzung des *ordre public* auszugehen, wenn die Entscheidung auf einem Verfahren beruht, das von den Grundprinzipien des deutschen Verfahrensrechts in einem Maße abweicht, dass es nach der deutschen Rechtsordnung nicht als in einer geordneten, rechtsstaatlichen Weise ergangen angesehen werden kann', section A.III.4.a).
- 16 The problems arising out of German data protection law in the context of US discovery are addressed in a separate article in this Newsletter.
- 17 Higher Regional Court (OLG) Munich, Decision of 27 November 1980, case number 9 VA 4/80.
- 18 Higher Regional Court (OLG) Celle, Decision of 6 July 2007, Case number 16 VA 5/07, at II.2.c) (1), referring also to the earlier decision of the Higher Regional Court (OLG) Munich, see note 16 above.
- 19 Subsequently, the notes verbal of 13 January 1956 and 8 October 1956 were confirmed by the German note verbal of 17 October 1979 and the US note verbal 1 February 1980. The full text of the notes verbal is cited at Geimer/Schütze, *Internationaler Rechtsverkehr in Zivil- und Handelssachen*, 374 2a.
- 20 *Ibid* 1.
- 21 *Ibid* 1 (a), (b).
- 22 *Ibid* 3.
- 23 The US Embassy in Germany provides detailed practical information at its homepage at <http://germany.usembassy.gov/acs/judicial-assistance/>, including the applicable fees.
- 24 See <http://germany.usembassy.gov/english-speaking-services/2008-deposition-instructions.pdf>.
- 25 *Ibid*.
- 26 Böhmer, *Spannungen im deutsch-amerikanischen Rechtsverkehr in Zivilsachen*, Njw 1990, 3049, 3054.
- 27 *Ibid*. It is reported that German authorities have filed protests with the US Embassy after obtaining knowledge of the taking of depositions on German territory without involvement of the US Mission.
- 28 Hohmann in *Münchener Kommentar zum Strafgesetzbuch* (1st edn, 2005) § 132, note 18; Böhmer, above note 22.
- 29 *Ibid*.
- 30 Reufels, *Pre-trial discovery-Maßnahmen in Deutschland*, RfW 1999, 667, 670, arguing that even if the US court defines the pre-trial discovery measures there would be no violation of sovereign authority on the ground that discovery orders by the US court merely specify the procedural rights of the parties.

Be careful what you write: attorney-client privilege for international businesses

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The growth of the global economy has forced multinational companies to increasingly consider whether their international legal communications are discoverable in litigation. Depending on the nature of the communication, US courts may apply US privilege law or foreign privilege law to determine whether communications are subject to discovery. In addition, some courts will consider other countries' discovery procedures in determining whether an attorney communication should be discoverable. Accordingly, companies conducting international business and their attorneys should familiarise themselves with the various privilege laws and discovery procedures in the countries where they do business, to anticipate whether communications may be discoverable and to adopt communication practices to maintain the privilege where it is available.

In the US, the attorney-client privilege protects confidential communications between a client and the client's attorney, where the purpose of the communication was to seek or provide legal advice. Protecting the privilege promotes full and frank disclosures between attorneys and their clients so that attorneys can confidentially, candidly, and effectively provide legal advice. With some limitations, US privilege law extends to corporate in-house attorneys.

But in US litigation domestic law does not necessarily govern the privilege inquiry. To determine whether a communication involving an international attorney or client is privileged, most courts in the US will balance international and US legal interests. This approach recognises international comity where appropriate. Courts commonly apply a choice-of-law 'contacts' analysis and defer to the law of the country with the most direct and compelling interest in the communication, unless there is a contrary public policy.¹ In complex cases this may require consideration of dozens of countries' privilege laws.²

One issue that is inconsistent across international privilege law is whether communications with non-attorney legal professionals are privileged. For example, prior to 1998 Japan did not extend privilege protection to communications with *benrishi*-patent agents who are not licensed attorneys.³ Even in the US courts have inconsistently extended and denied privilege to communications with domestic non-attorney patent agents.⁴ Compare this uncertainty with the UK's express statutory privilege for non-attorney patent agents who are officially licensed with the Chartered Institute of Patent Agents.⁵ Those working with technology companies seeking international patent rights should understand these differences. Knowing precisely which foreign patent agents may be communicated with freely and which must be communicated with more delicately, will protect business interests and may prevent the inadvertent disclosure of sensitive communications.

Interestingly some countries do not recognise privilege at all. For example, Chinese law does not recognise privilege for confidential communications between an attorney and a client. If a company communicates with foreign counsel about a matter for which China has the most direct and compelling interest, those communications could be discoverable in US litigation. Before communicating with Chinese counsel, a client would be wise to consider the purpose and necessity of the communication and how it may be used in future litigation.

Another important consideration is that many foreign countries do not extend the attorney-client privilege to in-house counsel. The justification is that in-house counsel are not viewed as independent from their employers.⁶ For example, France has a separate licensing scheme for in-house attorneys and independent attorneys, and in-house attorneys are excluded from the French bar.⁷ Many countries do not extend any privilege to in-house counsel,

including Austria, Bahrain, Bulgaria, Czech Republic, Belgium, Finland, France, Italy, Kazakhstan, Latvia, Lithuania, Luxembourg, Hungary, Sweden, Switzerland, Saudi Arabia, and the United Arab Emirates.⁸ Even where US privilege law applies, if the communication is with an in-house attorney who is not a member of the appropriate domestic licensing bar, the communication may not be privileged.⁹ As a result, multinational companies should not assume that communications with in-house counsel and corporate employees are privileged. Instead, determining whether privilege attaches requires a fact-specific inquiry into the country where the in-house attorney works, whether the in-house attorney is licensed to practice law, whether the communication is primarily seeking or providing legal advice or is instead a business communication, and what country has the most direct and compelling interest in the communication.

Finally, there is some disagreement over whether the privilege extends to communications with US lawyers practicing overseas. The European Court of Justice has held that privilege within its jurisdiction only applies to communications with a lawyer licensed to practice by the local bar of a Member State.¹⁰ Accordingly, communications with US attorneys practicing in Europe do not receive the same protections as communications with local attorneys. This may seem unfair to US corporations conducting business in Europe, and certainly favours local lawyers over outsiders. Understanding this distinction may be critical to preserving privilege.

Even where international privilege law applies, some courts have endeavoured to not merely apply the foreign privilege laws through the lens of US discovery procedures, but to instead delve into whether or not the communications would be discoverable in the foreign jurisdiction. For example, in *Astra Aktiebolag*, several communications at issue related to a Korean proceeding, including communications from Korean counsel to their Swedish client. The court determined that Korea had the predominant interest in these communications and evaluated Korean privilege law and Korean discovery procedures.¹¹ The court concluded that Korean law does not protect communications from the lawyer to the client and does not recognise anything similar to the attorney work product doctrine in the US. Even though the court

determined that Korea did not have an applicable privilege, it refused to order production of the communications because discovery in Korea is so limited that the documents in question would not have been subject to discovery in any event. This decision preserved international comity and protected public policy, and reached the same result by applying US privilege law as it would have had it applied Korean privilege and procedure.

Given the vast differences in international privilege laws, clients and their counsel should become familiar with privilege laws in the jurisdictions where they conduct business and may be subject to suit. International corporations should hire local counsel where specific local legal advice is sought and should discuss local privilege laws before sending or requesting sensitive information. Further, given the numerous jurisdictions that do not recognise a privilege for in-house counsel, corporations should understand that communications between foreign in-house counsel and company employees may not receive the same protections they receive in the US.

Notes

- 1 *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc*, 208 FRD 92 (SDNY 2002).
- 2 See *In re Rivastigmine Patent Litig*, 237 FRD 69 (SDNY 2006) (analysing whether privilege attaches to communications touching 37 separate countries).
- 3 See *Murata Manufacturing Co Ltd v Bel Fuse Inc*, 2005 WL 281217 (ND Ill 3 February 2005) (discussing 1998 Amendments to Japanese Code of Civil Procedure governing privilege law); *Bayer AG and Miles, Inc v Barr Labs, Inc*, 33 USPQ2d 1655 (SDNY 1994) (describing Japan's privilege law prior to 1998 amendments).
- 4 Compare *Mold-Masters Ltd v Husky Injection Molding Sys*, 2001 WL 1268587 (ND Ill 15 November 2001) (extended privilege to non-attorney patent agents), with *Park v CAS Enterprises, Inc*, 2009 WL 3565293 (SD Cal Oct 27, 2009) (no privilege for communications with non-attorneys).
- 5 *Stryker Corp v Intermedics Orthopedics, Inc*, 145 FRD 298 (EDNY 1992).
- 6 *Akzo Nobel Chemicals, Ltd v European Commission*, (Case C-550/07 P) [2010].
- 7 See *Louis Vuitton Mallettier v Dooney & Bourke*, 2006 WL 3476735, at *17–18 (SDNY 2006).
- 8 Steven Davidson and Michael Miller, *Protecting Your Company Against The Evaporating Attorney-Client Privilege*, available at www.acc.com/chapters/wmacca/uploads/Slide-ACPriv.pdf [last accessed 14 March 2012]; citing 'Attorney–Client Privilege for In-House Counsel in Cross-Border Contexts', Allen & Overy, September 2011.
- 9 See *Louis Vuitton Mallettier*, 2006 WL 3476735, *17–18.
- 10 See *AM&S Europe Ltd v Commission of the European Communities* (155/9); [1983] QB 878 (requiring that a lawyer is licensed to practice by the local bar of a member state for the privilege to attach to a communication).
- 11 *Astra Aktiebolag*, 208 FRD 92 at 98.

Arbitration discovery in Spain

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The use of arbitration discovery as an evidentiary device could be considered as a newcomer within the Spanish legal system. The 2003 Arbitration Act – partially amended in June 2011 – contains general provisions as to the manner in which the proceedings are conducted by the arbitrators (Article 25.2), the right of the parties to submit or propose relevant evidence in support of their pleadings (Article 29.1) and the limits of the court assistance in the taking of evidence (Article 33). No mention is made in the 2003 Arbitration Act to the use of the IBA Guidelines on anything akin to the taking of evidence. However, since its enactment, the arbitration rules of the main Spanish arbitration institutions provide for detailed provisions on the subject of evidence, such as the Spanish Court of Arbitration (Article 23), the Madrid Court of Arbitration (Article 29) or the Civil and Mercantile Court of Arbitration (CIMA) (Article 24). The proper understanding of the situation of arbitration discovery in Spain recommends a twofold approach: from the arbitration perspective and from the Spanish courts' point of view.

From the arbitration perspective, Spain can be considered as a reliable venue for the practice of arbitration discovery. The Spanish market contains a pool of reputed professionals in arbitration – several of them with international recognition – which will, in principle, guarantee the proper conducting of the evidentiary phase and, in particular, of the functioning of this accessible instrument. Spanish arbitration practitioners are familiar with the contents, functioning and limit of the IBA Guidelines on the taking of evidence; some of them were even helped to draft the IBA's recommendations.

Despite the domestic or the international character of the arbitration procedure, the wording of the available arbitration rules is as broad as to allow the agreement of the parties on this issue, i.e. arbitration discovery or, lacking such agreement, to establish certain *de minimis* rules available to the arbitrators for protecting fundamental rights of the parties to the arbitration. In any case, the applicable articles of the 2003 Arbitration Act

will support the decisions so granted by the arbitration tribunal.

The core of the question then relies on the agreement of the parties on how to develop the performance of this essential stage during the arbitration, as arbitrators must respect the parties' sovereignty over the modelling of the arbitration procedure. Properly used, arbitration discovery constitutes a powerful tool. It can even be used as an instrument for exerting the proper leverage which might lead to a settlement of the dispute, to the benefit of the disputing parties. Therefore, it is strongly suggested that agreements on this delicate issue are reached at the early stages of the procedure. To that extent, it may be recalled that the Spanish legal system – as with many other systems based on Continental Law – gives special attention to documentary evidence, attached in support of those written pleadings submitted by the parties throughout the process. Both parties and counsel are responsible for analysing the case in advance and for appearing before the arbitral tribunal with all the relevant available documentary evidence either attached to the pleadings or properly identified as an external source of evidence, so that the parties' right to be heard can be fully respected. Counsel is expected to have enough experience to distinguish the evidence provided to him or to her and to give the proper advice to his or her clients on the application or rejection of the IBA Guidelines or other similar available recommendations, as it might be necessary to access some sources of evidence during the procedure. That being the case, where the parties intend to use arbitration discovery, both counsel and arbitrators should be keen on this sort of evidentiary practice – at least – under the IBA Guidelines. Professionals ought to be selected on this basis.

A relevant limitation can be perceived to the practice of arbitration discovery. In our professional experience, those arbitrators serving in Spain will be reluctant to allow the performance of 'fishing or hunting expeditions' in the opposite party's archives; such a practice could even be perceived as a subtle hint for a poorly founded case. This type of practice will be limited to specific

documentation which is in the possession or under the control of the opponent, which is relevant to the determination of an aspect of the substance of the case and to which the access has been unjustifiably denied to the requesting party. In those situations, the applicant for arbitration discovery must file a request before the arbitration tribunal where the applicant should be able:

- i to pinpoint the source of the evidence and its possible location;
- ii to identify the affected documents which should be brought to the arbitration because of its relevance to the dispute; and
- iii to justify the reason why – despite its efforts – its access has been denied by the addressee of the request to make this strategic documentation available.

Should the arbitration be administered under one of the main sets of rules previously mentioned, the arbitrator will then be empowered to determine the validity of the proposed evidence and, eventually, to strongly suggest that the reluctant party brings the requested documentation to the procedure, as otherwise a negative inference could be drawn in the award. These technical requirements are unique to the arbitration process. They are inspired and closely aligned with the principles informing British disclosure, rather than with the American style of discovery.

From the courts' point of view, the situation has evolved in the right direction, despite

the limited reported court cases on the issue. Article 33 of the 2003 Arbitration Act, along with Article 7, provides for the basic principles according to which the court is expected to assist the arbitral tribunal in the taking of evidence: collaboration and limited intervention. These provisions are relevant, as they constitute the basis of the evolution of courts' assistance to arbitration in Spain with respect to the former regulation contained in the 1988 Arbitration Act. The joint application of both provisions will ensure that the judicial intervention in these circumstances will be limited to providing judicial assistance to the arbitral tribunal, including those specific measures to protect the source of evidence which may be brought before the tribunal. Moreover, the Spanish Civil Procedure Act provides for certain instruments which, although differently named, have similar effects in practice to arbitration discovery. The determination of the validity of the evidence remains under the arbitrator's exclusive competence.

Having considered the main provisions regulating the practice of arbitration discovery in Spain, we can conclude that this jurisdiction is progressing adequately on the recognition of these evidentiary means. The main principles are available to the parties, recognised by the courts and enforced by arbitral tribunals on a regular basis. Spain needs the consolidation of that progress, as it is increasingly becoming a prominent international arbitration venue.

Taking US discovery in Luxembourg through Mutual Legal Assistance requests

Mutual Legal Assistance requests from the US may work to take US-style discovery measures on the territory of the Grand-Duchy of Luxembourg. This article examines how this works and what the limitations are.

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There are fundamental differences between Luxembourg and US provisions on the taking of evidence.

US common law truth discovery entitles the parties to learn the strengths and weaknesses of each other's case although this is more limited in criminal matters where the defendant has certain constitutional safeguards as compared with civil cases.

In Luxembourg the role of the parties in the truth-finding process is much more restricted. Even though the parties are said to be the key players in civil litigation (they initiate the procedure, bear the burden of proof, etc), they cannot force their opponent to disclose documents relating to the case.

Moreover, the parties' involvement is even more limited in criminal matters, where Luxembourg procedural rules (like most European countries in the civil law tradition) tend to be inquisitorial rather than party-driven. Luxembourg criminal procedure is a mixed system, combining aspects of both adversarial and inquisitorial models although tending to be more influenced by the latter. As a result it is the judge (not the parties) who plays the active role, in particular during the investigations prior and during a criminal trial. The investigating judges (*juges d'instruction*) are responsible for carrying out the investigations and collecting evidence for both the prosecution and the defence.¹ Investigating judges have rather discretionary legal powers for getting to the truth.

