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International News

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Arbitration of Trust Disputes

Opportunities for Investment in the Chinese Health Care Market

The US and EU Strengthen and Harmonise Protection of Trade Secrets

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Efficiency and simplification are the key words for this year. The proposed reforms to the EU Merger Regulation are set to make merger controls more business-friendly and effective. In 2016 the United States and the European Union both adopted federal trade secret protections that harmonise state-level laws.

In China, the current trend in administrative investigations and enforcement against multinational companies is to launch follow-on investigations, which have the advantage of coming with a "roadmap" from the initial foreign investigation. The next big trend in trust disputes is likely to be the use of arbitration, which provides a number of significant advantages over court actions; and the Eleventh Circuit has finally affirmed that Section 1782, under which US district courts can allow litigants to discover certain documents does apply extraterritorially.

As the new US President's term of office commences in January, bringing with it a period of change and uncertainty, it's good to know that the legal world is shifting towards a more efficient and simplified way of thinking.

Please contact me if you have any comments on our articles or would like to discuss any of the issues raised.

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Overview of the Proposed Reforms of the EU Merger Control Regime

MÉLANIE BRUNEAU AND ANTOINE DE ROHAN CHABOT

In October 2016, the European Commission launched a public consultation to continue the process of identifying possible areas of the EU Merger Regulation suitable for refinement, improvement and simplification.

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In the past couple of years, the European Commission has decided to review and evaluate the functioning of different aspects of the EU merger control regime regulated by EU Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation), its implementing regulation and related notices and guidelines.

The process started in 2014 when the Commission adopted a White Paper titled "Towards More Effective EU Merger Control" (the White Paper), which presented the Commission's view that EU merger control worked well and that no fundamental overhaul of the system was needed. The Commission did, however, identify specific amendments to the EU Merger Regulation to make it more effective.

In the wake of the positive feedback it received during the consultation it organised following the publication of the White Paper, the Commission launched another public consultation in October 2016 on the "Evaluation of procedural and jurisdictional aspects of EU merger control", through which it is seeking feedback from stakeholders on the effectiveness of certain additional procedural and jurisdictional aspects of EU merger control. Stakeholders have until 13 January 2017 to respond. Responses can be submitted via https://ec.europa.eu/eusurvey/runner/EUMergerControlSurvey2016.

KEY PROPOSALS IN THE WHITE PAPER

Introducing a Light and Tailor Made Review of Acquisitions of Non-Controlling Minority Shareholdings That Could Harm Competition

The Commission recognised that, in some instances, acquisitions of minority shareholdings could be detrimental to competition, particularly acquisitions of competitors or vertically related companies. Competitive harm may arise, for example, from the influence acquired over a competitor's strategic decisions or access to a competitor's confidential business information.

Unlike the merger control rules in some EU Member States and countries such as Canada, Japan and the United States, the EU Merger Regulation does not allow the Commission to address competition concerns that may arise from minority shareholdings, which could, according to the Commission, constitute an enforcement gap.

For example, the Commission has prohibited the merger of Ryanair and Aer Lingus twice since 2007, as it found that the dominant position created by the merger would be harmful to the 11 million EU consumers flying annually to and from Ireland. Conversely, the Commission lacked jurisdiction to review Ryanair's near 30 per cent minority shareholding in Aer Lingus, which was subsequently reviewed by the UK Competition and Markets Authority. The UK Authority only had jurisdiction over flight routes from Ireland to the United Kingdom, and could not have reviewed the transaction in the context of the entire European Union.

As a result of this analysis, the Commission proposed in the White Paper a tailor made review system limited to certain categories of minority shareholdings. The Commission highlighted that these changes would specifically be targeted at EU-impacting transactions that give a certain degree of influence in a competitor or a vertically related company and could therefore be problematic from a competition point of view. According to the Commission, this would apply to between 20 and 30 cases per year and would leave benign transactions, notably companies' restructuring efforts or the private equity market, completely unaffected.

Making Case Referrals Between EU Member States and the European Commission More Business-Friendly and Effective

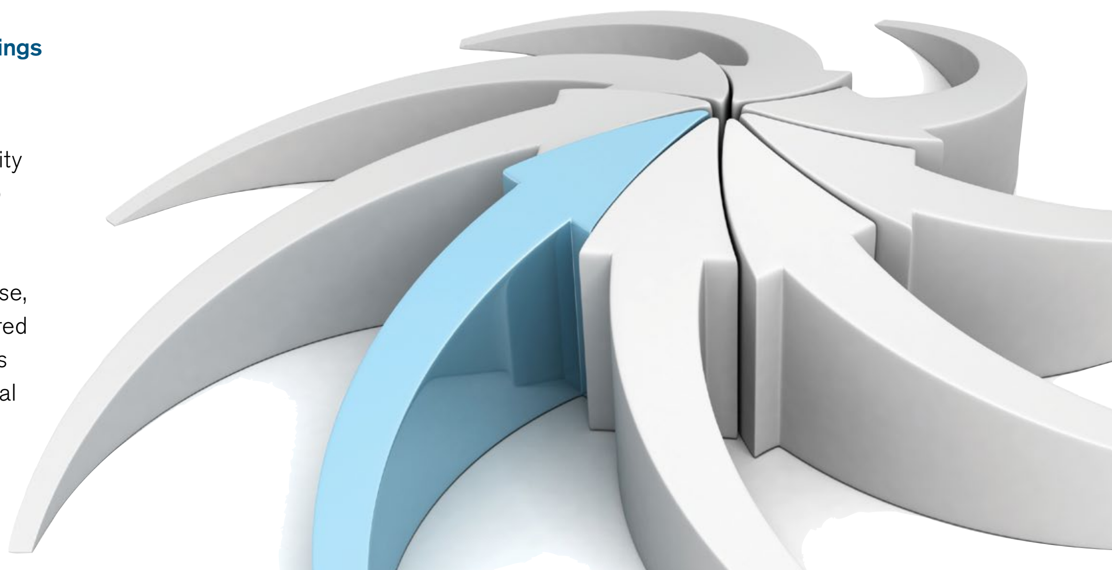
The White Paper stated the Commission's aims to reduce the administrative burden on businesses and on itself, to enhance the one-stop-shop approach, and to streamline allocation of cases to the most appropriate authority.

