US litigation in 2011: the landmark decisions

Mark Danis, Morrison & - Monday, 06 February 2012 10:10

Mark Danis of _Morrison & Foerster_ in San Francisco looks back on some of the most notable US litigation developments involving foreign parties in 2011.

In the rough-and-tumble of international business litigation, 2011 delivered a remarkable number of important federal court decisions.

Foreign parties were successful in securing Supreme Court precedent narrowing the scope of personal jurisdiction, in obtaining dismissals based on *forum non conveniens* and in obtaining confirmation of a multi-million dollar arbitral award for an embargoed country.

In other decisions, however, courts expanded trade secret protection to extraterritorial conduct and affirmed the protections of the Alien Tort Statute against foreign corporations.

All in all, it is difficult to identify any unifying trends across the broad array of issues tackled in 2011's docket. What is clear from the virtually thousands of international issues confronted by federal courts last year, however, is that the US continues to be at the forefront of resolving critical business disputes across a spectrum of technologies, countries, statutes, and treatises.

And that the struggle by countless jurists to "get it right," irrespective of the nationality of the parties appearing before them, or of ongoing political and economic tensions between the US and other countries, reinforces the standing of the US as one of the world's premier venues for the resolution of international business conflicts.

Here is a brief look back at some of 2011's more notable decisions involving foreign litigants.

The Supreme Court Limits Personal Jurisdiction Over Foreign Defendants

On 27 June 2011, the Supreme Court decided two personal jurisdiction cases. In *Goodyear Dunlop Tires SA v Brown*, 131 S. Ct. 2846 (2011), the Court addressed whether a state court can exercise general jurisdiction over a foreign defendant – i.e., a defendant outside the forum state – for the introduction of goods into the stream of commerce.

And in *J McIntyre Machinery, Ltd. v Nicastro*, 131 S. Ct. 2780 (2011), the Supreme Court addressed the circumstances under which a state court can exercise specific jurisdiction over a foreign defendant for an injury in the state based on goods introduced into the US stream of commerce.

In both cases, the Supreme Court limited the ability of state courts to assert personal jurisdiction over foreign defendants.

In *Goodyear*, a unanimous Supreme Court held that a court may not exercise general jurisdiction over a foreign defendant merely because that defendant introduced goods into the stream of commerce.

In *J McIntyre Machinery*, a sharply divided Supreme Court ruled that a foreign defendant's single sale in the forum state was an insufficient basis for the state court to exercise specific jurisdiction. While there was no majority opinion for the Court, six justices indicated that a foreign defendant may not be passively subject to personal jurisdiction merely due to the introduction of goods into the stream of commerce.

As a result of the *Goodyear* and *J McIntyre Machinery* cases, the sometimes uphill battle of personal jurisdiction motions is now a more achievable strategic option for foreign defendants.

Federal Circuit Expands the Reach of Trade Secrets Law to China in *TianRui Group Co. Ltd.,* et al *v International Trade Commission*, 661 F.3d 1322 (Fed. Cir. 2011), the Federal Circuit held that the International Trade Commission (ITC) can prevent the importation into the US of products made abroad using US trade secrets that were misappropriated abroad.

This territorial expansion of trade secret law also included a holding that "a single federal standard, rather than the law of a particular state, should determine what constitutes a misappropriation of trade secrets."

The general presumption is that US laws do not have extraterritorial reach absent a contrary legislative intent.

On its face, the statute at issue in *TianRui*, Section 337 of the Tariff Act of 1930, did not directly address the issue of extraterritoriality. Section 337 states that the ITC can exclude articles from importation when it has found "(u)nfair methods of competition (or) unfair acts in the importation of (those) articles."

Nonetheless, looking to the context of the statute, the court found that the presumption against extraterritoriality did not apply since the focus of Section 337 "is on an inherently international transaction – importation," and therefore that Congress must have intended that the statute would apply to conduct that may have occurred abroad.

The court further emphasised that it was not applying Section 337 to sanction purely extraterritorial conduct, since the "unfair" conduct at issue also required importation of tainted goods into the US.