It is in order to reconcile their respective systems that the Grand Duchy of Luxembourg and the US have entered into several mutual legal assistance treaties (MLATs) on the taking of evidence (the 'MLAT Instruments'):

- the Hague Convention on taking of evidence abroad in civil or commercial matters dated 18 March 1970 (the 'Hague Convention') ratified on 26 July 1976;

- the Mutual Legal Assistance Treaty in criminal matters signed on 13 March 1997 (the '1997 Convention');
- the Agreement on Mutual Legal Assistance entered into by and between the EU and the US on 23 June 2003 (the 'European Agreement'). The purpose of the European Agreement is to establish a common set of provisions regarding mutual legal assistance between EU Member States and the US;
- a written bilateral instrument entered into by Luxembourg and the US complementing the provisions of the 1997 Convention pursuant to those of the European Agreement (the 'Instrument'); and
- the Luxembourg law dated 8 August 2000 on international mutual legal assistance on criminal matters, as amended (the '2000 Law'), which essentially sets out the details, from a practical standpoint, of the above international rules.

In spite of their different scope of application, the purpose and the rules set out by these instruments are quite similar. In essence, the purpose of the MLAT Instruments is to facilitate the processing of the MLAT requests in the taking of evidence. In civil and commercial matters as well as in criminal cases, both instruments apply when carrying out 'investigative acts', that is, acts implemented to obtain evidence.

MLAT Instruments between the US and Luxembourg broadly provide that the 'Central Authority'² of the requesting state (the 'Requesting State') can or should send its request to the Central Authority of the state receiving the request (the 'Requested State')³; that the Central Authority of the Requested State then transmits the request to the domestic authority having jurisdiction to carry out the request as if it were a domestic matter⁴; and, most importantly, that MLAT requests are carried out in accordance

with the laws of the Requested State (ie, Luxembourg procedural laws, if the MLAT originates from the US).⁵

Limitations to discovery under the Hague Convention

In its report, the 2003 Hague Conference on Private International Law (HCCH), Special Commission has defined pre-trial discovery of documents as the ‘procedure known to common law countries, which covers request for evidence submitted after the filing of a claim but before the final hearing on the merits’.⁶

Pursuant to Article 23 of the Hague Convention, ‘a Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common law countries’. The purpose of this reservation was to permit the States to ensure ‘that foreign requests for discovery are sufficiently substantiated so as to avoid requests whereby a party is merely seeking to find out what documents might be in the possession of the other party to the proceedings’.⁷

Like most civil law countries, Luxembourg has declared such a reservation:

‘In accordance with [A]rticle 23, Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries shall not be executed.’⁸

Due to the large amount of declarations made under Article 23 of the Hague Convention, the 2003 HCCH Special Commission clarified the nature and purpose of the pre-trial discovery of documents and invited States that have made a general non-specific declaration (as Luxembourg) to revisit their reservations. However, Luxembourg maintained its initial declaration, that is, a full exclusion of requests issued for the purpose of obtaining pre-trial discovery of documents.

Therefore, due to the expansive definition of the ‘pre-trial discovery’ concept, there is a risk that many MLAT requests fall within the scope of the Article 23 refusal.

Limitations to discovery under the 1997 Convention

Similarly, Article 5.2 of the 1997 Convention provides that ‘requests shall be executed in accordance with the laws of the Requested State except to the extent that this Treaty

provides otherwise’. It also adds that ‘the courts of the Requested State shall have the authority to issue such orders to execute requests under this Treaty as are authorized under the laws of the Requested State with respect of proceedings in domestic investigations and prosecutions’.

This means that when presented with a US MLAT request, Luxembourg authorities will process the request as if it were a request under domestic law. As previously stated, Luxembourg procedural rules, which, like most European countries of civil law tradition, tend to be constructed on the principles ruled by the inquisitorial model of criminal justice, do not know or recognise US discovery rules.

Thus, US discovery rules should not apply in Luxembourg under the 1997 Convention. Fortunately, this is not the case in practice.

‘Special method or procedure’ under the Hague Convention

We have seen that in principle ‘the judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed’.⁹

However, Article 9 also provides that the judicial authority responsible for the execution of the request ‘will follow a request of the requesting authority that a special method or procedure be followed, unless it is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practise and procedure or by reason of practical difficulties’.

This means that the US, for instance, can give additional ‘specific directions’ to Luxembourg in its letter of request. The Requesting State may ask the judicial authority of the Requested State not to apply its own domestic rules, but to apply specific procedures possibly unknown in the Requested State but commonly used in the Requesting State (eg, cross examination).

As a consequence, Luxembourg authorities faced with specific requests would be under a duty to follow the US rules unless they decide they are:

- forbidden or impractical from a Luxembourg standpoint; or
- covered by the concept of ‘pre-trial discovery of documents’ for which Luxembourg has made a specific reservation.

According to work documents from the Luxembourg Parliament ‘impractical’ does

not simply mean ‘difficult’ or ‘not practical’, but totally and unavoidably impracticable in Luxembourg.¹⁰

The requested authorities may thus not refuse to deal with specific directions on the sole basis of an existing difference with their domestic procedures. The US procedure must violate an absolute Luxembourg legal prohibition to apply the requested measure.¹¹

In such a case, Luxembourg is under a duty to promptly inform the US of its refusal and the reasons for it.¹² In accordance with the provisions of Article 36 of the Convention, if the US considered there is no basis for refusal, a solution will have to be found through diplomatic channels.

The HCCH does not provide a clear definition of the precise scope of ‘pre-trial discovery of documents’.¹³ It is therefore up to the Luxembourg authorities to decide whether or not the US special request falls within the scope of the Luxembourg full exclusion of US requests issued under pre-trial discovery purposes. Because the purpose of the Convention is to facilitate the processing of the MLAT requests in taking of evidence, the Luxembourg authorities will often limit the scope of ‘pre-trial discovery’ and agree to execute the request.

‘Preferred method of execution’ under the 1997 Convention

The 1997 Convention is quite similar to the Hague Convention except for the possible refusal Luxembourg may make to requests issued under pre-trial discovery purposes.

Indeed Article 5.2 of the 1997 Convention provides that ‘requests shall be executed in accordance with the laws of the Requested State except to the extent that this Treaty provides otherwise’. However, if so, ‘the preferred method of execution specified in the request shall be followed except insofar as it is prohibited under the laws of the Requested State’.

As a result, some US discovery procedures and methods (like cross-examination) may be applied in Luxembourg at the discretion of the Luxembourg authorities in the framework of a MLAT request made under the 1997 Convention. This is in fact what emerges in practise.

In addition to the opportunities for interpretation included in the various agreements, practise has shown that Luxembourg authorities tend, as much as possible, to meet the requirements of Requesting States.

Practical examples of discovery and other US procedures carried out in Luxembourg

Luxembourg investigating judges are not, as they would be in domestic procedures, under a duty to carry out investigations for both parties in order to discover the truth: they will execute the MLAT measure irrespective of the result.

In the framework of a witness-hearing request to the Luxembourg authorities under the 1997 Convention, the US authorities can give directions as to the process of the hearing. Some directions may not be fully compliant with Luxembourg domestic rules and will still be allowed by the judge.

Use of English

Luxembourg has three official languages (French, Luxembourgish and German), therefore hearings usually take place in one of these languages. Upon the request of the US authorities, however, a Luxembourg judge not only permitted a simultaneous translation of the hearing and examinations into English by an interpreter, but even allowed the hearings to entirely take place in English (with no interpreter), with the prior express consent of the witness.

Transcript of depositions

It is possible to have depositions transcribed by a stenographer and video-taped (this is also permitted under Luxembourg law).

Attendance of specific persons

US parties are allowed under Article 5.5 of the 1997 Convention¹⁴ to request the attendance of specific persons at the hearings. On this basis, it may for instance be requested that the parties’ US counsels,¹⁵ professional translators, videographers and/or stenographers attend hearings.

Use of US examination methods

US examination methods include direct examination, cross- and redirect examination of the witness by the parties’ counsels.

Luxembourg law does not in principle permit counsel to ask questions directly to a witness. The situation is only different when questioning suspects, in which case witnesses may be asked questions either by the judge or directly by the defence counsel if authorised by the judge.

So essentially, only the judge puts questions directly to the witnesses. US defendants could raise potential US inadmissibility of non-cross-examined depositions before the US Courts, in which case the Luxembourg judge could decide to let the parties conduct the examination themselves (ie, with a direct, cross- and redirect examination) as would have occurred before a US court.

Oath-taking

US requests may require a witness to take an oath before the US Ambassador to Luxembourg. In this case, the Luxembourg judge would typically refuse to grant this measure based on the presumption that US rules are sufficiently met by the domestic Luxembourg oath-taking requirements (under which the witness swears to tell the truth and nothing but the truth).

Notes

- 1 Articles 27 and 51 of the Luxembourg Code of Criminal Procedure
- 2 Determined by each State at the time of signing.
- 3 Article 2 of the Hague Convention and of the 1997 Convention.
- 4 Article 2 of the Hague Convention and Article 5 of the 1997 Convention.
- 5 Article 9 of the Hague Convention and Article 5 of the 1997 Convention.
- 6 HCCH, *Outline Evidence Convention*, September 2010, p 2.
- 7 HCCH, *Outline Evidence Convention*, September 2010, p 2.
- 8 Luxembourg law approving the Hague Convention dated 19 March 1977.
- 9 Article 9 of the Hague Convention.
- 10 Work document from the Luxembourg parliamentary document n°2005, p 1653.
- 11 Work document from the Luxembourg parliamentary n°2005, p 1653.
- 12 Article 13 of the Hague Convention.
- 13 Except the definition of the 2003 HCCH Special Commission, which is quite vague – see above.
- 14 ‘The Central Authority of the Requested State may permit the presence during execution of a request of persons specified in the request.’
- 15 Counsels of the accusers, the defendants and, if appropriate, of the witness.

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Addressing the challenge of cross-border discovery in US Courts:¹ the ABA weighs in with a new resolution²

Cross-border discovery and foreign data protection and privacy concerns are not new to US courts. The United States Supreme Court recognised the need to respect non-US law in the context of cross-border discovery at least as far back as 1987, when it held in *Aerospatiale v District Court of Iowa*³ that international comity compels ‘American courts (to) take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.’⁴ More recently, the need for consideration of the interests of non-US litigants in an age of interconnected commerce was emphasised by US District Court Judge John Gleeson, who wrote in *In Re Payment Card Interchange Fee and Merchant*

Discount Antitrust Litigation, ‘by its very nature, international comity sometimes requires American courts to accommodate foreign interests even where the foreign system strikes a different balance between opposing policy concerns.’⁵

Both *Aerospatiale* and *In Re Payment Card Interchange Fee* recognise that protecting data privacy and disclosing information for purposes of litigation and arbitration need not be mutually exclusive. Properly applied, US law thus provides a clear and workable standard for resolving the conflict. Nevertheless, a number of US courts have misapplied the standard and ruled that the needs of the proceeding before them inevitably must take precedence over the privacy and data protection concerns of other nations. The end result is that litigants face a Hobson’s Choice: violate foreign

law and expose themselves to enforcement proceedings (including possible criminal prosecution⁶), or choose noncompliance with a US discovery order and risk US sanctions ranging from monetary costs, to adverse inference jury instructions,⁷ to default judgments. This result is inconsistent with promotion of the rule of law, as it facilitates violation of law, either in the US or abroad.

The challenges associated with cross-border discovery, and the current state of US jurisprudence addressing foreign data protection and privacy concerns, have not gone unnoticed by the US legal community. In February 2012, the House of Delegates of the American Bar Association passed a resolution⁸ urging that, where possible in the context of the proceedings before them, all US courts ‘consider and respect, as appropriate, the data protection and privacy laws of any applicable foreign sovereign, and the interests of any person who is subject to or benefits from such laws, with regard to data sought in discovery in civil litigation.’ The Resolution was sponsored by the ABA Section of International Law and was co-sponsored by the Sections of Administrative Law and Intellectual Property, as well as the New York State Bar Association.

The ABA Resolution was prompted by a Report and Recommendation from the ABA Section of International Law⁹ that expressed concern that US courts rarely enforce the prohibitions of foreign privacy statutes (including data privacy laws and bank secrecy legislation, as well as so-called ‘blocking’ statutes) in a manner that would preclude or limit pre-trial discovery sought pursuant to US civil procedure rules.¹⁰ The report further asserted that (i) in considering the risk of hardship to the producing party US courts tend to consider insufficient the fact that production of the information would be illegal in the foreign country and, instead, require a strong indication that hardship would in fact result in the particular case,¹¹ and (ii) in assessing the competing interests of the relevant jurisdictions US courts frequently conclude that, while a foreign country’s general interest in protecting information of its nationals is legitimate, it does not suffice to preclude or restrict production.

The ABA Resolution seeks to help restore the true balancing function of *Aerospatiale*. Privileging the interests of US litigants to discovery without due regard to the requirements of the relevant

foreign legislation often places parties in the perilous situation of having to choose between inconsistent legal requirements and perhaps to incur sanctions under one legal system or the other. Permitting broad discovery in disregard or even defiance of foreign protective legislation can ultimately impede global commerce, harm the interests of US parties in foreign courts and provoke retaliatory measures. Consistent with the ABA’s mission to uphold the rule of law, the ABA Resolution urges US courts to carefully consider, and appropriately respect, the data protection and privacy laws of foreign countries as they concern the disclosures of data subject to protection by the laws of those countries. The Resolution recognises that the daily interfaces essential to cross-border commerce and dialogue, including through electronic information transfers, call for appropriate consideration and recognition of the exigencies of other legal systems and, where warranted, application of their data protection and privacy laws.

Notes

- 1 ‘Cross-border discovery has become a major source of international legal conflict, and there is no clear, safe way forward. At the heart of these conflicts are vastly differing notions of discovery and data privacy and protection. And the frequency and intensity of these conflicts is heightened by an expanding global marketplace and the unabated proliferation of Electronically Stored Information’ The Sedona Framework® for Analysis of Cross-Border Conflicts: A Practical Guide to Navigating the Competing Currents of International e-Discovery and Data Privacy (Public Comment Version August 2008) (hereinafter ‘Sedona Framework’) at 1, available at www.thesedonaconference.org.
- 2 David M Kroeger, Jenner & Block, Chicago, Illinois. The views expressed herein are those of the author and do not necessarily express the view or views of any Jenner & Block clients. The author participated in the drafting of the ABA Report and Recommendation referenced herein, which has in turn been relied upon heavily in the drafting of this article.
- 3 *Société Nationale Industrielle Aérospatiale and Société de Construction d’Avions de Tourisme v United States District Court for the Southern District of Iowa*, 482 US 522 (1987)
- 4 *Ibid* at 546. The Court set forth a five-factor balancing test for the application of non-US data protection law, discussed in greater detail below.
- 5 05-MD-1920 (JG) (JO) (EDNY 27 August 2010) at *19–20.
- 6 *See, for example, In re Advocat Christopher X*, Cour de Cassation, Chambre Criminelle, Paris, 12 December 2007, No 07-83228 (conviction for violation of France’s Blocking Statute and imposition of monetary fine affirmed).
- 7 In instructing a jury on an adverse inference, the court advised the jurors that they may presume that the information not produced at trial would be adverse to the position of the party who had the responsibility to produce it. *See Zubulake v UBS Warburg LLC (‘Zubulake IV’)*, 220 FRD 212, 219–222 (SDNY 2003).
- 8 www.abanow.org/2012/01/2012mm103
- 9 *See* note 8 above.

10 James Chalmers, *The Hague Evidence Convention and Discovery Inter Partes: Trial Court Decisions Post-Aérospatiale*, 8 Tul J Int'l & Comp L 189, 190–91 (2000); Jenia Iontcheva, *Sovereignty on our Terms*, 110 YLJ 885, 887 (2001); see also, *Hagenbuch v 3B6 Sistemi Elettronici Industriali SRL*, No 04 C

3109, 2005 US Dist LEXIS 20049, *17–18 (ND Ill 12 September 2005).

11 See *Cochran Consulting, Inc v Uwaterc USA, Inc*, 102 F3d 1224, 1231 (Fed Cir 1996).

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Recent English case law developments on privilege

Background

A substantial body of case law continues to be generated in relation to the scope of privilege from disclosure during court proceedings in England and Wales. We explain below some recent developments in the context of litigation privilege.

When does litigation privilege arise?

