the global voice of the legal profession

International Litigation News

Newsletter of the International Bar Association Legal Practice Division

SEPTEMBER 2013

also uncertainties relating to how the rules governing DBA arrangements will be applied, for instance, it appears as though the solicitor is required to deduct the costs deemed to be payable by the defendant, even if these costs are ultimately never paid. Amendments to the rules are said to be in the pipeline and will be released for consultation in the autumn.

Cost budgeting

This is a fundamental change and goes to the heart of the reforms, which is to bring down costs in all cases. Jackson wants judges to case manage actively, although it remains to be seen how much judges themselves have the appetite to do this.

From 1 April 2013, all parties other than litigants in person and litigants in cases worth over £2m in the Commercial Court and Chancery Division must file and exchange budgets. Any party that fails to do so will be entitled only to the applicable court fees. These budgets may then be agreed between the parties. If they are not agreed, the court will review the budget and make any appropriate revisions. However, it should be noted that the Court of Appeal held in the recent case of *Troy Foods Ltd v Manton* [2013] EWCA Civ 615 that costs budgets could not be assumed to be reasonable simply because they were approved. Note also that CPR 44.3 (2)(a) states that the court may disallow or reduce costs that are disproportionate in amount even if they were reasonably or necessarily incurred. This is expected to be a fractious area of the new rules and two Court of Appeal judges have been appointed to deal with appeals arising from costs disputes.

Conclusion

Although it will take time to assess the effects of these legislative proposals, it is undoubtedly a very different legal landscape facing competition lawyers in the UK today. Although the Jackson Reforms may pose challenges and the bedding-down process may be difficult, the new opt-out regime and the widening of the CAT's remit provide significant opportunities for claimants to recover losses that were simply not practically or procedurally possible before.

Evidentiary disclosures in parallel criminal and civil cases in the United States

UNITED STATES OF AMERICA

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Corporations outside the United States have assumed traditionally that they can rely on international treaties to protect them from the document production regime governing civil lawsuits filed in the US. However, these guarantees are no longer effective as non-US companies have found themselves subject to the jurisdiction of US courts. One primary example of this conflict between international treaty protections and the more liberal US discovery system arises when non-US companies agree to cooperate with US regulatory and prosecutorial agencies, such as the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ), and send documents to the US for production to these governmental entities. The production of foreign documents to these US agencies generally results in the loss of these international treaty protections and, as a result, allows private civil litigants to gain access to the foreign company documents. However, in the current atmosphere where companies have little option but to cooperate with US government inquiries, non-US companies generally cooperate with the US government and, thus, risk the possible disclosure of their documents to private parties. US court decisions in recent years highlight the tension between cooperation with the US governmental authorities and the disclosure of documents to private litigants in the US court system, in addition to suggesting some possible ways to minimise the risks of exposing foreign documents to US discovery.

Since the mid-2000s, US regulators have increased their focus on investigating

corporate crime. As discussed below, these standards have made it almost impossible for any company, regardless of where it is based, to resist an investigation by US government authorities or risk being branded by the US government with the proverbial scarlet letter of being uncooperative.

In early 2003, then-US Deputy Attorney General Larry Thompson issued his now-famous memorandum entitled, Principles of Federal Prosecution of Business Organizations. This document, better known as the Thompson Memorandum, purported to set forth a 'revised set of principles' designed, in part, to increase 'emphasis on scrutiny of the authenticity of a corporation's cooperation' in deciding whether to file criminal charges against the company. The Thompson Memorandum sets forth a number of factors to be considered in whether a corporation should be charged with a crime, including 'the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation.' In defining what that cooperation means, the Department of Justice has adopted an expansive view and expects companies to leave no stone unturned, even though, as the Thompson Memorandum itself concedes, 'records and personnel may be spread throughout the United States or even among several countries'. In 2008, then-US Deputy Attorney General Mark Filip released an updated memorandum on corporate cooperation credit, which repeated many of the themes from the Thompson Memorandum, except that waiver of attorney-client privilege is no longer a relevant factor in evaluating corporate cooperation.

The Securities and Exchange Commission has followed this same approach in recent years and has rewarded those companies that have cooperated fully with government investigations of massive corporate fraud. One example of this approach was seen in the SEC investigation of Royal Ahold, the Dutch supermarket conglomerate. In February 2003, Ahold announced a series of significant financial irregularities in its operations in the US and elsewhere, resulting in a substantial decline in its stock price.

