UNITED STATES

Maura K Monaghan
Debevoise & Plimpton, New York
mkmonaghan@debevoise.com

Jacob W Stahl
Debevoise & Plimpton, New York
jwstahl@debevoise.com

Kristin L Bryan
Debevoise & Plimpton
New York
klbryan@debevoise.com

To file or not to file: the forum non conveniens dilemma

Introduction

Over the past two decades there has been a proliferation of litigation in the United States by overseas plaintiffs who are seeking redress for harm allegedly committed outside the United States. Such plaintiffs often – although not always – claim jurisdiction under the Alien Tort Statute of 1789 (ATS).[1] In response, defendants often file a forum non conveniens motion in which they are required to demonstrate that the lawsuit can be heard in an adequate alternative forum. While such motions are often successful, they can also be paradigmatic examples of the old adage 'be careful what you ask for because you might just get it.' In several high-profile cases, companies prevailed on forum non conveniens claims in the US, only

to be subjected to punishing verdicts overseas in courts that the defendants themselves previously argued were appropriate – making it difficult (if not impossible) to argue later to a US court that the foreign court's damages award should not be enforced because it violated the defendant's due process rights.[2] How should a company decide whether it is preferable to litigate in the US or overseas? As we will discuss below, answering this question requires an analysis of a number of factors related to the foreign jurisdiction including: the substantive law; rules of procedure; procedures (if any) for consolidation of similar cases; and whether the foreign court respects the rule of law and/or will be hostile to a US corporation.

Factors supporting use of forum non conveniens motions

There are several valid considerations supporting use of a forum non conveniens motion when a corporate defendant is involved in foreign mass tort litigation. For the following reasons, US corporations find the following arguments appealing – particularly when they are considered without comparison to the potential outcome in a foreign jurisdiction:

US tort law is perceived as more favourable to plaintiffs than foreign jurisdictions

Tort law in the US is generally viewed as more favourable to plaintiffs compared to the laws of other countries. Plaintiffs bringing tort claims in the US may rely on theories of strict liability and prevail on lesser standards of proof than the standards that would be required in foreign courts. Notwithstanding this fact, in limited instances the law of foreign jurisdictions may be more plaintiff-friendly than US law. In Australia, for example, there is no class action certification requirement and no requirement that common issues in a class action predominate over individual issues.

Plaintiffs proceeding in US courts usually obtain higher damages awards

Typical damages awarded in tort cases in the US are significantly larger than in other countries. US plaintiffs may also seek punitive damages, a remedy either not available or heavily circumscribed in many foreign jurisdictions. Canada, for example, has a judicial cap on the amount of non-pecuniary damages available for personal injuries caused by negligence. Several European countries prohibit punitive damages in most civil cases on the basis that such awards are contrary to public policy.

Plaintiffs prefer the strategic advantages of US procedural rules

Compared to other countries, US procedural rules better equip plaintiffs to control litigation. The Federal Rules of Civil Procedure permit a plaintiff in the US to take depositions, seek the production of large quantities of documents at a defendant's expense, and engage in other forms of fact-finding. If a case goes to trial, plaintiffs in the US also usually find that they have a greater input in the proceedings compared to foreign jurisdictions. This is particularly true compared to those countries that utilise inquisitorial systems of justice where judges exercise a high degree of control over fact-finding and trials.

The US has no 'loser pays' rule

In the US a plaintiff is ordinarily not required to pay a defendant's legal costs if the plaintiff fails to prevail with a claim. This contrasts with the 'loser pays' system utilised in jurisdictions such as Canada and England. Accordingly, commencing a lawsuit in the US for tort claims of questionable merit is seen as involving less downside risk for plaintiffs compared to foreign jurisdictions which have a 'loser pays' rule.

When forum non conveniens motions go awry

Although there are often compelling reasons for a corporate defendant to file a forum non conveniens motion when facing a lawsuit brought by a foreign plaintiff alleging harm in a foreign country, recent high profile cases illustrate the hazards associated with such motions when the alternative forum turns out to be inhospitable to the defendant. The defendant can then be in the unenviable position of arguing that an award should not be enforced due to due process violations when the defendant itself previously argued that the foreign forum was adequate.

Chevron's litigation in Ecuador

In 1993, a putative class of Ecuadorian citizens filed a lawsuit in the US District Court for the Southern District of New York against Texaco, Inc, a subsidiary of Chevron Corp, seeking billions of dollars in damages as a result of alleged environmental contamination that they contended was caused by Texaco's petroleum exploration and drilling activities. Chevron endorsed Ecuador as an adequate alternative forum, had the action dismissed on forum non conveniens, and the Second Circuit Court of Appeals affirmed.[3] In 2003, however, a group of Ecuadorian plaintiffs (including many of the original plaintiffs) brought a lawsuit against Chevron and Texaco in Ecuador. In 2011, the Ecuadorian court awarded the plaintiffs damages exceeding US$18bn. Recently revealed evidence indicates that the plaintiffs' Ecuadorian lawyers secretly ghost wrote the court's entire opinion after agreeing to pay Ecuadorian judges money from the eventual recovery.

