Navigating the Jurisdiction of American Courts

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Introduction

It is well known that American courts exercise extraterritorial jurisdiction over foreign persons and companies on a regular basis. This is not because the American courts apply materially different jurisdictional rules than other sovereign nations: in most nations, courts exercise jurisdiction over foreign entities where extraterritorial conduct has nontrivial intended effects in the home jurisdiction.

Rather, it is because the American system has several features that make it a very attractive venue to private claimants, both foreign and domestic. Perhaps paramount among these features are the availability of extensive documentary and testimonial discovery, claimant-friendly juries, opt-out class action litigation, and punitive or multiple damages in many cases. This has led to a substantial volume of private litigation. The sheer volume of private claims involving foreign entities means that issues of extraterritoriality are presented to American courts relatively frequently. Moreover, unlike elsewhere in the world, American courts are called upon to exercise extraterritorial jurisdiction much more frequently at the behest of private parties than at the behest of the government.

In the context of all this private litigation against foreign entities, an important trend has developed of significance to many international enterprises. Claimants increasingly are calling upon American courts to exercise extraterritorial jurisdiction over foreign companies based on so-called "alter ego" theories, even when those foreign companies have no operations in the U.S. nor had anything to do with the alleged wrongdoing. There are different flavors of alter ego theories (*e.g.*, agency, instrumentality, and allied theories) but all of them essentially involve disregarding the corporate form ("piercing the corporate veil") of a subsidiary that allegedly committed the wrongdoing and/or a subsidiary unquestionably already subject to the court's jurisdiction in the court's forum.

At the outset of a case, this alter ego proposition is often advanced in an effort to establish a court's jurisdiction over the direct or indirect foreign parent/shareholder of such a subsidiary. If and when jurisdiction is thus established, claimants will seek to impose vicarious liability on any ultimate parent company over whom jurisdiction is established. This approach can be threatening and put more than normal pressure on a foreign defendant to settle even before jurisdiction is established.

What is more, claimants generally enjoy success in persuading American courts to grant them "jurisdictional discovery," including from foreign parent corporations, to prove their alter ego theories even before it has been established that the court has personal jurisdiction over those foreign parent companies. This discovery can be extensive and include both testimony and document productions. In virtually all cases this reaches far beyond the type of discovery that would be allowed in the home country of the targeted parent company. Indeed, in many countries, such intrusive discovery, jurisdictional or otherwise, is affirmatively prohibited, most especially before jurisdiction over the defendant has been established. Yet American courts tend to disregard this reality, putting foreign corporations in a difficult position.

To some extent, American claimants seem to be seeking to bring to the United States the virtually irrebuttable presumption of parent liability for actions of subsidiaries adopted in competition cases by the European Commission, the General Court, and the European Court of Justice. In cartel cases brought by the EC, parent companies at the helm of an undertaking are presumed to have control over the acts of all subsidiary units of the undertaking and hence to be jointly and severally liable for the infringements of any subsidiaries within the undertaking.

Fortunately, U.S. courts have not gone this far. Indeed, in general, American courts demonstrate a strong respect for the limited liability of separately incorporated companies, including subsidiaries within a corporate group, at least to the extent corporate governance rules and structures are rigorously honored, and the subsidiary is adequately capitalized and not looted or otherwise treated as if it were a mere division of the parent. When it comes to liability, the majority rule in the courts of the United States is that a corporate veil should only be pierced if the subsidiary can be deemed to have no real will of its own, but rather is so dominated and controlled by a corporate parent that it is a puppet on a string.

American courts are somewhat less rigorous, however, when it comes to applying corporate separateness and veil piercing principles to the matter of extraterritorial jurisdiction. There is an annoying degree of complexity and unpredictability in the American system around the rules governing when a court can assert personal jurisdiction over a foreign parent company based on alter ego theories. This is largely because those rules vary from state to state and between federal court regions, known as "circuits." But also, American courts have a bias towards allowing discovery to determine whether a case may proceed. They seem influenced by a view that asserting "alter ego jurisdiction" is quite different than imposing "alter ego liability," even though the standards for doing both are, at least superficially, very much the same.

