“Playing Defense”

Foreign (Swiss) Entities and U.S. Discovery

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What is U.S. Pre-Trial Discovery?

- Party vs. Non-Party Discovery
  - Discovery Requests vs. Subpoenas
- Written/Document vs. Testimonial Discovery
  - Documents vs. Depositions

Written Discovery

- Interrogatories

INTERROGATORY NO. 1:

Please identify each individual who may have knowledge of the subject matter of this litigation, along with the subjects of that information, including, without limitation, any witnesses that You may use to support Your claims or defenses and experts with whom you have consulted.

Response: [redacted] objects to this interrogatory as premature and overly broad. [redacted] has not yet identified all individuals who may have knowledge of the subject matter of this litigation or who it may call as a witness. [redacted] objects to this request insofar as it seeks information about experts beyond the scope of Federal Rule of Civil Procedure 26(b)(4). [redacted] is in the process of preparing a list of such individuals responsive to this Interrogatory. The parties to this litigation should agree on a date upon which all parties will exchange preliminary witness lists.

Written Discovery

- Requests for Admissions

REQUEST FOR ADMISSION NO. 4:

Admit that as of the end of February 2008, the Net Asset Value of the [redacted] Fund was $153,346,799, and the total reported value of the [redacted] holdings of [redacted] Fund was $33,805,681, such that [redacted] holdings constituted approximately 22% of the [redacted] Fund Net Asset Value.

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

Denied. The ending balance ownership as of the end of February 2008 was $189,765,471.19. The Base Currency MV of the [redacted] holdings of [redacted] was $33,805,681.11 which was 17.8% of the Capital Balance. As a percent of holdings the total value of [redacted] was $153,346,798.59 with a base currency MV of [redacted] at $33,805,681.11 which was 22.0% of the total holdings.

Document Discovery

- Requests for Production of Documents

REQUEST NO. 1:

Produce any documents reflecting communications, including emails, between and among any Respondents regarding any construction work performed for [redacted] and/or [redacted]

RESPONSE TO REQUEST NO. 1:

The files containing responsive documents have been made available to [redacted]'s prior counsel [redacted] and accountant [redacted] and current counsel on prior occasions including October 2010. The construction files related to the four contracts that are the subject matter of this arbitration will again be made available to Claimant on or after July 22, 2013 (to the extent that same exist, remain in Respondents' possession and can be accessed. Respondents have been unable to access some previously-archived e-mails for this time period.

Testimonial Discovery

- Depositions
  - Corporate Depositions vs. Individual Depositions
  - Discovery Deposition vs. Trial Deposition

NOTICE OF RULE 30(b)(6) VIDEO DEPOSITION OF [redacted]

PLEASE TAKE NOTICE that starting on **September 22, 2016 at 9:00 a.m.** in the law offices of [redacted] undersigned counsel for Plaintiffs, the [redacted] will take the deposition of a representative of [redacted] upon oral examination, under oath, for all purposes allowed by law, and before an authorized court reporter and videographer. Pursuant to Rule

Testimonial Discovery *cont'd*

- Implications of U.S.-style deposition prep
  - Deponent is extensively prepared by defending attorney(s), including:
    - Review and analysis of potential exhibits;
    - Mock deposition questions, etc.
  - Corporate designee has an obligation to educate him/herself on topics noticed, requiring:
    - Discussions with current/former employees;
    - Review and analysis of potentially relevant documents, etc.

Broad Scope of Discovery – Concept of Discoverability

- Federal Rule of Civil Procedure 26(b)(1):

  "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. *Information within this scope of discovery need not be admissible in evidence to be discoverable.*"

Avenues for Limiting Discovery

- Objections to Discovery Requests
  - Between the Parties
- Agreed Limitations after Meet and Confer
  - Between the Parties
- Motions to Quash / Motions for Protective Order.
  - Involvement of the Court

Avenues for Compelling Discovery

- Motions to Compel
  - If granted, Court order requiring production of information, documents, witnesses, etc.
- Motions for Sanctions.
  - If granted, sanctions can include:
    - Monetary sanctions
    - Evidentiary sanctions
      - E.g., adverse inferences; limitations on use of evidence
    - Striking of defenses/claims

Who Is Subject to U.S. Pre-Trial Discovery?

- Any party to a proceeding in the U.S. (at least once jurisdiction is established)
  - Federal/state court proceedings
  - International/domestic arbitrations

Who Is Subject to U.S. Pre-Trial Discovery? *Cont'd*

- Any non-party present in the U.S. in connection with a domestic (i.e., U.S.) proceeding
  - Via regular subpoena process (or letters rogatory)
- Any non-party present in the U.S. in connection with a foreign (i.e., non-U.S.) proceeding
  - Via discovery mechanism pursuant to 8 U.S.C. § 1782
    - Unsettled questions over application to arbitrations.

The Hague Convention vs. U.S. Discovery
The *Aerospatiale* Decision

- *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522 (1987):
  - The Hague Evidence Convention is not "the exclusive means for obtaining evidence located abroad" in U.S. proceedings.
  - U.S. courts retain authority under domestic U.S. law "to order a foreign national party before it to produce evidence physically located within" a Hague Convention state such as Switzerland.
  - No requirement that litigants must "first resort to Convention procedures whenever discovery is sought from a foreign litigant."

But – *Aerospatiale* cont'd

- "American courts should . . . take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state."

Balancing Tests Since *Aerospatiale*

- Lower Courts consider a variety of (non-exhaustive) factors, including:
  - Second Circuit: *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 22 (2d Cir. 1998) (four factor test):
  - Fifth Circuit: *In re Anschuetz & Co., GmbH*, 838 F.2d 1362, 1364 (5th Cir. 1988) (three factor test)
  - Ninth Circuit: *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992) (seven factor test)
  - Restatement (Third of Foreign Relations Law § 442 (Am. Law Inst. 1987) (five-factor test)
  - Specific example: *In re: Xarelto (Rivaroxaban) Prod. Liab. Litig.*, No. MDL 2592, 2016 WL 3923873, at *8 (E.D. La. July 21, 2016) (applying five factor test in connection with discovery seeking German personnel files)

The Case for "Hardship"

- Are the limitations/prohibitions of Swiss Privacy Laws Sufficient?
- What "Evidence" is Required for a U.S. Court?
  - "Expert" testimony/report on foreign (Swiss) law issues?
  - "Official" response?

Potential Wild Card – U.S. Subsidiary

- Concept of "possession, custody or control" in U.S. discovery
- Potentially less sympathetic venues – e.g., domestic (i.e., U.S.) arbitrations

Potential Avenues for Avoiding U.S. Discovery Sanctions Or If Compliance Is Desired

- "Voluntary" production combined with safeguards:
  - Multi-tiered protective order, *and/or*
  - Redactions of certain protected information, *and/or*
  - Submission containing protected information filed under seal.
  - Others?

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