

The California International Law Journal

Official Publication of The State Bar of California International Law Section <http://international.calbar.ca.gov/>

VOL. 21, NO. 1, SPRING 2013

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The International Trial Lawyer—2012 Year In Review

By Mark W. Danis and Jessica A. Roberts

In 2012, U.S. federal courts tackled a spectrum of issues involving international litigation and foreign parties, from the arcane formalities of a properly administered deposition oath, to the more consequential question of whether an organization can be liable under the Torture Victim Protection Act for an alleged killing abroad. Along the way, courts also forayed into disputes surrounding service of process in an Internet age, and who holds the reins when dueling actions are fought in U.S. and foreign courts.

Of the many civil cases involving international issues, here is a brief look back at some of 2012's more notable decisions.

I. THE EXEMPTION OF ORGANIZATIONS FROM THE TORTURE VICTIM PROTECTION ACT

In one of a number of cases touching on the rights of international litigants, the U.S. Supreme Court confronted a question of statutory interpretation as to the meaning of the word “individual” in the Torture Victim Protection Act (“TVPA”). In *Mohamad v. Palestinian Authority*, the relatives of a naturalized citizen, who was allegedly tortured and murdered by the Palestinian Authority in Jericho, brought suit against the Authority and another organization under the TVPA.¹ The question confronted by the Court was whether the statute extends liability to “natural persons *and* nonsovereign organizations,” such as the Palestinian Authority.

Recognizing that the TVPA authorizes a cause of action against “[a]n individual’ for acts of torture and extrajudicial killing committed under authority of color of law of any foreign nation,” the Court held that the statute could not be applied to impose liability against organizations.² The Court noted, “[a]s a noun, ‘individual’ ordinarily means ‘[a] human being, a person’ Evidencing that common usage, this Court routinely uses ‘individual’ to denote a natural person, and in particular to distinguish between a natural person and a corporation.”³

The opinion resolved a split in which some courts had held that the TVPA extended to corporate entities.

The Supreme Court recognized that the ruling would prevent suits where “victims may be unable to identify the men and women who subjected them to torture, all the while knowing the organization for whom they work”; however, the Court held that this was a constraint in the TVPA that Congress had intended through its precise wording in the act.⁴

II. THE EXPANDING BOUNTY OF U.S. DISCOVERY FOR USE IN FOREIGN PROCEEDINGS

Federal courts continued to give 28 U.S.C. § 1782 a broad reading that allows for obtaining discovery in the U.S. for use in proceedings abroad. Under section 1782, a district court has discretion to grant a request for discovery of evidence when (1) the person from whom discovery is sought resides (or is found) in the district of the trial court to which the application is made, (2) the discovery is for use in a foreign or international tribunal and (3) the application is made by a foreign or international tribunal or any interested person.⁵

Courts considering section 1782 emphasized the congressional intent of “providing efficient means of assistance to participants in international litigation in our federal courts and encouraging countries by example to provide similar means of assistance to our courts.”⁶

Last year, the Second Circuit considered whether it was proper to consider, in deciding whether to grant a request under section 1782, if the discovery sought was admissible in evidence in the foreign proceeding. The court held that it was not.⁷ Guided by the Supreme Court’s decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, where the Court held that section 1782 does not require that the sought-after documents or testimony have been discoverable under the laws of the foreign jurisdiction,⁸ the Second Circuit likewise held that “there is no statutory basis for any admissibility requirement” as to requests made under section 1782.⁹

Examining another aspect of section 1782’s “for use” prong, the Eleventh Circuit considered whether a foreign arbitration is “a foreign or international tribunal” for the purposes of section 1782. The court held that the arbitral panel at issue “acts as a first-instance decisionmaker; it permits the gathering and submission of evidence; it resolves the dispute; it issues a binding order; and its order

is subject to judicial review,” and “[t]he discovery statute requires nothing more.”¹⁰ As such, the court found that the arbitral panel met the requirements of section 1782 and the district court was held to have properly granted a section 1782 application for depositions and the production of documents.¹¹

III. FOREIGN SERVICE OF PROCESS BY SNAIL MAIL OR EMAIL

Several district courts followed the recent trend of allowing foreign service of process by mail. In *Tracfone Wireless, Inc. v. Bitton*, the district court explained that the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the “Hague Service Convention”) “is a multilateral treaty that allows service of process of judicial documents from one signatory state to another without the use of consular and diplomatic channels.”¹² In allowing service by mail, the court noted that “many federal circuit and district courts, including this Court and others in the Eleventh Circuit, have held that Article 10(a) permits service by mail unless the recipient State objects to this method.”¹³ The court found that Canada, the country at issue in *Tracfone*, had made no such objection.