We have considerable experience litigating alter ego liability and jurisdiction theories. This brochure is based on that experience and intended to sensitize multinational legal departments and their outside counsel to the opportunities for foreign multinational companies to organize their affairs in such a way as to maximize the opportunity to avoid the jurisdiction of American courts. This, in turn, can help foreign parent companies avoid allowing their balance sheets to be threatened by the American legal system based on the actions of subsidiaries, be they American or non-American. A fundamental reason separately to incorporate subsidiaries in the United States is to limit liability arising out of their conduct to their own net worth and not expose affiliates to those liabilities. Yet, given the complexity of tax and corporate governance considerations, it is quite easy to lose sight of the importance of maintaining the limited liability of all corporate subsidiaries.

Personal Jurisdiction in American Courts - Background

In the United States, a court must have personal jurisdiction over a defendant to hear claims brought against it. Without personal jurisdiction, an American court cannot render judgment against a defendant. If a court finds that it does not have jurisdiction over a defendant, it must dismiss the claimant's complaint.

When a foreign enterprise acts directly within the United States and those acts come under legal scrutiny, jurisdiction will usually be found, and an American court will be empowered to sit in judgment and hear the dispute.

When a foreign enterprise acts overseas and its extraterritorial acts have intended, direct, and non-trivial economic consequences in the United States, jurisdiction typically will also be found if those overseas acts are challenged in court by a directly injured party.

There is nothing particularly remarkable about such governing jurisdictional principles; they are familiar to the legal systems of nearly all countries, including in Europe. The way for foreign companies to avoid the direct jurisdiction of American courts in such situations is to avoid undertaking conduct directly *in* the United States, and to avoid undertaking conduct *outside of* the United States that would have material intended effects within the United States. Given the global nature of commerce, the nature of global supply chains, and the ubiquity in commerce of the internet, this can be a challenge. Still, avoiding this sort of direct jurisdiction can to some extent be managed by having an organizational structure that limits activity within, and export into, the United States to certain subsidiaries (*e.g.*, just subsidiaries based in the U.S. or dedicated to export into the U.S.), and to assure that the liabilities of such subsidiaries do not spread to non-American shareholders. In principle, this is quite simple. In reality it can be a challenge if not carefully managed and supervised by the internal and external legal teams of multinational corporations.

American courts can exercise two types of personal jurisdiction over corporate defendants, both foreign and domestic: "general jurisdiction" and "specific jurisdiction."[1]

A court has *general jurisdiction* over a defendant when the defendant is "at home" in the relevant forum. Typically, a defendant is found to be "at home" where it is incorporated or where it primarily does business (such as its corporate headquarters).

[1] Courts can also exercise personal jurisdiction if a defendant consents to or waives the right to object and, in the case of an individual defendant, if the defendant is served with proper process while she or he is physically in the forum state. We do not address this issue in this paper.

A court's general jurisdiction does not depend on where the defendant's alleged unlawful conduct took place, but rather on where the defendant's business is primarily located. So long as the defendant is "at home" in the forum, the court has jurisdiction to hear claims against that defendant, regardless of where in the world the defendant's alleged unlawful conduct took place.

An American court has *specific jurisdiction* over a defendant if the plaintiff's claim "arises" within the forum where the court resides, *i.e.,* the defendant's conduct or the plaintiff's injury occurred in the relevant forum.[2] Specific jurisdiction thus only exists if there is sufficient relationship between the claim at issue (the alleged unlawful conduct or injury) and the forum in which the suit is brought. This can be the case even if the defendant is not "at home" in the forum. For example, a court might have specific jurisdiction over a defendant whose principal business is not in the forum if the defendant actively engaged in business activities (*e.g.,* advertising) in the forum that caused the claimed injury, or in business activities outside the forum (*e.g.,* contract negotiations) that predictably and substantially caused the claimed injury inside the forum (*e.g.,* executing a contract for substantial sales of a defective product in the forum).