For pre-notification referrals to the Commission, the requirement for two separate submissions (a referral request and a subsequent notification) would be abandoned to make the process quicker and less burdensome. The Commission would have European Economic Area (EEA)-wide competence to review a transaction received *via* post-notification referral, with the aim of avoiding parallel reviews by the Commission and national competition authorities (NCAs).

Fostering Coherence and Convergence Between EU Member States

The White Paper showed an intention from the Commission to promote enhanced cooperation between itself and NCAs, as well as amongst NCAs when reviewing a merger that does not fall under the Commission's jurisdiction, in order to avoid contradictory or divergent decisions.

The Commission acknowledged the high degree of convergence already achieved, and the White Paper supported, in principle, the idea of moving towards a system where the Commission and all NCAs would apply the same substantive EU law.



> The Commission acknowledged the high degree of convergence already achieved.

Streamline and Simplify Procedures

The White Paper suggested excluding certain, non-problematic transactions from the Commission's review, such as the creation of joint ventures operating outside the EEA and those with no impact on European markets.

In addition, consideration was given to further extend the light review system based on a simple information notice to some categories of non-problematic cases currently dealt with under a simplified procedure. This would further reduce costs and administrative burdens on businesses.

THE 2014 PUBLIC CONSULTATION

Respondents to the 2014 consultation mostly agreed that the EU merger control system worked well overall and viewed favourably the White Paper's proposals in relation to the streamlining of the case referral system and the simplification of procedures.

Stakeholders were, however, more critical as regards the necessity of introducing a review of minority shareholdings, considering that

- The enforcement gap was not sufficient to call for new regulation.
- The most potentially problematic cases of minority shareholding acquisitions could be dealt with by existing rules.
- Theories of harm in relation to minority shareholdings only apply in very limited circumstances and there is not enough empirical evidence of these existing in practice.
- The proposed system would capture many more than the Commission's estimate of 20 to 30 cases per year.

THE 2016 PUBLIC CONSULTATION

According to the Commission, the 2016 consultation aims in particular to establish the effectiveness, relevance, efficiency and coherence of

- The jurisdictional thresholds set out in the EU Merger Regulation
- The simplified procedure applying to certain categories of concentrations as set out in the EU Merger Regulation, its implementing Regulation and the Commission Notice on simplified procedure
- Certain technical aspects of the procedural and investigative framework for the assessment of mergers
- The referral system as set out in the EU Merger Regulation, related provisions of its implementing regulation and the Commission notice on case referral.

Of these topics, the issue of the jurisdictional thresholds set out in the EU Merger Regulation is the most interesting as, at present, it only applies to concentrations with an EU dimension, *i.e.*, those where the undertakings concerned meet the different relevant turnover thresholds.

In the aftermath of the 2014 public consultation, a debate emerged on the effectiveness of these purely turnover-based jurisdictional thresholds. The question centred specifically on whether or not they allow the capture of all transactions that can potentially have an impact in the internal market.

This may be particularly significant for the digital economy, where services are regularly launched to build up a significant user base before a business model is determined that would result in significant revenues. Relevant business models may involve the formation of commercially valuable data inventories without generating corresponding turnover, at least in an initial period. Players in the digital economy may therefore have considerable market potential, but generate only a small turnover at the moment when jurisdiction needs to be established for EU merger control purposes. This perceived legal gap may not only concern the digital industry, but also other industry sectors, such as pharmaceuticals.

The acquisition of companies with a low turnover is likely not to be captured under the current notification requirements of the EU Merger Regulation, even in cases where the acquired company already plays a competitive role, holds commercially valuable data, or has a considerable market potential for other reasons. It has therefore been suggested that the existing turnover-based jurisdictional thresholds of the EU Merger Regulation should be complemented by additional notification requirements based on alternative criteria, such as the transaction value.

NEXT STEPS

The Commission expects to publish the responses to the 2016 public consultation in early 2017. Depending on the results of the consultation, the Commission will assess whether or not any policy and/or legislative measures are warranted.

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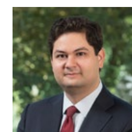

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The US and EU Strengthen and Harmonise Protection of Trade Secrets

ERIC HAGEN AND LAURA MORELLI

A knowledge-based economy depends on that knowledge being protected. Inadequate or inconsistent protection of competition-sensitive information threatens companies and industries whose greatest assets are their trade secrets, particularly in an increasingly international, digital business environment.

In 2016, governments on both sides of the Atlantic adopted measures to address the unpredictability of trade secret protection across different jurisdictions.

In the United States, where trade secret laws differ by state, the Defend Trade Secrets Act (DTSA) officially became law on 11 May 2016 and created, for the first time, a federal private civil cause of action for trade secret misappropriation. In the European Union, where Member States likewise have a patchwork of laws with varying degrees of protection, the Directive on "the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure" was adopted on 8 June 2016. The Directive seeks to harmonise the laws of Member States to provide a minimum level of protection across the European Union.

THE DEFEND TRADE SECRETS ACT

The DTSA amends the Economic Espionage Act, which, when passed 20 years ago, provided for criminal prosecution of trade secret theft. Prior to the DTSA, civil actions for trade secret misappropriation were governed solely by state law. As a result, access to federal courts was not guaranteed, even in cases involving sophisticated cross-border misappropriation.