In *Dierig v. Lees Leisure Industries, Ltd.*, the Eastern District of Kentucky recognized that the Fifth and Eighth Circuits had reached different conclusions regarding the propriety of service by mail, but in the absence of settled authority in the Sixth Circuit, opted to “follow the sound decision reached in a number of the circuits, as well as within this district, that the term ‘send’ . . . was intended to include service of process.”¹⁴ Thus, unless a country has objected to service by mail, it seems increasingly likely that a federal district court will allow such service.

District courts around the country also were increasingly willing to allow service of process by email.¹⁵ For example, plaintiffs were allowed to serve process via email on defendants located abroad as an alternative means where the plaintiff showed (1) that service by email was “reasonably calculated to provide actual notice” to the defendant; and (2) international agreement did not prohibit such service.¹⁶

The first prong—whether the service was reasonably calculated to provide actual notice—involves looking

at traditional notions of due process.¹⁷ For example, in *Facebook*, the court noted that the “Foreign Defendants rely on electronic communications to operate their businesses.”¹⁸ Similarly, in *Teller*, the court noted, “the only means of communication between the Plaintiff and Defendant has been electronic mail.”¹⁹

The second prong—whether international agreement prohibits such service—requires consideration of the applicable international agreements, if any. Some cases noted that while the Hague Service Convention governs service abroad in signatory countries, Article 1 states that the Convention does not apply when the address of the person to be served is unknown.²⁰ The court in *Facebook* also noted several cases holding that the Hague Service Convention does not expressly prohibit email service.²¹

Still, some courts remain unpersuaded that service by email is appropriate without an adequate showing that the plaintiff has attempted service through other means before seeking to serve via email.²² In *Kowalski*, the court found that the plaintiffs’ argument that service under the Hague Service Convention would take too long had no merit when the plaintiffs did not seek preliminary relief.²³ Moreover, the court noted, plaintiffs did not put forward any evidence that they were unable to locate the defendant.²⁴ As such, the court declined to exercise its discretion to authorize alternative service.²⁵

IV. THE TRAP OF AN INVALID OATH IN A FOREIGN DEPOSITION

In May of last year, the district court for the Southern District of Indiana provided litigants with a powerful reminder to ensure a valid oath at an international deposition.²⁶ In *McCarthy*, the court sustained the defendants’ objection to the deposition testimony of a witness who was deposed in Italy without the proper oath.

The defendants argued that the oath administered to the witness failed to satisfy the requirement that a deposition taken in a foreign country must be “before a person authorized to administer oaths either by federal law or by the law in the place of examination” unless the parties stipulate otherwise.²⁷ The court reporter who administered the oath in question (1) had been a court reporter for over 30 years; (2) was a certified Registered Professional Reporter and a

Certified Shorthand Reporter; (3) was authorized to administer oaths in both state and federal cases within Indiana; and (4) had provided court reporting services for thousands of depositions in both state and federal cases, including depositions held in foreign countries.²⁸ Nonetheless, being authorized to administer an oath within a state differs from being authorized to administer an oath by federal law. Satisfying the latter requires that authorization be sought from the judge.

Thus, the court noted, none of the court reporter's extensive credentials demonstrated that the reporter "is 'authorized to administer oaths by federal law,' or by the law of Italy."²⁹ As a result, the court held that the deposition "was not conducted in compliance with the requirements of Federal Rule of Civil Procedure 28" and "was not a 'lawful deposition' such that it satisfie[d] the requirements of Federal Rule of Evidence 804(b)(1)."³⁰ Consequently, the objection to admitting the deposition testimony was sustained.

Counsel can readily address the trap of an invalid oath by stipulating under Rule 29 that the reporter can administer the oath and that the parties waive any objection to the validity of the deposition based on the oath. In conjunction with such stipulation, a court order also can be sought that authorizes a reporter to administer an oath in a foreign country.