Accordingly, a court can have specific but no general jurisdiction over a defendant, it can also have general but no specific jurisdiction over a defendant, or it can have both general and specific jurisdiction.

Basic Principles of Alter Ego Law

Claimants bringing suit in U.S. courts often name direct and indirect parent companies as defendants in cases arising out of conduct by a subsidiary, even if the parent company operates entirely outside the U.S. and was not involved in the alleged unlawful conduct. There are several reasons why this happens. For example: claimants and their counsel may seek the deepest pockets; they may wish to threaten foreign enterprises so as to extract a more favorable or earlier settlement; or it may be the case that the actor causing the alleged injury is impecunious or insolvent.

In addition to bringing suit against the subsidiary that actually committed the allegedly unlawful acts and the direct or indirect foreign parent companies, claimants will also often name as a defendant an American corporate

[2] While "forum" typically refers to the State, for some claims brought under federal laws, such as the federal antitrust laws and other claims arising under federal law, the relevant "forum" may be the United States. In these cases, the court has specific jurisdiction if the defendant's alleged conduct occurred anywhere in the United States. In some cases, furthermore, the "forum" might be a particular judicial district or circuit.

affiliate, even if it had nothing to do with the alleged unlawful conduct or injury. A claimant may do this for the purpose of increasing their chances of establishing personal jurisdiction over the foreign parent company. For example, the claimants give themselves the freedom to argue that the foreign parent/shareholder is subject to the jurisdiction of the US court both because (i) the American subsidiary, over which the court has *general* jurisdiction, is an alter ego for the foreign parent, and/or (ii) the subsidiary that committed the allegedly unlawful acts, over which the court has *specific* jurisdiction, is an alter ego of the foreign parent.

Claimants thus can and do seek "two bites at the apple" in establishing personal jurisdiction over the foreign parent company based on alter ego theories. In addition, they broaden and enhance their jurisdictional discovery opportunities by having a basis to request discovery not only of the allegedly culpable foreign subsidiary and the foreign parent company, but also of the American affiliate.

Whether courts are looking at alter ego *jurisdiction*, or alter ego *liability*, the main considerations are somewhat similar sounding. In each case courts are examining the question of corporate separateness; corporate governance; and intra-corporate conduct. In so doing, they tend to look at a variety of factors, without there being much clarity as to how these factors should be weighted. These factors tend to include, but may not be limited to, matters such as the following:

- Does the parent company own 100% of the subsidiary?
- Is the subsidiary financially dependent on the parent in all or most respects?
- Do the parent and subsidiary companies share the same employees, corporate officers, or board members?
- Do the parent and subsidiary engage in the same business, utilizing the same assets?
- Are the parent and subsidiary completing the same jobs for downstream customers?
- Do the parent and subsidiary have the same address and phone lines?
- Does the subsidiary in various ways hold itself out so as to appear to be the parent corporation (stationery, business cards, advertising and marketing materials)?
- Do the parent and subsidiary maintain genuinely separate books, tax returns, bank accounts and financial statements?
- Where the parent provides various services (legal, accounting, other) to

the subsidiary, are these properly charged back to the subsidiary on an arm's-length basis that is objectively reasonable and consistent with normal corporate practice?

- Do parent and subsidiary maintain a unified marketing image?
- Has the parent integrated its sales and distribution systems with its subsidiaries so that they are not particularly distinguishable?
- Does the parent treat the subsidiary's funds as its own?
- Do employees of the parent substantially control the business of the subsidiary in various respects (*e.g.,* sales, pricing, dictating supply arrangements, transferring the subsidiary's employees at will in or out of other business units)?

Additionally, in some jurisdictions, courts look to the vague and subjective question of whether respecting the corporate separateness of a subsidiary would "… produce injustices or fraud," although this is a corporate veil piercing consideration that typically bears on ultimate shareholder *liability*, and not so much on alter ego *jurisdiction*.

While none of these factors is necessarily dispositive, the important factors are those that tend to suggest a consistent disregard for corporate formalities and structure such that the direct or indirect shareholder can readily be seen as treating the subsidiary as part of its own operation, very much like a division.