There are several grounds on which a party in English legal proceedings can claim to be entitled to withhold the production of material in its possession to the opposing party. One of those grounds is legal professional privilege, which has two sub-categories: legal advice privilege and litigation privilege. Legal advice privilege can be claimed only if the communication takes place between a lawyer and his client. There is no such requirement for litigation privilege and communications between either a lawyer or his client and a third party can be protected by the privilege. For this reason, it is wider in scope than legal advice privilege. However, two pre-conditions must be met before litigation privilege can arise.

The communication must be made:

- when litigation is in reasonable contemplation or has been commenced; and
- for the dominant purpose of obtaining information or advice in connection with, or of conducting or aiding the conduct of, such litigation. If that dominant purpose was missing at the time the communication was made, the document will not be privileged, even if it is subsequently used in connection with the litigation. The document must also be confidential.

When is litigation in reasonable contemplation?

The Court of Appeal adopted a fairly narrow approach to the test of when litigation is in reasonable contemplation in 2004 in *United States of America v Philip Morris Inc & Ors*.¹ It confirmed the finding of the trial judge that a 'mere possibility' of litigation or 'a distinct possibility that sooner or later someone might make a claim' or 'a general apprehension of future litigation' would not satisfy the test (although this did not mean that a greater than 50 per cent chance of litigation was required).

More recently, though, the courts have adopted a more generous approach. This began with the 2008 case of *Westminster International BV & Ors v Dornoch Ltd & Ors*² in which notice of loss was given to the insurers of a vessel and the claimants appointed surveyors to produce a report. When the insurers received that report they immediately appointed solicitors and their own surveyors. Just over a month later, the insurers' surveyors produced a report which estimated that the cost of repair would be far less than the claimants had claimed. The insurers' surveyors' figures were supplied to the claimants shortly afterwards and, about eight months later, the claimants commenced court proceedings against the insurers.

The Court of Appeal held that 'on any footing' there had been a real prospect of litigation when the insurers' surveyors had produced their report and found that the requirements of litigation privilege had in fact been satisfied even earlier, when the insurers had concluded that further investigation was required. Etherton LJ accepted that it was not sufficient for the appointment of the insurers' own surveyors to 'aggravate the claimants'. However, he also found that because this was

a huge claim (potentially triggering liability of €145m) which would inevitably give rise to complexities with subrogation and other legal issues, the insurers did have 'serious concerns' about the reliability of the repair estimates contained in the claimants' report and that it was 'as likely as not' that their own surveyors would challenge them. Etherton LJ therefore went on to say that:

'if [the insurers' figures] were less, there would be a real prospect of litigation. In my judgment, it was entirely understandable that in those circumstances the [insurers] would instruct solicitors, very much with a view to such possible litigation.'

The Court of Appeal nevertheless cautioned that each case will turn on its own facts and that neither one or both of a statement on behalf of the insurer as to its state of mind or the fact of retaining solicitors, will guarantee that the requirements for litigation privilege have been satisfied.

This issue arose again in March 2011 in *AXA Seguros SA De CV v Allianz Insurance Plc & Ors*.³ Here, the claimant reinsured made a claim under a reinsurance contract with the defendant reinsurers following damage to a highway as a result of a hurricane in Mexico.

Prior to the placement of the reinsurance contract, the reinsurers had asked the reinsured for surveys confirming that the highway had been constructed to internationally acceptable standards. When these were not supplied, they introduced a 'Reverse Onus of Proof' clause, requiring the reinsured to prove that the condition had been fulfilled. Following a hurricane in October 2001 loss adjusters were appointed by the reinsurers and the reinsured. The loss adjusters themselves recommended the appointment of engineers to inspect the highway. The engineers were duly appointed and inspected the highway in February 2002. By January 2003 the reinsured had lost an arbitration in Mexico and was ordered to pay out under its policy. The reinsurers on the other hand denied liability to the reinsured on the ground that the reinsured was unable to show that the construction of the highway had been acceptable. In support of its case the reinsured sought disclosure of certain reports and other documents produced by the engineers from March 2002 onwards. The reinsurers denied access to them on the grounds of litigation privilege.

It was held that there had been a reasonable prospect of litigation by January 2002.

This was a result of the 'reasonable prospect' as of that date that the engineers' report would reveal a breach of the condition, resulting in the reinsurers rejecting the claim which would inevitably lead to litigation. However Clarke J went on to find that the documents were not privileged on other ground to which we return below.

What is the dominant purpose of the communication?

In the important case of *In the Matter of Highgrade Traders Ltd*,⁴ the Court of Appeal examined the issue of whether reports produced by loss adjusters to investigate a claim under an insurance policy were produced for the dominant purpose of using those reports in connection with subsequent litigation between the insurer and the insured. At first instance, the judge held that there had been a duality of purpose: namely, to investigate the cause of the loss and to prepare for any future litigation. As a consequence he found that the dominant purpose test had not been satisfied.

The Court of Appeal disagreed. The two purposes for commissioning the reports were inseparable. The insurers were not investigating the cause of the fire as a matter of academic interest: they needed to discover the cause of the fire in order to determine whether it had been started fraudulently and hence to take legal advice on whether the claim was covered. If the claim was pursued and resisted by insurers, it was inevitable that litigation would follow. The court held that taking advice with a view to deciding whether or not to litigate was a purpose which would give rise to litigation privilege. It was not necessary to show that the reports had actually been used in subsequent litigation.

In *Axa Seguros*, Clarke J held that the documents were not privileged because the dominant purpose test had not been satisfied. He held that on the facts of this case the engineers had been instructed for a dual purpose: assessing whether the highway had been constructed to internationally acceptable standards, and determining to what extent any damage had been caused by the hurricane and assessing the correctness of the original surveyor's costings of remedial work. On the second purpose the reinsurers and the reinsured shared a common interest. As between the two purposes, Clarke J found that neither purpose was predominant nor was it possible to get around that issue by

allocating individual documents to one purpose or the other.

Waiver

Where privilege can be established, it can nevertheless be waived in a number of ways, for example, by the loss of confidentiality or by express or implied waiver judged on an objective basis.

In the recent case of *Cadogan Petroleum v Tolley & Ors*⁵ the claimant alleged that their former CEO and COO had been taking secret commissions and/or bribes. The COO sought disclosure of documents recording employee interviews undertaken by the claimant's solicitors. The judge held that the documents were covered by litigation privilege. However, the COO sought to argue that the claimant had waived that privilege by referring to the interviews when applying for a freezing injunction.

The judge, Newey J, observed that in an affidavit the claimant's solicitor had not merely referred to the fact that the interviews had taken place but had gone into the detail of what the interviewees had said in order to advance his client's case. The judge therefore concluded that privilege in the interviews had been waived and that it did not matter that the interview notes themselves had not been exhibited: whether the claimant's solicitor's

summary was a fair distillation could only be tested by full disclosure of the interview notes (subject to redaction of anything indicating the note-taker's personal thoughts or comments).

Privilege belongs to the client and not the lawyer so only the client as the owner of the privilege can waive that privilege. Nevertheless, great care is required because it is not difficult for the client's privilege to be waived by its solicitor acting under express or implied authority. In the recent case of *D (A Child)*⁶, the Court of Appeal cautioned that it did not matter that the client's witness statement had been drafted by her solicitor and that neither she nor her solicitor had appreciated the consequences of the words used. For a witness statement to say no more than 'I am acting on the advice of my solicitors and counsel' will not waive privilege in their advice but solicitors and counsel should be on guard to avoid inadvertently forcing their clients to hand over confidential advice by ill-considered words written in documents or spoken in court.

Notes

- 1 [2004] EWCA Civ 330.
- 2 [2009] EWCA Civ 1323.
- 3 [2011] EWHC 268 (Comm).
- 4 [1984] BCLC 151.
- 5 [2011] EWHC 2286 (Ch).
- 6 [2011] EWCA Civ 684.

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Supreme Court guidance concerning typical pitfalls in private international law: forum selection, choice of law and enforcement of foreign judgments

In international trade, forum selection and choice of law clauses have long been a standard part of commercial agreements.

However, even in the current world of increasingly globalised business relations the issues of jurisdiction and applicable law are seldom afforded the attention they deserve in the heated negotiations to seal the deal. Paradoxically, although these clauses may get marginal attention when drafting the agreement, they often become the key determining factors in the success of enforcing the agreement.

The Finnish Supreme Court has recently rendered a precedent (KKO:2011:74) which highlights the medley of legal issues that arise when forum selection and choice of law clauses fail to adequately take into account the contracting party's need to enforce the agreement in the location of the counterparty's assets. The Supreme Court ruled in favour of the enforceability of the agreement and found Finnish courts to have international jurisdiction to hear the case despite the existence of a forum clause and a foreign judgment rendered in the same matter.

This case commentary on the Supreme Court's precedent aims to provide insight on the typical pitfalls of private international law to both lawyers involved in drafting international commercial agreements and to those resolving disputes arising out of the same.

Enforceability of the agreement in the state of defendant's assets as the core of the problem

The Supreme Court case concerned a surety obligation issued as a guarantee for a lessee's obligations under a lease agreement. The lessee was a Korean company that had leased freight containers from a Bermudan company. A Russian company had issued a guarantee to the Bermudan company as security for the obligations of the Korean lessee company.

The surety obligation included a forum selection clause granting exclusive jurisdiction to a Californian court. It also included a choice of law clause according to which the agreement was governed by Californian law.

As the Korean company had failed to pay the lease for the freight containers and the Russian guarantor had not reacted to claims under the surety obligation, the Bermudan company and other companies within the same group had initiated legal action in a competent Californian court against the Russian guarantor. The Californian court had accepted the claim and ordered the Russian guarantor to pay the Bermudan company and its group companies US\$3,285m under the surety obligation.

However, the Russian company did not have sufficient assets in the US to enforce the Californian judgment. Instead, some of the company's assets could be traced to Finland. As there is no international agreement on the recognition and enforcement of judgments between Finland and the US, the Bermudan company and other companies within the same group had to initiate new legal action in Finland to claim the same payment awarded by the Californian court.

Lower courts based judgment on strict interpretation of applicable law and forum selection

The plaintiffs' claim against the Russian guarantor in the Finnish court of first instance, that is, the District Court, was based on both the surety obligation and the Californian judgment.

The Russian defendant company failed to respond to the plaintiffs' claim in the time limit prescribed by the Finnish court. However, it sent a reply after the expiry of the deadline in which it referred to a Russian court judgment. The Russian court had considered that the validity of the surety obligation was to be determined under Russian law and had found the obligation to be null and void.

Under Finnish procedural law, if a defendant has not delivered the requested response on or before the prescribed deadline, the plaintiffs' claim is to be accepted by a default judgment. However, if the claim is manifestly without a basis, the claim is to be dismissed by a judgment on the merits.

On the basis of this provision, the District Court held that the plaintiffs' claims could not be accepted by a default judgment despite the defendant's late reply. The District Court found that the reply – although belated – gave reason to find the surety obligation invalid. Thus, the District Court dismissed the claim as manifestly unfounded.

The Bermudan plaintiff company and its group company's appealed the District Court judgment to the Court of Appeal. In the appeal, they particularly referred to the choice of law clause in the surety obligation indicating that it was governed under Californian law.

In its reply to the appeal, the Russian defendant correspondingly referred to the forum clause according to which disputes arising out of the surety obligation should be submitted to the jurisdiction of a competent US court.

On the basis of the appeal and the reply, the Court of Appeal ruled *ex officio* that the Finnish courts did not have international jurisdiction to hear the case due the forum selection clause in the surety obligation. The Court of Appeal further found that there was no legal basis to directly enforce the Californian judgment in Finland. Thus, the Court of Appeal dismissed the plaintiffs' claim in its entirety.

The Supreme Court takes practical approach in favour of enforceability

The plaintiffs appealed the Court of Appeal's judgment to the Supreme Court and were granted leave of appeal.

The Supreme Court first considered the significance of the forum clause in determining the international jurisdiction of Finnish courts. The Supreme Court agreed with the Court of Appeal that a forum clause granting exclusive jurisdiction to a foreign court usually barred the international jurisdiction of Finnish courts. However, the Supreme Court emphasised that the parties could waive their agreement on forum selection at any time and without any formal requirements. As the Russian defendant had in its response to a question posed by the Court of Appeal stated that it did not dispute the Finnish courts' jurisdiction, this should have been deemed as a waiver of forum selection, and Finnish courts were competent to hear the case.

The Supreme Court then considered whether the judgment rendered by the Californian court ruled out the international jurisdiction of Finnish courts in the same matter. The Supreme Court noted that the parties could agree on a competent court to consider their case, but they were not free to choose the state in which a foreign judgment would be enforced. In the absence of an international agreement on recognition and enforcement of judgments between Finland and the US, this meant that the plaintiffs could not enforce their rights under the surety obligation in Finland unless the Finnish courts had jurisdiction to reconsider the case. Thus, the Supreme Court found that the foreign judgment could not deprive Finnish courts of their jurisdiction in matters where the foreign judgment was not enforceable in Finland.

On the basis of the above, the Supreme Court overruled both judgments of the lower courts and accepted the plaintiffs' claim by a default judgment.

Foresight and expertise are key to drafting and applying forum selection and choice of law clauses

The Supreme Court's precedent can be endorsed for its practical approach to the enforceability of the surety obligation. By interpreting the forum selection clause as being subject to a waiver by the defendant,

by not considering non-enforceable foreign judgments as absolute hindrances for a Finnish court to hear the same case and by rendering a default judgment without reviewing the merits of the case under the applicable law, the Supreme Court made it possible for the plaintiffs to enforce their rights in Finland. Thus, the Supreme Court decision reflects the commonly accepted principle according to which private international law should be applied and interpreted in a way that does not obstruct the party's access to justice.

However, the Supreme Court judgment also highlights the need for foresight and expertise in private international law when drafting forum selection and choice of law clauses in international trade agreements.

As regards forum selection clauses, it is paramount to anticipate whether the judgment rendered in the selected forum may need to be enforced in the state of the counterparty's domicile or the state in which the counterparty's assets are otherwise located. If the judgment of the competent court is not directly enforceable in the state of the defendant's assets, the forum selection clause risks making the party's rights under the agreement legally ineffective or at least very costly to enforce.

This risk has been mitigated in the European Union by the Brussels I Regulation¹, which provides that a judgment rendered in a civil or commercial matter

in one EU country must be recognised and enforced in another EU country without any review as to its substance, unless there are public policy reasons or other reasons detailed in the regulation to refuse enforceability. Similar rules also apply within the European Economic Area by virtue of the Lugano Convention.² However, outside the EU and EEA, there are few international agreements or laws governing recognition and enforcement of foreign judgments, and thus, the problem regarding forum clauses and enforceability persists with respect to most non-EEA judgments.

With regards to choice of law clauses, the Supreme Court case accentuates the need to carefully investigate the governing law and its effects, for example, on the validity of the contract. In the current case, the surety obligation was evidently wholly invalid under Russian law, whereas it was enforceable under Californian law. Extensive knowledge of the substantial law chosen in the contract, but also of the procedural law of the state of enforcement is thus essential when drafting complex commercial agreements.

Notes

- 1 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- 2 The Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters concluded on 30 October 2007.

Moral and religious conflicts in German employment litigation

Employees do not leave their moral or religious beliefs at the factory gate – and usually this does not create any problems as most jobs do not give rise to moral or religious conflicts for employees. However, in some situations job requirements and moral or religious convictions seem to be incompatible. Although the cases attracting the most publicity in Germany in recent years have involved the Islamic faith, such conflicts

can of course arise in connection with any moral or religious conviction. Traditionally, German courts¹ handling such cases have cited the basic right of freedom of faith and conscience laid down in Article 4 of the German Constitution (*Grundgesetz*). In recent years the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*), which is based on several European anti-discrimination directives,² has added a new perspective on

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the issue of moral and religious conflicts in employment relationships. This article will discuss three different types of cases in which such conflicts can arise.

Having a certain faith as a job requirement

Most jobs can be performed regardless of one's religious or moral beliefs. Therefore, an employer cannot require employees to have certain religious views or belong to a certain church. Consequently, an employer cannot reject an applicant on the basis of his religion or beliefs. It is not even allowed to ask job applicants about such beliefs. This has long been a recognised principle in German employment law³ and is now laid down in sections 1 and 7 of the General Equal Treatment Act.

