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Note from the Editors

We are pleased to present the inaugural issue of Blank Rome's *International Litigation & ADR Update.* The primary purpose of this newsletter is to keep our clients and friends abreast of pertinent developments in the law regarding international litigation and alternative dispute resolution.

Blank Rome's international practice continues to grow at a rapid pace and we hope our readers will find the information and insights contained in our newsletter to be useful. We will welcome your comments and ideas! ■


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Parties to litigation in the United States, as well as third parties who are subject to the jurisdiction of a U.S. court, must comply with court orders and adhere to the discovery obligations set forth in the Federal Rules of Civil Procedure or corresponding state procedural rules. Parties to a U.S. litigation generally must produce evidence responsive to discovery demands wherever in the world the party maintains such evidence, and a U.S. court may direct even non-parties to produce evidence held by them abroad. Failure to comply with one's discovery obligations or a court order can lead to sanctions ranging from fines to entry of judgment against the offending party.

Not surprisingly, situations arise where complying with one's duties to produce evidence under U.S. law will place a litigant in violation of the laws of another country. Over the years, U.S. courts have had many occasions to address the interplay of U.S. discovery obligations on the one hand and

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foreign "blocking statutes" and similar foreign legislation on the other hand. To date, however, there is very little case law addressing whether and if so how U.S. discovery obligations can be harmonized with foreign data privacy laws. Considering that collisions between discovery obligations under U.S. law and the structures of foreign data privacy laws, especially in the context of electronic discovery, are becoming increasingly commonplace, one can expect significant developments in this area in the near future.

Prior Case Law—Foreign Blocking Statutes and the Hague Evidence Convention

There is a relatively well-developed body of case law in the U.S. dealing with the effect of bank secrecy laws, blocking statutes, and similar rules enacted in, for example, Switzerland, France, the UK and elsewhere, the general purpose of which is to protect foreign commercial interests or simply to prohibit parties from complying with U.S. discovery requests. The pertinent case law addresses the question whether a party, which holds evidence abroad in a jurisdiction prohibiting its disclosure in the context of a U.S. litigation, should be required to produce such evidence despite the prohibitions of foreign law, or is entitled either to a protective order or to an order directing that evidence be taken pursuant only to the Hague Evidence Convention (to which the U.S. and many of the countries with such blocking statutes are signatories), which in turn might have the effect of insulating that party from civil or criminal liability under the applicable foreign law.

The leading case is *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa,* ("SNIA") 482 U.S. 522, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987). In that case, SNIA sought an order that discovery be had only pursuant to the Hague Evidence Convention, arguing that this convention was the exclusive mechanism for the taking of evidence between countries that are signatories to it. The U.S. Supreme Court disagreed, and upheld the lower courts' directive to SNIA to produce evidence pursuant to its discovery obligations under the Federal Rules of Civil Procedure and without resort to the Hague Evidence Convention, despite SNIA's argument that the production would violate French law.

The *Aerospatiale* Court did acknowledge that resort to the Hague Convention might be appropriate under certain circumstances, and established a multi-factored balancing test to determine when such circumstances might exist. Those factors have since been incorporated in the Restatement (Third) of the Foreign Relations Law of the U.S. § 442, a provision that also addresses the issue of compelled production in the face of foreign prohibitions even where the evidence may be located in a country that is not a Hague Evidence Convention signatory. Subsection (c)(1) of the referenced Restatement section suggests that consideration should be given to, *inter alia:* the importance to the litigation of the information requested; the degree of specificity of the request; whether the information originated in the U.S.; the availability of alternative means of securing the information; and the extent to which compliance or noncompliance would violate the respective interests of the U.S. and the country where the information is located.

Other subsections of Restatement § 442 take into account the good faith efforts of the party opposing the order to secure permission from the foreign authorities for disclosure. A further factor looked to by some courts in applying the *Aerospatiale*/Restatement balancing test is the hardship that would be suffered by the producing party as a result of production in violation of foreign law, including the likelihood of prosecution abroad.

Considering that many blocking statutes and similar laws were aimed in whole or in part at hampering the American discovery process, or at protecting the commercial interests of foreign business entities, it may come as no surprise that parties have not often been successful in arguing that such statutes, and the parties' potential exposure to sanctions under them, should require discovery to be conducted solely via the Hague Convention. There have been some notable exceptions, but the general trend in the case law is clear. In applying the *Aerospatiale*/Restatement balancing test, the courts have often noted, among other things, that strong policies of the U.S. outweigh the policies reflected in the pertinent blocking statutes, and that the likelihood of prosecution under foreign law for violation of the blocking statutes has in any event been minimal.

Foreign Data Privacy Laws—The New Frontier

Since the passage of the EC's 1995 Data Privacy Directive, the European Union and its member states, as well as several countries that are not EU members, have been developing an increasingly comprehensive body of laws protecting the data privacy of their citizens. In this connection, three main points are worth noting at the outset.