The American legal system writ large is not altogether consistent in applying these factors due to the federal system, which divides jurisdictions into 50 separate states; multiple federal judicial trial court "districts;" and thirteen separate federal appellate "circuits." What is more, in practice, U.S. courts have considerable discretion in how much proof they require from a plaintiff to establish a prima facie case of personal jurisdiction, including alter ego jurisdiction. This can lead to divergence and unpredictability in outcomes. For example, in cases where defendants have contested personal jurisdiction but when a court decides the issue of personal jurisdiction based only on briefs and declarations, some courts have held that the plaintiff has a "relatively slight" burden to establish a prima facie case of alter ego jurisdiction. On the other hand, where courts have decided or agreed to order jurisdictional discovery, or have a hearing about whether there is alter ego jurisdiction, courts typically require the plaintiff to prove jurisdiction by a preponderance of the evidence.

All of this means that in some parts of the United States, and under certain circumstances, it may be relatively easy for claimants to persuade an American court to exercise jurisdiction over a wholly foreign enterprise and impose material litigation burdens on them, even if those parent companies have no operations in the U.S. and had nothing to do with the alleged unlawful conduct.

This reality, in turn, presents the following risk: if a subsidiary is found to be an alter ego for the parent company for purposes of establishing personal jurisdiction over the parent company, it can become an uphill battle for the defendant parent company to later convince the same court that the subsidiary is *not* an alter ego of the parent company for *liability* purposes (such that the subsidiary's corporate veil would be pierced and the parent would be liable for any unlawful conduct by the subsidiary). In other words, a finding of alter ego jurisdiction can make it directionally more difficult to prevent a finding of alter ego liability.

It therefore is advisable to expend considerable thought to a strategy and tactics to deal with alter ego jurisdiction and liability issues at the front end of any litigation. Positions taken at the beginning of the litigation, when the facts may be poorly understood or developed, can have significant positive or negative effects down the road. For example, even apart from alter ego theories, there is always some danger of waiving one's right to contest jurisdiction, and so a foreign corporation cannot call into play the jurisdiction of the court in order to prove the absence of the asserted jurisdiction. This is a counterintuitive and subtle point, but one of much importance. Better yet, anticipating and managing the issue *before* there is *any* litigation can represent an ounce of prevention that can be worth millions later.

Managing the Risk of Alter Ego Jurisdiction and Liability

Given the risk and exposure to a parent company's balance sheet arising out of alter ego principles, whether jurisdictional or liability-based, much can be gained and considerable risk avoided, by carefully and properly managing corporate structure, governance, and "day-to-day operations" of a multinational enterprise. Management of these issues is almost certainly a responsibility of the legal department of any large multinational corporation. And it may not be easy, since there will be pressures from the tax department and those responsible for organizational governance to create management structures and responsibilities that cut across corporate and national lines in a variety of ways. And frequent corporate reorganizations seem to be more the rule than not. Each such re-organization can lead to unintended alter ego jurisdictional exposure. Public securities filings and annual reports can also be sources of risk in this area.

Central to managing the problem is taking reasonable steps to establish the structure of a corporate group and managing the conduct of the corporate enterprise. At bottom, this means taking steps to avoid even *the appearance* that a parent improperly manages or micromanages the affairs of its subsidiaries that do business in or export into the United States. Generally, the less influence a parent has over its subsidiaries' day-to-day operations, the less likely a court will find a prima facie case of alter ego jurisdiction. But this does not mean that a parent company cannot manage the affairs of subsidiaries. It just means that management must take place as much as reasonably possible through proper structural channels utilizing governing structures established by subsidiary's charter and by-laws, as well as those governing structures established by the parent's charter and bylaws. At the risk of some oversimplification, the more closely a corporate subsidiary resembles a mere division of the parent company, the higher the risk that it will be held to be one and the same as its direct or indirect parent corporations.

