HERBERT SMITH FREEHILLS

CROSS-BORDER LITIGATION

INTERNATIONAL PERSPECTIVES

IN THIS ISSUE

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WELCOME

Welcome to the first issue of Cross-Border Litigation, a periodic publication spotlighting legal and practical issues specific to litigation with an international aspect.

Why the focus on cross-border litigation? The increasing physical and technological globalisation of business has inevitably resulted in a dramatic increase globally in the number of litigated disputes where the parties are based in different jurisdictions, or there is some other international aspect (such as the location of evidence or assets). In the English Commercial Court, for example, 66% of cases in 2015/16 involved at least one foreign litigant, with 57 countries represented.

Such disputes of course raise particular legal issues, many of which fall within what is traditionally known as "private international law" - such as jurisdiction, choice of law and enforcement of foreign judgments. As the volume and complexity of cross-border disputes grows, those areas of law are continuing to evolve apace, both within national legal systems and through multi-jurisdictional arrangements being established and judicially interpreted. For commercial parties dealing internationally, an awareness of developments and problematic issues in those areas of law is important, not only when a dispute arises, but also at the deal-making and contract drafting stages, as a key part of their dispute risk management.

Further, beyond matters of substantive law, cross-border litigation typically gives rise to practical challenges that do not arise, or not to the same extent, in domestic disputes. Relatively straightforward procedures can become complicated where they span borders, and it is important to be aware of such additional hurdles and how best to navigate them.

This publication will seek to tap into the vast expertise of the firm's leading commercial litigators across the globe, to give readers the benefit of their hands-on experience in conducting cross-border litigation and to flag key developments in this area that should be on commercial parties' radars.

In this issue

The factors behind the increase in cross-border commercial disputes are highlighted in our discussion with **Don Robertson** of our Sydney office, who in over 35 years of practice has witnessed the dramatic increase in the proportion of commercial disputes involving some international aspect.

On the other side of the globe, **Adam Johnson QC** in London provides his take on the growth of cross-border disputes as a discrete area of practice and discusses the particular challenges of litigating across borders, particularly from an advocate's perspective.

With regard to substantive law, this issue spotlights two important country-specific issues that commercial parties need to be aware of when drafting jurisdiction and governing law clauses in international commercial contracts:

- the particular restrictions imposed by Chinese law on jurisdiction and governing law clauses in **China-related contracts**
- the current position on the use of asymmetric jurisdiction clauses in **France-related contracts**

We also look at developments in two separate procedural processes, each of which can potentially be valuable weapons in a cross-border litigant's armoury:

- the recent (January 2017) introduction of a new **European Account Preservation Order** system, aimed at providing a faster and more streamlined option for identifying and freezing bank accounts within the EU
- the US statutory process known as **section 1782 orders** for obtaining disclosure by US entities for use in foreign proceedings - which a recent decision suggests could even be used to access documents located outside the US.

Finally, looking forward to the upcoming negotiations over the **UK's departure from the EU**, we look at the likely impact of Brexit on jurisdiction and choice of law clauses and enforcement of judgments, by reference to each of the possible alternatives open to the UK government in this area.

We hope that you enjoy reading this issue and welcome your feedback.

To discuss any of the topics covered or other cross-border litigation issues, do not hesitate to get in touch with one of our regional key contacts listed at the end of this publication, or your usual Herbert Smith Freehills contact.

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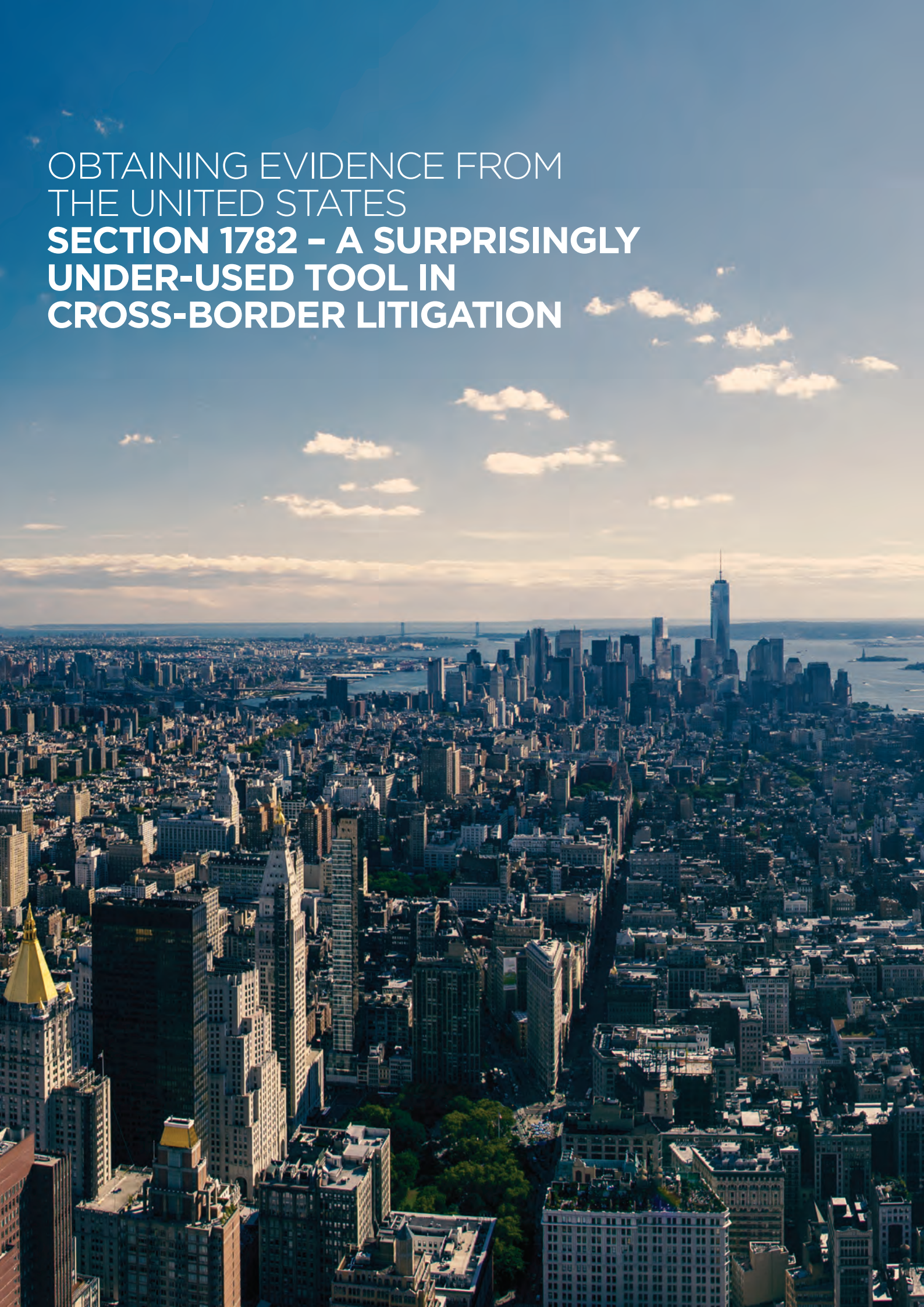
OBTAINING EVIDENCE FROM THE UNITED STATES **SECTION 1782 – A SURPRISINGLY UNDER-USED TOOL IN CROSS-BORDER LITIGATION**