Notably, the DTSA does not preempt state law, so parties may still pursue state law claims. Although pursuing both state and federal claims could lead to more complexity, the DTSA and the laws of the 50 states, 48 of which have adopted some form of the uniform trade secrets act (UTSA), do at least share much in common. For example, there is substantial overlap in the DTSA and UTSA definitions of "trade secret" and "misappropriation."

Likewise, DTSA remedies are similar to UTSA remedies: injunctive relief, compensatory damages (in the form of actual damages, unjust enrichment, or reasonable royalties), enhanced damages for willful and malicious misappropriation (capped at twice compensatory damages), and lawyer's fees in cases involving bad faith or willful and malicious conduct. There are, however, some notable differences.

One key (and controversial) feature of the DTSA is its *ex parte* seizure provision. This is a new remedy not available under state trade secret laws. Under the DTSA, courts, per a plaintiff's expedited, unilateral request, may order law enforcement to seize property "necessary to prevent the propagation or dissemination of the trade secret that is the subject of the

action." This procedure is intended only for emergencies to prevent or mitigate immediate and irreparable injury when less severe procedures would be ineffective. This provision requires "extraordinary circumstances" and, if abused, can result in damages against the seizing party. To that end, the movant must post a bond sufficient to cover such damages if the seizure was unwarranted.

In addition, satisfying the threshold requirements for an *ex parte* seizure is not easy. A plaintiff must prove the defendant actually possesses the misappropriated information and must identify "with reasonable particularity" the property to be seized and its location. Once seized, that property remains safeguarded by the court pending an expedited hearing on the propriety of the seizure.

> "The DTSA created a federal private civil cause of action for trade secret misappropriation."

Another important aspect of the DTSA is the inclusion of employee mobility protections similar to protections in states that reject the "inevitable disclosure" doctrine. The DTSA restricts injunctive relief that would "prevent a person from entering into an employment relationship," requiring that such relief must be "based on evidence of threatened misappropriation and not merely on the information the person knows." The DTSA also explicitly seeks to avoid conflicts with already existing state employment laws, which is an area where disputes are expected to arise, given that the DTSA is likely to be asserted against former employees.

Finally, another employee protection feature of the DTSA is the immunity provided to whistleblowers who might disclose confidential information when reporting unlawful activities to government officials or as part of an anti-retaliation lawsuit. Under this provision, employers are required to provide notice to employees of this immunity protection in any agreement governing the use of trade secrets or other confidential information. Companies should therefore review and modify their standard employment and non-disclosure agreements to bring them into compliance with the DTSA.

THE EUROPEAN TRADE SECRETS DIRECTIVE

In the European Union, Member States have different forms of protection against unlawful acquisition, use, and disclosure of trade secrets, notwithstanding some general standards on trade secrets provided by the Trade-Related Aspects of Intellectual Property Rights Agreement. The Directive goes further in harmonising civil rules in the European Union. Member States are, however, still permitted to offer more stringent protections not provided by the Directive, such as rules of criminal liability, as long as certain safeguards in the Directive are met.

The definition of a "trade secret" under the Directive is fairly similar to that under the DTSA. Under the Directive, a trade secret is information that meets three cumulative conditions: i) it is secret ii) with a commercial value iii) that has been subject to reasonable steps to be kept secret. Also similar to the DTSA is the fact that the Directive carves out whistleblower protections, allowing disclosure of trade secrets to protect the general public interest, *i.e.*, for revealing misconduct, wrongdoing or illegal activity.

As with the DTSA, the Directive addresses several aspects of remedies. Important elements include the provisional and precautionary measures that may be requested by trade secret holders: i) the cessation or prohibition of the use or disclosure of the trade secret; ii) the prohibition of the production, offering, placing on the market, use, importation, export, or storage of infringing goods; and iii) the seizure or delivery of infringing goods. These measures are revoked, or cease to have effect, if the trade secret holder fails to institute legal proceedings leading to a decision on the merits within a reasonable period. If not otherwise specified, a "reasonable period" is one that does not exceed 20 working days or 31 calendar days, whichever is longer.

Definitive measures also may be requested, including the destruction of any documents containing the trade secret, or their return to the trade secret holder, or any other appropriate corrective measures, such as the recall of the infringing goods from the market, or their destruction.

Another significant element of the Directive concerns compensatory damages, which must be calculated by taking into account the negative economic consequences, including the trade secret holder's lost profits, unfair profits made by the infringer, and other elements such as the moral prejudice caused to the trade secret holder.

Finally, whereas the prospect of losing the confidentiality of a trade secret often dissuaded trade secret holders from defending their trade secrets, the Directive adds the possibility of restricting disclosure of trade secret information to hearings with a limited number of persons, as well as making available versions of judicial decisions in which the passages containing trade secrets have been removed.

The DTSA and the Directive both recognise the economic harm caused by trade secret theft. While DTSA claims are already being asserted in the United States, EU Member States have until 9 June 2018 to implement laws to comply with the Directive.

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Opportunities for Investment in the Chinese Health Care Market

DAVID DAI, DALE VAN DEMARK AND JENNY WANG

The purchasing power of the Chinese middle class is reshaping the world's market for luxury brands, tourism, real estate, and private investments. It has also created a strong demand for premium health care services and products.

China is the world's most populous country and the second largest economy. In the past three decades, it has maintained rapid economic development. China's urban population is projected to reach one billion by 2030 (approximately 70 per cent of the population), with more than 220 cities housing at least one million residents. The high-density environment and the lifestyle and diet associated with urban living are creating enormous health care challenges.

CHINA'S HEALTH CARE BOOM

Currently, over 185 million Chinese residents are over the age of 60 (approximately 15 per cent of the population), and China is projected to become the world's most aged society by 2030. In recent years, there has been a substantial increase in spending on pensions and social security, which has created a relatively wealthy segment of elderly consumers. The growing senior population is driving increased demand for senior care services such as skilled nursing facilities, independent senior living facilities, and services that target age-related health problems such as diabetes, hypertension, cancer and respiratory illness.