First, under the referenced laws the U.S. is generally deemed to be a country that does not have adequate data privacy protections in place, and therefore the processing or transfer of data to the U.S. is prohibited except under quite circumscribed circumstances, and then only when specific steps have been taken to protect data privacy.

Second, while it can be argued that the general assumption under current U.S. law is that anything written on a company computer belongs to the employer, there is no such assumption under the referenced European data privacy laws. To the contrary, under those laws, an employee generally has a right of privacy even with respect to personal data created in the workplace. Thus, if litigation is commenced in the U.S. but electronically stored information ("ESI") is maintained abroad, these data privacy laws may become an impediment to easy compliance with a party's discovery obligations.

Third, the penalties for violation of EC and related data privacy rules can be significant, and can take the form of stiff monetary fines or prison sentences.

Further important points, for purposes of the discussion here, are: (1) that the policies underlying the EU and related country-specific data privacy laws, unlike the policies underlying many of the blocking and similar statutes discussed in the preceding section, are arguably not to hinder U.S. discovery or protect commercial secrets, but rather to protect individual freedoms; and (2) that the likelihood of prosecution for violations of both blocking statutes and data privacy laws seems to be increasing. For example, in 2007 an attorney was fined €10,000 euro by a French court for seeking to take evidence in France in connection with a litigation in the U.S. without doing so via the Hague Convention. Similarly, prosecutions of European companies for violations of the EU or country-specific data privacy rules are a reality, and some of the fines in recent years have been quite substantial.

Against this backdrop, there are surprisingly few decided cases in the U.S. addressing the interplay between a party's (or third party's) U.S. discovery obligations on the one hand and its duties under foreign data privacy laws on the other hand. Certainly these issues are being addressed on an increasingly frequent basis by international commercial litigators, but only a few courts have weighed in to date. Indeed, the effect of foreign data privacy laws on general discovery of ESI in a civil case has yet to be addressed in any detail by a U.S. court. That said, in the few reported decisions dealing with foreign data privacy laws, as in the decisions dealing with foreign blocking statutes, the matter has usually been decided in favor of the party advocating discovery despite the prohibitions of foreign law.

It is only a matter of time, however, before U.S. courts will be forced to provide additional guidance in this area. European legislators may also find it necessary to address this substantial issue of conflicting rules to ensure that the rights of their own citizens are not unduly compromised in U.S. litigation. In assessing how the law in this area will develop in the future, pertinent questions include whether the arguable differences in policy underlying foreign data privacy laws on the one hand and foreign blocking and similar statutes on the other hand, coupled with the apparently increasing likelihood of prosecution under foreign law, will affect the manner in which the *Aerospatiale* and Restatement balancing tests are applied. If so, perhaps U.S. courts may be more willing to issue protective orders or directives that discovery be taken pursuant to the Hague Convention. If not, and if foreign entities are regularly directed by U.S. courts to produce ESI in contravention of foreign data privacy laws, prosecutions under the foreign data privacy laws may become more commonplace. Alternatively, one may ask whether the EU and its member countries will make adjustments to facilitate cross-border e-discovery in order to ensure that their citizens do not suffer draconian sanctions in the context of U.S. litigation.

The ramifications of the new foreign data privacy laws are quite broad. Even in the absence of threatened litigation, clients must consider carefully the country in which data will be stored and how their decisions in this regard will be important in the event of future litigation in the U.S. Parties that are considering initiating litigation must consider whether they will be able, if they bring suit, to reconcile their discovery obligations under U.S. law on the one hand with their duties under foreign law on the other. Parties who have been drawn into litigation in the U.S. will of course need to bear in mind not only the blocking statutes and similar rules that may have limited their ability to respond to U.S. discovery demands in the past, but also the emerging data privacy laws that may further limit their ability to respond in whole or in part. And, all parties will need to consider the apparently increasing likelihood of prosecution in the event of noncompliance with applicable foreign rules. No doubt, the stakes are high on all sides, and it will be interesting to follow both the American case law and foreign legislative developments in the months and years to come. ■

Sovereign Immunity and Enforcement of Awards in the U.S. Under the New York Convention

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The enforcement of arbitration agreements and, more particularly, arbitration awards, against "foreign states" in the United States is of particular interest given the availability of the theories of alter ego, principal/agent, and veil piercing for seeking to hold a foreign state liable for an award against its agent or instrumentality. There is also the significant potential for a foreign state to have a non-immune asset in the U.S. against which to enforce a U.S. judgment recognizing a foreign arbitration award. Indeed, enforcement against the foreign state or its assets in the U.S. may well be the only way to ensure payment of an arbitration award when the foreign state can dissolve its agency or attempts at enforcement in and through the foreign state's own courts would be futile. Recent developments in the pertinent case law suggest that enforcement in this area may now be somewhat easier in certain circumstances than it has been in the past.

Background

The starting place for examination of this issue must be the U.S. Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. 1602 et seq., which states:

> Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned . . . Claims of foreign states to immunity should henceforth be decided by courts of the U.S. and of the States in the conformity with the principles set forth in this chapter.