The US statutory procedure known as a "section 1782 order" can be an extremely valuable tool in cross border disputes, essentially allowing a litigant in non-US proceedings to obtain US style discovery from US based entities, for the purposes of the foreign proceedings. The procedure holds particular appeal where the dispute is being heard in a jurisdiction that has only limited or no procedures for disclosure of documents, where it can potentially provide parties facing US-based opponents with a competitive advantage by effectively allowing a one-way disclosure of documents.

However, despite its longstanding history and relatively straightforward text, the statute still poses certain interpretive difficulties with which the US courts continue to grapple – including in an important recent decision suggesting that it may even be used to access documents located outside the US.

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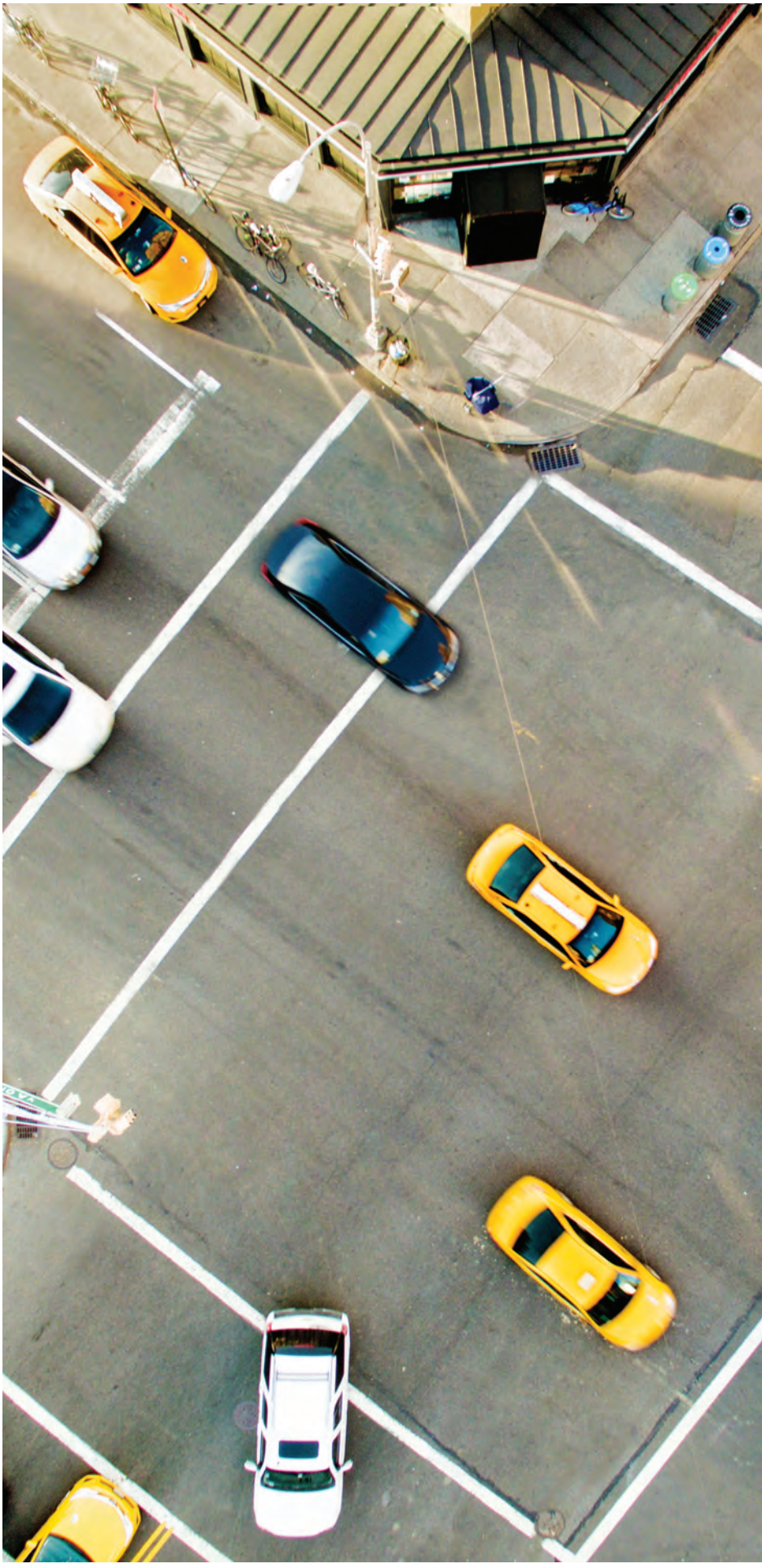
Laurence Shore, a partner in our New York office, looks at the scope of section 1782 and issues to bear in mind if you are considering making use of the procedure.



In 1964, the US Congress enacted the current version of section 1782 of Title 28 of the United States Code ("**Section 1782**"). Its full title is "Assistance to foreign and international tribunals and to litigants before such tribunals".

Essentially, the statute enables a US district court to order US-based individuals and entities to provide evidence for use in a proceeding in a foreign or international tribunal.

What types of evidence may be obtained ?

Section 1782 permits a US district court to order the production of:

- testimony
- documents
- 'other things'

That list is apt to cover most standard US discovery tools (such as document production and depositions) but not, according to at least one district court, interrogatories. It might also exclude requests for admissions, but that question has not been tested.