What does that mean in practice? Our experience in the area suggests there are several steps a multinational corporation operating through subsidiaries in various countries can take to minimize their exposure to claims of alter ego jurisdiction and alter ego liability. We list some such steps below. None of these steps guarantee perfect success, nor do we mean to suggest that one must take each step to avoid a finding of alter ego jurisdiction. Rather, the points below present a menu of management/legal options, some combination of which can help undercut and/or cut short alter ego claims, both in the jurisdictional and liability context.

Maintaining Corporate Formalities and Separateness

1. Consider establishing and following traditional corporate governance arrangements for each group company, such as establishing a board of directors and having them meet periodically, in accordance with bylaws, to adopt decisions, set policies etc.

2. Where a parent corporation wishes to set policies for the subsidiary corporation, consider doing so through properly designated representatives on the Board of Directors of the subsidiary, or in the

case of an LLC, through properly designated representatives interacting with the Executive Board or the Chief Executive Officer of the subsidiary.

3. Consider maintaining separate financial records and bank accounts for each group company, and filing separate tax returns for each group company. While it may not be necessary to utilize separate independent accounting firms for the preparation of financial statements and tax returns, utilizing separate firms can be useful in demonstrating corporate separateness.

4. Consider demonstrating in the financial records that, notwithstanding any cash pooling or similar arrangements, each group company is sufficiently capitalized to pay its debts and operate its business.

5. Care should be taken in extracting money from a subsidiary. Try to have monies flowing from a subsidiary to a parent company paid and authorized by the subsidiary's management in a way that makes it clear that the funds are not being "taken" by a parent. Often, shareholders are expected to be paid a dividend, and to be reimbursed for services provided. Other extractions of funds from subsidiary may be susceptible to being characterized as "looting," and treating the assets of the subsidiary as one's own.

6. Consider taking visible measures to demonstrate the separateness of subsidiaries' operations, including establishing separate physical facilities, separate phone lines and directories, and even separate email domains (*e.g.,* @companyUSA.com for U.S. subsidiary vs. @companyEUR.com for European subsidiary/parent or @company.com for parent).

7. Group-wide marketing slogans or branding taglines, such as "one company, worldwide," are very common and standing alone ought not create an inference of alter ego. But claimants will point to such slogans and branding opportunistically to argue that the parent and its subsidiaries are just one big enterprise. Therefore, when engaging in such global branding, consider making clear in internal and externally-facing documents that this simply is meant to establish a global brand, representing a consistent quality and image based on high-level principles and best practices. Consider having public documents about corporate branding reviewed by counsel with an eye towards corporate separateness, as well as other material considerations.

Demonstrating Autonomy

8. If a foreign enterprise is managed using cross-group committees or business divisions, which is very common, then try to make sure that public and internal documents reflect that such committees and business divisions manage group matters at a high level, but that management of day-to-day operations of individual group companies remains squarely within the autonomy of each group company.

9. Consider memorializing the autonomy of group subsidiaries, in both subsidiary and corporate/group policies, guidelines, handbooks, protocols, best practices etc. Try to avoid the appearance that group companies are mere sales or marketing arms of the parent company.

   For example, consider explaining expressly in such materials how, notwithstanding high-level group/corporate policies and guidelines, subsidiaries retain and exercise substantial discretion to deviate from such policies and guidelines in their day-to-day operations and to run such day-to-day operations relatively independently, including but not limited to their go-to-market and sales strategy, customer relations, payroll and employee hiring etc.

   Extensive communications from parent to subsidiary regarding sales, marketing, advertising, pricing and the like may give claimants ammunition to argue that the activities of the subsidiary are being carried out by a direct or indirect parent. Try to manage these communications so that they do not appear to be unalterable granular directives. Indeed, consider having policies on such topics emanate from senior management of the subsidiary after senior management has been given guidance by duly authorized representatives of the shareholder or parent.

10. Try to avoid characterizations of group governance structures that could be read as suggesting that the parent company "controls the daily affairs" of group companies. Avoiding such characterizations is especially important in publicly filed or available documents, such as securities filings, annual reports, quarterly financials, press releases or analyst calls etc.