V. MAINTAINING CONTROL THROUGH FOREIGN ANTI-SUIT INJUNCTIONS

Two decisions in 2012 illustrate the willingness of federal courts to enjoin "vexatious" foreign suits that interfered with the ability of district courts to adjudicate overlapping issues. In *Microsoft Corp. v. Motorola, Inc.*, the Ninth Circuit affirmed a preliminary injunction issued by the Western District of Washington that temporarily prevented Motorola from enforcing an injunction against Microsoft in Germany.³¹ Microsoft had sued Motorola in Washington, claiming that Motorola had breached an obligation to license patents (including some foreign patents) on terms that were reasonable and non-discriminatory. While the litigation was pending, Motorola sought and obtained an injunction against Microsoft in Germany for infringement under some of the same patents at issue in the Washington litigation. Because Motorola's suit in Germany was deemed to have frustrated the Washington district court's ability to adjudicate the

patent license issues, the Ninth Circuit held that the district court had not abused its discretion in issuing a preliminary injunction.

The same month that *Microsoft* was decided, the Southern District of New York issued an order enjoining a litigant from further pursuing an action abroad "that would interfere with the parties' arbitration proceedings in New York."³²

Both the *Microsoft* and *Travelport* opinions recognized that "[a] federal district court with jurisdiction over the parties has the power to enjoin them from proceeding with an action in the courts of a foreign country, although the power should be used sparingly."³³ A multipart test was applied to decide whether an injunction should be issued, starting with a determination of two threshold requirements: "(1) the parties must be the same in both matters, and (2) the resolution of the case before the enjoining court must be dispositive of the action to be enjoined."³⁴

With those requirements met, the courts then went on to consider a disjunctive list of additional factors, including whether the foreign litigation would (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's *in rem* or *quasi in rem* jurisdiction; or (4) prejudice other equitable considerations.³⁵ In the Second Circuit, courts also consider whether "adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment."³⁶

Both the *Microsoft* and the *Travelport* courts found that a number of these factors were satisfied, and in particular that the foreign suit was a vexatious attempt to end run litigation in another venue. For example, in *Microsoft*, the Ninth Circuit disagreed with Motorola's contention that the German litigation could not be deemed "vexatious" because the German court ruled in Motorola's favor.³⁷ The court noted that the definition of vexatious included "harassing," and such was the state of affairs when, "in the midst of litigation over Motorola's obligations under Washington state contract law with respect to a portfolio of patents that includes the two German patents, Motorola initiated separate proceedings in Germany to enforce those two patents directly."³⁸

Similarly, the court in *Travelport* found that "the Nigeria Action is vexatious."³⁹ Despite an agreement

between Bellview and Travelport to resolve the dispute in an arbitral forum, Bellview obtained a restraining order and initiated contempt proceedings against Travelport in the Federal High Court in the Federal Republic of Nigeria.⁴⁰ The district court noted that, “[a]fter initially *requesting*, [sic] arbitration, Bellview now resists it and, in its briefing papers, accuses Travelport of delay. These actions are nothing if not vexatious.”⁴¹

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Looking ahead, 2013 will be and already is another important year for the international trial lawyer. In March, the U.S. Supreme Court addressed the scope of Copyright Act as to works made and legally acquired abroad and then imported into the United States.⁴² In April, the Court affirmed the judgement of the Second Circuit dismissing a complaint against certain foreign corporations. The Court held that the presumption against extraterritoriality applies under the Alien Tort Statute, and nothing in the statute rebuts that presumption.⁴³ And in its 2013-2014 term, the Court will tackle whether a court can exercise general personal jurisdiction over a foreign corporation based solely on service in the forum state of an indirect corporate subsidiary.⁴⁴ In these and other cases, courts will continue to refine the proper reach and application of U.S. law in the shadow of globalization.

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Endnotes

- 1 *Mohamad v. Palestinian Auth.*, 132 S.Ct. 1702 (2012).
- 2 *Id.* at 1705.
- 3 *Id.* at 1707 (citations omitted).
- 4 *Id.* at 1710.
- 5 *Brandi-Dohrn v. IKB Deutsche Industriebank*