By default, production under section 1782 is governed by the Federal Rules of Civil Procedure (FRCP). Amongst the implications of that are that:

- the ordinary tools of discovery management used in US domestic litigation will apply
- so too will limits on discovery, such as limits on the distance a non-party may be forced to

travel to attend a deposition and the tests as to what degree of custody or control an entity must have over a document in order to be ordered to produce it.

Notably, section 1782 cannot be used to compel testimony or disclosure that would be in violation of any "legally applicable privilege." That includes privileges arising under either domestic US law or a relevant foreign law, although the latter must be demonstrated by "authoritative proof".

> "...the section 1782 procedure is a potentially valuable weapon in a litigant's armoury where there is likely to be relevant evidence based in the US"

Does it extend to documents outside the US?

The statute makes clear that a section 1782 order can only be made against an entity that 'resides' or 'is found' in the US. However, it is silent as to whether the evidence being sought also needs to be physically located in the US or whether it includes material that is physically located abroad but in the custody or control of the US-based target.

This issue is important as such an extraterritorial reach would potentially allow documents held outside the US by a non-US company to be accessed under section 1782 on the basis that the company was a foreign subsidiary or other affiliate of a US-based company, provided it could be established that the relationship was sufficiently close that the US company had the requisite degree of control over the documents.

The issue is also increasingly relevant as the question of the physical location of electronically held data becomes more complicated with advances in data storage technology. Recognition that the statute is not limited to US-based documents would remove any potential for recipients of section 1782 orders to resist production of electronic documents on the grounds that they were technically stored on foreign servers or in cloud-based platforms.

The law on extraterritoriality of 1782 (as concerns the location of documents) is unsettled. The bulk of authority (including in New York) has historically been against it. Recently, however, the Eleventh Circuit considered the question in *Sergeeva v Tripleton Int'l Ltd* and ruled that

> "the location of responsive documents and electronically stored information—to the extent a physical location can be discerned in this digital age—does not establish a per se bar to discovery under § 1782."

The court's reasoning included the fact that disclosure under section 1782 is by default governed by the FRCP, under which domestic discovery obligations do extend to materials located outside the US.

It is too early to gauge the import of *Sergeeva*. While noteworthy for suggesting the possible extraterritorial application of section 1782—and at variance with the bulk of existing authority on the point—the Court's analysis was fairly cursory and its conclusion somewhat tentative (if the foreign location of evidence is not a "per se bar" to discovery, when is it?). It remains to be seen how the other Circuits will respond to this development.

With respect to documents located outside the US, it is also worth bearing in mind that several foreign jurisdictions have enacted blocking or bank secrecy statutes that may prohibit production of documents pursuant to a section 1782 order. The existence of such laws would be a factor likely to be taken into account by a US district court when exercising its discretion whether to issue a 1782 order in any particular case, as discussed further below. However, if an order was nevertheless made, the recipient of the order might find itself faced with the unenviable choice between breaching either the foreign blocking legislation or the section 1782 order. Of course, in that regard, a section 1782 order is no different to any other mandatory disclosure order.

SECTION 1782 OF TITLE 28 OF THE UNITED STATES CODE

Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.

The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

Who can apply under section 1782?

An order may be made pursuant to a "request made by a foreign or international tribunal or upon the application of any interested person".

"Interested Persons"

Given that the scheme is concerned with obtaining evidence for use in foreign proceedings, an 'interested person' plainly includes a litigant in the relevant proceedings. However it is not limited to the parties themselves and has a wider scope. The US courts will also have regard to an applicant's "participation rights" in the foreign proceedings, such as a right to present evidence to the tribunal, a right to seek further review, etc. Examples from the case law of applicants that have qualified as interested persons include:

- an agent of a trustee in a foreign bankruptcy proceeding
- a complainant in a European Commission investigation
- an administrator of an estate in foreign probate proceedings

"A foreign or international tribunal"

The legislative history of section 1782 supports a wide scope for the term 'foreign or international tribunal', given that the term replaced 'court' in the predecessor statute. Cases have interpreted 'tribunal' to include various quasi-judicial administrative proceedings and regulatory proceedings.

However, one of the most problematic issues regarding section 1782 is whether it applies to foreign *arbitral* tribunals – and, in particular, international commercial arbitration tribunals. This is a controversial and much-discussed question.

Hans Smit, the lead drafter of section 1782, was adamant that private arbitration was within the statute's reach. However, US courts are divided on this point. Some first-instance District Courts have held that a tribunal in an international commercial arbitration is, or at least can be, within the statute's scope. However, the appellate Circuit Courts are inconsistent (and, even where they have reached the same result, have sometimes done so for different reasons). There is therefore no definitive answer and the controversy is ripe for Supreme Court resolution.

By contrast, US Courts have generally accepted section 1782 requests in support of *investor-state arbitrations* (see, for example, the Chevron-Ecuador case highlighted in the boxed text). There is no obvious rationale for the distinction between investment and commercial arbitrations in this context. However, it could be attributed to the investment treaty framework – ISDS tribunals are 'legitimised' by state action involved in their formation and ICSID tribunals are by definition 'international tribunals', having no juridical seat.

When can a request be made?

While the statute prescribes that the evidence must be sought 'for use in a proceeding', it is otherwise silent as to timing.

The Supreme Court has clarified that the procedure is not limited to supporting legal proceedings already on foot, but includes those 'in reasonable contemplation' (which is consistent with domestic US pre-trial discovery).

But what does 'reasonable contemplation' mean? As one circuit court has explained: "*The future proceedings must be more than speculative . . . and a district court must insist on reliable indications of the likelihood that proceedings will be instituted within a reasonable time.*" Examples of proceedings that have held to be in 'reasonable contemplation' include:

- a treaty arbitration before the tribunal had ruled on whether it had jurisdiction
- a case where seven years had elapsed between the underlying events and the purportedly 'imminent' litigation

The District Court's discretion

Once the above statutory requirements are met, the District Court still retains a broad discretion as to whether to grant a 1782 order, and to what extent.

The leading authority in this regard (and on section 1782 more generally) is the Supreme Court's 2004 decision in *Intel v Advanced Micro Devices 542 US 241 (2004)*. In that judgment, the Court identified four factors to guide the exercise of this discretion – although it is important to note that these are not prerequisites and none is individually dispositive.