An exception is made for certain employees of religious institutions or other organisations the ethos of which is based on religion or belief. For constitutional reasons, this exception has also been recognised for many years. For example, it was held that the dismissal of an employee of a Catholic institution who had left the Catholic Church was justified.⁴ A special provision concerning religious institutions and other organisations is now contained in section 9 of the General Equal Treatment Act, which permits different treatment for religious or ideological reasons if a certain religion or belief is a justified occupational requirement, having regard to the organisation's ethos.⁵ Since the General Equal Treatment Act has been in force, the Federal Labour Court (Bundesarbeitsgericht) has not issued any decisions clarifying the cases in which a certain religion or belief is a 'justified occupational requirement'.⁶ In our opinion, this should depend on the position held by the employee, in particular the extent to which his job requires him to profess his faith. For example, a church minister or a nursery-school teacher in a parochial kindergarten may be required to be a member of that church,⁷ whereas a janitor in the same kindergarten can arguably belong to a different religion or even be an atheist as long as this does not conflict with the employer's legitimate interests.⁸

Refusal to perform certain tasks on moral or religious grounds

Sometimes employees refuse to perform certain tasks assigned to them because they believe that performing them contradicts

their moral or religious convictions. The Federal Labour Court has had to rule on such cases on several occasions.

In a 1984 case an employee who worked as a printer refused to print a leaflet advertising books that glorified the actions of the German army during the Second World War.⁹ The employee argued that his conscience prohibited him from becoming involved in any way in the publication of such a leaflet. The employer dismissed the employee on the grounds that the employee had committed a breach of contract when he refused to follow its instructions. The employee filed a claim for unfair dismissal. While the Higher Regional Labour Court (Landesarbeitsgericht) in Kiel (Northern Germany) rejected the claim,¹⁰ the Federal Labour Court held that the dismissal was unfair; according to the Federal Labour Court, the employee had made a serious conscience-based decision which the employer should have and could have taken into consideration.

In a 1989 case, an employee who worked as a scientist for a pharmaceutical company refused to work on a project concerning a drug that could be used to treat radiation sickness in the event of a nuclear war.¹¹ The employee was dismissed for breach of contract. The Federal Labour Court again held that the employer should have considered that the employee's refusal represented a serious conscience-based decision. The employer was obliged to try to find another project or activity that the employee could perform without violating his conscience. However, the Federal Labour Court also held that a dismissal could have been justified if no meaningful alternative activity had been possible.

In 2003 the Federal Labour Court had to decide on a case involving an employee who had signed a contract as a gardener for a local authority.¹² He had been told that part of his job would include burial work. The employee, who was a Sinti, later refused to perform burial work on the grounds that his conscience did not allow him to work with dead bodies. In this case the Federal Labour Court held that the dismissal was not unfair.

These cases were decided by the courts on the basis of the general principles of German employment law: the employer can give instructions as to the work to be done. However, such instructions must be fair pursuant to section 106 of the German

Industrial Code (*Gewerbeordnung*). If the employee refuses to follow a particular instruction even though the instruction is fair, he is committing a breach of contract, which entitles the employer – usually only after a warning has been issued – to dismiss the employee (conduct-related dismissal – *verhaltensbedingte Kündigung* – according to section 1(2) of the Unfair Dismissal Act – *Kündigungsschutzgesetz*).¹³ If the instruction in question is unfair, the employee can refuse to follow it. An instruction may be regarded as unfair if the employer, in issuing the instruction, does not duly consider the basic rights of the employee, including the freedom of faith and conscience. However, if an employee is unable to perform the work for which he is employed, he can be dismissed (dismissal for reasons related to the person of the employee – *personenbedingten Kündigung* – pursuant to section 1(2) of the Unfair Dismissal Act). Such an inability to work may, for example, be caused by illness, but also by religious or moral conflicts.

The most recent case, which concerned a supermarket employee, was decided by the Federal Labour Court in 2011:¹⁴ the employer had ordered the employee to work in the beverages department and put bottles on the shelves. The employee argued that his Islamic faith prohibited him from handling beverages containing alcohol and therefore refused to put alcoholic drinks on the shelves. The employer terminated the employment relationship. The Higher Regional Labour Court in Kiel held that the dismissal was fair.¹⁵ The Federal Labour Court repealed the judgment, but did not render a final ruling because the dismissal might have been justified if there was no other task to be assigned to the employee in the supermarket. In order to determine this, the case was referred back to the Higher Regional Labour Court.

The Federal Labour Court adhered to its earlier decisions and set forth the following general principles:

- If the employee tells the employer that performing a certain task will lead to a serious moral or religious conflict, it might be unfair if the employer insists on its instructions. If the employee refuses to follow these instructions, he is not committing a breach of contract. Therefore, he cannot be dismissed for conduct-related reasons. However, a dismissal for reasons related to the person of the employee can be justified if it is not possible

for the employer to give the employee a meaningful (from the employer's perspective) alternative task.

- As long as the employee does not reveal his moral or religious conflict to the employer, instructions given by the employer are binding. However, if the employee reveals such a conflict after the instruction has been given, the employer can be obliged to exercise its right of instruction again and to try to find a different task for the employee.
- If, on the basis of moral or religious grounds, the employee refuses to perform a task which would normally be part of his contractual duties, the burden of proof lies with him/her to justify this refusal.

The Federal Labour Court also discussed whether it would constitute (illegal) discrimination on religious grounds if a dismissal for reasons related to the person of the employee were considered justified due to a lack of meaningful alternative tasks. The Federal Labour Court held that this did not constitute direct discrimination pursuant to sections 1 and 7 of the General Equal Treatment Act, but only indirect discrimination pursuant to section 3(2) of the Act, which could be justified.

Religious customs and dress

The cases discussed above directly concerned the tasks to be performed by the employee. In other cases, certain religious customs or dress have been disapproved of by the employer, other employees and/or customers, even though they did not directly affect the work to be done.

The most prominent case¹⁶ concerns the headscarf worn by many Muslim women: after returning from parental leave, a shop assistant in a department store decided to wear a headscarf at work. The employer informed her that it did not approve and ordered her not to wear the headscarf while working. She refused and was dismissed for reasons related to her person. The employer argued that its employees were required to follow a certain dress code and to wear clothes that did not attract attention. It reasoned that if the employee was unable to do her work without wearing a headscarf, she was not able to perform her work properly. The Higher Regional Labor Court in Frankfurt held that the dismissal was fair.¹⁷ It argued, inter alia, that the customers of the department store (which was located in a rural area) had 'rural-conservative'

attitudes and that the store was therefore justified in enforcing a dress code in order to avoid creating a 'provocative, unusual, foreign' impression. The Federal Labour Court repealed the judgment. It argued that wearing the headscarf was protected by the freedom of religion and that the employer should have taken this into consideration. According to the Federal Labour Court, the mere fear that customers could be offended by the headscarf did not justify a dress code prohibiting the headscarf. However, they did apparently think that a prohibition of the headscarf could be justified if the employer could actually prove that customers took offence to it. As the General Equal Treatment Act was not in force at the time in question, the Federal Labour Court did not mention any possible anti-discrimination issues. It is doubtful whether mere 'customer preferences' can justify a prohibition of the headscarf and – consequently – a dismissal if the (female Muslim) employee refuses to remove it. Allowing an employer to adopt its customers' discriminatory prejudices does not seem consistent with the goals of anti-discrimination legislation. However, an exception should be made if unreasonable economic losses are caused or even the very existence of the company is threatened.¹⁸

In a recent decision concerning a law in the state of North Rhine-Westphalia, the Federal Labour Court accepted a provision prohibiting any expressions of religious views by school teachers.¹⁹ This provision applied to the (Islamic) headscarf in particular. The Federal Labour Court held that such a law did not constitute illegal discrimination or violate other fundamental rights. The decision referred to, among others, decisions by the European Court of Human Rights in Strasbourg concerning the headscarf in public schools and universities.²⁰ The difference between this and the department store case is that an open display of religious views by a teacher might violate the students' – or their parents' – freedom of religion. The state and its employees are therefore obliged to be completely neutral in religious matters.

An interesting case concerning rather strange 'religious' customs has come to the authors' attention in their own legal practice: in this case a Muslim employee offended his new colleagues on his first day on the job when he refused to shake hands with female employees. He argued that his 'great respect' for women prohibited him from touching

them. Not surprisingly, his first day was also his last day at the company. The employee filed a lawsuit claiming that the dismissal had been discriminatory. The Unfair Dismissal Act is not applicable during the first six months of an employment relationship, but the General Equal Treatment Act is. If the case had not been settled, it would have ultimately led to the question of how the conflict between the freedom of religion and the fundamental principle of equal treatment of men and women can be resolved.

Conclusion

Moral and religious conflicts are not an everyday problem in German employment law, but the matter is by no means purely academic. Increasing religious diversity, a growing willingness to fight for one's rights as an employee, as well as recent anti-discrimination legislation make it likely that the issue will create more work for employment litigation lawyers. Interesting questions such as the relevance of customer preferences have yet to be answered.

Notes

- 1 For an overview of the German civil justice system, see S Rützel, G Wegen and S Wilske, *Commercial Dispute Resolution in Germany* (CH Beck, 2005), 2–13.
- 2 Directives 2000/43/EC (29 June 2000), 2000/78/EC (27 November 2000), 2002/73/EC (23 September 2002) and 2004/113/EC (13 December 2004).
- 3 Cf Schmidt, in *Employment and Labor Law* (12th edn, CH Beck 2012), Article 10 GG margin no 96.
- 4 Federal Constitutional Court (Bundesverfassungsgericht), decision of 4 June 1985, docket no 2 BvR 1703/83; Higher Regional Labour Court of Rhineland-Palatine, decision of 2 July 2008, docket no 7 Sa 250/08.
- 5 The exception is also provided for in Article 4(2) of Directive 2000/78/EC.
- 6 A recent decision by the Federal Labour Court (8 September 2011, docket no 2 AZR 543/10) concerned a head physician in a Catholic hospital who was dismissed for remarrying after his divorce. The Court held that the dismissal was unfair. The grounds of the verdict have not yet been published in full.
- 7 Cf Federal Labour Court, decision of 21 February 2001, case no 2 AZR 139/00, concerning a teacher in a Protestant nursery school who became a member of a different religious community and publicly professed her faith. The judgment was accepted by the European Court of Human Rights, decision of 3 February 2011, docket no 18136/02.
- 8 Bauer, Göpfert and Krieger, *General Equal Treatment Act* (3rd edn, CH Beck 2011), section 9 margin no 15 et seq.
- 9 Federal Labour Court, decision of 20 December 1984, docket no 2 AZR 436/83.
- 10 Higher Regional Labour Court of Schleswig-Holstein, decision of 6 January 1983, docket no 2 (3) Sa 353/82.
- 11 Federal Labour Court, decision of 24 May 1989, docket no 2 AZR 285/88.
- 12 Federal Labour Court, decision of 22 May 2003, docket no 2 AZR 426/02.

- 13 For more information on the termination of employment relationships in German law, see S Lingemann, R von Steinau-Steinrück and A Mengel, *Employment & Labor Law in Germany* (3rd edn, CH Beck/Ant N Sakkoulas 2012), chapter B V.
- 14 Federal Labour Court, decision of 24 February 2011, docket no 2 AZR 636/09.
- 15 Higher Regional Labour Court of Schleswig-Holstein, decision of 20 January 2009, docket no 5 Sa 270/08.
- 16 Federal Labour Court, decision of 10 October 2002, docket no 2 AZR 472/01.
- 17 Higher Regional Labour Court of Hesse, decision of 21 June, 2001, docket no 3 Sa 1448/00.
- 18 Cf G Thüsing, in *German Civil Code* (12th edn, Munich 2012), section 8 AGG margin no 17 et seq.
- 19 Federal Labour Court, decision of 22 August 2009, docket no 2 AZR 499/08.
- 20 ECHR, decision of 10 November 2005, docket no 44774/98; decision of 15 February 2001, docket no 42393/98.

The discovery process in Russia: will the new era come?

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According to the official statistics of the Supreme Arbitration Court of the Russian Federation (SAC), in 2011 Russian arbitration courts tried 1,675 cases involving foreign parties, and 463 court orders of foreign courts were executed. Out of the total number of cases, 198 related to international commercial transactions, and six to administration of Russian legislation on foreign investments. In addition, arbitration courts tried 110 petitions on application of injunctions, filed by foreign parties.¹

In view of the above we would like to share our experience on one of the most crucial parts of litigation – the discovery procedure – as it is in Russia today and how it might change in the near future.

For illustrative purposes let us refer to the discovery system in the US. It is common knowledge that this stage of litigation is deemed to be the most important, and consequently the most expensive and time-consuming. A great number of settlements are made if only to avoid it.

Unlike the US where discovery process is the pre-trial procedure, here in Russia it can be performed virtually at any stage of litigation, even at appellate and/or cassation level. Meanwhile the Chairman of the Supreme Arbitration Court² proposed to limit the discovery proceedings to hearings in first instance courts and to prohibit the production of new evidence in the higher instances.

The analysis below summarises the core aspects of discovery process in Russia as well as the pros and cons of new ideas proposed by the Chairman of SAC.

Generally, the discovery process could be of two types: pre-trial examination and evidence examination in court.

Pre-trial examination

Pre-trial examination provides for the possibility of perpetuation of evidence if there are signs of potential spoliation. A motion for perpetuation is filed prior the filing of a lawsuit.

Most commonly perpetuation motions are filed in the course of intellectual property (IP) disputes when it is crucial to record copyright infringement in a timely manner.

The perpetuation could take numerous forms, for example:

- evidence search (including internet search) with the participation of court bailiff and recording the revealed facts;³ or
- seizure of material evidence.⁴

In addition, Russian legislation provides for a possibility of non-court pre-trial examination, so called ‘examination on instructions of a notary’. However, quite a few lawyers are aware of it. Frankly speaking, pre-trial examinations are few and far between, and judges are fully involved (unlike in the US where discovery is mostly performed by the litigating parties themselves).

At the trial proceedings the following types of discovery are applicable:

- examination of written and material evidence;
- questioning of parties;
- carrying out expert examination and/or review of an expert opinion;
- independent professional advice;

- witness testimony; and
- review of audio, video records, other documents and materials⁵.

Most often Russian litigators bet their stakes on expert opinions due to one simple reason: the party whose expert was assigned by the court normally wins. Russian courts choose state expert organisations as the first-tier experts. Reputable private expert companies fall into the second tier followed by the independent contractors. Where international law is involved, Russian courts may direct their inquiries to the Russian Ministry of Justice or experts, both in Russia and abroad.⁶

There are three key aspects of examining written evidence:

- obtainment of evidence;
- the form of evidence; and
- the deadline for evidence production.

Obtainment of evidence

Russian procedural law allows parties to produce evidence at their own discretion and to request evidence from the other party as well as the third party. In order to obtain judicial vindication, a counsellor shall prove that he/she is unable to obtain the evidence unassisted, explain the correlation of this evidence to the case and specify the location of this evidence.

The form of evidence

In general it is possible to present copies of documents; however, in the absence of an original, those copies may be disregarded. One of the reasons is that documents shall be presented as ‘duly certified copies’, however one may not find such term defined in the legislation. Therefore it depends on the inner convictions of a particular judge. If parties present two different wordings of one ‘original’ document, in the vast majority of cases, such evidence is disregarded entirely in the absence of the original document.

The notarised translation into the Russian language is presented when the documents submitted are in a foreign language.⁷ Documents issued by the state authorities of foreign countries are accepted when they are legalised or apostilled, unless otherwise stipulated by an international treaty with this country.

The deadline for submission of evidence

In Russia there are no requirements to disclose evidence in full prior to the court hearings. That is why production of evidence is treated by a Russian litigator as the most crucial strategic action: some lawyers produce evidence a matter of minutes prior to delivery of the judgment of the first instance court.

On the other hand there is a statutory prohibition of production of new evidence at appellate and/or cassation level unless there is a proof of the impossibility of its production in the first instance court.⁸ However the term ‘impossibility’ is quite broad and in the majority of cases the judges of the higher courts still admit this evidence at their own discretion. It means that in some cases it leads to review of the case *ab initio*.

The Chairman of the SAC proposes to prohibit the submission of new evidence to the appealation or cassation in principle. This proposal has already provoked heated debate among Russian trial lawyers.

On the one hand, a bona fide party that puts its efforts into timely production of evidence must be secure from ‘surprises’ in the form of new evidence produced by the party acting in bad faith.