Demonstrating Arm's Length Relationships

11. Consider taking affirmative steps to demonstrate that any significant intra-group supply, distribution or other non-SG&A services (*e.g.* from parent to subsidiary or vice versa)

are provided on an arm's-length basis, such as executing supply or distribution agreements, or expressly reflecting the service in transfer pricing policy and practice manuals etc.

Managing Group-Internal Communication Lines

12. Communications from the parent company to the group subsidiaries are inevitable and indeed necessary to manage a conglomerate well. But consider setting up a structure or "chain of command" through which most communications and guidance from the parent to the subsidiary flow. A more streamlined approach, if practicable, will help avoid frequent and widespread communications between numerous employees of the parent company and subsidiaries, which could otherwise create the impression that the parent company has its hands in much of the subsidiary's operations.

13. Further, for best effect in defending against alter ego claims, that chain of command preferably follows the legal entity structure. So, for example, in a scenario where there is an ultimate parent company, interim holding company, and a subsidiary, consider having the communications flow from a designated executive body at the parent, to the proper executive body at the Holding company, down to the appropriate executive body at the subsidiary. When various employees at the parent directly communicate with (and provide guidance or directives to) various employees of the subsidiary, there could develop the impression that the corporate entities are simply being ignored.

Jurisdictional Discovery in the United States

We have navigated foreign clients through jurisdictional discovery, which is worth discussing for at least two reasons. *First,* it is a somewhat unusual and counterintuitive procedure by which American courts presume to make demands on foreign enterprises over whom they have not established any jurisdiction at all. They do so pursuant to a set of "Federal Rules of Civil Procedure" (or state equivalents) that are unfamiliar to foreign courts, foreign legal systems, and many foreign companies. *Second,* the material discussed above can come into play quite quickly and importantly in the course and context of "jurisdictional discovery." A discussion of that process thus will illustrate how our recommendations above may help mitigate against the risk of alter ego jurisdiction.

When a defendant parent company moves to dismiss the claimant's case for lack of personal jurisdiction, but the court believes that the claimant's alter ego allegations are plausible or establish a prima facie case, it will often permit the claimant "jurisdictional discovery" to gather evidence to support its jurisdictional allegations. This jurisdictional discovery may not be narrowly tailored strictly to alter ego matters, but will likely also give the claimant opportunity to prove pertinent direct contacts between the foreign parent company and the United States. That means the non-U.S. defendant(s) will have to produce internal documents, witnesses for depositions, and responses to interrogatories on a relatively wide variety of topics.

Such jurisdictional discovery can become quite sprawling and unusually burdensome. It can extend to all defendants within the group, including the allegedly culpable subsidiary, any American subsidiary and the foreign parent company or shareholder. The American rules of civil procedure require parties to produce any non-privileged material "within the custody, possession or control" of the defendants that is reasonably likely to lead to admissible evidence relating to the claims or defenses, including personal jurisdiction. Claimants will nearly always seek to expand supposedly "limited" *jurisdictional* discovery into discovery touching upon the merits as well, arguing that jurisdictional alter ego issues overlap with *liability* alter ego issues. This is a non-trivial argument, and will often lead to intense disputes about the proper magnitude and scope of jurisdictional discovery. Managing these issues can be a delicate matter since, as discussed above, a defendant does not want to lose a jurisdictional argument on some basis that tends to damage materially its alter ego liability argument.

All of this also raises questions of international comity. Should American courts not show more restraint in imposing draconian and uniquely American discovery processes overseas in such circumstances? Probably so, but American judges tend not to exhibit great restraint in most cases. Now, and for the foreseeable future, American courts have and will continue to have broad discretion to allow intrusive jurisdictional discovery overseas without much fear of adverse appellate review. This means parent companies often are going to have to deal with the burdens, costs, distraction and general offensiveness of such discovery, which can take months or years and millions of dollars.

Given the potentially significant costs, burdens and downside risks of jurisdictional discovery to the merits of the case, we list some strategies foreign enterprises can consider in anticipating or dealing with jurisdictional discovery on alter ego grounds or otherwise.

- If other judicial proceedings in the same dispute are already pending in another country, strongly consider seeking dismissal on the grounds of *forum non conveniens* before any jurisdictional discovery proceeds.