On the other end of the spectrum, China has recently revised its one-child policy by allowing its citizens to have two children per family. As a result, China may experience a baby boom, which will likely lead to strong demand for more medical facilities, equipment and services in connection with gynecology, obstetrics and pediatrics.

Finally, the Chinese Government has been increasing its health care spending in an effort to enhance affordability and access to medical care. Since the per-capita health expenditure in China is still very low relative to the United States (US$367 : US$9,416 in 2015), there is a huge potential for additional spending increases in the future.

OPPORTUNITIES FOR FOREIGN INVESTORS

China adopted its 13th Five-Year Plan in March 2016. The Plan reflects a recognition that the government alone cannot meet the increased demand for higher quality health care and senior care services and products. As such, the Plan promotes a "Healthy China" movement, which aims to establish an integrated health care and senior care system and encourages private investment in the health care and senior care sector. This is consistent with the recent trend of the Chinese Government encouraging investment in private health care and senior care facilities. Foreign capital participation in this sector is viewed as a key lever to achieving international quality standards and practices.

This means there are increasing opportunities for non-domestic health care providers. Foreign senior care operators, which are now permitted to set up wholly-foreign owned enterprises (WFOE) in China, will enjoy various favourable policies. Tax incentives, administrative fee exemptions and special deductions and waivers, which were once provided only to Chinese-owned, senior care facilities are now being offered to those that are foreign-owned.

Although senior care facilities are now permitted to be wholly-owned by foreign investors, policies on foreign ownership of Chinese hospitals have see-sawed. In 2013 and 2014, China issued special policies that permitted establishment of hospitals that are WFOE in Beijing,

Fujian, Guangdong, Hainan, Jiangsu, Shanghai and Tianjin. In 2015, however, China took a step back and restored its restriction on the maximum foreign equity ownership (70 per cent) in hospitals, except for health care providers from Australia, Hong Kong, Macau and Taiwan.

Despite the new restriction on WFOE hospitals, foreign investors continue to show interest in China's hospital market. According to data from Dealogic, there have been 11 inbound investment transactions in China's hospital sector in 2016 so far, with a total transaction value of US$354.7 million. This is a significant increase from a single deal worth US$9.1 million in 2014.

> "China is projected to become the world's most aged society by 2030."

Given the acute need to rapidly improve the availability and quality of health care and senior care facilities, increasing foreign investment in these sectors is expected for many years.

OUTBOUND INVESTMENTS AND INTERNATIONAL OPPORTUNITIES

China has not fully liberalised the country's capital account. As a result, all outbound investments from Chinese companies are subject to regulatory approvals and require filings with various authorities, including the Chinese Ministry of Commerce, the Chinese National Development and Reform Commission, the State Administration of Foreign Exchanges, the China Securities Regulation Commission, the China Banking Regulation Commission and the China Insurance Regulation Commission.

The good news is that, in recent years, China has effectively abolished many of the administrative controls that had previously restricted overseas investments and greatly streamlined the regulatory approval regime. Investments in non-sensitive markets and sectors can now use a streamlined process based on record filing rather than direct approval by the Ministry of Commerce and the National Development and Reform Commission. This record filing normally takes less than a week. The State Administration of Foreign Exchanges (SAFE) has also relaxed rules to permit Chinese companies to obtain foreign currency more quickly via banks rather than through SAFE. These liberalisations have provided Chinese companies with greater control and flexibility over outbound investments and greatly reduced bureaucratic red tape.

Nevertheless, China will continue to be cautious in lifting control over its capital account and outbound investments owing to the uncertainty persisting over China's growth prospects and economic fundamentals. For example, given the recent devaluation of Chinese currency, SAFE has tightened its control on foreign exchange for outbound investments and required Chinese banks to maintain a balance of their own income and expenditure of foreign currency when selling foreign currencies to Chinese outbound investors. This has caused significant timing and funding issues for Chinese companies that are trying to obtain sufficient foreign currency to finance their outbound investments. In response to these issues, foreign sellers have begun to guard against funding risk by imposing a reverse break-up fee ranging generally from 3 to 15 per cent.

Chinese companies also want to tap into the increasing domestic demand for high-end health care services and products. As a result, they have been stepping up their outbound investment in Australia, Europe, Israel and the United States, in an effort to access advanced health care technology, expertise and branding that can be brought back to China to satisfy the needs of the domestic market.

According to data compiled by Bloomberg, as of July 2016, Chinese companies had announced more than US$3.9 billion in overseas acquisitions in the pharmaceutical, biotechnology and health care sectors this year, which is a tenfold increase over 2012. ChemChina, China's largest state-owned chemical company, is on track to acquire Swiss seed and pesticide company Syngenta AG in a deal described as a "mega merger" valued at US$43 billion.

The changing demographic and economic landscape in China is increasing the demand for health care services and products. At the same time, the global reach of Chinese industry—including the health care and life sciences sectors—is increasing, as these firms identify opportunities abroad.

The Chinese Government has been taking steps to improve the regulatory environment to ease both foreign direct investment in the Chinese health care sector and outbound investment by Chinese firms. While market conditions will drive business decisions, these changes will give Chinese and non-Chinese health care sector participants more flexibility and comfort in these markets.

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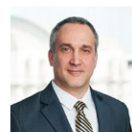

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INTERNATIONAL > ANTITRUST

Changes to Chile's Competition Law

CARLA HINE AND RYAN LESKE

Chile has amended its Competition Law to "consolidate [its] leadership as a sophisticated agency in Latin America."

The amendments, which were published in a new law on 30 August 2016, include the introduction of mandatory premerger notification and a two-phase merger control system, required notification for acquisitions of minority stakes, criminal penalties for cartel involvement, an increase in the maximum fine for anticompetitive conduct, and *per se* enforcement for interlocks between competitors under certain circumstances.