The *TianRui* decision comes at an interesting juncture, with US diplomats hammering China to strengthen IP enforcement, and federal prosecutors ramping up criminal prosecution of trade secret theft under the Economic Espionage Act. Meanwhile, for civil litigants *TianRui* provides a new tool for enforcement of trade secret rights.

Ninth circuit allows suit for alleged international law violations in Papua New Guinea

The battle over the extraterritorial reach of US laws also was at issue in *Sarei v Rio Tinto*, 2011 US App. LEXIS 21515 (9th Cir. 2011), a case involving accusations of human rights abuses against mining giant Rio Tinto.

In a splintered *en banc* decision, much of which is beyond the scope of this article, the Ninth Circuit took up two issues of interest to international businesses. First, whether the Alien Tort Statute (ATS) could apply to extraterritorial conduct, and second, whether the ATS can apply to corporations. The court answered both questions in the affirmative.

On the question of extraterritoriality, the court was guided by the principle that "(w)hen a statute gives no clear indication of an extraterritorial application, it has none," but that such indication can be derived either from the text or the context of the statute.

On its face, the ATS is silent on the question of extraterritoriality, providing that "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."

Nonetheless, looking to the statutory history – where piracy was "one of the paradigmatic classes of cases recognized under the ATS" – to the ATS's creation of claims for non-US citizens, and to the ATS's provision for application of international law ("the law of nations"), the Ninth Circuit was satisfied that there were in fact "clear indications" of the statute's extraterritorial applicability.

Rejecting the Second Circuit's decision in Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010), cert. granted, 132 S. Ct. 472 (2011), that the ATS bars corporate liability, the Ninth Circuit joined several other circuits in holding that there is "no legislative history to suggest that corporate liability was excluded and that only liability of natural persons was intended."

The Supreme Court recently granted certiorari in Kiobel on the question of corporate liability, and so the final word on this issue may be yet to come.

Confirming arbitral award for Iran, ninth circuit rejects public policy argument

Today, political tensions between Iran and the US seem at a breaking point, with the US recently warning Iran to not cross a "red line" by closing the Strait of Hormuz.

And yet in a case where Iran received a USD 2.8 million arbitration award for breach of contract against San Diego-based Cubic International – relating to the sale of military equipment no less – the Ninth Circuit showed no hesitancy in confirming that award and rejecting Cubic's argument that confirmation was contrary to the public policy of the US.

In some respects the decision in *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc*., 2011 U.S. App. LEXIS 24839 (9th Cir. 2011), is unremarkable. Confirmation of foreign arbitration awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention.

Under the Convention, the grounds to refuse confirmation of an award are narrow, with few litigants succeeding to thread the eye of that needle.

Cubic Defense nonetheless sought to block enforcement under the "public policy" exception of the Convention, arguing that the ICC's award was "contrary to a fundamental public policy of the United States against trade and financial transactions with the Islamic Republic of Iran."

In support of its position, Cubic cited to the trade sanctions and weapons-of-mass-destruction embargo imposed by the US on Iran.

Cubic seemed to have a point, as the arbitral award was for breach of contract relating to Cubic's proposed sale of military equipment (dating back to a 1977 contract), and payment by Cubic to Iran might violate the current trade sanctions absent a Treasury Department licence.

Weighing against Cubic, however, was the fact that the US intervened as *amicus curiae* in support of Iran, and the trade sanctions regulations contain no prohibition on the confirmation of arbitral awards.

The Ninth Circuit stuck to the high road and was "not persuaded by Cubic's argument, which gives too little weight to this country's strong public policy in support of the recognition of foreign arbitral awards, and too much weight to the regulatory restrictions governing payment of the ICC's award."

Second circuit directs forum non conveniens dismissal for Peru

Historically, *forum non conveniens* motions were infrequently granted. Of late, however, these motions appear to be getting closer scrutiny and the dismissal rate has increased.

The Second Circuit's decision in *Figueiredo Ferraz E Engenharia de Projeto Ltda*., 2011 U.S. App. LEXIS 24748 (2d Cir. 2011), is a case in point. In *Figueiredo*, the plaintiff sought and obtained from the district court a confirmation of a arbitral award against the Republic of Peru and other parties.