Basis for Jurisdiction in U.S. Courts

The FSIA now "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 439 (1989). Once the allegedly immune defendant has made a *prima facie* showing that it is a "foreign state", the burden of persuasion shifts to the opposing party to show that the "foreign state" is not entitled to immunity, and thus is subject to jurisdiction, through the application of one of the exceptions to immunity enumerated in FSIA §§1605-1607.

There are several possible grounds for assuming *in personam* jurisdiction over a foreign state, in the commercial context, enumerated specifically in Section 1605 of the FSIA entitled "General Exceptions to the Jurisdictional Immunity of a Foreign State."

Waiver

Section 1605(a)(1) provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the U.S. or of the States in any case
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

A foreign state therefore waives its sovereign immunity by implication when it becomes a signatory of the New York Convention. "[W]hen a country becomes a signatory to the Convention, by the very provision of the Convention, the signatory State must have contemplated enforcement actions in other signatory States." *Seetransport Wiking Trader Schiffarhtsgellschaft MBH & Co. v. Navimpex Centrala Navala ("Seetransport"),* 989 F.2d 572, 578 (2d Cir. 1993).

Seetransport involved a contract dispute between a German company ("Seetransport") and an instrumentality of the former Socialist Republic of Romania ("Navimpex"). In their contract, the parties agreed to settle disputes through arbitration before the ICC. Both parties participated in the arbitration and an award was issued in favor of Seetransport. Seetransport sought enforcement of its arbitral award in the U.S. District Court for the Southern District of New York, which granted summary judgment in favor of Seetransport.

Although the Second Circuit held the cause of action for direct enforcement of the arbitral award in *Seetransport* to be time-barred, and remanded for further proceedings on enforcement of the French decision on appeal, it held, regarding waiver:

> [W]hen Navimpex entered into a contract with Seetransport that had a provision that any disputes would be submitted to arbitration, and then participated in the arbitration in which an award was issued against it, logically, as an instrumentality or agency of the Romanian Government—a signatory to the Convention—it had to have contemplated the involvement of the courts of any of the Contracting States in an action to enforce the award. Accordingly, we conclude that under §1605(a)(1), Navimpex implicitly waived any sovereign immunity defense and, therefore, the district court had subject matter jurisdiction.
>
> ***Id.*** **at 578-579.**

THE COMMERCIAL ACTIVITY EXCEPTION

There is also an exception to jurisdictional immunity where:

> . . . the action is based upon a commercial activity carried on in the U.S. by the foreign state; or upon an act performed in the U.S. in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the U.S. in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the U.S.
>
> **28 U.S.C. § 1605(a)(2)**.

As stated in *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607, 614, 112 S.Ct. 2160, 2166, 119 L.Ed.2d 394, 405 (1992), "when a foreign government acts, not as a regulator of a market, but in a manner of a private player within it, the foreign sovereign's actions are commercial within the meaning of the FSIA."

THE ARBITRATION EXCEPTION

Finally, the FSIA was amended in 1988 specifically to address, *inter alia,* the recognition and enforcement of arbitral awards and arbitral agreements "made by the foreign state with or for the benefit of a private party to submit to arbitration." Section 1605(a)(6) provides that a foreign state will not be immune in any case before a court of the U.S.:

> (6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the U.S., or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the U.S., (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the U.S. calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a U.S. court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

Establishing a Foreign State's Liability for an Award Against Its Agency or Instrumentality

The potential for enforcement, and collection, of a foreign arbitral award issued against a foreign state's "agency or instrumentality" by way of an action in the U.S. courts against a "foreign state" is, for the reasons suggested in the introduction, of great interest. In many cases it may be the only practical means of collection.

The seminal case dealing with this issue is *First National City Bank v. Banco Para Comercio Exterior de Cuba* ("Bancec"), 462 U.S. 611, 103 S. Ct. 2591, 77 L.Ed.2d 46 (1983). The case involved an action brought by a Cuban bank, Bancec, to collect on a letter of credit issued by a U.S. bank, First National (later Citibank). Shortly after Bancec sought to collect on the letter of credit, Citibank's assets in Cuba were seized and nationalized. Citibank refused to permit the draw down and, when Bancec filed a lawsuit in the U.S., Citibank asserted a set-off for the value of its seized Cuban assets. Bancec claimed that it was a "separate juridical entity" and that the set-off was improper. The trial court found that "Bancec lacked an independent existence; and was a mere arm of the Cuban Government . . ." and its "alter ego." It permitted the set-off and dismissed Bancec's complaint. The Court of Appeals for the Second Circuit reversed, stating that "as a general matter courts [of the U.S.] would respect the independent identity of a foreign state's instrumentality."

Justice O'Connor cautioned that "[f]reely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against a sovereign …" 77 L. Ed.2d at 58. Thus, "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such."