However, on the other hand, Russian trial lawyers often face the situation when the court ruling is based on the facts that have not been examined (or even disclosed) in the course of court hearings. Therefore in order to appeal against such groundless court decrees the counter-evidence must be produced to the higher judges.

In case the Chairman’s proposals will be transformed into amendments to the Procedural Codes, the strategy and tactics of litigation in Russian courts will significantly change.

Notes

- 1 www.arbitr.ru/_upimg/BF2D3B8F8961047431972C2285F4F18A_an_zap_2011.pdf
- 2 <http://pravo.ru/review/face/view/69375/>
- 3 Ruling of SAC of March 29, 2010 No BAC-3103/10 .
- 4 Ruling of FAC of North-Caucasian district of October 29, 2007 No Ф08-7201/07.
- 5 Article 64 of the Arbitration Procedure Code of the Russian Federation. Article 55 of the Civil Procedure Code of the Russian Federation.
- 6 Article 1191 of the Civil Code of the Russian Federation.
- 7 Article 255 of the Arbitration Procedure Code of the Russian Federation. Article 408 of Civil Procedure Code of the Russian Federation.
- 8 Articles 268, 286 of the Arbitration Procedure Code of the Russian Federation. Article 327.1 of Civil Procedure Code of the Russian Federation.

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Russian Supreme Arbitrazh Court rules on jurisdiction in cases involving Russian establishments of foreign companies

On 13 January 2012 the panel of three Supreme Arbitrazh Court judges (the 'Panel') passed a ruling dismissing the appeal from the lower courts in the case of *Socprop Sarl v Bombardier Inc and Bombardier Transportation GmbH* (the 'Ruling').¹ The Ruling concerns conflict of jurisdictions issues in the case where a foreign company has a branch or representative office in the Russian Federation.

Facts

The claimant, Socprop Sarl (a Luxemburgish company), commenced the proceedings in the Arbitrazh Court of the City of Moscow against Bombardier Inc (a Canadian company) and Bombardier Transportation GmbH (a German company) seeking specific performance of certain agreements between the claimant and Bombardier Inc, and damages. The claimant argued that the court has jurisdiction over the dispute pursuant to Article 247(1)(2) of the Russian Arbitrazh Procedural Code (APC), as both defendants allegedly had representative offices in Russia.

The first instance court declined jurisdiction over the claim and terminated the proceedings. This decision was confirmed by both appellate and cassation courts. The courts decided that the claim did not have sufficient connection with Russia. In particular, the courts found that, contrary to the claimant's allegation, one of the defendants (Bombardier Inc) had no representative office in this country. Claimant sought to apply Canadian law to this issue. They argued that Bombardier Inc, pursuant to Canadian law, that is, the law of the place of its incorporation, did have the representative office at the material time. The courts, however, concluded that Article 247(1)(2) of

the APC only concerns representative offices created in Russia under relevant Russian laws and that, therefore, the position under Canadian law was irrelevant.

The claimant filed an appeal with the Supreme Arbitrazh Court. The appeal was based, inter alia, on the allegation that the case file contains sufficient evidence of both defendants having representative offices in Russia. Further, the claimant alleged that, even if the courts were right to find that one of the defendants had no representative office here, they should have declined jurisdiction only with respect to such defendant.

Decision

Having considered the submissions by the claimant, the Panel refused to grant leave for the appeal to be heard by the Presidium of the Court and dismissed the application altogether.

The Panel opined that Russian arbitrazh courts only have jurisdiction over disputes involving foreign litigants if there is the exclusive jurisdiction pursuant to Article 249 of the APC, a jurisdiction agreement pursuant to Article 248 of the APC, or a close connection between the claim and the territory of Russia (Article 247 of the APC). None of these grounds were present in the case at hand.

The Panel paid particular attention to the close connection factor. They found that the contracts in question have been executed abroad by the foreign companies; the representative offices of the defendants did not take any part in formation or performance of the relevant agreements; the decision on the merits would have to be enforced abroad. Hence, the Panel agreed with the lower courts' conclusions that the

case did not have sufficient connection with the territory of Russia. In the absence of any other ground for jurisdictions, the courts were right to terminate the proceedings.

Analysis

The claimant sought to establish the jurisdiction on the basis of the defendants' alleged presence within the jurisdiction through their representative offices (Article 247(1)(2) of the APC). Hence, the interpretation of this provision by the Panel deserves particular attention.

This article provides for jurisdiction of Russian arbitrazh courts over the commercial disputes involving foreign parties if 'an administration, branch or representative office of a foreign person is located in the territory of the Russian Federation'.

It is widely accepted that defendants should be sued at the place of their incorporation or domicile. The extension of this principle would create a ground for jurisdiction of the courts of the foreign state where the defendant carries out its business through a branch, representative office or other establishment.²

Such extension, however, should be somewhat limited, for '[i]n balancing the legitimate interests of both parties the additional forum for the plaintiff is opened and available only insofar as the defendant availed himself there through activities of his own.'³ Thus, Article 5(5) of the Brussels I Regulation provides for the jurisdiction only 'as regards a dispute arising out of the operations of a branch.'⁴

Article 247(1)(2) of the APC does not contain any similar wording. Construed literally, this article would provide for the jurisdiction of Russian arbitrazh courts notwithstanding whether the dispute has any connection with the operations of a branch or representative office (and thus with Russia) or not. On this basis, some scholars suggest that the very existence of a branch or representative office of a foreign company in Russia should suffice to establish the jurisdiction of Russian courts over such foreign company.⁵

The Panel, however, adopted teleological interpretation of Article 247(1)(2) of the APC, suggesting that Russian arbitrazh courts can only entertain jurisdiction pursuant to this provision if the claim is closely connected with the territory of Russia. In the context of a branch or representative office of a foreign

company, such close connection should be with operations of such establishment within the territory of Russia. The Panel did not explain in detail what would provide for such close connection in this context. However it can be derived from the Ruling that the sufficient connection may exist in contractual disputes when the relevant establishment takes part in formation and/or performance of the relevant agreement. We may assume that, if the claim has tortious basis, the close connection would be found in establishment (through its employees) taking part in causing harm.

This approach is in line with international practice. The Panel even referred to the European Court of Justice (ECJ) ruling in *Blankaert and Willems v Trost* which is not common for Russian judgments. This reference, however, seems rather out of place for a number of reasons. First of all, the case concerned interpretation of Article 5(5) of the Brussels I Regulation, which, unlike the Russian procedural rules, expressly states the close connection requirement. Furthermore, the case concerned the operations of a commercial agent, rather than a branch or representative office. Thus, reference to, for example, *Sar Schotte GmbH v Parfums Rothschild Sarl* (Case 218/86) would be more relevant here. Finally, in *Balnkaert*, the ECJ was not required to provide interpretation of the 'dispute arising out of operations of the branch' factor. The better illustration to this principle would be *Lloyd's Register of Shipping v Societe Campenon Bernard* (Case C-439/93); or an English Court of Appeal decision in *Anton Durbek GmbH v Den Norske Bank Asa* [2003] EWCA Civ 147.

The Panel's interpretation brings Article 247(1)(2) of the APC in conformity with the solution adopted in relation to Russian defendants. Thus, Article 36(5) of the APC stipulates that the claim against a Russian company arising out of the operations of its branch or representative office may be brought before the court at the place of such branch or representative office. Hence, one cannot sue a Russian defendant at the place of its branch or representative office for something completely unrelated to the latter's operations. Why should the position differ in respect of foreign litigants?

Conclusion

The Ruling provides a useful and plausible guideline for interpretation of Article 247(1)

(2) of the APC. Unfortunately, this guideline was offered by the Panel's Ruling, rather than the resolution of the Presidium of the Supreme Arbitrazh Court. Hence, the interpretation contained therein can only be considered persuasive, but not binding on the lower courts. Hopefully, the Panel's approach will be followed by the lower courts facing the similar question.

Notes

- 1 Ruling of the Supreme Arbitrazh Court of the Russian Federation No VAS-14851/11 dated 13 January 2012 can be accessed in Russian at http://kad.arbitr.ru/PdfDocument/c6b204e5-4680-4b80-93c2-78c95b4eece4/A40-116933-2009_20120113_Opredelenie.pdf.
- 2 See, for example, Article 5(5) of the Council Regulation (EC) No 44/2001 (the 'Brussels I Regulation'); Principle 3.1 of the ILA Fourth and Final Report: Jurisdiction over Corporations (2002) (the 'ILA Principle 3.1'). For Russia, see Article 247(1)(2) of the APC.
- 3 *Magnus/Mankowski*, Brussels I Regulation (2007) Article 5 note 298.
- 4 The ILA Principle 3.1 provides for the jurisdiction of the courts of the state where a corporation has a branch, agency or other establishment with respect to the disputes arising out of operations of the corporation in this state. Hence, this principle focuses on the operations of the corporation, rather than its establishment (as in Article 5(5) of the Brussels I Regulation).
- 5 A Mamaev, 'Comparative analysis of the provisions of the Russian Civil Procedural Code and APC governing the alternative international jurisdiction in civil cases' in: *Arbitrazh and civil procedure* No 11 2007.

Enforcement of Worldwide Freezing Orders in Switzerland

Worldwide Freezing Orders (WFO), or so-called 'Mareva injunctions', have been described as one of the 'nuclear weapons' of commercial litigation and arbitration. Often granted at the pre-trial stage in *ex parte* hearings, a WFO prevents a defendant, by way of a preliminary injunction, from disposing of assets pending the resolution of the underlying substantive proceedings. While granted only in common law jurisdictions, such orders can be made to have worldwide effect. Their enforcement in other jurisdictions can, however, be problematic. For instance, freezing orders targeting a person do not exist in Switzerland. Indeed, a Swiss attachment order will always target a specific asset or bank account. A recently published Swiss Federal Supreme Court decision provides guidance as to the enforceability of English WFOs in Switzerland.¹ Of particular interest in the case was the question of whether a party can apply for a mere declaration of enforceability without actually seeking to enforce the WFO against specific assets.

WFO enforcement in Switzerland

In Switzerland, the enforcement of a WFO is possible under certain conditions. Different legal regimes are applicable depending on whether the WFO has been

issued by a Court of an EU Member State or by a non-EU court. While the enforcement of an EU WFO is governed by the Lugano regime, the enforcement of a non-EU WFO is governed by the Swiss Private International Law Act (PILA).

WFO enforcement under the Lugano regime

According to the established practice of the Swiss courts, a WFO pertaining to a civil or commercial matter issued by a court of an EU Member State is characterised as a provisional measure which may, in principle, be declared enforceable pursuant to Articles 38 et seq of the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('LC 2007').² The LC 2007 is the successor treaty to the 1988 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ('LC 1988'), which contained identical provisions on the enforcement of provisional measures at Articles 25 et seq. Due to the similarity of the provisions, the jurisprudence of the Swiss courts on the application of Articles 25 et seq of the LC 1988 can also be said to apply to Articles 38 et seq of the LC 2007.

An *ex parte* interim order could be enforced under the LC 1988 provided that the defendant

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was granted the right to be heard in the underlying proceedings, within a reasonable time, prior to the application for recognition and enforcement in Switzerland.³ In a previous decision, the Swiss Federal Supreme Court considered that a five business day period to apply for variation or discharge of the *ex parte* WFO was too short.⁴ One might conclude that the WFO could have been recognised in Switzerland if the time for varying or discharging the order had been longer, for instance, one month. One might also assume that an *ex parte* WFO which has been confirmed after an *inter partes* hearing would, in principle, be enforceable in Switzerland.

In the recent case mentioned above, the Swiss Federal Supreme Court had to decide on an appeal against a decision of the Zurich Court of Appeal. Initially, the claimants (30 corporations) had requested the First Instance Court to (i) declare a WFO of the London High Court of Justice enforceable, and (ii) to order protective measures against the defendant and a bank in Switzerland, Bank D, at which the defendant held an account. Invoking Article 39(2) of the LC 1988, the claimants sought in particular to limit the defendant's rights to dispose of the funds held in his account with Bank D. The two requests were subsequently subdivided into separate proceedings. The following discusses the first request (ie, the request to obtain a declaration of enforceability). Although the case was decided under the LC 1988 (the WFO having been issued by the High Court before the entry into force of the LC 2007), its reasoning is also applicable to the LC 2007.

The First Instance Court held that a WFO can, in principle, be declared enforceable upon request and after submission of the required documents, provided that the decision is enforceable in the state of origin, the decision has been notified to the defendant, and there are no grounds for refusal according to Articles 27 and 28 of the LC 1988. However, the First Instance Court rejected the claimants' application considering that they had not been able to show an actual interest in obtaining a mere *declaration of enforceability* (as opposed to the actual enforcement) of the WFO in Switzerland, and they appealed to the Zurich Court of Appeal. The Zurich Court of Appeal rejected the appeal for the same reasons and confirmed the decision of the First Instance Court.

In doing so, the Zurich Court of Appeal imposed an additional condition for the declaration of enforceability of a WFO, namely that the applicant had to show 'a

legitimate interest' in obtaining a declaration of enforceability of the WFO in Switzerland. Indeed, under Swiss procedural law, a party seeking declaratory relief must in principle demonstrate that it has an actual interest in obtaining such declaratory relief. If the party could be compensated by monetary compensation, the Swiss courts would generally consider that no such actual interest exists. According to the Zurich Court of Appeal, the claimants had no legitimate interest in obtaining a declaratory order unless they applied for the actual enforcement of the WFO in Switzerland. The Zurich Court of Appeal also considered that although the WFO was not legally binding on third parties on Swiss territory, banks in Switzerland would usually comply voluntarily with a foreign WFO, at least for a certain period of time (assuming that the bank had been informally notified of the WFO). According to the Zurich Court of Appeal, this also showed that the claimants had no legitimate interest in seeking a declaration that the WFO was enforceable. It thus concluded that a declaration of enforceability would (*de facto*) not be of any use to the claimant.

The claimants successfully appealed to the Swiss Federal Supreme Court, which held that the LC 1988 does not require that a party seeking a declaration of enforceability of WFO must simultaneously request the enforcement of the order. It further held that the Swiss banks' voluntary compliance with a foreign freezing order is irrelevant to the claimants' right to have the order declared enforceable. The Swiss Federal Supreme Court therefore considered that a party benefitting from an English WFO has a legitimate interest in obtaining a declaration of enforceability from a Swiss court.

WFO enforcement under the PILA

Under Swiss conflicts of law rules (Article 25 of the PILA), a foreign decision must be enforced in Switzerland if:

- the judicial or administrative authorities of the state in which the decision was rendered had jurisdiction; no ordinary appeal can be lodged against the decision or the decision is final;
 - and there are no grounds for refusal as specifically listed in the PILA (eg, violation of Swiss public order or violation of *res judicata*).
- The enforcement of interim measures pursuant to these rules is a matter of debate. The prevailing view seems to be that Swiss courts cannot enforce interim measures

ordered by foreign courts as the PILA requires that a decision be final. The Swiss Federal Supreme Court has acknowledged that this view has been adopted in the majority of the doctrine but it has not decided on the issue, leaving the question open. In any event, even the authors who consider that a foreign interim measure could be enforced under Article 25 of the PILA are of the opinion that the provision would only apply to *inter partes* interim measures. A non-EU WFO is therefore likely to be unenforceable in Switzerland.

Conclusion

WFOs have become a feared tool, especially for holders of Swiss bank accounts. The recent decision of the Swiss Federal Supreme Court

brings guidance to cross-border litigators as to how WFOs can be translated into the Swiss legal order and enforced. The question remains, however, open in relation to a WFO issued by a court of a non-EU Member State.

Notes

- 1 Decision of the Swiss Federal Supreme Court 4A_366/2011 31 October 2011.
- 2 It is a parallel agreement to Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation). While the 2007 Lugano Convention entered into force for the EU, Denmark and Norway on 1 January 2010, it has only applied to Switzerland since 1 January 2011 and to Iceland since 1 May 2011.
- 3 *Bernard Denilauler v SNC Couchet Frères* (C-125/79) [1980] ECR 1553, with effect also in Switzerland pursuant to Protocol 2 of the LC 1988 and LC 2007.
- 4 Decision of the Swiss Federal Supreme Court 4P.331/2005 of 1 March 2006.