The most important amendments for parties doing business in Chile, and those considering potential transactions in the country, are the introduction of a mandatory premerger notification to the National Economic Prosecutor (FNE) and a two-phase merger control system.

In the past, premerger filings in Chile were voluntary, with limited exceptions for specific markets. Under the new law, parties must report a transaction to the FNE prior to its execution when the sum of both parties' sales in Chile in the prior year is greater than, or equal to, 1.8 million Chilean units of account (approximately US$71 million) and both parties' sales in Chile are greater than or equal to 290,000 Chilean units of account (approximately US$11 million).

Once the premerger notification has been filed, the new, two-phase merger control system prohibits parties from closing the transaction until it has been approved by the FNE or the Chilean Competition Court. The FNE can investigate a notified transaction for 30 days, after which it must either approve the transaction or extend the investigation for another 90 days for a more in-depth review.

> "The FNE can investigate a notified transaction for 30 days."

Similar to the reporting requirements included in the new merger control system, the amendments also require that a party inform the FNE within 60 days of acquiring an interest representing more than 10 per cent of the equity of a competitor. This obligation only arises when both the acquiring and acquired parties record annual revenues in excess of 100,000 Chilean units of account (approximately US$3.96 million). This provision will allow the FNE to investigate the potential anticompetitive effects arising from the acquisition, including the sharing of competitively sensitive information and increased opportunities for collusion.

Overall, the amendments to the Chilean Competition Law mirror enforcement techniques that have been effective in other countries. The FNE president, Felipe Irarrázabal, publicly stated that the legislation will "Allow us to consolidate our leadership as a sophisticated agency in Latin America, because it provides us with all the tools to combat effectively and efficiently any competition infringement." Companies with businesses in Chile need to be aware of their new reporting obligations to avoid any inadvertent violations.

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Statute of Limitations in Administrative Investigations by Chinese Government Agencies Following Foreign Investigations

JOHN HUANG, LEON LIU AND JOHN KOCORAS

In follow-on investigations, the Chinese Government often faces a statute of limitations hurdle that may enable a company to limit its liability under China administrative law.

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The current trend in Chinese administrative investigations and enforcement against multinational companies (MNCs) is for Chinese government agencies to launch investigations in response to settlements with government agencies outside China, or judgments in non-Chinese courts, when the conduct in question is related to the companies' activities in China.

FOLLOW-ON INVESTIGATIONS

Chinese government agencies have found that follow-on investigations avoid some of the challenges that agencies in China face when investigating MNCs doing business in China.

Follow-on investigations provide more security for Chinese agencies because they come with a roadmap:

- There are often public descriptions of the foreign government's findings.
- The company probably conducted an internal audit or review related to the foreign government investigation, to which the Chinese authorities can request access.
- The company might have reviewed, organised and submitted evidence to the foreign government and, again, the Chinese authorities can request copies from the company.
- The company might have paid a financial penalty, which will serve as an indicator of the severity of the conduct.

When a Chinese Government agency initiates a follow-on investigation, a variety of unique issues arise based on the specific case facts and evidence. The factor that would most complicate a case is the involvement of a State Owned Enterprise (SOE) as a partner or customer in the activities at issue, which would require delicate handling by both outside counsel and Chinese government agencies.

In most investigations there will be three critical legal issues to resolve in order to assess potential parallel liability in China:

1. The Chinese Government's desire to assert jurisdiction over and penalise the foreign entity.
2. Cross-border document production.
3. The statute of limitations for the alleged conduct.

The statute of limitations issue provides the best possible opportunity for a company to seek to limit potential liability from a China law perspective before a follow-on investigation is completed by the Chinese Government.

STATUTE OF LIMITATIONS

One major drawback, from the Chinese Government's perspective, of the follow-on investigation method is that it is common for foreign investigations to take years to complete before a judgment is finally rendered or a settlement is entered. The information in the judgment or settlement agreement could be related to conduct occurring outside the statute of limitations for civil administrative penalties in China. If Chinese authorities are investigating potential violations of criminal law rather than administrative law, different statute of limitations principles apply, requiring careful analysis not covered below.

With regard to administrative investigations, Article 29 of the Administrative Penalty Law of China provides a two-year statute of limitations for most administrative offenses, including violations of anti-bribery and competition laws. Article 29 states

Where an illegal act is not discovered within two years of its commission, an administrative penalty shall no longer be imposed, except as otherwise prescribed by law. The period of time prescribed […] shall be counted from the date the illegal act is committed; if the act is of a continual or continuous nature, it shall be counted from the date the act is terminated.

In comparison, US laws establishing limitations periods for an enforcement

"Follow-on investigations provide more security. . .because they come with a roadmap."

action under the Foreign Corrupt Practices Act (FCPA) provide for a five year statute of limitations for both criminal and civil proceedings (see 18 US Code Section 3282; 28 US Code Section 2462). FCPA investigations can take years, and the limitations period can be extended, or "tolled," with the parties' consent. For example, it is possible that the Securities and Exchange Commission or Department of Justice could settle an investigation in 2017 that commenced in 2012, involving conduct that occurred in 2009, which appears on its face to be outside the statute of limitations for an administrative penalty in China.

In a typical case, where the foreign investigation took many years, the challenge for the Chinese government agencies to successfully find liability in follow-on investigations is to find conduct within the last two years (current activities) that can be used to consider the historical conduct as "continual or continuous" in nature. Certain tax and environmental laws have different statutes of limitations, and in financial misconduct cases authorities might try to identify tax violations that avoid the two-year statute of limitations. When such charges are not viable, Chinese government agencies often must find a link between current and historical activities to assert that the historical activities continued into the last two years.