Having stated the "presumption," however, the court then stated it may be rebutted and therefore:

> . . . an incorporated entity–described by Chief Judge Marshall as "an artificial being, invisible, intangible, and existing only in contemplation of law"—is not to be regarded as legally separate from its owners in all circumstances. Thus, where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be liable for the actions of the other. . . . In addition, our cases have long recognized "the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." . . . In particular, the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies. [citations omitted].
>
> **77 L. Ed.2d at 60.**

The court warned that its decision was the application of "internationally recognized equitable principles to avoid injustice" and created "no mechanical formula for determining the circumstances under which the normally separate judicial status of a government instrumentality is to be disregarded."

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Sovereign Immunity and Enforcement of Awards (continued)

Accordingly, the various circuit courts (Courts of Appeals) of the U.S. have been left to develop the "formula" in cases seeking to hold the foreign state liable for an award against its agent or instrumentality. The development of that rule is beyond the scope of this newsletter. However, it is worth noting for present purposes that the Second Circuit Court of Appeals (before which many commercially significant matters are heard) has recently removed a substantial hurdle to enforcement against foreign states. Specifically, that court had previously required a showing that the alleged alter ego have jurisdictional contacts with the U.S. As discussed below, however, it has recently abandoned that requirement.

Due Process is No Longer Required for FSIA Award Enforcement in the Second Circuit

In *Frontera Resources Azerbaijan Corp. v. State Oil Co. Of The Azerbaijan Republic,*[1] a dispute arose from an agreement pursuant to which Frontera had developed and managed oil deposits in Azerbaijan for the state-owned oil company, SOCAR. SOCAR seized Frontera's oil and refused to pay for previously delivered oil. Frontera was awarded approximately $1.24 million by a Swedish arbitral tribunal.

Frontera sought to confirm the award in the New York courts under the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards). The district court dismissed the action for lack of personal jurisdiction on the basis that SOCAR had insufficient contacts with the U.S. to meet the "due process" clause's requirements for hauling it into court here. The Constitution's due process clause states that "no person shall be . . . deprived of life, liberty or property without due process of law." This has been applied, by case law, to mean that a defendant if "not present within the territory of the forum … have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

The district court questioned whether due process protections applied to state-owned entitles but was constrained to decide that they did based on Second Circuit precedent holding that a foreign state is a "person," within the meaning of the clause. Accordingly, the action was dismissed for lack of personal jurisdiction.

On appeal, Frontera contended that: (1) personal jurisdiction is not needed for a court to confirm a foreign arbitral award under the Convention, and (2) the Second Circuit's decision should be overruled because due process protections should not apply to foreign states or their instrumentalities. Frontera also claimed it should have been allowed jurisdictional discovery.

SOCAR conceded that the FSIA provided the statutory basis for the court's jurisdiction (§ 1608(a)) but argued that the district court correctly decided that it had insufficient contacts with the U.S.

Frontera, in challenging the district court's jurisdictional ruling, argued that because the Convention's seven enumerated grounds for refusing to enforce an award did not include a jurisdictional requirement the district court wrongly imposed a personal jurisdiction or *quasi in rem* jurisdictional requirement for recognition. The Second Circuit acknowledged that it had "previously avoided deciding" whether either jurisdictional basis was required to confirm an award under the Convention but noted that three other circuits had so ruled. Accordingly, the court ruled that the lower court had not erred in requiring jurisdiction over either SOCAR or its property as a prerequisite to confirmation but then considered this may have led to the court to provide an "unwarranted place in its analysis" to the due process clause.

A FOREIGN SOVEREIGN IS NOT A "PERSON"

In reviewing its earlier decisions finding that a foreign state and its agents and instrumentalities were "persons" protected by the due process clause, the court considered the Supreme Court's ruling in *Republic of Argentina v. Wellover* (1992) that cited its earlier decision that individual states of the U.S. are not "persons" to ask if the "states of the Union have no rights under the due process clause, why should foreign states?" The court could find no good reason why foreign nations should be in a more favored position. The Second Circuit therefore ruled that foreign states are not entitled to due process clause protections and that the lower court "understandably," erred in following its prior precedent—which it overruled. Accordingly, if SOCAR was an agent of the Azerbaijani state within the meaning of the Bancec framework for disregarding presumptions of corporate separateness, it would not be entitled to Constitutional protections denied to a State. If, however, it could be considered to have a separate and independent juridical status then, presumably, it would be entitled to due process protections.

The court remanded that issue to the district court to determine if SOCAR is an agent of Azerbaijan and, *if not,* entitled to due process protections. The court upheld the district court's denial of discovery of SOCAR's jurisdictional contacts with the U.S.; therefore, if the lower court rules that SOCAR is entitled to due process protections then, presumably, the action will be dismissed. The Court declined to rule on SOCAR's *forum non conveniens* argument, which it stated could be raised again on remand.

The decision is an important development under the Convention: "minimum contacts" would not appear to be needed to confirm an award where there is a *prima facie* case that a state agency is so dominated by the sovereign that it should not be recognized to have a separate "juridical" status.

