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The expansion of transatlantic litigation

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As many corporate executives, directors, and general counsel will have noted, the rapid expansion of foreign trade and investment over the past decade has brought with it an increase in international litigation and arbitration. As business pursuits take place across borders with increasing frequency, business disputes and governmental regulatory scrutiny have become increasingly concerned with activities occurring in foreign jurisdictions. This article briefly explores two important ways in which international litigation has expanded due to changes in the legal and regulatory landscape in the US and Europe. As discussed below, these factors have led to transatlantic litigation and investigations that will continue to be critical areas of legal risk for international businesses and businesspeople.

Increasing international criminal and regulatory investigations

US government agencies such as the Department of Justice (DoJ) and the Securities and Exchange Commission (SEC) have contributed to the expansion of transatlantic litigation due to their increased emphasis in recent years on extraterritorial criminal and regulatory enforcement of laws and rules prohibiting corruption, securities fraud, and accounting violations. Consider, for example, the Foreign Corrupt Practices Act (FCPA), a US statute that prohibits bribery of foreign officials and requires businesses to maintain accurate records and adequate systems of internal accounting controls. The FCPA provides for both financial penalties and imprisonment, and applies broadly to US individuals and companies, foreign companies with securities traded in the US, and any person, including foreign individuals and companies, acting in furtherance of bribery of a foreign official while in the US.

There has been a dramatic increase in FCPA investigations and enforcement efforts by the DoJ and SEC in recent years — in 2007, these agencies commenced 38 new FCPA cases against US and foreign companies and individuals, compared to 15 in 2006 and seven in 2002. Highly-publicized FCPA cases have continued to produce record penalties and fines, reaching over $40 million in some cases. Individuals have increasingly become targets of investigations and prosecutions, with upper-level management receiving increased scrutiny in parallel with investigations of their companies and several recent high-profile prosecutions of corporate executives. US government agencies also often request companies to conduct extensive internal investigations, frequently by outside counsel, and to report their findings, in order to demonstrate a willingness to cooperate that could result in more lenient treatment at the discretion of government officials.

The increasingly active FCPA enforcement climate in the US has been accompanied by a concomitant increase in anti-corruption efforts elsewhere, particularly as a result of the 1999 OECD Anti-Bribery Convention, which requires parties to implement foreign anti-bribery laws. Thus, for example, companies or individuals facing FCPA inquiries from US government agencies may also undergo foreign bribery investigations from authorities in Europe or elsewhere based on similar legislation. Indeed, even where authorities in one country decline to continue or pursue an investigation, authorities elsewhere may become aware of the same matter and elect to open an investigation of it.

The increasing use of international enforcement measures (including for crimes beyond the realm of corruption, such as white-collar fraud) has also been assisted in some cases against individuals by the streamlining of extradition procedures. The UK Extradition Act 2003, for example, lowered the threshold of proof for extradition from the UK to selected countries including the US, removing the requirement that prosecutors show a *prima facie* case before the accused could be extradited. This has facilitated the extradition to the US of UK individuals accused of business crimes, as happened in the highly

publicized *Bermingham* case (the NatWest Three case), where the UK extradited three investment bankers with UK nationality to the US to face charges of fraud connected to the affairs of Enron. The three bankers pled guilty to wire fraud in Texas and were sentenced in early 2008 to over three years in prison. The recent *Norris* case in the UK also emphasized that even in cases where the underlying charged crime was not a crime in the UK and thus could not form the basis for extradition (in this case, price fixing, which was a crime under US antitrust law but was not criminalized in the UK until after the alleged conduct had occurred), a UK national could nevertheless be extradited for obstruction of justice connected with impeding the investigation of the alleged US crime.

Enhanced access to US courts and procedures for foreign litigants

Another factor contributing to a rise in transatlantic litigation in recent years has been the increased willingness of US courts to provide access for foreign litigants to pursue cases with significant extraterritorial connections. One example of this trend has been in the area of securities class action lawsuits, where institutional and individual shareholders bring a collective action for damages against a company and its management for violations of securities laws or other actions that allegedly damaged the value of the company.

In recent cases, US federal courts have permitted European plaintiffs (along with US plaintiffs) to bring securities cases against European corporate defendants using US class action procedures — procedures that do not yet have a close equivalent in Europe and that can afford distinct advantages to large numbers of potential plaintiffs who might otherwise be unable to bring claims. For example, in May 2007, the US District Court for the Southern District of New York certified a class of plaintiffs including numerous European individuals and institutions in a securities lawsuit against the French company Vivendi, holding among other things that the US class action procedure was (from a US perspective) a superior method of litigation management for French, English, and Dutch plaintiffs and that the integration of American and European securities markets precluded the need to create subclasses of shareholders. Likewise, in October 2007, the same court held that a UK pension fund was the "most adequate plaintiff" to represent the interests of shareholders in a securities fraud class action against the UK pharmaceutical company GlaxoSmithKline, and therefore appointed the fund as lead plaintiff in the US lawsuit.

Another example of this trend has been in the area of human rights lawsuits for civil damages under the Alien Tort Statute (ATS). This US statute, which was part of the Judiciary Act of 1789, provides that "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," and has been used as a vehicle for foreign plaintiffs to bring claims in US courts for human rights violations occurring anywhere in the world, often against foreign national defendants, including more recently foreign corporations. Despite the US Supreme Court's 2004 opinion in *Sosa v Alvarez-Machain*, which expressed ambivalence about the use of this statute in certain circumstances, lower federal courts have continued to keep many ATS cases against foreign companies alive, as the US Court of Appeals for the Second Circuit did in its 2007 opinion in *Khulumani v Barclay National Bank*, when it reinstated a lawsuit by individual South African plaintiffs against numerous multinational corporations for complicity in perpetuating the regime of apartheid in South Africa.

Conclusion

The expansion of transatlantic litigation in these areas poses significant new risks for businesses and businesspeople with international operations. Parties operating particularly in regions with a high risk of corruption or similar charges, including parts of Africa, the Middle East, and Asia, should pay close attention to internal accounting controls and practices and should seek expert guidance to minimize the risk of non-compliance and potential governmental inquiries and penalties in an international regulatory environment with increased scrutiny and, in some cases, streamlined extradition procedures. Seeking guidance to analyze and strengthen internal controls also reduces the risk of exposure to transnational securities and other financial investigations emanating from US authorities.

Likewise, executives and directors of non-US companies should also consider that potential litigants are increasingly availing themselves of US procedures and laws by bringing claims against those companies in US courts under certain circumstances including shareholder class actions and human rights litigation. These claims are often accompanied by parallel litigation in European or Asian fora, highlighting the importance of obtaining expert advice regarding the role and limits of international law, the coordination of litigation strategy and tactics across jurisdictions, and the selection of appropriate local representation in those jurisdictions.