The four *Intel* factors are:

1. *Is the evidence accessible by other means?*

   The court should consider the extent to which a section 1782 is necessary in order to obtain the evidence. If the target of the order is not a party to the foreign proceedings, the foreign tribunal may not have jurisdiction to order them to produce the material and it may therefore be unobtainable without a section 1782 order. If the target is a party, it could be expected that the foreign tribunal would normally have power to order production itself, in which case the US court might regard the need for a 1782 order as not as strong. However, this is only a guiding factor and the existence or absence of such a power in the foreign court will not necessarily be determinative.

2. *Nature of the foreign tribunal and proceedings and its receptivity to US judicial assistance*

   The 'receptivity' inquiry is: would the foreign tribunal *reject* the evidence if it was provided under 1782? Applicants enjoy a presumption of receptivity, and the contrary must be demonstrated by "authoritative proof".

   (Of course, even if the US court is satisfied in this regard, that is no guarantee that the foreign tribunal will not in fact take objection to the use of section 1782 in a particular case, particularly if it has not had prior notice of the application and if it regards the procedure as cutting across the tribunal's own management of the proceedings.)

3. *Is the request an attempt to circumvent policies of a foreign country or the US (as to proof-gathering restrictions or otherwise).*

   This is often confused with a "foreign discoverability" requirement – that is, a requirement to prove that the material sought would be discoverable under the rules applicable to the foreign court or tribunal. There is no such requirement under section 1782. In fact, the US courts look favorably on requests intended to overcome technical discovery limitations or obtain evidence beyond reach of a foreign tribunal.

   However, they are skeptical of efforts to replace a "foreign decision with one by a US court" or to otherwise undermine the foreign court or tribunal's authority to control its own discovery process. For example, the applicant in *In re Application of Caratube Int'l Oil Co.* (2010) was the claimant in an ICSID arbitration governed by the IBA Rules on the Taking of Evidence. The IBA Rules provided that a party may ask the *tribunal* "to take whatever steps are legally available to obtain the requested documents." The District Court denied the 1782 application, noting that while it was open to the *tribunal* to make the 1782 application, the claimant by proceeding unilaterally had "side-stepped these guidelines and...undermined the tribunal's control over the discovery process."

4. *Is the request unduly intrusive or burdensome?*

   The court has discretion to reject or trim requests that it deems would be overly intrusive or burdensome on the recipient.

In summary, the section 1782 procedure is a potentially valuable weapon in a litigant's armoury where there is likely to be relevant evidence based in the US which cannot be readily obtained otherwise. In any particular case, it will be important to consider how the discretionary factors outlined above might apply (on which you may need to take local advice in the US) and also the likely attitude of the foreign tribunal in which you will seek to use the evidence.

In re Application of Roz Trading Ltd.
(N.D. Ga. 2006)

- *The petitioner requested the District Court to compel The Coca-Cola Company to produce documents for use in pending arbitral proceedings arising out of a failed joint venture with a Coca-Cola subsidiary*
- *In the first decision of its kind, the Court concluded that that the private arbitral tribunal was a 'tribunal' within the meaning of section 1782. The Court based this conclusion on the Supreme Court's dicta in Intel and the statutory text and legislative history.*
- *The Court went on to grant the petitioner's application, ordering Coca Cola to produce specific documents requested as well as any documents responsive to categories listed in the petitioner's application*

In re Application of Chevron Corporation
(S.D.N.Y. 2010)

- *Perhaps the most famous section 1782 case, arising out of the Chevron-Ecuador saga.*
- *A US filmmaker had made a documentary at the request of the plaintiffs in an Ecuadorian class action. Chevron sought to subpoena the outtakes, asserting that they were likely to be relevant to an investment arbitration it had commenced against Ecuador.*
- *The investment tribunal was not established by private parties, but was formed pursuant to the US-Ecuador BIT. This fact, coupled with the Supreme Court's dicta in Intel, brought the tribunal within the application of section 1782*
- *The court found that Chevron's request met the statutory and discretionary factors and granted its application. This decision was largely upheld on appeal to the Second Circuit*

THE GROWTH OF CROSS-BORDER DISPUTES **AN AUSTRALIAN PERSPECTIVE**

Donald Robertson, partner in our Sydney disputes team, has practised commercial litigation for over 35 years and over that time has seen a dramatic increase in the proportion of commercial disputes that are cross-border or have international aspects.

We sought his views on this trend and on why clients need to have regard to the particular complexities of cross-border litigation as part of their risk management.

You have been practising in commercial dispute resolution in Australia for many years – how has the landscape changed over that time in terms of the extent of cross-border disputes your clients are involved in?

When I first started practice, the focus of the Australian economy, and hence of the firm's clients, was not even national, but very state-based. Many laws, including key commercial ones such as corporations law, were also state-based. Cross-border matters did arise from time to time (and the firm did many of those matters) but they rarely concerned ongoing commercial relationships.

Now, every aspect of our clients' business is affected by, or a part of, a global value chain in which production processes and service chains stretch across many different nations in complex commercial relationships. My clients also deal with regulatory issues which have an immediate impact in other countries (regulators have their own networks of cooperation and regulatory disputes quickly are transmitted globally).

Why do you think there a need for a focus on cross-border disputes?

The need really arises from the shape of our clients' businesses. They are participants in global value chains. Sometimes that means they have an office overseas, but more often they have contracts or long-term relationships (a joint venture or similar structure) that result in complex dealings with each other. As many are long-term in nature, there is inevitably an event not contemplated by the agreement; or there is an incentive for a party to act in an opportunistic manner, taking advantage of the necessary gaps that appear in such arrangements.

Much of our clients' risk management strategies around these relationships is guided by the dispute resolution tools available – meaning that many of the legal and practical complexities of cross-border litigation need to be considered at an early stage as part of that risk management.

Also, many private cross-border disputes will involve associated regulatory issues. Because clients are exposed to multiple regulatory regimes, their regulatory strategy now has to take into account how regulators in other countries react. Just as regulators coordinate across boundaries, so also there is a need for coordination of regulatory responses and to have in place a plan for regulatory interaction with foreign regulators.

In terms of legal and regulatory changes, what would you say are currently the key drivers that have the potential to draw more clients into cross-border disputes in the future?

The world continues to integrate and our clients look to our region and out of our region for production capacity and markets. The strengthening of global value chains (which tend to "cluster", with hubs centred in China, Germany and the United States) will be the key reason for an increase in cross-border disputes, including within any company's own value chain due to the complex models of doing business across borders.

This increased intertwining of the world economy is of course accompanied by the global movement to integrate regional markets through regional and bilateral trade and investment agreements.