Discovery is sneaking into Swiss litigation

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Discovery is sneaking into Swiss litigation

On 1 January 2011 the new Swiss Federal Code of Civil Procedure (the 'Civil Procedure Code') came into force, signalling a landmark progress for litigation in Switzerland. The Civil Procedure Code replaced the former structure of 26 different procedural regulations on the cantonal (state) level and it harmonised the rules applicable to civil proceedings throughout Switzerland.

New instrument of pre-trial discovery

Along with the enactment of the Civil Procedure Code, new procedural tools were introduced into the Swiss litigation system that previously had been unknown to many litigators practicing in Switzerland. One of these tools enables a form of pre-trial 'discovery', allowing the claimant to obtain evidence prior to litigation if they are able to show on a *prima facie* basis a legitimate interest in obtaining such evidence (Article 158(1)(b) of the Civil Procedure Code). Such legitimate interest may be based on the need to explore the evidentiary basis of the claim and properly assess the merits of a potential lawsuit prior

to lodging the claim. For litigators from common law countries this may sound like yesterday's news but, in Switzerland prior to 2011, the pre-trial gathering of evidence had been possible only in cases in which there was an imminent risk of evidence becoming unavailable prior to the (late) evidence-taking stage of the proceedings. In such a situation, for instance if a witness was seriously ill and in danger of dying before his/her testimony would normally be taken, the claimant was entitled to request the securing of evidence at a pre-trial stage. This previously very limited form of obtaining evidence at the pre-trial stage has now been expanded.

The evidence proceedings in a Swiss litigation normally take place after the pleading stage, that is, after the parties have each submitted statements on the merits of the case. This means that in principle the claimant has to file their lawsuit on the basis of the information at their disposal when filing the suit, without having access to the evidence in possession or control of the other party. In view of this basic set-up, the new instrument of pre-trial discovery would appear to represent a revolutionary development and a most helpful tool in the

hand of any potential litigant, and one would assume that potential litigants have jumped at the opportunity to obtain evidence in order to determine their chances of success prior to filing the lawsuit. However, there is so far very little case law addressing this new instrument of civil discovery which suggests that many claimants do not yet make use of it. This may be because Swiss litigators remain largely unfamiliar with the concept of pre-trial discovery and they seem to link this concept exclusively to discovery or disclosure processes practiced in common law countries (although such instrument for obtaining evidence at the pre-trial stage was already recognised in a few of the former 26 cantonal civil procedure codes). There is some wisdom in the saying 'you can't teach an old dog new tricks' but, looking at the advantages that can unfold by properly using this new procedural tool, it is expected that litigators in Switzerland will set aside their reservation and soon begin using this instrument more frequently.

How to obtain evidence at the pre-trial stage

The new procedural tool for obtaining pre-trial evidence is designed as a request to the court for preliminary measures. Unlike in the US, such discovery is not performed by the litigating parties themselves, but rather the court is always involved in the process of evidence-gathering at the pre-trial stage. In Switzerland the court orders the production of documents and/or examines the witnesses, that is, the court's assistance is sought not only in cases where the opponent or a third party objects to the discovery requests. This arrangement implies that the success of this new discovery tool ultimately will depend on how the courts apply it. The requirement of *prima facie* showing of 'legitimate interest' is quite an elastic term that offers the judges plenty of discretion. However, in order not to undermine the goal of this new provision, namely to provide future litigants with the opportunity to assess the merits of their case, the courts will have to apply it quite broadly. In a decision of 31 January 2012, the Federal Supreme Court outlined in general terms the preconditions for obtaining evidence under this new provision of article 158(1) (b) of the Civil Procedure Code. It held that the requesting party must furnish *prima facie* evidence of the existence of factual circumstances which give rise to a claim, and

such party must show on a *prima facie* basis that the evidence sought to be obtained is potentially relevant in proving (some of) these factual circumstances. If the evidence sought to be obtained is the only piece of evidence that is available and suitable to prove certain relevant facts giving rise to the claim, the standard of proof is lowered with respect to these facts. In such events the test is not a *prima facie* showing of the existence of the factual circumstances, but it is sufficient for the requesting party to properly substantiate the facts giving rise to their claim. As the motion for discovery is heard in proceedings of a summary nature, the requesting party is confined to meeting the relevant test based only on documentary evidence. The requesting party, as a rule, is prevented from relying on witness statements for that purpose.

The limits of Swiss-style discovery

Although this article uses the catchy term 'discovery' when referring to the new procedural tool for obtaining evidence at the pre-trial stage, it must be pointed out that the kind of discovery to be obtained under Article 158(1) (b) of the Civil Procedure Code has little in common with wide-ranging US-style discovery. Compared to the US, the relevance of the materials sought to be obtained will have to achieve a standard higher than 'reasonably calculated to lead to admissible evidence'. Moreover, in order to prevent 'fishing expeditions', the evidence discoverable under Article 158(1) (b) of the Civil Procedure Code will be limited in scope. Considering Switzerland's civil law tradition, it has to be assumed that in general the courts will merely order the production of specific documents or specifically defined categories of documents, and that the courts will examine witnesses or commission expert reports only on the basis of sufficiently detailed interrogatories on subjects specifically relevant to the case. This restricted form of discovery ensures that the new procedural tool is not misused for unfair tactics already at the pre-trial stage. For instance, it will not be possible for a claimant to impose significant costs on their opponent by filing extensive information requests which are expensive and time-consuming for the other side to fulfil, thereby forcing settlements in unmeritorious cases simply to avoid the costs of discovery.

Certain types of information are generally non-discoverable for reasons of privilege (eg,

legal correspondence between the opposing party and his counsel) or because they are considered to be a work product of opposing counsel. Such legal privilege however does not extend to in-house lawyers. Moreover, the opposing party can assert confidentiality of the requested information and invoke protection of their business secrets. If the opposing party shows credibly that there is indeed a risk of disclosing confidential information and/or business secrets, the court must take appropriate measures to ensure that the taking of evidence does not infringe upon the opponent's legitimate confidentiality interests. The court, for instance, may exclude the requesting party from participating in the taking of evidence and/or may allow the documents containing confidential information to be redacted before being produced. In such circumstances the court may, however, deem it appropriate to at least provide the requesting party's outside counsel with unredacted copies of the documents produced and/or to allow such counsel to take part in the examination of witnesses or site visits ('outside counsel only' approach). If important trade and business secrets cannot be safeguarded by appropriate means, the court as an *ultima ratio* can deny the request for disclosure of evidence.

Potential litigants may be tempted to take advantage of this new discovery tool and to try to obtain evidence that is located in Switzerland despite foreign courts having jurisdiction as to the substance of the matter. In principle, there would seem to be nothing wrong with this because the discovery tool under Article 158(1)(b) of the Civil Procedure Code is regarded as a form of provisional relief, and under Swiss international law it is explicitly stipulated that applications for provisional measures may be made to Swiss courts even if the courts of another state have jurisdiction as to the substance of the dispute. Swiss courts have so far not ruled on the admissibility of such an application under Article 158(1)(b) of the Civil Procedure Code. In view of the European Court of Justice's judgment in *St Paul Dairy* (C-104/03), it is, however, doubtful that Swiss courts will assist potential litigants to obtain evidence just to evaluate their chances of success in a case to be heard before a foreign court. For all other scenarios, particularly if Swiss courts have (exclusive or concurrent) jurisdiction as to the substance of the case, this new instrument of civil discovery is a useful tool to evaluate the risks and chances before delving into the vagaries of litigation.

Revision of the Swiss Federal Act on Unfair Competition

Introduction

The Swiss Federal Act on Unfair Competition (UCA) has recently been revised. The centre piece of the revision is an increased protection against unfair general terms and conditions (GTC).

The revised text also provides for protection against new types of acts of unfair competition and introduces information requirements with respect to e-commerce.

Protection against unfair general terms and conditions

Current situation

Protection against unfair GTC is afforded by Article 8 UCA which provides in its current version:

'Shall be deemed to have committed an act of unfair competition, anyone who, in particular, uses pre-formulated general terms and conditions, which are likely to mislead the contracting party to its

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detriment and which (a) considerably depart from the statutory provisions, directly applicable or by analogy or (b) provide for a distribution of the rights and obligations significantly departing from the repartition corresponding to the nature of the contract.'

Objective of the revision of Article 8 UCA on unfair general terms and conditions

The protection afforded under Swiss law against unfair GTC had often been criticised in Swiss scholarly writing. The requirement under the former Article 8 UCA that the term had to be likely to mislead the contracting party had the consequence that the provision had virtually no relevance in practice. As a result, the protection against unfair GTC in Switzerland was much lower than that in its EU Member neighbouring countries.

Given this state of discontent, it was decided to revise the provision on unfair GTC. The revised Article 8 UCA now states as follows:

'Acts unfairly who, in particular, uses general terms and conditions which, contrary to good faith, provide for a significant and unjustified imbalance in the rights and obligations arising under the contract, to the detriment of the consumer.'

A term will thus be considered unfair if the following requirements are met:

- the clause is part of general terms and conditions;
- the clause is contained in a consumer contract;
- there is an imbalance between the contractual rights and obligations;
- the imbalance is significant and unjustified;
- the consumer is disadvantaged;
- the principle of good faith is breached.

The new Article 8 UCA is largely inspired by Article 3(1) of Council Directive 93/13/ECC of 5 April 1993 on unfair terms in consumer contracts which provides as follows:

'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

Definition of 'general terms and conditions'

As is currently the case, the revised UCA does not provide for a definition of 'general terms and conditions'. There is however a general

understanding that GTC are contractual provisions which are formulated by one party in advance to be used in an undefined number of contracts.

Limitation of the scope of application of the new Article 8 UCA to business-to-consumer contracts

The suggestion to increase the protection against unfair GTC was initially met with considerable opposition because of the concern that freedom of contract would be too heavily hampered. It was therefore decided to limit the new regulation to business-to-consumer contracts, as is the case under the Council Directive on unfair terms.

Consumer contracts are not defined in the UCA. In other Swiss statutes, consumer contracts are defined as contracts relating to the provision of ordinary goods and services intended for the personal or family use of the consumer and which are not associated with the professional or commercial activities of the consumer.

As a result, small and medium-sized enterprises cannot claim protection although, when contracting with large enterprises, they are often in the position of the weaker party just like consumers.

Absence of an indicative list of unfair general terms and conditions

In contrast to the Council Directive on unfair terms, the revised UCA does not provide for an indicative and non-exhaustive list of terms which may be deemed unfair. Case law will have to be awaited for guidance. The following examples were nevertheless mentioned during the revision process:

- levying of interest on the total amount due when partial payments were made;
- automatic and significant extension of a contract of fixed duration, especially when the deadline for the consumer to express his/her desire not to extend the contract is set at a date long before the end of the initial contract term;
- right of the GTC drafter to unilaterally modify the GTC at any time; and
- automatic and tacit extension of a warranty for which the consumer needs to pay.

It is however fair to assume that the list of unfair terms attached to the Council Directive on unfair terms will serve as a source of inspiration for the Swiss courts.

Consequence of a breach of Article 8 UCA

There is no guidance in the revised law as to the consequence of a breach of Article 8 UCA. It must however be assumed that an unfair provision in GTC will be deemed null and void and thus replaced by applicable statutory law. The nullity of the unfair provision does not affect the validity of the contract as a whole which remains in place.

The possibility of a partial nullity in the sense of a salvatory reduction of an unfair GTC provision to what is permissible was recently rejected by the Swiss Federal Tribunal (the 'Tribunal'). The Tribunal noted that a mere partial nullity would wipe out the prevention objective pursued by laws aimed at protecting the economically weaker party because a breach of such laws would have no adverse consequences for the drafter of the problematic provision (decision 4A_404/2008 of the Swiss Federal Tribunal dated 18 December 2008). This reasoning also applies under the revised Article 8 UCA.

New provision concerning e-commerce

The development of e-commerce has been significant over the years. In order to limit abuses, new transparency rules have been introduced through the revision of the UCA. A website offering goods and services now has to provide the following:

- identity and contact details of the operator of the website;
- indication of the technical steps necessary for the conclusion of a contract;
- technical means enabling the correction of the data entry before the sending of an order; and
- confirmation of an order by electronic mail.

Similar requirements were already provided for in Directive 2000/31/EC of the European Parliament and of the Council on e-commerce of 8 June 2000.

Extended catalogue of acts of unfair competition

The emergence of new unfair practices in recent years has prompted an extension of the list of acts of unfair competition in the revised Article 3 UCA.

Registers

Whoever offers inscriptions in registers without mentioning, visibly, in big print and

in an intelligible language, that payment is required, and without indicating the duration and the price of the contract, will from now on be regarded as acting unfairly. The sending of an invoice for such registers in the absence of a previous order will similarly be considered as an act of unfair competition.

Snowball systems

The unfairness of snowball and pyramid-systems is expressly mentioned in the revised UCA. It will thus be considered unfair to make a bonus or any other kind of performance conditional on the beneficiary first recruiting other persons for the business system.

Winnings promises

Whoever promises winnings in the context of a competition will not be able to link the cashing of the winnings to the use of a premium-rate service number, to the purchase of goods or services or to the participation at a sales event.

Phone calls

It will now be an act of unfair competition to ignore the mention in the telephone book that marketing calls are not desired or that consumer data should not be passed on for advertising purposes.

Legal enforcement

Entry into force

Although the revised UCA came into force on 1 April 2012, the entry into force of Article 8 UCA has been delayed until 1 July 2012 in order to give companies more time to adapt their GTC to the new law, if necessary.

Right to sue

The revision will expand the government's right to sue: the government will now have the right to proceed on a civil or criminal level against unfair commercial practices, if collective interests (such as those of domestic members of an industry sector) are threatened or violated. Up until now, the government was only entitled to sue where this was deemed necessary to protect Switzerland's reputation abroad.

The revision also enables the government, in order to protect the public interest, to publicly name and thus pillory businesses which act unfairly.

The revision has left unaltered the right to sue of professional and economic associations whose aim are the defence of the economic interests of their members, and of consumer protection organisations. It will be interesting to observe in the coming years whether or not consumer protection organisations will start to bring actions against companies using unfair GTC.

Exchange of information with foreign authorities

With the awareness that unfair practices do not stop at borders, the amended UCA now

entitles Swiss authorities to collaborate with foreign authorities. Swiss authorities, provided reciprocity is granted, will in particular be able to exchange information on individuals who have participated in unfair acts.

Conclusion

The revision of the UCA is to be welcomed as it reflects recent practical developments and increases protection against unfair business practices. The revised, tougher provision on unfair GTC now enables judicial review of too one-sided provisions and may have the effect that provisions in GTC used so far will be qualified as unfair and thus null and void. It is therefore advisable to review existing GTC before the revision becomes effective on 1 July 2012.

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Mortgage default and foreclosure process in the United Arab Emirates

In the wake of the sharp downturn in the real estate sector in the aftermath of the global crisis, the United Arab Emirates' (UAE) economy has found itself exposed to unprecedented rates of mortgage default. While the actual figures and magnitude of the default are unclear, the UAE Central Bank has acknowledged that the country's banking sector has been ridden with a growing proportion of non-performing loans, reaching a record high at the end of 2011. The unprecedented nature and the magnitude of the default have inevitably led to a series of legal and economic hurdles, exacerbated by the uncertainties involved in handling them. This is further complicated by the varying laws and practices of the individual emirates and their relationship with the federal laws.

In general, the UAE federal mortgage laws are rather dated, going back to 1985, especially as applied in the context of today's reality, and are largely untested. While Dubai has its own more current mortgage laws, issued in 2008, those laws too are scant in

the specifics which are necessary to deal with today's realities and equally untested. Moreover, neither body of laws seems to address the peculiarities of the Islamic or Sharia compliant mortgages.

Specifically, neither the UAE laws nor Dubai laws provide an adequate system to deal with mortgage default and resulting foreclosure. In sum, under both laws, foreclosure of real property requires a formal court action and a sale at a public auction. Under the federal laws, no separate mechanism exists to foreclose on real property outside of enforcement of contractual rights, which, in turn, can only be administered through regular court proceedings. In Dubai, there is a provision for specific execution proceedings in civil courts. Instead of going through a traditional court action, banks have the right to execute foreclosure through a simple hearing before a judge, after giving the debtor proper notification. The execution judge orders an attachment against the mortgaged property to be sold by public auction. In theory, such

execution proceedings aim to be more expeditious and less costly than regular court proceedings. In practice, however, they are shrouded in mystery and are time-consuming.