Conclusion

Despite potential pitfalls, enforcement actions in the U.S. under the New York Convention offer meaningful remedies "[i]n a modern world where foreign state enterprises are every day participants in commercial activities" but neither they nor their governmental owner will acknowledge their commercial liabilities. The *Frontera* decision is significant, and provides litigants greater opportunities for enforcement of foreign arbitral awards against foreign states. ■

1. 582 F3d. 393 (2d Cir. 2009).

Application of Foreign Law in U.S. Federal Courts

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Foreign law may govern the determination of some or all issues in litigation in the United States. Foreign law may apply by virtue of a contractual choice of law provision or a judicial choice of law analysis, or on some other basis. In proceedings before U.S. federal courts, Fed. R. Civ. Proc. 44.1 controls both the manner in which assertions regarding the applicability of foreign law are to be raised and the manner in which foreign law is to be proven. That rule reads as follows:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

As may be readily apparent, this generally stated rule leaves substantial discretion in the hands of federal judges. Accordingly, an understanding of how the rule has been applied in practice is important, especially if one is facing federal court litigation in which foreign law may apply.

Notice

As stated in Rule 44.1, "[a] party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice." Yet nothing in the rule defines which pleadings should include such notice or offers any insight into what forms of written notice might be deemed reasonable. Thus, interpretation has been left to the courts, which have determined that reasonable written notice "may come at any time sufficient to give the court and the defendants adequate notice of the need to research the foreign rules.[1]

In applying this standard, federal courts have considered (1) the stage that the case had reached at the time of notice, (2) the reason proffered by the party for any failure to give earlier notice, and (3) the importance to the case as a whole of the issue of foreign law sought to be raised. The inquiry is necessarily case specific, and adequate notice has been found where notice was provided in motion papers, objections to discovery, and even on appeal. Certainly, as a practical matter, the sooner notice can be provided the better if one wishes to avoid a claim of unfair surprise from one's adversary.

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Determination of Foreign Law

The court has broad discretion to determine foreign law, and thus "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence."

The determination of foreign law can be made at a pre-trial hearing, a motion for summary judgment or at trial. And, as aids to determination of foreign law, federal courts have allowed the introduction of judicial decisions, statutes and codes, law review articles, and foreign legal treatises. Some courts have also found that a foreign sovereign's views regarding its own laws are persuasive, even when the foreign sovereign is a party to the action.

Expert Witnesses

Although the procedure for presenting proof of the applicable foreign law is varied, the most common source of proof of foreign law is the testimony of expert witnesses. Experts can present their testimony in person, by deposition or through affidavits. Most commonly, foreign law experts are practitioners licensed by the foreign country, law professors knowledgeable with respect to the foreign law, and nationals of the country whose law is arguably applicable. Rule 44.1, in conjunction with the Federal Rules of Evidence governing experts generally, provides the court great latitude over admissibility of expert testimony.

Some courts have found that practitioners of foreign law are the most qualified to serve as experts. This is especially so where questions relate to matters of practice as opposed to substantive legal issues. As an example, in a case where the court had to determine whether the Indian legal system was adequate to handle a complex personal injury litigation, plaintiff submitted the opinion of a law school professor with impeccable credentials concerning his knowledge of the Indian legal system, while defendant submitted the opinions of two attorneys admitted to practice law in India. The court viewed "[the professor's] opinions concerning the Indian legal system, its judiciary and bar as far less persuasive than those of [the attorneys], each of whom has been admitted to practice in India for over 40 years."[2]

The choice of an expert will inevitably be determined on a case by case basis. In making the determination with respect to which expert or experts to present, a party may conclude that the best way of educating the court is to engage in an exercise of comparative law. In this connection, it would be important to demonstrate the similarities, as well as the differences, between the foreign law at issue and law of the U.S. where the action is pending. An American law professor familiar with the pertinent foreign law may be the expert best able to convey to the court the similarities and differences between the substantive foreign law and the corresponding U.S. law. On the other hand, a practitioner of the foreign law would likely possess practical experience and knowledge of the foreign legal system, which would allow him or her to provide insights that most law professors could not offer. Accordingly, to assist the court in determining the law of the foreign country it may be appropriate to offer the testimony of multiple experts, each with a different background but all offering complementary viewpoints.

The Court's Inquiry

Some U.S. federal appellate courts have adopted the view that it is the court's duty to ascertain the applicable foreign law, and have found that "federal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities."[3] Following that directive, one district court found that the affidavits submitted by the parties' foreign law experts were inadequate and conducted its own research into the foreign law. The Court of Appeals agreed with the district court and urged both trial and appellate courts to research and analyze foreign law independently. However, although the Court of Appeals approved of the district court's initiative, it concluded that the district court should have demanded a more complete presentation by the parties or should have conducted a more in-depth inquiry into the foreign law.[4] Along similar lines, and as part of its endeavor independently to determine foreign law, the district court may appoint a special master to determine the applicable foreign law.

