

MAYER • BROWN

Hot Topics Affecting the Financial Services Industry

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Hot Topics Affecting the Financial Services Industry

Cross-border Issues: A Practical Focus on Jurisdiction and Parallel Proceedings

Introduction

- International transactions lead to international disputes
- Frequent cross-border issues:
 - Service of documents abroad; choice of law; foreign evidence-gathering (documents and oral testimony); state immunity; interim relief; international enforcement of judgments.
- Where will these disputes be adjudicated?
 - Three principal issues:
 - Jurisdiction – what court can adjudicate the dispute?
 - Venue – what court should hear the dispute?
 - Parallel proceedings – what happens when two courts hear the same case?

Recent Developments

- Rules throughout the world are constantly evolving to address these issues, via:
 - international treaties and conventions
 - national statutes
 - common law
- Internationally:
 - EU Regulations and Conventions are already in place to address: jurisdiction / parallel proceedings, enforcement of judgments, governing law, and service and evidence gathering within the EU.
 - Hague Conventions are already in place to address: service and evidence gathering outside the EU and for proceedings in non-EU countries.
 - NB new 2005 Hague Convention (not yet in force) re: choice of court clauses and enforceability of Judgments.

US Landscape

- In the US:
 - Recent trend in US courts limiting the adjudication of foreign disputes
 - Recent Supreme Court rulings reflect this trend
 - *Morrison*
 - *Kiobel*
 - *Daimler*
 - Common law regarding jurisdiction and venue: **uncertainty**
 - Parties increasingly attempt to dictate the outcome
 - Consent to jurisdiction clauses
 - Forum selection clauses
 - Choice of law clauses

European Landscape

- In Europe:
 - EU “Brussels Regulation” was “re-cast” from January 2015
 - The Brussels/Lugano regime-scope has widened and may do so further (thus reducing the scope of application of national rules)
 - Rule changes to address the problem of the “Italian torpedo” (court selected in an exclusive choice of court agreement will now consider the question of its jurisdiction rather than court “first seised”)
 - New rules introduced as a result of the widened scope of Brussels/Lugano (especially re: parallel proceedings in non-European countries)

When Transacting: Dispute Resolution Clauses – Exclusive/Non-exclusive

- Exclusive clauses are restrictive.
 - The courts of [Country X] shall have exclusive jurisdiction over all disputes arising out of or in relation to this Agreement.
- Non-exclusive clauses are permissive.
 - The courts of [Country X] shall have jurisdiction to decide all disputes arising out of or in relation to this Agreement, without prejudice to the right of either party to commence an action in any other court of competent jurisdiction.

When Transacting: Dispute Resolution Clauses – Exclusive/Non-exclusive (cont.)

- Reasons for making clauses exclusive:
 - Increased certainty and less risk of being sued in an “undesirable” country (assuming other countries’ courts uphold the choice of court agreement).
 - “Race to the court” less likely, and an attempt by the other party to sue first elsewhere is more likely to prove futile.
 - Less likely to encounter parallel proceedings in more than one country.
- Problems with exclusive clauses:
 - Removes the option to sue in a different country – e.g., if it transpires, by the time of the dispute, that there are persuasive reasons for doing so.
 - Practical and substantive complexities (and added time and cost) of international enforcement – must render judgment of selected court enforceable in country where assets / other party is located (but see above re: 2005 Hague Convention).

When Transacting: Dispute Resolution Clauses – Exclusive/Non-exclusive (cont.)

- Reasons for making clauses non-exclusive:
 - Retain the option to elect (at the time of the dispute) to sue elsewhere.
 - Can elect to sue in country where the assets and / or the other party is located – to avoid practical and substantive complexities of international enforcement.
- Problems with non-exclusive clauses:
 - Also gives the other party the option to sue elsewhere.
 - Possible “race to the court,” especially within Europe (NB: increasing tendency to commence proceedings for declarations of non-liability to seize jurisdiction).
 - Risk of parallel proceedings.
 - NB standard 1992 and 2002 ISDA Master jurisdiction clause is non-exclusive (save vis-à-vis the courts of other European countries where the choice of court is England). Consequently, there is a real risk of parallel proceedings in respect of such disputes – e.g., in England and the United States.

When Transacting: Dispute Resolution Clauses – Alternatives

- Asymmetrical clauses offering exclusivity to one party only?
 - Enforceability
 - Risk of judicial modification
- Clauses restricting venue to specific jurisdictions?
 - But does not remove the possibility of parallel proceedings as between countries in which it is permissible to commence proceedings.
- Non-exclusive clauses that become exclusive upon filing?
 - But encourages a race to the court (a race which might be lost).
- Arbitration clauses?
 - Neutral/predictable forum

When a Dispute Arises: Parallel Proceedings

- (1) Parallel proceedings in two European countries:
 - Rules designed to prevent/ reduce the risk of parallel proceedings in two European countries.
 - Court “first seised” is often key – especially if proceedings could be commenced in a number of different European countries – e.g., if there is no jurisdiction clause or the clause is non-exclusive.
 - No possibility of obtaining an anti-suit injunction in one European country to restrain a party from starting / continuing proceedings in another European country.
 - New rules re: exclusive jurisdiction clauses (mentioned above) and recent case law will increase the effectiveness of such agreements, which are generally upheld.