The changing economic framework is being matched by a rapid change in the legal instruments relevant to cross-border disputes, creating a strong international disputes services market: there is a strong movement towards harmonisation or codification of the principles of law dealing with cross-border issues; the development of regional courts such as the Singapore International Commercial Court; the various Hague Conference projects (recognising choice of court agreements, giving the right to choose law or "rules of law" (soft law) and recognition of judgments) which seek to improve international procedural law and reinforce parties' autonomy in shaping their own dispute procedures; and the substantive unification by restatement of international contract law by the UNIDROIT Principles of International Commercial Contracts.

How have you seen the changing landscape directly affecting clients in your practice?

A global network is a critical part of my practice as the firm's clients are global in character and they now regularly find that their disputes have an international aspect in some form or other (even where this isn't immediately apparent from the beginning!). The linkages with foreign offices are now simply part of our own global value chain, as I call on overseas offices to assist with local proceedings that have global dimensions (such as involving evidence or assets located overseas) or I provide assistance in foreign proceedings with Australian connections.

This couldn't be better demonstrated than by pointing to two recent matters of mine: The first involved obtaining freezing orders against a shareholding in an Australian company to assist an international arbitration (on a claim of over US$ 1 billion) seated in Switzerland between a Kazakhstan and a Russian entity. The second involved potential evidence of foreigners in Australian court proceedings in which the evidence is sought to be taken in Paris under the Hague Convention on Taking Evidence Abroad and also in the US under section 1782 of the United States Code.

I think most lawyers would agree that dealing with the international aspects of a dispute can be amongst the most challenging and potentially frustrating aspects of a case. So it is key to have access to a global network that can provide a seamless, total service to a client embroiled in a conflict, no matter what corners of the globe the dispute takes us to.

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EUROPEAN ACCOUNT PRESERVATION ORDERS **A NEW STREAMLINED PROCEDURE FOR FREEZING EU BANK ACCOUNTS IN CROSS-BORDER CASES**

From 18 January 2017, creditors in the EU have available to them the new European Account Preservation Order (EAPO) procedure, aimed at facilitating debt recovery in civil and commercial matters by streamlining the process for freezing a debtor's bank accounts in most EU countries.

We answer some of the questions that our clients have been asking about the new procedures.

Most national courts in the EU already have procedures for preserving a defendant's assets. Why the need for an EU-wide procedure?

In cross-border cases, having to rely on national courts' procedures for preserving assets can often be time-consuming and cumbersome, especially when the creditor needs to freeze multiple accounts located in different jurisdictions. More importantly, such measures can prove ineffective in such circumstances - if the seizures of the accounts in the various jurisdictions do not run parallel and in a coordinated way, the debtor will be warned and may have an opportunity to move funds so as to defeat enforcement. Also, the conditions in national law for the grant of such protective measures as well as the efficiency of their implementation vary considerably throughout the EU.

In addition, the Recast Brussels Regulation (No. 1215/2012) which facilitates the enforcement of judgments within the EU does not apply to orders that are made without notice to the defendant (which is of course commonly the case with asset freezing orders).

How does the new procedure work?

Under the EAPO Regulation (No. 655/2014), a creditor domiciled in a Member State can request an EAPO from a Member State court, which will be in a standard form specified in the legislation.

In addition, as a creditor often does not know where the debtor holds its bank account(s), the Regulation allows for the creditor to first ask the court to collect the information needed to identify the debtor's account from the national authorities of the Member State in which the creditor believes that the debtor may hold an account.

> "Once issued, the EAPO will be recognised in all the other participating Member States, where any accounts may then be frozen ..."

The legislation provides for the use of standard multilingual forms for each step in the procedure, including for the application, for the EAPO itself, for a declaration by the banks holding the frozen accounts as to the preservation of funds, and for any application by a debtor for a remedy or appeal.

Where and when does the new procedure apply?

The scheme only operates within the EU. That is, it can only be used by creditors domiciled in a participating Member State and only applies to bank accounts held in a participating Member State. (Participating states include all the EU Member States apart from the UK and Denmark – as to which see below). Of course, non-EU debtors may still be impacted by the scheme in that any accounts held by them in a participating EU jurisdiction are able to be frozen.

Furthermore, it is only available in cross-border cases - where the targeted bank account is held in a different Member State to where the application for the EAPO is filed or the creditor is domiciled.

The types of 'civil and commercial' debts that may be enforced under the scheme include not only those arising from contractual claims but those relating to tort and civil claims for damages or restitution that are based on criminal behaviour.

As the legislation is in the form of a Regulation, it is immediately binding and directly applicable in all participating Member States (from 18 January 2017) without the need for transposition into national laws.

What about the UK and Denmark?

As both the UK and Denmark have opted out of the legislation, the EAPO procedure will not be available to creditors domiciled in those countries, UK and Danish courts will not issue EAPOs and the procedure cannot be used to freeze UK or Danish bank accounts.

However, as is the case for non-EU entities, any accounts held by UK and Danish entities in other Member States may be frozen under an EAPO.

How and when can you apply for an EAPO?

The timeframe in which an EAPO can be sought is very broad: a creditor may apply before the initiation of proceedings on the substance of the dispute, at any stage during such proceedings, or after it has obtained a judgment, court-approved settlement or an "authentic instrument" requiring the debtor to pay a claim.

In the latter case, the competence to issue an EAPO generally lies with the courts of the Member State in which the judgment was issued, where the court settlement was approved or concluded or where the authentic instrument was drawn up. Otherwise it lies, in principle, with the courts of the Member States that have jurisdiction to rule on the substance of the claim. One notable exception is where the debtor is being pursued in their capacity as a consumer – in which case the EAPO must be sought in the Member State where the debtor is domiciled.

Where an EAPO is granted prior to the commencement of proceedings, the applicant must then initiate proceedings on the substance of the dispute within 30 days of making the EAPO application or within 14 days after its issue – otherwise the order will be revoked.

Applications will generally be made on paper, in the form specified by the legislation. The time-limits foreseen for the decision on an application vary from 5 to 10 days.

Each Member State has appointed an authority responsible for the enforcement of EAPOs in its jurisdiction. The specific means by which an issued EAPO is conveyed to the banks in question and served on the debtor will vary according to the procedures adopted by that authority.

What does a claimant need to prove?

A court will issue the EAPO when it is satisfied that there is an urgent need for a protective measure because there is "a real risk" that the subsequent enforcement of the claim against the debtor "will otherwise be impeded or made substantially more difficult".