Other federal appellate courts have concluded that although federal courts are empowered to determine foreign law on its own, they are not obligated to do so. Under this approach, if the parties fail to prove the applicable foreign law, the court could apply the forum's law. However, at least where the parties agree that foreign law applies, the court will most likely conduct its own analysis of the applicable foreign

law or instruct the parties to submit more complete submissions, rather than rejecting the applicability of foreign law altogether. It is most likely that a court would apply the forum's law only when the parties completely fail to raise the issue of foreign law; when no information or insufficient information has been obtained on the foreign law; or the court finds that the foreign law is unsettled.

Appeals

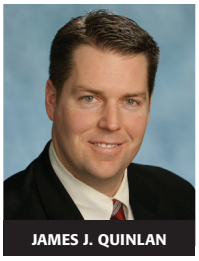
A district court's determination of an issue of foreign law is treated as a ruling on a question of law, not fact, and, therefore, no deference is given to the district court's determination of foreign law. Accordingly, an appellate court may consider information not available to or considered by the district court, and may even conduct its own inquiry into the applicable foreign law.

Conclusion

Parties to federal court litigation in the U.S. would be well-advised to move quickly to notify opponents as soon as possible when it appears that an issue of foreign law may arise, lest they be barred from presenting evidence of the pertinent foreign law. In addition, parties should consider carefully the best manner of proving foreign law to the court's satisfaction, including introduction of the testimony of multiple experts where appropriate. Parties must bear in mind that federal judges are free to consider evidence of foreign law gleaned from their own inquiries and need not base their findings of foreign law on the evidence provided by the parties. Therefore, parties who wish to have meaningful input into the determination of applicable foreign law should be prepared to provide detailed and credible evidence. Failure to do so invites the court to reach its own conclusions. ■

1. *Hodson v. A. H. Robins Co.,* 528 F. Supp. 809, 824 (E.D. Va. 1981), *aff'd,* 715 F.2d 142 (4th Cir. 1983), *abrogated on other grounds, Van Cauwenberghe v. Biard,* 486 U.S. 517 (1988); *see also Northrop Grumman Ship Sys. v. Ministry of Def.,* 2009 U.S. App. LEXIS 15260 (5th Cir. 2009); *Thyssen Steel Co. v. M/V Kavo Yerakas,* 911 F. Supp. 263, 266 (S.D. Tex. 1996) ("The rule is not intended to be a strict time bar to parties attempting to raise a choice of law question.")
2. *Union Carbide Corporation Gas Plant Disaster at Bhopal,* 634 F.Supp. 842 (S.D.N.Y. 1986). Although this case does not apply Rule 44.1, it is instructive insofar as it confirms that in some circumstances practitioners may provide more useful expert testimony than academics.
3. *Haywin Textile Products, Inc. v. Int'l Finance Investment and Commerce Bank Ltd.,* 137 F.Supp.2d 431, 435 (S.D.N.Y. 2001) (*quoting Curtis v. Beatrice Foods, Co.,* 481 F.Supp. 1275, 1285 (S.D.N.Y. 1980) affirmed, 633 F.2d 203 (2d Cir. 1980).
4. *See Twohy v. First National Bank of Chicago,* 758 F.2d 1185 (7th Cir. 1985).

S. 1606–The Foreign Manufacturers Legal Accountability Act of 2009: Congress's Attempt to Haul Foreign Manufacturers Before U.S. Courts



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Introduction

Currently pending before the Senate is a bipartisan Bill, S. 1606, that, if passed, would make it substantially easier for American litigants to sue non-domiciled foreign manufacturers (for the purpose of this article, "foreign manufacturers") of products sold in the United States. Although consideration of the Bill has thus far taken a backseat to healthcare reform, manufacturers will want to monitor developments going forward, in particular whether S. 1606 emerges from the Senate Finance Committee in 2010.

The Origin of S. 1606

On May 19, 2009, Senator Whitehouse presided over a Hearing of the Subcommittee on Administrative Oversight and the Courts of the Senate Judiciary Committee entitled, "Leveling the Playing Field and Protecting Americans: Holding Foreign Manufacturers Accountable." During the hearing, the members of the panel unanimously testified that American litigants using U.S. courts face significant obstacles when seeking to redress harms allegedly caused by the products of foreign manufacturers (foreign companies not domiciled in the United States). The panel identified four distinct obstacles: (1) product identification, (2) service of process, (3) obtaining personal jurisdiction, and (4) enforcing judgments against foreign entities abroad.

With respect to product identification, the panel noted that U.S. laws are generally lax and do not adequately require identification of products' origin; hence, the generic label "made in [country X]." American litigants are therefore forced to spend time and money trying to identify the foreign company responsible for manufacturing a defective product.