- Take the position that discovery around alter ego theories as much as possible should be limited to the subsidiaries that are defendants in the case as opposed to the parent company. After all, the subsidiary defendants' documents ought to show whether they are dominated or controlled by the parent company or, rather, run their daily affairs relatively autonomously. Discovery of their files is narrower than discovery of the foreign parent company's files, because the foreign parent company presumably manages dozens if not hundreds of different subsidiaries around the world, most of which have nothing to do with the case. A helpful analogy to illustrate that point is to describe the subsidiary defendants as the "narrow end of the funnel," whereas the foreign parent company represents the "wide end of the funnel."

- Identify early on discrete sets or repositories of documents that can be dispositive in establishing that the subsidiary is/was *not* an alter ego of the parent but operated autonomously, such as minutes of board and executive meetings or documents showing that the subsidiary kept its own financial records, tax filings, assets, phone lines, addresses etc. Proactive production of such files may help shortcut plaintiffs broader less focused discovery demands (though there is no guarantee it will).

- If the court is inclined to permit jurisdictional discovery, it is vital to persuade the court expressly to acknowledge in its order that such jurisdictional discovery must be much more limited than regular discovery, given that jurisdiction over the defendant has not yet been established. Consider asking this court to limit discovery to a certain number of weeks or months; a small number of depositions; a small number of documents custodians. Also consider asking the court to make the claimant pay some or all of the cost for extraterritorial discovery.

- Consider carefully whether to allow the claimant's lawyers to come to your home country, or whether you wish to have them pay for witnesses to be brought to the United States or some other country where depositions could take place. Make sure that counsel for the claimant is bound not to serve any papers on any witnesses brought to the United States for jurisdictional discovery.

– Alert the court to the American Supreme Court's admonitions in its *Aerospatiale* decision[3] that it must take particular care to protect foreign defendants against undue burdens of overseas discovery, including by ensuring that the parties use less intrusive discovery methods, such as interrogatories instead of depositions or broad document requests. While district courts have often largely disregarded that case, it is nonetheless a potentially powerful tool.

– Guard closely against, and challenge, any jurisdictional discovery requests by the plaintiff that are disguised fishing expeditions into the merits of the case. In general, we have found it more advantageous to force a court to rule against foreign defendants than to concede material jurisdictional discovery matters without a fight. But, of course, one has to pick one's battles sensibly based on the circumstances.

– Force the plaintiff to focus on relevant time periods, which are different for general and specific jurisdiction claims. For general jurisdiction claims, discovery ought to be limited to the time period leading up to the filing of the complaint, while discovery for specific jurisdiction claims should be confined to the time period around the alleged unlawful conduct.

– If you have strong witnesses at the subsidiaries who can testify to their autonomy over daily affairs, push the plaintiff to take their depositions early on to try to preempt deeper and more burdensome overseas discovery.

– If, in the course of jurisdictional discovery, you are dealing with a somewhat ambiguous factual record, consider retaining an expert in corporate governance who can explain to the court why the facts that the claimants highlight to support their alter ego theories actually are perfectly consistent with common governance practices by international conglomerates and therefore do not support alter ego findings.

[3] *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa,* 482 U.S. 522 (1987).

Conclusion

A foreign enterprise drawn into the American legal system based on contestable claims of jurisdiction should take great care in setting out a strategically sound course of action early. There are many pitfalls and traps that can be avoided with advance planning along the lines set forth here. Of course, ideally, one avoids being drawn into the American legal system altogether. And doubtless a principal objective is to contain any liabilities that arise in the United States to any U.S. subsidiaries (or subsidiaries dedicated to export into the U.S.). Seeking to achieve this goal can very much be worth the relatively modest cost of implementing policies and governance practices designed to limit the ability of the American legal system to impair the balance sheet of the parent enterprise. As the American saying goes: "an ounce of prevention is worth a pound of cure." We hope this brochure has provided some useful suggestions towards that objective.

We would be pleased to provide such counsel as might be desirable on this important topic.

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