CONTINUAL OR CONTINUOUS CONDUCT

Interestingly, it is not necessary for the current activities to be unlawful for them to be considered as a continuation of historical, unlawful activities. From a legal perspective, the link should be stronger than simply maintaining a business relationship, but it does not have to be substantially stronger.

The agencies have discretion over this determination and there are no statutory or regulatory factors for the government to consider in determining whether or not activities are continuous. If the link between current and historical activities is reasonable, the Chinese government agency could therefore legitimately assert that the conduct has been continuous.

Logically, there are many factors that would be relevant to whether or not activities can reasonably be considered as a continuation of unlawful historical conduct, including the effect of unlawful conduct on the creation or maintenance of the business relationship; the characteristics of the other party, *i.e.*, a government official, SOE, or if it is in a sensitive industry; and whether or not

> "The courts are, however, likely to be highly deferential to agencies' decisions."

- The unlawful conduct related to a specific contact person or people with decision making power.
- That contact remains the primary contact and still has decision making power.
- The unlawful conduct assisted in creating a specific business deal or a long term business relationship.
- The terms of that business relationship remain the same.

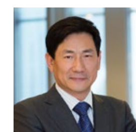
If a Chinese government agency determines that the current activities make the historical conduct continuous, the company may challenge this decision in Chinese courts. The courts are, however, likely to be highly deferential to agencies' decisions in such situations. To effectively limit liability from a China law perspective, a company should therefore proactively assess the situation before a follow-on investigation could even be launched.

PRACTICAL STEPS

Companies currently facing investigations in foreign jurisdictions for activities related to China should consider conducting an internal review from the perspective of Chinese law.

The company needs to make conscious efforts to visibly disconnect its historical and current activities in order to preserve the statute of limitations protections. It is common for companies to conduct an internal review and remediation during an international investigation, but they often fail to review and remediate from a China law perspective, leaving legal vulnerability in the jurisdiction where the conduct occurred. Companies should make such remediation a priority. When a company learns that it is the subject of a follow-on investigation and has a valid argument that the statute of limitations bars penalties, it should explore with counsel whether or not it could raise the statute of limitations with investigation agencies immediately, before investigations progress.

With proper remedial measures in both compliance and business activities, it is possible for a company to limit, or possibly eliminate, Chinese administrative liability in follow-on investigations.



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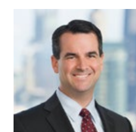

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Arbitration of Trust Disputes

JACOB GRIERSON AND NICHOLAS HOLLAND

> "Arbitral awards are typically easier than court judgements to enforce internationally."

Trust arbitrations could be the "next big thing" in dispute resolution.

Trust arbitrations are still relatively rare as a result of the perceived difficulties considered to be inherent in arbitrating such disputes. Arbitration should, however, appeal to those involved in certain types of trust disputes and there are, increasingly, solutions available for the perceived difficulties.

ADVANTAGES OF ARBITRATION FOR TRUST DISPUTES

There are many reasons why arbitration is better suited to certain types of trust disputes than court litigation.

Trust disputes generally involve intimate issues for families, who would often welcome increased privacy and confidentiality. Arbitration is a private process and, while arbitration is not—contrary to accepted wisdom—automatically covered by confidentiality in all jurisdictions, arbitration clauses can be drafted in such a way as to ensure confidentiality.

Arbitral awards are typically easier than court judgements to enforce internationally, given the adoption of the New York Convention by a large number of countries including, since 2014, the British Virgin Islands. Even those jurisdictions that have made the "commerciality" reservation, *i.e.*, have only agreed to recognise and enforce commercial arbitration awards, are likely to consider trust disputes to be commercial and therefore to enforce awards resulting from trust arbitrations.

Arbitral awards are final and binding. With very limited exceptions, there is no right of appeal against an arbitral tribunal's award in an arbitration. The result is final, subject only to a request to set aside the award due to procedural irregularities, such as an unfair procedure or lack of independence, or because the award is contrary to public policy.

Unlike Court proceedings, which do not allow the parties to select a judge

with expertise in the area of dispute, arbitration allows the parties to choose the arbitrator based on his or her particular technical skills and experience in a particular area or industry. In the context of trust disputes, this can be particularly important, given the very specialised nature of the disputes in question.

Finally, arbitration allows for a flexibility that is unknown in court litigation. It allows the parties and/or the arbitral tribunal to devise procedures that best suit the parties and the dispute. For example, the parties can agree, or the arbitral tribunal can order

- A "bifurcation" of issues
- The filing of evidence, such as witness statements and documents, together with or subsequent to the submission of written submissions
- Lesser or greater discovery.

DIFFICULTIES WITH ARBITRATING TRUST DISPUTES

Despite all these advantages, trust arbitrations have been slow to catch on.

One explanation for this is that the initial exploration of trust arbitration did not find favourable treatment in the United States, where the courts rejected the notion that the trust deed constituted a written agreement to arbitrate. Similarly, England and offshore jurisdictions have embraced the donative theory of trusts, *i.e.*, that the trust sets out the terms of a *gift* rather than those of a *contract*, which obviously causes difficulties for trust arbitration, given its essentially consensual nature.

Even if the trust deed can be conceived of as a contract, an agreement to arbitrate can only bind those who are parties to it. It has therefore long been thought that an arbitration provision in a trust deed cannot bind beneficiaries. Whilst parties to an arbitration agreement agree to refer any dispute to arbitration, there is no such agreement or consent required of beneficiaries. Commentators question whether or not beneficiaries can therefore be bound by arbitration provisions in a trust deed or even refer a dispute to arbitration.

Further, there is a question mark over whether or not an arbitrator can make an order binding on minor and unborn beneficiaries who cannot give consent or be parties to an agreement.

In addition, from an enforcement perspective, Article V(1) (a) of the New York Convention provides that an arbitral award may not be recognised or enforced where the parties to it were, according to the law applicable to them, under some incapacity such as being a minor.