With respect to service of process, the U.S. Constitution requires that all defendants be put on notice through the proper service of legal papers which, the panel testified, can be difficult and expensive to effect abroad. Specifically, American litigants generally must effect service upon foreign companies in their native countries via treaties, which require cumbersome and time-consuming procedures. For example, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Convention") governs the manner in which American litigants must serve companies domiciled within the borders of most of the United States' major trading partners, and

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service pursuant to the Hague Convention can take nine months or more and can cost thousands of dollars.

With respect to personal jurisdiction, the panel described how yet another U.S. constitutional requirement impedes American litigants' efforts to sue foreign corporations. Under the due process clause of the 14th Amendment to the Constitution, a defendant cannot be sued in the U.S. unless it has "minimum contacts" with a particular jurisdiction within the U.S. and unless exercise of jurisdiction would not offend "traditional notions of fair play and substantial justice." Since 1987, U.S. courts have been guided by the *Asahi* case[1], which generally requires a certain minimum level of purposeful activity by the foreign entity directed at the U.S. forum, and limits the exercise of personal jurisdiction over foreign defendants, even where minimum contacts exist, if exercise of jurisdiction would be fundamentally unfair under the circumstances. The panel noted that lack of personal jurisdiction is regularly raised as a defense by foreign corporations that have been sued in U.S. courts, and that jurisdictional disputes lead to increased costs for plaintiffs, as well as delays and strains on judicial resources.

As to enforceability of judgments, the panel noted that while U.S. courts regularly enforce foreign judgments against American entities, reciprocity is often lacking in foreign countries. Moreover, foreign corporations often structure assets so that judgments obtained in the U.S. cannot be enforced in the foreign country.

Because these four hurdles make it difficult to bring a claim or enforce a judgment against a foreign manufacturer, American litigants often pursue only domestic defendants, even if the domestic defendants' share of liability is minor in relation to that of a foreign manufacturer in the chain of distribution. Accordingly, the panel members suggested that Congress enact legislation to help ensure that foreign manufacturers can be held accountable for products that allegedly cause harm in the U.S.

How S. 1606 Would Work

S. 1606, by its terms, is "a bill to require foreign manufacturers of products imported into the United States to establish registered agents in the United States who are authorized to accept service of process against such manufacturers and for other purposes." By requiring foreign manufacturers to appoint registered agents, the Bill would significantly lessen the burden upon U.S. litigants in connection with service of process. Notably, this requirement would obviate the need for American litigants to utilize the Hague Convention to effect service upon entities domiciled in foreign countries. Yet S. 1606 would not violate the Hague Convention, because that treaty governs only the service of process abroad within the territory of a foreign country, and not service (such as service upon a registered agent) within the U.S.

In addition, S. 1606 specifically requires that a foreign manufacturer's registered agent be located in a state in which the company has a "substantial connection to the importation, distribution or sale of [its] products. . . ." Thus, S. 1606 tackles the concerns addressed in the *Asahi* decision (see above) by seeking to ensure that the "purposeful activity" standard for exercise of jurisdiction will be satisfied in respect of any suit initiated by service upon a statutorily appointed registered agent. Indeed, the effect of the Bill is that a foreign corporation will be deemed to have consented to exercise personal jurisdiction over it upon appointment of a registered agent pursuant to the statute's terms.

From a technical standpoint, the Bill targets foreign manufacturers of "covered products," which include: (1) drugs, devices and cosmetics as defined by the Federal Food, Drug, and Cosmetic Act; (2) biological products as defined in Section 351(i) of the Public Health Service Act; (3) consumer products as defined by section 3(a) of the Consumer Product Safety Act; (4) chemical substances as defined by section 3 of the Toxic Substances Control Act; and (5) pesticides as defined by section 2 of the Federal Insecticide, Fungicide, and Rodenticide Act.

The Bill expressly requires the head of each "applicable agency" (defined in the Act), including the Food and Drug Administration, the Consumer Product Safety Commission, and the Environmental Protection Agency, to ensure that all foreign corporations that import and distribute covered products in commerce register an agent for acceptance of service within 180 days of the passage of the Act. After this time period elapses, it would be illegal for any unregistered foreign company to import a covered product into the U.S. for distribution in commerce. S. 1606 directs the Secretary for Homeland Security to prescribe regulations to enforce this prohibition. The Bill also requires the Secretary of Commerce to work with the other agency heads to create a public internet registry of the registered companies. While the Bill does not specifically delve into actual product identification requirements, the aforementioned agencies could promulgate rules that require registering foreign manufacturers to list the products that each imports into the U.S.

"Product" Exemptions

Section 5(a)(3) of the Bill provides an exemption for manufacturers that import covered products of a minimum value or quantity; the relevant agency head is charged with determining minimum values and quantities of covered products.

Additionally exempted, at least for the time being, are agricultural products. However, the Bill requires the Secretary of Agriculture and the Commissioner of the Food and Drug Administration to complete a joint feasibility study and report for Congress's review concerning the advisability of requiring foreign producers of foods distributed in commerce in the U.S. to appoint registered agents.