Chevron filed a civil Racketeer Influenced and Corrupt Organizations Act (RICO) lawsuit in the Southern District of New York in 2011 against Steven Donziger, the lead attorney for the plaintiffs in the Ecuador litigation, alleging that Donziger executed a scheme to extort and defraud Chevron by bringing a baseless lawsuit against the company. A six-week bench trial concluded in November 2013 and the parties are awaiting a ruling from Judge Lewis Kaplan.[4]

DBCT South American litigation

Dibromochloropropane (DBCP) is a pesticide that was used globally by companies to grow bananas and other produce in the 1970s and 1980s. The first DBCP lawsuit was brought in the mid-1990s when thousands of plaintiffs from 23 countries filed personal injury DBCP lawsuits in Texas against various corporate defendants, including Dole and Dow. These actions were dismissed on forum non conveniens grounds.[5] In response to the dismissal, in 2000 the Nicaraguan National Assembly passed a law to facilitate the filing of DBCP lawsuits against specific defendants, including Dole and Dow. As of 2009, Nicaraguan courts have awarded over US$2bn in damages to DBCP plaintiffs in actions commenced under this law. In one instance, 32 plaintiffs who claimed to be sterile after DBCP exposure, but nevertheless continued to father children after their alleged exposure, collectively recovered US$21m in a lawsuit brought against Dole in Nicaragua.[6]

Considerations when filing a forum non conveniens motion

Given the fact that foreign plaintiffs frequently refile a lawsuit in their home jurisdiction after a forum non conveniens dismissal (as happened to Chevron and Dole), a corporate defendant should engage in a cost-benefit analysis that focuses upon whether it is clearly advantageous to subject itself to the laws and procedures of a foreign jurisdiction before moving to dismiss a foreign lawsuit. Such a cost-benefit analysis should include not only the factors discussed above but also the following issues:

The law of the alternative foreign forum

First and foremost, a defendant should examine the relevant foreign jurisdiction's law before exposing itself to litigation in a foreign forum through filing of a forum non conveniens motion. A defendant must have a comprehensive understanding of the substantive law of the foreign jurisdiction implicated by a plaintiff's lawsuit, because it may be significantly different from US law.

Additionally, the procedural rules of foreign courts may result in proceedings that are lengthier than in the United States. For example, some foreign jurisdictions do not permit summary judgment, a vehicle that defence counsel frequently use in the US to seek dismissal of meritless cases prior to trial. Additionally, the appellate process can take significantly longer in some jurisdictions than the US, making it more difficult to reach finality. Many foreign jurisdictions lack the equivalent of MDL (multidistrict) litigation; absent class actions, it is difficult for a defendant to buy global peace.

Any assessment of the law of a foreign jurisdiction should also include an analysis of the amount of damages that could be awarded against a defendant in a proceeding outside of the US. Foreign courts may permit consideration of factors, such as the profitability of a corporate defendant, in awarding damages that US courts do not permit to be included in the calculation of compensatory damages.

Fact-finding issues in the foreign jurisdiction

Second, the amount of time required to conduct discovery and the mounting of a defence in foreign courts can also diverge from the norm in the US. In complex cases, a defendant could find itself significantly disadvantaged by a foreign forum with quick discovery turnaround times, a problem compounded by a defendant's lack of familiarity of the foreign law. Moreover, the discovery afforded to defendants in foreign jurisdictions tends to be significantly less generous than those of US courts. For example, in some instances, depositions (if they are allowed) can only be conducted by judges, rather than the parties' attorneys.

Foreign jurisdictions can also take dramatically different approaches in regards to the taking of expert testimony. There is no guarantee that a corporate defendant will be able to present the testimony of its experts when mounting a defence. If the foreign court permits expert testimony, it may permit a plaintiff to introduce evidence that is not supported by reliable scientific data and would not be admissible in US courts.

Judicial impartiality and the availability of a jury trial in the foreign forum

Third, as Chevron learned, a corporate defendant in foreign courts can also face a great deal of risk over the ultimate arbitrator of the case. Jury trials in civil litigation are not common in foreign jurisdictions, in contrast to the US. Moreover, a corporate defendant may find that foreign plaintiffs have a 'home court' advantage where they reside. Courts in some jurisdictions – particularly those without independent judiciaries – may be highly influenced by local plaintiffs and their lawyers and/or hostile to US corporations. A defendant must also consider that over the potentially lengthy trajectory of overseas litigation, there may be geopolitical developments that significantly alter the likelihood that the defendant will be able to prevail.

Limitation on class actions and the consolidation of similar claims in the foreign jurisdiction

Fourth, for cases involving many potential plaintiffs, a corporate defendant may be surprised to discover that many foreign jurisdictions do not allow for the consolidation of claims as is done in the US with multidistrict litigation and class actions. Because each plaintiff may have to file suit in his/her locale, a defendant may be faced with the unsavoury prospect of defending similar actions before multiple tribunals. This increases a defendant's litigation costs, reduces efficiency, and also exposes a defendant to the possibility of inconsistent judgments.

Conclusion

Although a corporate defendant may be drawn to the appeal of a forum non conveniens motion to dismiss actions brought by foreign plaintiffs for conduct occurring outside the US, the progression of Chevron's litigation in Ecuador and DBCP litigation in Nicaragua suggest that companies need to undertake a nuanced assessment. Forum non conveniens motions implicate a host of complicated issues early in litigation, particularly that a defendant must commit to the adequacy of an alternative forum. Prudence therefore dictates that a defendant should carefully balance the possibility of a large tort award in the US versus the risks of litigating in a foreign forum.

Notes

1 28 USC. 1350.
2 See, eg, Aguinda v Texaco, Inc., 142 F Supp 2d 534, 539 (SDNY 2001) (agreeing with Texaco that Ecuador was an adequate alternative forum).
3 Aguinda v Texaco, Inc., 142 F Supp 2d 534, 554 (SDNY 2001); Aguinda v Texaco, Inc., 303 F 3d 470, 480 (2d Cir 2002).
4 Chevron Corp. v Donziger et al., No 1:11-cv-00691-LAK-JCF (SDNY).
5 Delgado v Shell Oil Co., 890 F Supp 1324, 1362 (SD Tex 1995) (finding that foreign jurisdictions provided adequate remedies for foreign plaintiffs).
6 Osorio et al. v Dole Food Co., et al., 665 F Supp 2d 1307, 1319-20 (SD Fla 2009).