Despite the extent of the fraud at Ahold, the company escaped the wrath of the SEC without paying any penalty. In October 2004, the SEC announced that it was filing a civil fraud complaint against Ahold, yet was settling this action at the same time without Ahold admitting any liability or paying any fine. In agreeing to such a settlement, the SEC specifically acknowledged that it 'did not seek a penalty from Ahold because of, among other reasons, the company's extensive cooperation with the Commission's investigation', including Ahold's decision to provide the SEC with 'the internal investigation reports and the supporting information and to waive the attorney-client privilege. The SEC's message was plain: cooperate and the company can avoid a serious penalty, even for a massive corporate fraud.

While Ahold certainly gained a 'clear corporate advantage' from cooperating with the US government investigations, its cooperation resulted in a number of significant consequences in connection with the inevitable US securities class action lawsuit; at the time, Royal Ahold traded on the US exchanges, but it since has delisted in the US. Two decisions in the Ahold case demonstrate that the broad and unlimited corporate cooperation now expected by the SEC and DOJ may result in the disclosure of a company's documents and other material to private litigants in the US.

In the first Ahold decision of interest, the US securities class action plaintiffs filed a motion seeking the US court's approval to obtain early disclosure of certain documents prior to the court's decision on the dismissal of the lawsuit. Specifically, the plaintiffs sought permission to obtain copies of all documents, including internal investigation reports, previously provided by Ahold to the SEC, DOJ and other governmental authorities in the US, as well as various governmental agencies in the Netherlands. In March 2004, the US federal court granted the plaintiffs' request as to Ahold, noting that, 'the burden of producing the materials should be slight, considering that the defendants have previously produced them to other entities'. As a result of this decision, Ahold was required to produce to the US plaintiffs in excess of ten million pages of documents, including copies of its internal investigation reports, which had been produced previously to governmental authorities in the US and the Netherlands.

The second Ahold decision of note further expanded the scope of the production of Ahold's materials to the US plaintiffs. During the course of the various internal investigations undertaken at Ahold's behest, Ahold's outside counsel conducted numerous witness interviews and prepared more than

800 interview memoranda, some of which were produced to the SEC and DOJ as part of Ahold's extensive cooperation with the US government. Subsequently, the US class action plaintiffs sought copies of all of these interview memoranda and argued that they were entitled to them because they previously had been produced to the SEC and DOJ. In a September 2005 decision, the US federal court agreed with the plaintiffs, noting that, 'to the extent that Royal Ahold offensively has disclosed information pertaining to its internal investigation in order to improve its position with investors, financial institutions, and the regulatory agencies, it also implicitly has waived its right to assert the work product privilege as to the underlying memoranda supporting its disclosures'.

These two Ahold decisions are instructive in demonstrating that the 'clear corporate advantage' to Ahold of cooperating with the US government during the course of its investigation certainly came with a price for Ahold: the early disclosure of millions of pages of documents to the US class action plaintiffs, in addition to the disclosure of internal investigation reports, including attorney memoranda of witness interviews.

Interestingly, neither of the *Royal Ahold* decisions discussed above mentions The Hague Convention or Taking of Evidence Abroad in Civil or Commercial Matters, or the fact that Ahold is a Dutch company and that many of the documents at issue were located outside the US. However, this comes as no real surprise, as the protections offered by The Hague Convention have diminished in the US courts over the last 40 years.

The Hague Convention has been adopted by nearly 60 countries and, according to the US State Department, '[its] primary purpose is to reconcile different, often conflictive, discovery procedures in civil and common law countries'. However, the intent of The Hague Convention is far from the reality on the ground. For example, many signatories to The Hague Convention have declared specifically that they will not permit pre-trial discovery of documents, as in the US system. However, this explicit carve-out from The Hague Convention has been ignored by the US courts, which have concluded that the procedures set forth in The Hague Convention are not mandatory for litigants who may choose the more liberal US discovery rules to obtain documents from non-US entities.