One solution is to treat the arbitration as a reference from the court, bookending the arbitration with the appointment of a litigation guardian for minors and unborns and the reduction of any arbitral award to a Tomlin Order issued by the court. This will, however, reduce some of the advantages of arbitration, including privacy/confidentiality and enforceability.

Another solution is the "deemed acceptance theory". This attempts to resolve the difficulty of enforcing awards by proposing that beneficiaries can be bound by the arbitration provisions in a trust deed on the basis they claim "under or through" a settlor, who is a party to the trust deed. The beneficiaries therefore fall within Section 82(2) of the English Arbitration Act 1996, which provides that parties to an arbitration agreement include a "person claiming under or through a party to the agreement".

RECENT LEGISLATION TO ENCOURAGE TRUST ARBITRATIONS

None of these solutions is entirely satisfactory, and certain jurisdictions have introduced legislation to deal specifically with these issues.

In Arizona, the Bahamas, Florida, Guernsey, Jersey, Liechtenstein and some other jurisdictions, legislation has been enacted to confirm the binding effect of arbitration agreements on beneficiaries.

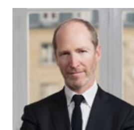
The recent Bahamas legislation goes further than any other legislation in this respect. In 2011, the Bahamas introduced the Trustee (Amendment) Act 2011. Section 91A of the Act enables a dispute or administration question relating to a trust to be resolved by arbitration if the trust instrument so allows. As a consequence, an arbitration provision in a trust instrument will bind all parties, including beneficiaries, regardless of whether or not they have been ascertained, or are in existence at the time, as if they were parties to an arbitration agreement.

In addition, Section 91B(2) of the Act vests an arbitration tribunal with the jurisdiction of an equity judge to exercise all powers conferred by statute or under the court's inherent jurisdiction. The tribunal is also vested with the power to appoint a representative of a class of persons or interests within the trust dispute, providing viable solutions to protect the interests of unascertainable beneficiaries within trust disputes. Without this provision, it would be necessary for the parties to apply to the court for the appointment of a suitable representative.

THE FUTURE

Arbitration of trust disputes is becoming increasingly viable, particularly in some of the offshore jurisdictions that have traditionally been the major venues for their resolution. Given the significant advantages of arbitration for resolving trust disputes, an increase in the number of arbitrations should be anticipated.

They are reported to be very popular with settlors, but they are likely to remain on the fringes of dispute resolution until trusts draftsmen embrace them.



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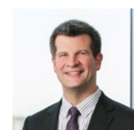

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Foreign Discovery Under 28 US Code Section 1782 in French Proceedings

AYMERIC DISCOURS AND NISRIN ABELIN

The foreign discovery rules under 28 US Code Section 1782 provides countries where discovery is either forbidden or severely restricted, with a competitive advantage in international litigation.

In civil law countries, such as France, Germany and the Netherlands, discovery as it is known in the United States does not exist. There is no general rule of procedure enabling a party to obtain information from the other party, except in very limited circumstances.

Three mechanisms allow foreign litigants to obtain evidence from a US-residing entity:

1. Their own national procedures, which can be quite limited, especially in civil law countries such as France.
2. Where applicable, the procedures provided for by the Hague Convention on the Taking of Evidence Abroad.
3. Section 28 US Code Section 1782, under which US district courts can allow litigants to discover certain documents for use in foreign proceedings. The Eleventh Circuit has finally affirmed that Section 1782 does apply to documents located in foreign companies (see p. 18).

Section 1782 therefore authorises the use of US style discovery before, or in the course of, litigation pending in countries where restrictive discovery rules apply (if it is permitted at all).

The requirements mentioned in Section 1782 for a foreign discovery request to be granted are complemented by four additional discretionary factors:

1. The scope of the request, which must be deemed not overly intrusive or burdensome.
2. The identity of the person from whom discovery is sought. That person must be a party in the foreign proceedings.
3. The nature of the foreign proceeding at hand, *e.g.*, the character of the foreign tribunal, the type of proceeding underway, and the receptiveness of the foreign tribunal to assistance from US courts.
4. The absence of fraudulent evasion of the law. A Section 1782 request must not be deemed an attempt to circumvent proof-gathering procedures applicable before the foreign court.

SECTION 1782 APPLICATIONS IN FRENCH CASES

French litigants are no strangers to the power of Section 1782 since it was established by *Euromepa v Esmerian* 51 F. 3rd 1095 (2nd Cir. 1995) with regard to insurance claims, and *Edelman v Taittinger* 295 F. 3d 171 (2nd Cir. 2002) with regard to corporate litigation, that the existence of pre-trial discovery under

French procedural law (even though limited) cannot obstruct the granting of Section 1782 applications.

Recent examples of the usefulness of Section 1782 can be found in the high profile applications filed by XPO and Elliott (a minority shareholder in Norbert Dentressangle), in the context of the battle these two companies are currently fighting before the Paris commercial court as a result of Elliott's efforts to thwart XPO's attempt to acquire all of Norbert Dentressangle's shares.

In French-related cases, litigants must remember that time is of the essence to successfully obtain a discovery order under a competitive advantage.

In *re Digitechnic*, Judge Coughenour interpreted Digitechnic's choice not to seek immediate discovery, but rather file its application at a later stage of the dispute, as a clear attempt to circumvent the French court's control, leading to the dismissal of Digitechnic's Section 1782 request.

In *re XPO Logistics*, Judge Schofield considered that the existence of discovery proceedings already pending in France justified staying consideration of the Section 1782 discovery request until the French proceedings advanced sufficiently for the court to better assess whether or not further discovery in the United States would be necessary.

Foreign discovery requests should therefore be filed at the earliest possible stage of the French proceedings to avoid the risk of a dismissal.