- AG, 673 F.3d 76, 81 (2nd Cir. 2012); *Consortio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 993 (11th Cir. 2012); *In re Mesa Power*, 2012 U.S. Dist. LEXIS 97329 at *8 (S.D. Fla. July 13, 2012).
- 6 *Brandi-Dohrn*, 673 F.3d at 81, quoting *Metallgesellschaft v. Hodapp*, 121 F.3d 77, 79 (2d Cir. 1997), (quoting *In re Application of Malev Hungarian Airlines*, 964 F. 2d 97, 100 (2d Cir. 1992)); see also *In re Mesa Power*, 2012 U.S. Dist. LEXIS 97329 at *8 (noting, “[t]he history of Section 1782 reveals Congress’ wish to strengthen the power of district courts to respond to requests for international assistance” (quoting *Lo Ka Chun v. Lo To*, 858 F.2d 1564, 1565 (11th Cir. 1988))).
- 7 *Brandi-Dohrn*, 673 F.3d at 81-82.
- 8 *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259-60 (2004).
- 9 *Brandi-Dohrn* 673 F.3d at 82.
- 10 *Consortio*, 685 F.3d at 990. The arbitration was pending in Ecuador before the Center for Arbitration and Conciliation of the Guayaquil Chamber of Commerce.
- 11 *Id.* at 994 (citing *Intel*, 542 U.S. at 248-49); see also *In re Mesa Power*, 2012 U.S. Dist. LEXIS 97329 at *11 (holding that a NAFTA arbitration “functionally qualifie[d] as a ‘foreign arbitration or international tribunal’” based on *Consortio* and *Intel*).
- 12 278 F.R.D. 687, 689 (S.D. Fla. 2012).
- 13 *Id.* at 690-91.
- 14 2012 U.S. Dist. LEXIS 26181 at *54 (E.D. Ky. Feb. 28, 2012).
- 15 See, e.g., *Teller v. Dogge*, 2012 U.S. Dist. LEXIS 111866, *2 (D. Nev. Aug. 9, 2012).
- 16 See *Facebook, Inc. v. Banana Ads, LLC*, 2012 U.S. Dist. LEXIS 42160 at **5-8 (N.D. Cal. Mar. 27, 2012); *U.S. Commodity Futures Trading Comm’n v. Rubio*, 2012 U.S. Dist. LEXIS 117898 (S.D. Fla. Aug. 21, 2012).
- 17 See *Facebook*, 2012 U.S. Dist. LEXIS 42160 at *5; *Teller*, 2012 U.S. Dist. LEXIS 111866 at *2-3; *ADT Sec. Servs., Inc. v. Sec. One Int’l, Inc.*, 2012 U.S. Dist. LEXIS 116494 (N.D. Cal. Aug. 17, 2012).
- 18 2012 U.S. Dist. LEXIS 42160 at *5.
- 19 2012 U.S. Dist. LEXIS 116494 at *6.
- 20 See *Facebook*, 2012 U.S. Dist. LEXIS 42160 at *8 n.6.
- 21 *Id.* at *7.
- 22 See *Kowalski v. Anova Food, Inc. LLC*, 2012 U.S. Dist. LEXIS 112647 (D. Haw. Aug. 10, 2012).
- 23 *Id.* at * 8.

- 24 *Id.* at *9.
- 25 *Id.* at *10.
- 26 *McCarthy v. Fuller*, 2012 U.S. Dist. LEXIS 65598 (S.D. Ind. May 10, 2012).
- 27 *Id.* at *3-4 (quoting Fed. R. Civ. P. 28, 30(b)(5)).
- 28 *Id.*
- 29 *Id.*
- 30 *Id.*
- 31 696 F.3d 872 (9th Cir. 2012).
- 32 *Travelport Global Distrib. Sys. v. Bellview Airlines Ltd.*, 2012 U.S. Dist. LEXIS 128604 at *21 (S.D.N.Y. Sept. 10, 2012).
- 33 *Microsoft*, 696 F.3d at 881 (quoting *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 989 (9th Cir. 2006)); *see also Travelport*, 2012 U.S. Dist. LEXIS 128604 at *18-21.
- 34 *Id.* at *18-19 (quoting *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987)); *see also Microsoft*, 696 F.3d at 881.
- 35 *Id.* at 882; *Travelport*, 2012 U.S. Dist. LEXIS 128604 at *19.
- 36 *Id.*
- 37 *Microsoft*, 696 F.3d at 886.
- 38 *Id.*
- 39 *Travelport*, 2012 U.S. Dist. LEXIS 128604 at *20-21.
- 40 *Id.* at *3.
- 41 *Id.* at *20-21.
- 42 *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1351 (2013).
- 43 *Kiobel v. Royal Dutch Petroleum*, 185 L. Ed. 2d 671 (2013).
- 44 *DaimlerChrysler AG v. Bauman*, No. 11-965.