The primacy of the US discovery rules over The Hague Convention is nothing new. More than 40 years ago, a New York judge in the *Laker Airways, Ltd v Pan American World Airways* case recognised the 'fundamental conflict' between The Hague Convention and the US discovery rules, yet concluded that, '[a] finding that the production of documents is precluded by foreign law does not conclude a discovery dispute. A United States court has the power to order any party within its jurisdiction to testify or produce documents regardless of a foreign sovereign's use to the contrary.' In fact, the *Laker Airways* case went even further and concluded that '[i]t is not *ipso facto* a defense to a discovery request that the law of a foreign country may prohibit production or disclosure' and, 'violation of foreign law is not necessarily a valid defense to a lawfully issued subpoena for documents'.

The tension described above between the protections, albeit weakened, offered by The Hague Convention and the increased risk of disclosure of documents resulting from corporate cooperation with the US government, as occurred in Ahold, is addressed in the case of *Ratliff v Davis, Polk & Wardwell*. In *Ratliff*, the SEC was investigating alleged accounting improprieties at Baan Company NV, a software company based in the Netherlands. As part of that inquiry, the SEC sought documents and testimony from Baan's Dutch auditor, Ernst & Young Accountants (E&Y). Subsequently, E&Y cooperated through its US counsel, the Davis Polk law firm in New York, and voluntarily provided documents and testimony to the SEC. At the conclusion of the SEC investigation, E&Y settled the SEC investigation with a penalty payment in June 2002.

At the same time as the SEC investigation, a securities fraud action was pending in the US against Baan and several other defendants. During the course of discovery in the US case, the plaintiffs sought copies of the documents produced by E&Y to the SEC by multiple avenues, including from the SEC itself and from E&Y in the Netherlands via The Hague Convention, but both efforts proved unsuccessful. The plaintiffs also served a subpoena on the Davis Polk firm and sought copies of E&Y documents previously produced to the SEC that were still in the law firm's possession. The law firm refused to produce these documents and the plaintiffs filed a motion to compel such production. Ultimately, the US court, and later the US appellate court, granted the plaintiffs motion, noting that, 'documents held by an attorney

in the United States on behalf of a foreign client, absent privilege, are as susceptible to subpoenas as those stored in a warehouse within the district court's jurisdiction'.

The key tipping point in the *Ratliff* decision was the fact that, even if the documents at issue had been privileged when E&Y sent them from the Netherlands to its attorneys in New York, the US courts concluded that such protections were lost when E&Y authorised its New York law firm to send these documents to the SEC because, 'such protection does not continue when the client voluntarily discloses the documents to a third party, here a government agency'.

In sum, the *Ratliff* decision restates many earlier principles of US law, yet takes them to the next inevitable step that private US plaintiffs may obtain from a law firm in the US those documents in its possession that a non-US client authorised to be provided to US government authorities as part of its cooperation with an investigation, regardless of the so-called protections offered by The Hague Convention.

Considering the *Royal Ahold* and *Ratliff* decisions, there appear to be limited options for a non-US corporation to protect its documents from further disclosure once they have been produced to US regulatory and criminal investigators. For example, many corporations that are cooperating with the SEC and DOJ have entered into confidentiality agreements in an effort to avoid waiver of any rights in connection with documents produced to the government. In fact, this is exactly what Royal Ahold did with the US government at the time of its production of documents and internal investigation reports. However, the US court refused to enforce this confidentiality agreement or prevent the production of documents on that basis because the agreement at issue apparently provided the SEC and DOJ with 'substantial discretion' in disclosing this material to other parties. Thus, the use of confidentiality agreements with the US government does not guarantee that documents produced to government authorities will not later be made available to private litigants.

One method to reduce the risk of the disclosure of these documents to US plaintiffs can be derived from what apparently was not done in the *Ratliff* case where the New York law firm apparently retained copies of the documents even after its Dutch client had settled with the SEC. In order to avoid the possibility of a successful subpoena to the US law firm representing a non-US client, the underlying documents at issue simply can be shipped out of the country at the conclusion of the US government investigation. While such an approach may prove costly and unwieldy to the client, it certainly reduces the possibility of a private litigant in the US of obtaining these documents directly from the US law firm, as the documents are no longer located in the US. Under such circumstances, the avenues open to the US litigant are reduced and may require the use of The Hague Convention procedures to obtain these documents, which are now located exclusively outside the US.

However, there is no panacea here and no magic bullet to address the problem facing non-US corporations. Once the decision has been made to cooperate with the US government, which is extremely hard to resist in this current environment, non-US companies must recognise at the outset that their cooperation may have the unintended consequence of making their documents ultimately available to US plaintiffs and serve as fodder for private litigation in the US courts.