When a Dispute Arises: Parallel Proceedings (cont.)

- (2) Approach of European courts where there are parallel proceedings in a non-European country (such as the US):
 - In some circumstances, they will only have a discretionary power to stay their proceedings in favour of a non-European court if the non-European proceedings were commenced first.
 - If there is a discretion to stay regardless of which proceedings were commenced first, that issue may still be a factor in determining whether to exercise that discretion.

When a Dispute Arises: Parallel Proceedings (cont.)

- (3) Approach of the US courts where there are parallel proceedings:
 - Uphold the parties' agreements (unless unconscionable to do so)
 - Conduct comity analysis
 - Identity of parties, issues, etc.
 - Judicial efficiency
 - Fairness and conveniens
 - Sequence of filing
 - Stay of US proceedings – international abstention
 - Anti-suit injunction – enjoining a party from prosecuting foreign action

When a Dispute Arises: Managing Parallel Proceedings

- Parallel proceedings in numerous countries:
 - may involve the same parties and substantially the same dispute, or may involve related disputes which might involve different or additional parties;
 - may also comprise regulatory/ criminal proceedings as well as civil disputes.
- It is crucial to approach parallel domestic and international proceedings in a coordinated way. That means:
 - designing and implementing a joined-up strategic approach;
 - understanding the likely timing of steps to be taken in the various proceedings;
 - keeping informed about, and reacting to, developments in other proceedings;
 - ensuring consistency within the various different proceedings.

Hot Topics Affecting the Financial Services Industry

US Department of Justice's Tax Division Investigations of International Financial Institutions

Key Types of Conduct that May Give Rise to U.S. Tax-Related Exposure for Financial Institutions

- Simply providing an account to a US person who fails to properly declare the account or income derived from it is not necessary a criminal act committed by a bank
- However, the DOJ would consider this a criminal act if the bank did something “in addition”
- The key is understanding the “in addition”
 - Marketing to US persons
 - Creating or advising on the creation of non-transparent ownership structures
 - Accepting documentation relating to the ownership of the account that is known to be false or fraudulent
 - Ignoring clear evidence that the client is not tax compliant
 - Deliberately assisting client avoid the disclosure of the account to US authorities
 - Repatriating funds to the United States in a non-transparent manner

How the US Department of Justice Identifies Targets

- John Doe Summonses (JDS)
 - John Doe Summon(es) are an IRS tool to seek information to identify unknown taxpayers
 - Such summonses recently have been served on US correspondent banks to identify wire transfers and US money services businesses
 - And US common carriers like FedEx, UPS, to identify communications with certain offshore entities known to create structures for US persons
 - In the past, JDS have been served on credit card companies, and IRS may do so again
 - In identifying undeclared US taxpayers, DOJ/IRS also can find their banks
- Data mining from Offshore Voluntary Disclosures (OVDs)
 - Undisclosed US taxpayers may regularize their accounts through Offshore Voluntary Disclosure Program
 - US taxpayers provide written submissions and may be interviewed
 - Can include discussion of role of offshore financial institutions

How the US Department of Justice Identifies Targets (cont.)

- Cooperating witnesses
 - Persons being prosecuted for tax evasion may provide information to government for more lenient treatment
 - DOJ has indicted and arrested taxpayers, bankers, and reached settlements with fiduciaries, banks
- Data mining from Swiss program
 - Swiss banks give DOJ “Leavers Lists” showing financial institutions that received outgoing US business
 - DOJ sought this information for future prosecutorial efforts
- Treaties
 - Data obtained from other jurisdictions through information exchange procedures contained in Income Tax Treaties or Tax Information Exchange Agreements (“TIEAs”)

Department of Justice Enforcement Priorities

- Countries
 - DOJ has indicated that it will pursue financial institutions in the Middle East, Asia, Caribbean and Europe
- Industries
 - DOJ has pursued actions against banks, fiduciaries, bankers, individual taxpayers
 - Any financial intermediary or financial services company could be a target
- Size or value of US cross border business
- Prominence in the industry
- Seriousness of conduct identified

Nature of Business (Risk Factors)

- Creation of entities / provision of fiduciary services for US persons
- Private wealth management business targeting US persons, especially with “US desk”
- Quality of implementation of QI Agreement / FATCA
- Current or former RMs or EAMs previously employed or associated with from banks that are either under investigation or have settled with the United States
- Advertising directed to US clients / US market
- Securities services provided to US residents
- Large number of US clients / high US AuM
- Jurisdiction subject to privacy laws
- Other recent compliance lapses

Initial Assessment to Scope Risk

- “It can never happen here” is dangerous view
- Counsel can assist to make an initial assessment
 - Review sample of files
 - Meet with RMs
 - Identify information known to be in the possession of the United States (e.g., voluntary disclosures, identity of RMs / EAMs, accounts transferred from banks known to be under investigation or have settled with the United States)

Potential Steps to Mitigate Risk

- Full investigation
 - Prepare for possible questions that DOJ might pose
- Strengthen policies and procedures, if needed
- Encourage customers to enter OVD, if appropriate
- Strengthen compliance function, if needed
- Provide training to ensure that bank employees are sensitive to tax avoidance risks
- Ensure strong FATCA compliance, esp. for accounts that might be considered problematic
 - However, FATCA will not necessarily erase past problems

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Questions?

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