Judgment Enforcement?

One issue not addressed by S. 1606 is the recoverability of judgments. A suggestion that Congress require foreign manufacturers to maintain product liability insurance never materialized in S. 1606. Nonetheless, obstacles to recoverability of judgments may dissipate to some extent should there be an improvement of reciprocity between foreign court systems and those of the U.S. As the panel noted, U.S. courts regularly enforce foreign judgments against American entities. Indeed, the Court of the Appeals for the Ninth Circuit recently entered an Order enforcing a Chinese judgment for over three million dollars against a U.S. helicopter manufacturer, arising out of the crash of one of its helicopters in China.[2] Such decisions are surely noticed by foreign courts and may be leveraged upon by American litigants and politicians demanding reciprocity for judgments issued by U.S. courts. An additional consideration is that, with the resources saved through elimination of product identification investigations, and the streamlining of procedures relating to service of process and personal jurisdiction, American litigants will have significantly more time and money to pursue judgments against foreign companies after a case is won on its merits.

Conclusion

S. 1606 has now been "in committee" for over five months with no action. With the current Senate schedule, it may be difficult to find time on the Senate floor to address S. 1606 on a stand-alone basis in 2010. However, because the Bill does have bipartisan support, it may be possible for the Bill to be added, in the form of an amendment, to another appropriate piece of legislation that is being considered on the Senate floor. Ultimately then, S. 1606's success may depend on Senator Whitehouse's ability to find a suitable piece of proposed legislation to "manufacture" the necessary votes to turn this Bill into law. ■

1. *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102 (1987).
2. *Hubei Gezhouda Sanlian Industrial Co., Ltd. v. Robinson Helicopter Company, Inc.,* 2009 WL 2190187 (9th Cir. 2009) (unpublished).

A Boost for Alternative Dispute Resolution in Hong Kong

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Civil Justice Reform

On April 2, 2009, Hong Kong implemented a Civil Justice Reform ("CJR") that applies to civil proceedings of the High Court and the District Court. The underlying objectives of the CJR are stated in Rule 1 of Order 1A of the Rules of the High Court, Cap. 4A:

(a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to civil proceedings before the Court;
(b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;
(c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
(d) to ensure fairness between the parties;
(e) to facilitate the settlement of disputes; and
(f) to ensure that the resources of the Court are distributed fairly.

The purpose of civil litigation is to resolve disputes. Toward this end, the courts have an active duty to manage cases, and part of this duty is to encourage the parties to consider the use of Alternative Dispute Resolution ("ADR") procedures. Thus, mediation, being a common mode of ADR, is encouraged by the courts to further the underlying objectives of the CJR.

Practice Direction on Mediation

The parties and their legal representatives must assist the Court in discharging its duty to resolve disputes, and the duty to cooperate toward mediated settlement of disputes is now set forth in para. 1 of the Practice Direction on Mediation ("PD31"), which came into effect on January 1, 2010. This new Practice Direction—the main points of which are noted below—reflects a trend in Hong Kong toward ADR, generally, and toward mediated dispute resolution, specifically.

In Hong Kong, mediation is a third party, neutral, assisted negotiation, aimed at reaching an amicable settlement acceptable to the parties. An impartial mediator brings the parties together in a private and confidential setting, and helps them to explore their respective needs and interests with a view of arriving at a mutually acceptable solution.

Negotiations in a mediation are privileged and conducted on a "without prejudice" basis, hence they cannot be used in any subsequent legal proceedings. The mediator does not impose a decision on the parties. Any party has the right to

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A Boost for Alternative Dispute Resolution (continued)

terminate the mediation process at any time. An agreement reached in mediation and signed by both parties is legally binding as a matter of contract. Generally, mediation is a more expeditious form of dispute resolution and less costly than litigation.

In Hong Kong, the general principle in litigation is that the losing party pays the legal costs of the winning party. Under the new Practice Direction, failing to participate in mediation can now be taken into account by the court on the question of costs (para. 4 of PD31). The court may also make an adverse costs order where a party unreasonably fails to engage in mediation even if that party wins the case. This is because it has been shown that case management has a direct bearing on the reduction or escalation of the costs of litigation.

Although the court may regret any failure to attempt mediation to resolve disputes, generally it will not make any adverse costs order against a party for unreasonable failure to engage in mediation, where the party has engaged in mediation to the minimum level of participation (para. 5(1) of PD31); or when a party has a reasonable explanation for not engaging in mediation (para. 5(2) of PD31). Active "without prejudice" settlement negotiations progressing between the parties, or active engagement in some other form of ADR to settle the dispute, may provide a reasonable explanation for not engaging in mediation.

It is expected that the need for trained mediators will soar in Hong Kong with the coming into effect of PD31. Blank Rome Solicitors has three trained mediators based in its Hong Kong office: Andrew Hart, whose LLM degree is in ADR, as well as Martin Downey and Peter Mills, both of whom have been trained mediators for over four years. ■

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