Significantly, neither law allows for voluntary foreclosure whereby the debtor relinquishes his rights to the property, along with all of the payments made thus far, without the need for court action. Voluntary foreclosure has the advantage of avoiding costly and time-consuming court proceedings and auction sales, while also giving banks the freedom to dispose of the property as they see fit.

Perhaps because of the complexities and novelty involved, the practice of foreclosure has been slow-coming across all of the UAE. Most banks in other emirates have yet to test it. Dubai has been the only emirate to have done so today. Even then, however, with its purported streamlined execution proceedings, foreclosure in Dubai is still in its infancy and is rather opaque. For example, the procedures and timelines involved in the actual court proceedings are ambiguous and inaccessible to the general public. From the few auctions which have taken place thus far it appears that the typical timeframe between the court judgment and the auction sale is at least one year. The cause for the delay is uncertain. Similarly unclear are the banks' internal guidelines and factors governing their decision to foreclose or not to foreclose.

The same applies to the auction proceedings, which, in Dubai, are conducted by the Land Department. For example, as of the beginning of 2012, the Dubai Land Department has sold only eight foreclosed properties at an auction. This number pales in comparison to the reported several hundreds of properties currently under foreclosure proceedings in Dubai courts. One of the reported reasons for such discrepancy has been the Land Department's struggle to establish values for the properties. The other reason has been the fear of flooding the market with low-priced homes, at a time when prices are already 50–70 per cent below their peak rates.

Aside from the delay in the administration of foreclosures in courts and at auctions, the banks themselves have been extremely reluctant to foreclose. While some banks have reported their preference for renegotiation of payment terms over a court action as the reason for their reluctance to foreclose, such reasoning is not entirely accurate. Rather, the banks' reluctance is attributable to factors

stemming from the peculiarities of the UAE legal and business landscape.

One factor, for example, is the banks' preference to use the threat of criminal prosecution to force borrowers to pay. This is made possible by the banks' practice of requiring guarantee cheques as security for the mortgage and the UAE law of criminalising dishonoured cheques. Thus, upon borrower's default, banks prefer to exercise the option of cashing guarantee cheques, which, once bounced, become a criminal offence under UAE laws, punishable by jail sentence. Such tactics results in at least a temporary repayment of mortgage installments, thereby allowing banks to avoid calling default on mortgages and to begin writing them off.

The other reason for the banks' reluctance to foreclose is the overwhelming number of defaulting mortgages, issued in the wake of the UAE's extraordinary property boom, characterised by sky-high prices and demand. Many borrowers took out multiple mortgages for speculative reasons, relying on rental yields to pay off their monthly mortgage payments. With property prices dropping between 50–70 per cent, monthly rental yields are no longer sufficient to cover mortgage payments. Similarly, the value of the mortgaged off-plan properties, the delivery of most of which has been hugely delayed, has dropped by more than half. These changes in economic conditions have dramatically reduced borrowers' ability to carry their mortgage obligations, resulting in significant defaults.

A further complication is that banks have thus far been reluctant to refinance mortgages, to make them more affordable, accounting for new economic conditions. This could be due to the absence of internal infrastructure or fear of having to realise their losses.

Another factor behind the banks' reluctance to foreclose is the uncertainty of foreclosure on properties under Sharia-compliant mortgages, where banks continue to own the property. To foreclose on such properties, in effect, means that banks must bring foreclosure cases against themselves. The existing laws or regulations do not address such issues.

Banks' reluctance to foreclose has led to an exodus of many borrowers out of the UAE, to avoid criminal prosecution. The UAE's current laws criminalising bankruptcy disallow debtors the opportunity to declare

bankruptcy and to restructure their lives while remaining in the UAE.

Perhaps realising these issues, the UAE has begun to introduce measures to address them. A number of legislative initiatives are currently being considered, including the draft bankruptcy law, which may potentially decriminalise bankruptcy. Also, the UAE Central Bank has represented that it would issue new rules to better regulate mortgage lending by the country's banks within the first quarter of 2012. This will include, amongst other things, a more thorough scrutiny of the borrower's repayment ability, as well as a more stringent loan-to-value ratio. This, however, may be some time coming insofar

as, at present, the UAE does not yet have an effective credit rating system to be able to assess borrower's creditworthiness. The particularity of the UAE demography, the majority of which are expatriates from other countries, is a further complication. It is more difficult to assess one's creditworthiness outside of the UAE's jurisdiction. Equally challenging is the attempt to cope with the expatriates' ease of escaping liability by simply leaving the UAE for their home countries. While the challenges are evident, it is also clear that the country is determined to address them and has already done much in that regard, at least in the way of public discourse and a series of draft laws.

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US Supreme Court rejects expansive approaches to exercising personal jurisdiction over foreign companies based on a 'stream of commerce' theory

US courts have often taken aggressive, expansive views of their ability to assert personal jurisdiction over parties based outside the forum state where the case was brought, both as to domestic parties from other US states and foreign parties from other nations. The US Constitution (the 'Constitution'), however, imposes limits on just how far individual states can reach in asserting personal jurisdiction over non-residents, because the Constitution's 'due process' provisions constrain such assertions of jurisdiction out of concerns for fairness and reasonableness, and due to limitations on individual states' sovereign power in a multi-state federal system.¹

Those constitutional limits showed their power in a pair of 2011 United States Supreme Court (the 'Court') decisions, *J McIntyre Machinery, Ltd v Nicastrò*,² and *Goodyear Dunlop Tires Operations, SA v Brown*.³

In both decisions, the Court rejected broad applications by state courts of the 'stream of commerce' theory of personal jurisdiction. Under this theory, manufacturers of goods would be subject to personal jurisdiction in any state where their goods are used or purchased. The Court's two decisions clarify and reaffirm that out-of-state and non-US companies (including out-of-state and non-US subsidiaries of US companies) are unlikely to be subject to a state's personal jurisdiction in such circumstances unless they have more than just sporadic or limited contacts with that state.

McIntyre Machinery overturned a New Jersey Supreme Court decision⁴ finding 'specific jurisdiction'⁵ over a British manufacturer of industrial equipment that allegedly caused a workplace injury in New Jersey. *Goodyear* reversed a decision of the North Carolina Court of Appeals⁶ finding 'general

jurisdiction⁷ in North Carolina over a US corporation's foreign subsidiaries whose products allegedly caused an automobile accident outside Paris. Both cases addressed the significance of placing goods into the 'stream of commerce', from which they ultimately reached a destination where an injury occurred.

McIntyre Machinery

McIntyre Machinery involved product liability claims brought by a plaintiff who injured his hand using a machine manufactured by an English company. The manufacturer had sold its machines to an independent US distributor, and some of those machines ended up in New Jersey.

The New Jersey Supreme Court held that because the plaintiff's injury occurred in New Jersey and the manufacturer knew or should have known 'that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states' but failed to take reasonable steps to prevent its products from being sold in New Jersey, personal jurisdiction over the English manufacturer in New Jersey was proper. This holding was predicated on a 'stream-of-commerce theory of jurisdiction' under which 'a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, which includes New Jersey', is subject to New Jersey jurisdiction if the product causes injury in New Jersey.⁸

The US Supreme Court in a six to three vote held that personal jurisdiction was improper in these circumstances. However, there was no single majority opinion. Four Justices joined in a plurality opinion, while two others joined a separate opinion based on narrower grounds. Because this narrower concurring opinion was necessary in order to obtain majority support for the Court's ruling, it is likely to be treated as the controlling rationale of the case by lower courts.

The plurality opinion, written by Justice Kennedy, noted that divided opinions in a 24-year-old US Supreme Court case, *Asahi Metal Industry Co v Superior Court*, had left the validity of the 'stream of commerce' theory unclear where there was no showing that a defendant had purposefully availed itself of the benefits of the laws of the state in question, that is, by 'engag[ing] in activities that reveal an intent to invoke or benefit from the protection of its laws.'⁹ Justice Kennedy,

now answering this question in the negative, concluded that transmitting goods into the stream of commerce 'permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.' Thus, because the English manufacturer had no offices in New Jersey, owned no property there, sent no employees there, did not advertise there, and had no contacts with New Jersey other than that the machine in question had ended up there, there was no showing that the company 'purposefully availed itself of the New Jersey market', and thus no basis to exercise personal jurisdiction over it there.¹⁰

The separate concurring opinion written by Justice Breyer took a more cautious approach, suggesting that straightforward application of earlier precedents was sufficient to resolve the question before the Court without having to decide issues left unresolved in *Asahi*. He noted that both *Asahi* plurality opinions required more than isolated or occasional sales of products in the forum state. Even under the more expansive of those opinions, finding personal jurisdiction still required that the sales at least be a part of a 'regular flow' or 'regular course' of sales in the forum state. Under the narrower plurality opinion, finding personal jurisdiction required 'something more' than simply placing a product into the 'stream of commerce', such as 'special state related design, advertising, advice, [or] marketing.'¹¹

Justice Breyer thus rejected using an 'absolute approach' resting on the distribution of products through a 'system that *might* lead to those products being sold' in New Jersey, noting that the Supreme Court 'has rejected the notion that the defendant's amenability to suit travels with the chattel', that is, travels with the goods sold by the defendant. He further noted that the defendant's status as a non-US-based manufacturer raised concerns about 'the basic fairness of [the New Jersey Supreme Court's] absolute rule.'¹²

Where Justice Breyer took issue with Justice Kennedy's plurality opinion in *McIntyre Machinery* was in regard to what he characterised as the plurality's 'strict rules that would limit jurisdiction where a defendant does not intend to submit to the power of a sovereign.' Justice Breyer took the view that *McIntyre Machinery* was an unsuitable 'vehicle for making broad pronouncements

that refashion basic jurisdictional rules.’ In particular, he expressed concern about the various factual permutations possible in a world of electronic and internet commerce, noting that the potential jurisdictional issues in such settings could involve ‘serious commercial consequences [that] are totally absent in this case.’ Justice Breyer thus suggested that the Court leave the issues implicated by the plurality’s broader approach to be addressed when a more appropriate case arose in the future.¹³

Goodyear

In contrast to its divided decision in *McIntyre Machinery* decision, the Supreme Court was unanimous in rejecting the state court’s exercise of personal jurisdiction in *Goodyear*, which presented much more straightforward issues than in *McIntyre Machinery*. *Goodyear* clarified that even where a defendant’s sales of goods that reach the forum state might be sufficient to provide ‘specific’ personal jurisdiction, that is, personal jurisdiction over a claim arising from an injury in that state related to those very goods, that sale of goods without more was still insufficient to subject that defendant to the ‘general’ jurisdiction of the state’s courts, for example, jurisdiction with regard to all disputes, whether or not related to the defendant’s activities in, or affecting, the forum state.

Goodyear involved claims arising from a 2004 bus accident outside of Paris, in which two North Carolina teenagers had died. The teenagers’ parents sued various parties including several foreign subsidiaries of Goodyear USA, asserting that tires made, designed and distributed by the subsidiaries were defective and had caused the crash. The tires in questions were made in Turkey, and were sold and used in Europe.

While Goodyear USA did not contest personal jurisdiction in North Carolina, its foreign subsidiaries did. The North Carolina Supreme Court held that the foreign subsidiaries were subject to North Carolina jurisdiction because some of the tires made abroad by those foreign subsidiaries – though not the tires actually involved in this particular crash – had reached North Carolina through the ‘stream of commerce’.¹⁴

The US Supreme Court reversed the decision. It said that the North Carolina court improperly had conflated the constitutional test for the proper exercise of ‘general’ jurisdiction with the constitutional test for the proper exercise

of ‘specific’ jurisdiction. The Supreme Court reaffirmed that ‘general’ jurisdiction over a corporation mainly exists when the corporation is domiciled or incorporated in the forum state or has its principal place of business there. Out-of-state defendants can also be subject to ‘general’ jurisdiction on a so-called ‘presence’ or ‘doing business’ rationale if their contacts with the state are ‘continuous and systematic’ in nature, which can be a demanding requirement to meet. But mere marketing or sales of products that reach the forum state, the Court held, will generally be held insufficient to support an exercise of ‘general’ jurisdiction over that defendant, for instance, as to claims that do not themselves arise from the marketing or sale of the defendant’s products in the forum state.¹⁵

Rejecting the ‘sprawling view of general jurisdiction’ taken by the North Carolina court, the Supreme Court said that it would make ‘any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed.’ This result, it said, was incompatible with long-standing due process precedents setting the limits on when states can exercise personal jurisdiction over out-of-state defendants.¹⁶

Implications of the Supreme Court’s decisions

Taken together, *McIntyre Machinery* and *Goodyear* represent a powerful rejection of the efforts by some US state courts to expand personal jurisdiction based on the ‘stream of commerce’ language used in the Asahi plurality opinion 24 years ago. These rulings reaffirm that mere occasional and sporadic sales of products that somehow reach a particular state will not ordinarily be sufficient to support personal jurisdiction in that state over the manufacturer of the products. Moreover, these rulings make clear that where the plaintiff’s claim is not directly related to a defendant’s sales of products in the forum state, so as to provide a basis for exercising ‘specific’ jurisdiction over the defendant, it will ordinarily be very difficult, if not impossible, for the plaintiff to establish ‘general’ jurisdiction over the defendant in the forum state if based solely upon such sales.

Nevertheless, a number of questions still remain open. For example, these recent rulings do not offer clear guidance regarding what level of sales reaching a particular state

should be deemed ‘occasional or sporadic’, or even on what the relevant metric is for measuring such level (eg, frequency of sales, unit volumes of sales, dollar volumes of sales, or some other measure?) Whatever measure of sales is chosen, should it be evaluated differently depending on the method of delivery or distribution?

In addition, application of judicial precedent in US courts is often very fact-specific. Thus, because *McIntyre Machinery* involved indirect sales through an independent distributor, it may not provide reliable guidance as to situations where a defendant has made at least some sales directly in or into the state where the litigation was filed. Moreover, under the Supreme Court’s analysis, if the defendant has deliberately targeted its marketing or sales efforts towards a particular state, it is uncertain whether a limited volume of sales may support personal jurisdiction there.

Finally, as Justice Breyer noted in *McIntyre Machinery*, the application of these principles is less clear and not well settled in the context of internet and electronic sales, such as when a defendant’s goods are available in all 50 states through retailers’ websites. US courts will likely continue to refine the application of personal jurisdiction rules to lawsuits arising from such transactions.

International companies may be able to reduce their risk of jurisdictional exposure

to unfamiliar US state court systems by reviewing and possibly modifying their US marketing and distribution practices. At least outside the internet commerce realm, if foreign-manufactured products are marketed through independent distributors and the foreign manufacturer avoids advertising or marketing that targets specific US states, its risk of becoming subject to jurisdiction in an unexpected locale may be reduced by these two decisions.

Notes

- 1 See, for example, *World-Wide Volkswagen Corp v Woodson*, 444 US 286 (1980); *Helicopteros Nacionales de Colombia, SA v Hall*, 466 US 408, 413–15 (1984)
- 2 131 S Ct 2780 (2011).
- 3 131 S Ct 2846 (2011).
- 4 201 NJ 48, 987 A.2d 575 (2010).
- 5 ‘Specific’ personal jurisdiction refers to exercising personal jurisdiction over a claim against a nonresident defendant when the claim being litigated arises from a transaction, occurrence or injury that occurred in the forum state. *Goodyear*, 131 S Ct at 2851.
- 6 199 NC App 50, 681 SE2d 382 (2009).
- 7 ‘General’ personal jurisdiction refers to exercising personal jurisdiction over a defendant, without regard to the nature of the claim, because of the defendant’s relationship to the forum state. *Goodyear*, 131 S Ct at 2851.
- 8 201 NJ at 73, 987 A.2d at 589.
- 9 480 US at 112; see also *McIntyre Machinery*, 131 S Ct at 2791.
- 10 131 S Ct at 2790–91.
- 11 *Ibid* at 2792 (citing *Asahi*, 480 US at 111, 112).
- 12 *Ibid* at 2793–94.
- 13 *Ibid* at 2794.
- 14 199 NC App at 61, 681 S.E.2d at 392.
- 15 131 S Ct at 2855–57.
- 16 131 S Ct at 2857.