On its face, this would appear to be a relatively low threshold, not necessarily requiring the claimant to establish that the defendant is likely to seek to avoid a judgment by moving assets. However, it will of course be up to national courts to apply the test and there is clearly scope for different courts to take varying approaches to the same facts.

In pre-judgment cases the creditor must also satisfy the court that it is likely to succeed on the substance of the claim.

What about the debtor's rights?

As is common with many Member States' national protective procedures, the debtor will not be informed about the creditor's application nor be heard prior to the EAPO being issued or implemented. However, the Regulation does provide for a number of legal remedies for debtors, including a right to apply to the court issuing the EAPO to revoke, or at least modify, the order based on an enumerated catalogue of grounds.

Where an EAPO is revoked, the debtor may also seek compensation from the creditor for any damage caused by the EAPO due to fault on the creditor's part. In general, the debtor bears the burden of proving such damage, although the Regulation contains a number of presumptions of fault by the creditor (for example, if the creditor fails to initiate proceedings on the substance within the set time limits). However, the specifics of any such claim for compensation are governed by the laws of the Member State in which the claim is brought.

The Regulation also includes a requirement for an applicant for an EAPO in certain circumstances (which is likely to include most pre-judgment applications) to provide security against the possibility of such a compensation order.

So will the scheme be effective?

Freezing a party's bank accounts in a civil claim (particularly pre-judgment) is a serious and intrusive step. Courts have long recognised that it is important that any procedure allowing for this carefully balance the rights of claimants and defendants. It is therefore perhaps not surprising that, despite the straightforward application procedure for an EAPO (or perhaps because of it), the new Regulation's supporting provisions setting out how the procedure will operate are quite detailed and, in some areas, rather complex.

In particular, the scheme defers to national laws on many important issues (such as whether joint accounts and nominee accounts can be frozen, what other accounts might be immune from seizure and the form of security the claimant must provide). The extent to which the scheme is successful in making the procedure for freezing accounts in the EU more efficient may therefore depend to a significant extent on the approach of the individual national courts to implementing it.

In any particular case, a party's decision whether to use the EAPO procedure rather than an existing national procedure for preservation of assets may depend on how sophisticated those existing procedures are in the jurisdiction where the order is being sought, how complex the substantive case and asset tracing facts are, and how the jurisdiction in which the target bank account is located has implemented the EAPO scheme up to that time.

Nevertheless, the new procedures are undoubtedly a move in the right direction and have the potential to considerably strengthen claimants' ability to enforce civil judgments and recover debts in the EU. In particular, the procedures for having a court obtain details of unidentified bank accounts from the foreign jurisdiction's authorities (as distinct from compelling the defendant to disclose them) may represent a valuable additional tool beyond what is currently available under most national systems.

Where do I find the detail?

The full title of the legislation is "The Regulation (EU) 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters".

The relevant forms have now been published in the Commission Implementing Regulation (EU) 1823/2016 of 10 October 2016.

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SPOTLIGHT ON: **ADAM JOHNSON QC**

Adam is a partner in our London disputes team with particular expertise in cross-border disputes and international law, with a focus on the financial services industry. He is a solicitor advocate and a member of the firm's Global Advocacy Unit.

On the occasion of his recent elevation to Queens Counsel (QC), recognising excellence in both written and oral advocacy, we asked him about his interest in both international law and advocacy.

What led you to specialise in cross-border disputes? Was private international law an area you were interested in from the beginning of your career?

At university I took a course in the conflict of laws with John Collier, a very eminent private international lawyer and an inspirational and amusing teacher. That was the start of it. I then decided to join a law firm with a growing international network and chose Herbert Smith. I had the good fortune to work with Lawrence Collins, Roger Wellings, Campbell McLachlan and other partners doing predominantly cross-border litigation. So to answer the question, it is something I have been involved in from the outset of my career and have always enjoyed.

"The case had a very interesting politcal dimension, and bought us into contact with some very unusual people"

How did your involvement in the firm's Advocacy Unit come about? Has it given you a different perspective on how to help steer clients through complex international litigation?

I joined the Advocacy Unit shortly after it was established in 2005. I had always had an interest in advocacy, both through handling interlocutory work in High Court cases (there was quite a lot of it about before the Woolf Reforms), and later on through helping with development of the firm's arbitration practice with partners like Lawrence Collins and Julian Lew. So when the Unit was formed I was happy to take on more of an advocacy-focused role, and to try and help with the integration of the new Unit partners into the firm.

Over time I've been fortunate enough to handle a number of cases as advocate which have an international litigation focus. What that gives you is first hand exposure to the business of explaining your problem – and your preferred solution – to a judge. Doing that, and appreciating what works and what doesn't work in practice when a decision comes to be made, certainly can help in advising clients on what is potentially feasible and workable.

You've been involved in many large cross-border disputes in Europe and the US – are there any standouts for you?

A few. Early on, the *Westland Helicopters* case (*Westland v. Arab Organisation for Industrialisation*) was one of the few English cases to deal with the status of international organisations under English law. The case had a very interesting political dimension, and brought us into contact with some very unusual people.

There were then a string of cases acting for the UK partners of Arthur Andersen, following the Enron collapse, and acting for the SEC in their enforcement proceedings against Roys Poyiadjis following the Aremisoft scandal – one of the first cases to deal with the recognition and effect in foreign proceedings of the regulatory and investigative powers of the SEC and the US Department of Justice.

How have you seen this area of practice develop over the years?

In one way it has fragmented, because of the impact of European law on core issues such as choice of law and jurisdiction. This has led to a sort of two-track system of private

international law in our courts, with some cases falling within the European Union regime and others within the traditional common law regime.

At the same time, in other ways the law has become more coherent, at least if you know your way around it. The EU legislation, in particular, has led to a set of standardised rules, which in many (though not all) cases, are easy to apply and lead to relatively predictable results. This is valuable for clients who appreciate certainty. For practitioners the challenge is to keep on top of everything that not only the English courts but also the European courts produce.

"... appreciating what works and what doesn't work in practice when a decision comes to be made certainly can help in advising clients on what is potentially feasible and workable"

More broadly, it seems to me it is increasingly important to develop a truly international and comparative law mindset. It is only if you familiarise yourself with the differences between different legal systems that you can take advantage of them for your clients, and that is what private international law in practice is all about.