The underlying dispute – breach of a services agreement performed in Peru – had been arbitrated in Peru and an award of USD 21 million issued in favor of the plaintiff.

Following an unsuccessful appeal of the award in Peruvian courts, Peru began to make payments on the award.

However, because a Peruvian statute limited the amount of money that an agency could pay annually to satisfy an award (3% of the agency's annual budget), only a small portion of the award (just over USD 1 million) had been paid.

This lead the plaintiff to file a petition in the Southern District of New York – where Peru had assets – to confirm the award and obtain a judgment for USD 21 million. Peru's motion to dismiss based on forum non conveniens was denied; the district court concluded that factor of the adequacy of the foreign forum weighed in favor of the plaintiff because "only a United States court 'may attach the property of a foreign nation located in the United States.'"

Strongly influenced by the fact that the plaintiff was seeking to end-run Peru's statutory cap on the rate at which an award could be satisfied, the Second Circuit reversed. In the court's words:

With the underlying claim arising (1) from a contract executed in Peru (2) by a corporation then claiming to be a Peruvian domiciliary (3) against an entity that appears to be an instrumentality of the Peruvian government, (4) with respect to work to be done in Peru, the public factor of permitting Peru to apply its cap statute to the disbursement of governmental funds to satisfy the award tips the FNC balance decisively against the exercise of jurisdiction in the United States.

The *Figueiredo* holding may be viewed as narrow given the existence of Peru's statutory cap, a unique public factor that will not be present in other cases.

Still, given the strong public policy in favor of enforcing arbitration awards (as demonstrated in Cubic Defense), the district court's denial of the *forum non conveniens* motion could just as easily have been affirmed, an outcome urged in the strong dissent of Judge Lynch.

Given the outcome in *Figueiredo* and the increased willingness of other courts to closely parse and grant forum *non conveniens motions*, these motions remain an important weapon in the international trial lawyer's toolkit.

Seventh circuit allows broad US discovery for use in German proceedings

Brick walls are common when seeking discovery abroad. For example, many foreign jurisdictions prohibit or severely restrict the ability to take depositions or compel the production of documents for use in US courts.

Against that backdrop, one might expect US courts to reciprocate when a foreign litigant seeks to obtain broad discovery in the US for use solely in a foreign litigation matter.

Not so, as articulated by Judge Posner in the Seventh Circuit's decision in *Applications of Heraeus Kulzar GbmH*, 633 F.3d 591 (7th Cir. 2011).

In *Heraeus*, a German company sued Biomet in a German court for theft of trade secrets. Proceeding under 28 U.S.C. § 1782, the German company sought the production of documents from Biomet's US headquarters via an application to federal district court in Indiana.

Section 1782 authorises the federal district court "of the district in which a person resides or is found [to] order him...to produce a document or other things for use in a proceeding in a foreign...tribunal."

As Judge Posner noted: "Discovery in the federal court system is far broader than in most (maybe all) foreign countries, and it may seem odd that Congress would have wanted foreign litigants to be able to take advantage of our generous discovery provisions."

These advantages of US-style discovery were directly at issue in *Heraeus*, as the documents sought by the applicant – the production of a broad set of emails and other documents spanning a 15-year period – were unobtainable in the German legal system, which only allowed discovery of documents that a party is able to identify specifically (i.e., individually, and not by category).

The Seventh Circuit considered and rejected as unproven (at least in this case) a host of purported abuses that might result from allowing US-style discovery for use in foreign proceedings.

Potential abuses, such as over-broad discovery requests or harassment, can be addressed by the district court under Rule 26.

Holding that the district court had erred in rejecting the discovery request, the Seventh Circuit set forth the applicable standard as follows: “Once a section 1782 applicant demonstrates a need for extensive discovery for aid in a foreign lawsuit, the burden shifts to the opposing litigant to demonstrate, by more than angry rhetoric, that allowing the discovery sought (or a truncated version of it) would disserve the statutory objectives.”