Anti-enforcement injunctions in the US? – the second circuit says ‘no’

‘This is an extraordinary case.’ – Judge Kaplan, Federal District Court, Southern District of New York¹

In the world of international commercial litigation few if any disputes have been given more attention than Chevron’s continuing saga in the Ecuadorian Amazon. The Ecuadorian plaintiffs secured a roughly US\$18bn Ecuadorian judgment,² which was nearly 19 years in the making and

the largest environmental damages judgment in history.³ Rather than wait for the plaintiffs to seek recognition and enforcement of the judgment, Chevron sought a declaration from a New York federal court: plaintiffs’ Ecuadorian judgment was not enforceable anywhere in the world (other than Ecuador).⁴

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The District Court preliminarily granted Chevron’s request for an anti-enforcement injunction against the Ecuadorian plaintiffs.⁵

The focus here is on the Second Circuit’s opinion reversing the district court’s anti-enforcement injunction⁶ and answering the question: are anti-enforcement injunctions still a viable strategy for judgment debtors?

Chevron Corporation v Donziger

Litigation in Ecuador

In the 1960s, Texaco Petroleum Company (‘TexPet’), a Texaco subsidiary, and Gulf Oil Corporation conducted oil exploration and drilling in the Ecuadorian Amazon through a consortium. In 1974, the Republic of Ecuador acquired Gulf’s interest through its state-owned oil company, Petroecuador. Petroecuador and TexPet continued operating the consortium until 1992, at which time Petroecuador became the sole owner of the consortium.⁷

In 1993 a purported class action on behalf of inhabitants of the Ecuadorian Amazon alleged personal injury and property damage as a result of the oil operations that allegedly polluted the rain forest and rivers in Ecuador. The lawsuit sought billions of dollars for alleged personal injuries and property damage. The case was styled *Aguinda v Texaco, Inc.*, and was filed in the US District Court for the Southern District of New York. That action was dismissed on forum *non conveniens* grounds and confirmed on appeal.⁸

In 2003 a group of Ecuadorians, including many of the *Aguinda* plaintiffs, sued Chevron and Texaco in Lago Agrio, Ecuador. The complaint alleged environmental contamination of the Ecuadorian Amazon by TexPet and Texaco from the 1960s to 1992. The complaint also alleged that Chevron, due to its merger with Texaco, succeeded to Texaco and TexPet’s liabilities.⁹

On 14 February 2011 the Lago Agrio court in Ecuador issued a multi-billion dollar judgment against Chevron. The court held that Texaco’s operator in Ecuador had caused extensive damage to the environment, peoples, and indigenous cultures in Ecuador in violation of Ecuadorian law. The court held that Chevron could be held liable on a veil-piercing theory for any damages owed by Texaco. The judgment awarded US\$8.6bn for, inter alia, soil and groundwater remediation, cancer deaths, natural resource damages, and

cultural damages. The judgment awarded punitive damages that would double the US\$8.6 billion award, unless Chevron issued a ‘public apology’ to the plaintiffs within 15 days from issuance of the judgment. Chevron did not issue any apology, thus the judgment was for roughly US\$18bn.¹⁰

The District Court grants (preliminarily) Chevron’s anti-enforcement injunction preventing recognition or enforcement of the Ecuadorian judgment

Even before the Ecuadorian court’s entry of the judgment on 14 February 2011, Chevron had filed a lawsuit, and on 8 February 2011 had in hand from the Federal District Court in the Southern District of New York a temporary restraining order, restricting the plaintiffs and their agents from seeking enforcement or recognition of any Ecuadorian judgment.¹¹

On 7 March 2011, Chevron secured a preliminary injunction essentially enjoining the plaintiffs and their agents from seeking recognition or enforcement of the Ecuadorian judgment anywhere in the world (other than Ecuador).¹²

The district court laid out the rule under New York’s Recognition of Foreign Country Money Judgments Act (‘New York’s Recognition Act’):¹³

‘A court in the US may not recognise a judgment of a court of a foreign state if: the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law [...] or if the judgment was obtained by fraud.’¹⁴

Relying on at least the following facts, the court concluded that Chevron was likely to succeed on its claim for declaratory relief that Ecuador has not provided impartial tribunals or procedures compatible with due process of law:

- Ecuador’s justice system was plagued by corruption and political interference, which has become worse since the latest presidential election (2009), including bribes and threats of violence or removal or the prosecution of judges for rulings against the Ecuadorian government.
- Ecuador’s president had taken a significant interest in the case against Chevron, made public statements of support for the plaintiffs, and publicly called for the prosecution of Texaco and Chevron lawyers.¹⁵

The court also concluded that Chevron had at the very least raised serious questions as

to the claim for declaratory relief that the Ecuadorian judgment was secured by fraud. Noting that this was a discretionary factor for the court to consider when weighing recognition, the court pointed to the following evidence to support its conclusion:

- The plaintiffs submitted forged expert reports to the Ecuadorian court.
- Plaintiffs’ experts wrote much or all of the supposedly independent expert’s (Mr Cabrera) damages report, without notifying the court of its involvement in preparing the report.
- Despite this relationship Mr Cabrera and plaintiffs ‘repeatedly misrepresented to the Ecuadorian court that there was no relationship or any form of inappropriate contact that might prejudice Chevron in the proceedings.’
- Once plaintiffs’ improper contacts with Mr Cabrera came to light, plaintiffs’ representatives tried to ‘cleansed’ the Cabrera report by hiring new consultants who, relying heavily on the Cabrera report, increased the damages claim from US\$27bn to US\$113bn, without visiting Ecuador or conducting new site inspections, but rather largely relying on the tainted Cabrera report.
- The Ecuadorian court relied on the ‘cleansed’ reports to support at least some aspects of its judgment.¹⁶

The Second Circuit reverses the District Court’s anti-enforcement injunction.

On 26 January 2012 the Second Circuit issued its opinion explaining why it had previously issued an order vacating Chevron’s worldwide injunction barring the recognition and enforcement of the Ecuadorian judgment against Chevron. The Second Circuit determined that injunctive relief by Chevron was not allowed under New York’s Recognition Act, international comity, or the Declaratory Judgment Act.

Putting aside the substance of Chevron’s attacks on the fairness of the Ecuadorian proceedings, the Second Circuit reasoned that New York’s Recognition Act did not authorise Chevron’s preemptive strike seeking to have a foreign-country judgment declared unenforceable:

‘Whatever the merits of Chevron’s complaints about the Ecuadorian courts, however, the procedural device it has chosen to present those claims is simply unavailable: The Recognition Act nowhere authorizes

a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor.’¹⁷

The Second Circuit also relied on international comity to support its holding that the worldwide injunction could not stand, articulating concerns over a ‘court in one country attempt[ing] to preclude the courts of every other nation from ever considering the effect of that foreign judgment.’¹⁸ The Second Circuit explained:

‘In such an instance, the court risks disrespecting the legal system not only of the country in which the judgment was issued, but also those of other countries, who are inherently assumed insufficiently trustworthy to recognize what is asserted to be the extreme incapacity of the legal system from which the judgment emanates. The court presuming to issue such an injunction sets itself up as the definitive international arbiter of the fairness and integrity of the world’s legal systems.’¹⁹

Lastly, the Second Circuit explained that because the Recognition Act did not provide a legal predicate for injunctive relief, the Declaratory Judgment Act could not be used to expand the statute’s authority to do so.²⁰ And with that, the Second Circuit put an end to Chevron’s anti-enforcement suit.

Anti-injunction suits should still be considered a viable strategic option even after the Second Circuit’s decision in *Chevron*.

There are at least three reasons why the anti-enforcement injunction is still an option that judgment debtors should consider in US courts.

First, recognition and enforcement proceedings in the US are largely governed by state law. There are essentially three sources of recognition and enforcement law that states use: the 1962 version of the Uniform Act; the 2005 version of the Uniform Act; and common law.²¹ Thus, even though one federal circuit court has interpreted New York’s Recognition law to not allow for preliminary injunctions, that result does not necessarily hold true for the numerous other jurisdictions where such a claim could be brought.²²

Secondly, the comity argument that cut against Chevron can be avoided by more narrowly tailoring the requested injunction. From the get-go, Chevron was fighting an uphill battle by asking a US court to enjoin

judgment creditors from enforcing their judgment anywhere in the world.²³ In light of Chevron’s worldwide operations, it likely had no choice but to ask for global relief. This request for worldwide relief combined with the Chevron’s fraud arguments heavily bolstered the Second Circuit’s analysis that this type of anti-enforcement injunction would violate comity:

‘It is a particularly weighty matter for a court in one country to declare that another country’s legal system is so corrupt or unfair that its judgments are entitled to no respect from the courts of other nations. That inquiry may be necessary, however, when a party seeks to invoke the authority of our courts to enforce a foreign judgment.

But when a court in one country attempts to preclude the courts of every other nation from ever considering the effect of that foreign judgment, the comity concerns become far graver.’²⁴

If a judgment debtor seeks declaratory relief on grounds other than the foreign country’s legal system is corrupt (eg, foreign court’s lack of personal jurisdiction over the defendant) and sought an anti-enforcement injunction just in the jurisdiction in which the claim was brought (eg, California), the comity concerns expressed by the Second Circuit would not weigh against the anti-enforcement injunction.²⁵

The final point is one of fairness. Relying on a district court opinion from Illinois, the Second Circuit explained that the better approach than an anti-enforcement injunction was ‘for the judgment-debtor to wait for the putative judgment-creditor to bring an enforcement action under the Illinois version of the Recognition Act, and then raise non-recognition as an affirmative defense.’²⁶ But this approach assumes that the judgment creditor or plaintiff has to bring his or her recognition suit in Illinois. That is likely not the case.

Recognition and enforcement proceedings have been construed by US courts to different from typical lawsuits. For example, in Texas and Iowa, the court does not need to have personal jurisdiction over the judgment debtor/defendant.²⁷ In New York, the judgment debtor does not even have to have assets in New York or be subject to personal jurisdiction in New York.²⁸ These types of cases provide judgment creditors the opportunity to choose a favourable forum in which to seek enforcement – even if the judgment debtor is not subject to personal

jurisdiction or currently has no assets in that state. Once that foreign-court judgment is recognised in one state, it will then likely be subject to the Full Faith and Credit Clause and enforceable in any other state in the US, including those states where the defendant has assets.²⁹ Because states’ laws differ on recognition and enforcement substance and procedure, this creates a significant tactical advantage for the judgment creditor.

The judgment debtor, on the other hand, has significant restrictions on where it may bring an anti-recognition-injunction proceeding. First, the court has to have personal jurisdiction over the judgment creditors.³⁰ Secondly, there would likely be a ripeness/jurisdictional issue if the judgment debtor sought an anti-recognition injunction in a jurisdiction where it had no assets.³¹ With substantive limitations on where and when³² a judgment debtor can bring an anti-enforcement injunction (and lesser restraints on judgment creditors) what is wrong with giving a judgment debtor the opportunity to choose the substantive and procedural law that will govern the recognition analysis? (This last point is likely more appropriately directed to lawmakers as opposed to judges).

At bottom, in light of the specific circumstances of the Chevron case, the Second Circuit’s decision is sensible.³³ There is still plenty of room left, however, for anti-enforcement injunctions under the right circumstances. Judgment debtors should continue to consider this strategy.

Notes

- ¹ *Chevron v Donziger*, 768 F Supp 2d 581, 595 (SDNY 2011), rev’d and remanded sub nom. *Chevron Corp v Naranjo*, 667 F3d 232 (2nd Cir 2012).

ANTI-ENFORCEMENT INJUNCTIONS IN THE US? – THE SECOND CIRCUIT SAYS ‘NO’

- 2 *Ibid.*
- 3 Simon Romero and Clifford Krauss, ‘Ecuador Judge Orders Chevron to Pay \$9 Billion’, *New York Times*, 14 February 2011, at A4.
- 4 *Chevron v Donziger*, 768 F Supp 2d at 594.
- 5 <https://twitter.com/jChadMitchell>, 5 January 2012
- 6 768 F Supp 2d 581 (SDNY 2011), rev’d and remanded sub nom. *Chevron Corp v Naranjo*, 667 F3d 232 (2nd Cir 2012).
- 7 *Chevron v Donziger*, 768 F Supp 2d at 596.
- 8 *Aguinda v Texaco, Inc*, 303 F3d 470 (2d Cir 2002).
- 9 *Chevron v Donziger*, 768 F Supp 2d at 600.
- 10 *Ibid* at 621.
- 11 9 February 2011 Order on Plaintiff’s Motion for Temporary Restraining Order, which stated in relevant part: ‘Defendants, their officers, agents, servants, employees and attorneys and all other persons in active concert or participation with any of the foregoing be and they hereby are restrained, to and including 11:59 p.m. on February 22, 2011, from funding, commencing, prosecuting, advancing in any way, or receiving benefit from, directly or indirectly, any action or proceeding for recognition or enforcement of any judgment entered against Chevron in *Maria Aguinda y Otros v. Chevron Corporation*, No. 002-2003 (hereinafter the “Lago Agrio Litigation”) currently pending in the Provincial Court of Justice of Sucumbios in Ecuador, or for prejudgment seizure or attachment of assets based on any such judgment.’
- 12 The actual terms of the Court’s preliminary injunction: ‘All defendants [...] are enjoined and restrained, pending the final determination of this action, from directly or indirectly funding, commencing, prosecuting, advancing in any way, or receiving benefit from any action or proceeding, outside the Republic of Ecuador, for recognition or enforcement of the judgment previously rendered in the Lago Agrio Case, or any other judgment that hereafter may be rendered in the Lago Agrio Case by that court or by any other court in Ecuador in or by reason of the Lago Agrio Case (collectively, a “Judgment”), or for prejudgment seizure or attachment of assets, outside the Republic of Ecuador, based upon a Judgment.’ *Chevron v Donziger*, 768 F Supp 2d at 660.
- 13 NY CPLR §§ 5301–5309.
- 14 *Chevron v Donziger*, 768 F Supp 2d at 632–33.
- 15 *Ibid* at 634.
- 16 *Ibid* at 636.
- 17 *Chevron Corp v Naranjo*, 667 F3d 232, 240 (2nd Cir 2012).
- 18 *Ibid* at 244.
- 19 *Ibid.*
- 20 *Ibid.*
- 21 J Chad Mitchell, *Personal Jurisdiction Dilemma*, 4 INT’L L. & MGMT REV 124–25 (2008).
- 22 See *Shell Oil Co v Franco*, No CV 03-8846 NM (PJWx), 2005 WL 6184247 (CD Cal 10 November 2005) (granting anti-enforcement injunction under California’s 1962 version of the Uniform Recognition Act).
- 23 *Chevron v Donziger*, 768 F Supp 2d at 594.
- 24 *Chevron Corp v Naranjo*, 667 F3d at 244.
- 25 *Shell Oil Co*, 2005 WL 6184247, *13 (granting anti-enforcement injunction against plaintiffs on lack-of-personal-jurisdiction grounds over the judgment debtor in the foreign-country proceeding and holding that Nicaraguan judgment cannot be enforced in the US).
- 26 *Chevron Corp v Naranjo*, 667 F3d at 245 (citing *Basic v Fitzroy Eng’g, Ltd*, 949 F Supp 1333 (ND Ill.1996)).
- 27 *Haaksman v Diamond Offshore (Bermuda), Ltd*, 260 SW3d 476 (Tx App 2008); *Pure Fishing, Inc v Silver Star Co, Ltd*, 202 F Supp 2d 905 (ND Iowa 2002).
- 28 *Lenchysbyn v Pelko Electric, Inc*, 281 AD2d 42 (NY App Div 2001).
- 29 *US Const* Article IV, § 1; see also 28 USC § 1738, the full faith and credit statute.
- 30 *Dow Chemical Co v Calderon*, 422 F3d 827 (9th Cir 2005) (affirming dismissal of anti-injunction suit where court did not have personal jurisdiction over judgment creditors – the plaintiffs in the foreign lawsuit).
- 31 J Chad Mitchell, *Personal Jurisdiction Dilemma*, 4 INT’L L. & MGMT REV 138–39 (2008) (discussing collection of cases failing to find an ‘actual controversy’ in anti-enforcement injunction setting).
- 32 *Ibid* (discussing cases where court refused to hear merits of anti-enforcement injunction because entry of unfavorable foreign-court judgment was too remote to satisfy ‘actual controversy’ requirement).
- 33 As I promptly tweeted after the Second Circuit vacated the district court’s ruling, the district court’s ‘enjoining enforcement worldwide—that is a stretch.’ <https://twitter.com/jChadMitchell>, 20 September 2011