USING EVIDENCE OBTAINED THROUGH SECTION 1782 IN FRENCH COURTS

European bodies, such as the UK House of Lords and the Dutch Supreme Court, expressly acknowledged more than 15 years ago that evidence obtained through the foreign discovery route can be used in proceedings before European national courts. French courts (albeit below the French Supreme Court) have come to the same conclusion.

The Versailles Court of Appeals was the first to recognise, in 2010, that the only limitation to the admissibility of evidence obtained through Section 1782 is that of abuse, which would require demonstration that the request was filed in bad faith.

> "Section 1782 allows French litigants to maximise discovery opportunities."

This point was then confirmed by the Paris Court of Appeals. In a 2014 case, inheritors filed a petition before the Paris Court of Appeals to obtain information from a leading art business. This petition was not granted and the heirs successfully filed a Section 1782 application in the United States. The documents then obtained were eventually submitted to the Paris Court of Appeals as supporting evidence. Their admissibility was then challenged by the opposing party on the grounds that

- The use of this evidence would violate the adversarial principle and the secrecy of correspondence rule.
- The documents were obtained unfairly, behind the back of the French court-appointed judicial expert, in breach of the decision initially rendered by the Paris Court of Appeals dismissing the heirs' petition.

The Court rejected these arguments and ruled in favour of the heirs so far as their Section 1782 application was necessary to preserve their rights.

SECTION 1782: A COMPETITIVE ADVANTAGE

Section 1782 allows French litigants to maximise discovery opportunities and have access to a wide-ranging discovery that has no equal under French procedural law. This provides them with a huge advantage, as opponents do not have access to a similarly broad and permissive discovery for documents situated in France.

Since it can be assumed that French litigants do not reside in the district of a US court, their US opponents, or foreign opponents affiliated with a US entity, cannot invoke Section 1782 or a similar provision to gather broad evidence from their French counterparts. The US entity therefore has no other choice but to deal with this issue upstream, where possible, by contractually pre-empting and precluding access to foreign discovery.

Although it has only been successfully applied once, France-based litigants also theoretically benefit from the protection of French law 68-678 of 26 July 1968, known as the French Blocking Statute. The Statute forbids any person, subject to the provisions of applicable international treaties such as the Hague Convention, and under the threat of a six month jail term and a €18,000 fine, from requesting, investigating or communicating documents or information relating to economic, commercial, industrial, financial or technical matters leading to the establishment of proof with a view to foreign administrative or judicial proceedings.

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The Eleventh Circuit Affirms Use of Section 1782 to Compel the Production of Documents Located in Foreign Countries

EFFIE SILVA AND LAUREN EVANS

The Eleventh Circuit affirms that 28 US Code Section 1782 applies to documents located in foreign countries.

In a case of first impression, on 23 August 2016, the Eleventh Circuit affirmed in *Sergeeva v. Tripleton Intl. Ltd.*, that 28 US Code Section 1782 reaches documents located in foreign countries. The statute provides federal assistance to applicants seeking evidence in the United States for use in a non-US proceeding. The Eleventh Circuit had not, however, addressed the extraterritorial limits of the statute until its 23 August decision. With no controlling law precedent and a dearth of instructive decisions from sister Circuit Courts, the court itself noted that the question of whether or not Section 1782 could reach documents located in foreign countries presented a question of first impression.

The case arose from an embittered divorce dispute in Russia. The Appellee, Anna Sergeeva, sought discovery assistance in the United States in hopes of uncovering her ex-husband's concealed marital assets. The hunt for these hidden assets had taken her to the Bahamas, the British Virgin Islands, Cyprus, Latvia, Switzerland and finally the United States. After being denied information by the Atlanta, Georgia-based Appellant, Trident Corporate Services, Ms Sergeeva filed an *ex parte* application for judicial assistance in the US District Court for the Northern District of Georgia, demanding the production of documents possessed by Trident's overseas affiliates.

There are four *prima facie* requirements that must be established before Section 1782 can be used by a US district court:

1. The request must be made "by a foreign or international tribunal or by any interested person".
2. The request must seek evidence, whether it be "testimony or statement" of a person, or the production of a "document or other thing".
3. The evidence must be "for use in a proceeding in a foreign or international tribunal".
4. The person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.

If these four requirements are satisfied then the court has discretion to grant the request.

In order to guide this discretion, the Supreme Court instructed district courts to consider

- The nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government to US federal court judicial assistance
- Whether or not aid is sought to obtain discovery in the foreign proceeding
- If Section 1782 is being used to circumvent foreign proof-gathering restrictions or other policies
- Whether or not the discovery requests are unduly intrusive or burdensome.

Trident argued to the district court that Section 1782 did not apply to documents located outside the United States that related to the ex-husband's ownership of a Bahamian company. Further, Trident contended that it did not have legal control over the non-US company and its documents. The district court disagreed and Trident appealed.

The Eleventh Circuit affirmed, finding that Section 1782 applies extraterritorially

and that Trident met the control requirement necessary. The court found that Section 1782's statutory text indicates that documents should be produced "in accordance with the Federal Rules of Procedure." As the court noted, discovery under the Federal Rules is "broad and covers materials located outside the United States." As a result, the district court could require Trident to produce documents outside the United States, as long as they had legal control of the material.

Additionally, the court found Trident had proper control over the information sought because the legal right to obtain documents is established where affiliated corporate entities have actually shared information in the normal course of business. The court found there was circumstantial evidence indicating control, because Trident would have been unable to perform its duties without information and documents from the Bahamian company in question.

The decision in *Sergeeva* demonstrates the Eleventh Circuit's extensive reach in aiding the discovery of documents outside US territorial limits. As we saw in *Foreign Discovery Under 28 US Code Section 1782 in French Proceedings* on p16, the implications for litigants in countries where discovery does not exist, or is severely restricted, are huge.

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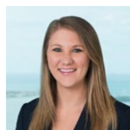

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