The inevitable Brexit question: Do you think that how international litigation is conducted out of London is likely to change significantly as a result of the UK's exit from the EU?

There may be a change in the basic principles we apply, because the EU legislation on choice of law and jurisdiction will fall away, and it is unclear at the moment what they will be replaced with. But I don't think there will be a change in the volume of work. That is because the reasons parties choose to litigate in the English courts are usually to do with the quality and independence of the judiciary, and the stability and perceived fairness of our substantive law in core areas like contract and commercial law. So I think the game will carry on as it always has, but will be subject to different rules.

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ASYMMETRIC JURISDICTION CLAUSES **AN UPDATE FROM FRANCE**

"Asymmetric" jurisdiction clauses (which give one contractual party greater flexibility than the other as to where proceedings can be commenced) are widely used in some sectors. But they are not without their risks in transactions with international elements. Decisions in a number of countries (including Russia, China and, particularly, France) have cast doubt upon the enforceability of such clauses and have the potential to leave parties exposed to being sued in a jurisdiction to which they would never have agreed.

The most recent decision of the French Supreme Court has clarified that not all asymmetric clauses will be struck down. However, they remain problematic and parties considering using such a clause in a contract that might have connections with France need to carefully weigh the potential benefits against the risks.

Clément Dupoirier and **Vincent Bouvard**, partner and associate in our Paris disputes team, bring us up to date on the current position.

In exclusive jurisdiction clauses, the parties to a contract agree in advance that any disputes between them will be submitted to a single court identified in the clause. However in practice, more complex arrangements have been developed, mainly under Anglo-American influence, aimed at expanding the array of possible jurisdictions, most often for the benefit of only one of the contracting parties (the party in the strongest position during contract negotiations).

Most often under these asymmetric clauses:

- one party is obliged to file its suit in a particular forum determined by the clause (generally the courts where its counterparty is domiciled); but
- the counterparty has greater freedom, within confines that may greatly vary with the wording of the clause. In practice, it is not uncommon for a clause to allow the beneficiary to apply to any other court that would normally assume jurisdiction to hear the dispute if the jurisdiction clause did not exist.

The starting point for understanding the French courts' attitude to such clauses is the well-known 2012 decision in the *Rothschild* case (Cass. 1ère Civ., 26 September 2012, 11-26.022). The French Supreme Court (*Cour de Cassation*) refused to uphold a jurisdiction clause that bound one of the parties to submit any disputes to the court referred to in the clause but allowed the other party to also bring suit in "any other competent court". The Supreme Court's reasoning was that such a clause is "potestative" – that is, "is at the discretion of a single party (...), and so runs counter to the subject and purpose of the option of expanded jurisdiction set out in Article 23" of the Brussels Regulation.

Despite the many criticisms of *Rothschild*, in France and internationally, the French Supreme Court mostly upheld the decision in a subsequent 2015 ruling in respect of a similarly worded clause, now referred to as the *Crédit Suisse* ruling. The Court did, however, remove all references to the concept of a potestative clause, and confined itself to relying on a requirement for predictability, which by the Court's hand thereby became a cardinal rule.

The Apple decision – a clarification

In October 2015, the French Supreme Court took the opportunity to refine the case law in its decision in *Apple Sales International v eBizcuss* (Cass. 1ère Civ., 7 October 2015, 14-16.898). Following that decision, it now appears that it is at least possible to draft an asymmetrical clause that will be upheld by the French courts.

A contract between a French incorporated company and an Irish incorporated company contained a jurisdiction clause agreeing that disputes would come under the jurisdiction of the courts of the Republic of Ireland. However the same clause also reserved the right – to the Irish company alone – to bring suit in the courts with jurisdiction over the counterparty's registered office, or those in any country where it suffered a loss caused by the counterparty.

The French company commenced proceedings against the Irish company in the Paris Commercial Court, pursuing allegations of competition law breaches. The Commercial Court accepted the Irish company's argument that it lacked jurisdiction, which belonged to the courts of Ireland. When the French company's appeal to the Paris Court of Appeal was equally unsuccessful, it appealed to the Supreme Court.

The clause at issue was undeniably asymmetrical: while the French company had no choice but to apply to the courts of Ireland, the Irish company had greater flexibility. However, unlike the clauses in *Rothschild* and *Credit Suisse*, it wasn't open to the party with the benefit of the clause (in this case the Irish company) to begin proceedings in *any* country that might have jurisdiction according to its own rules. The flexibility to choose another jurisdiction was restricted to the courts where the French company had its registered office, and the courts where any loss caused by the French company was suffered.

The *Crédit Suisse* ruling had not yet been issued when the appeal in *Apple* was filed, but the contours of the decision in *Apple* can be inferred from it. The Court had implied in *Crédit Suisse* that it was not opposed in principle to all types of asymmetry in jurisdiction clauses. It only invalidated the clause at issue after noting that the clause did not define the "objective factors" based on which the clause's beneficiary would be able to apply to a different forum than the one imposed on its counterparty. In other words, the Court suggested that it would uphold an asymmetric clause as long as the party that was not free to choose jurisdiction under the clause could objectively anticipate the alternative forums available to their counterparty.

The *Apple* decision confirmed this reading. The Supreme Court assumed the lower courts' reasoning as its own – that is, that the jurisdiction clause in this case did satisfy the "predictability requirement" because it was possible "to identify which courts would potentially have jurisdiction over a dispute", even if there were more than one such court. The choice was not under the beneficiary's complete control and the clause was not "potestative".

Five years after *Rothschild*, the case law from the French Supreme Court is therefore now considerably clearer. Asymmetric clauses are still to be avoided if they allow a single party to apply to any court of its choosing, while they are likely to be upheld if the other possible forums can be objectively determined (whether because explicitly stated or because specific rules for doing so are given). As suggested by the *Apple* case, the rules to determine the alternative forums must be laid down in the clause, hence at the time the contract is entered into, while the event(s) that will be relevant in activating this clause may only materialise at a later stage.

But still a note of discord . . .

Although the case law on this topic is perfectly intelligible to practitioners, it is not without critics. To the extent that the French position still rejects asymmetric clauses that allow complete freedom to one of the parties to apply to any competent court outside the jurisdiction specifically identified in the agreement, it is clearly out of tune with the Anglo-American tradition, in which this kind of clause is perfectly valid. Moreover, since such clauses were expressly allowed under the Brussels Convention (the forerunner to the Brussels Regulation), the Court implicitly found that the Brussels Regulation had restricted the freedom of contract on this issue.

Regardless, the case law of the French Supreme Court only stands thanks to the silence of the Court of Justice of the European Union (CJEU). No cases concerning this type of clause have come before the European court since the Brussels Convention was replaced by the Brussels Regulation. And yet other European courts – all applying the same EU law – continue to accept asymmetric clauses despite the situation in France, creating an unwelcome note of discord with the rest of the EU.

The goalposts were recently moved when the Brussels Regulation was replaced by the Recast Brussels Regulation (Regulation No. 1215/2012), which entered into force on 10 January 2015. Unlike the earlier regulation, which did not address the validity of jurisdiction clauses, the new text provides (in Article 25) that this issue must be assessed in accordance with the laws of the courts purportedly given jurisdiction by the clause in question. As the court appointed by the clause is unlikely to be a French court, could this mean the end – at least in practice – for the *Rothschild-Crédit Suisse* case law? Only time will tell – it remains to be seen how the French courts will apply the Recast Brussels Regulation and the absence of authority on the point leaves some uncertainty.

For now, businesses involved in transactions with ties to France must continue to take every precaution when drafting jurisdiction clauses. Those who wish to keep their options open when it comes to jurisdiction would be wise to phrase those options carefully.

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Key questions to consider when contemplating an asymmetric clause:

- Are there specific reasons why the flexibility of an asymmetric clause would be particularly useful in the particular transaction? For example, a risk that your counterparty may move its assets?
- Are there aspects of the transaction that give it some French connection, such that the French courts might have a basis to accept jurisdiction if your counterparty commenced there contrary to the terms of the jurisdiction clause? (eg parties' domiciles, location of property, place the contract has been negotiated or is to be performed, likely location of losses, etc).
- If so, would having the proceedings heard in France be a problem in the particular case?
- If having the suit heard in France is undesirable, but the flexibility of an asymmetric clause is still preferred, can the chances of it being upheld by a French court be maximised by drafting the clause so as to restrict your flexibility to commence proceedings elsewhere to jurisdictions that can objectively be identified?

CROSS-BORDER DISPUTES AND BREXIT
WHAT DOES IT MEAN FOR CHOICE OF LAW, JURISDICTION AND ENFORCEMENT OF JUDGMENTS?

The UK's rules on choice of law, jurisdiction and enforcement of judgments are in large part dependent on EU Regulations which will no longer apply post Brexit. So what is likely to happen then? That depends on what alternative arrangements the UK puts in place post-Brexit, which will largely depend on the result of its negotiations with the EU.

Choice of law

Choice of law is straightforward as very little is likely to change. The Rome I Regulation ((EC) No 593/2008) governs the applicable law in contractual matters in all EU Member States other than Denmark, and Rome II ((EC) No 864/2007) governs the applicable law in non-contractual matters. The rules in those Regulations require Member States to respect a choice of law, in most cases, regardless of whether any contracting party is EU domiciled or whether the chosen law is that of a Member State. So this means that a German court, for example, would be obliged to apply English law if that was the chosen law, regardless of whether the dispute was being heard before or after Brexit. The other rules in Rome I and Rome II, so those which apply in the absence of choice, are equally unaffected by whether or not the law indicated by the rules is the law of an EU Member State.

What will the UK put in place to replace Rome I and Rome II? We don't of course know what the final position might be. In the interim, the intention is that EU Regulations will be incorporated into British law by a Great Repeal Bill, with a view to each Regulation being kept, changed or repealed as parliament chooses over time. It seems unlikely that changing Rome I or II would be high on the government's agenda. The rules work well, generally speaking, and there is no pressing need to make changes.

Jurisdiction and enforcement

The position in respect of jurisdiction is more complicated. The recast Brussels Regulation (Regulation (EU) 1215/2012) allocates jurisdiction as between EU Member States, so when the UK leaves the EU, if nothing replaces that Regulation, each remaining Member State will apply, in respect of the UK, the rules it has in place in respect of non-EU countries. This will include so called exorbitant jurisdiction rules which are not permitted under the Regulation. These rules vary from country to country, but may allow jurisdiction to be taken based on, for example, the nationality of the claimant.

The recast Brussels Regulation also governs enforcement of most judgments as between EU Member States. In the absence of some other agreement, therefore, Brexit will mean each remaining Member State will apply its own rules on enforcement of non-EU judgments to judgments from the UK.

The same is true of course in England – the English courts will apply the common law jurisdiction rules to EU defendants. Those rules permit jurisdiction to be taken based, for example, on mere presence however temporary (although the court will not always exercise that jurisdiction where there is a more appropriate jurisdiction for the dispute to be heard). Similarly, the English courts will apply the common law rules to enforcement of a judgment from an EU country. Those rules are more restrictive than the rules in the recast Brussels Regulation, including in respect of the types of judgments that will be enforced.

So, it seems, it is in everyone's interests for a new deal to be negotiated. What will that deal look like?

Continuation of recast Brussels Regulation

There is a consensus amongst most legal commentators that the UK should try to negotiate the continuation of the rules currently in place – so those contained in the recast Brussels Regulation.

This isn't entirely without precedent. Denmark has an opt-out in relation to matters concerning justice (amongst other things) but it has entered into an agreement with the EU so that the Brussels jurisdiction regime in fact applies to it. Whether the EU would be prepared to enter into such an arrangement with the UK is however doubtful. Denmark is arguably in a very different position to the UK, given it is a member of the EU and therefore subject to the benefits and burdens that brings. A further obstacle is that the UK government has made clear in its White Paper published in February 2017 that it is not prepared to accept that decisions of the CJEU remain binding in the UK post Brexit.

Bespoke agreement

Taking a different tack, there could be a bespoke agreement, meaning the UK starts from scratch and tries to negotiate what it would like to see in an agreement with the EU on these matters, or it could take the recast Brussels Regulation as a starting point and try to negotiate changes to it.

There are aspects of the current regime which most English lawyers do not like, in particular the fact that certainty is the main guiding principle rather than flexibility when it comes to identifying available jurisdictions. While bespoke agreements appear to be what the government has in mind for the Brexit negotiations generally, it seems unlikely to happen in this context, given everything else which needs to be sorted out on Brexit, certainly in the short to medium term. And that's even assuming there is any appetite in the EU to negotiate a bespoke deal.

Lugano Convention 2007

The next possibility is that the UK joins the Lugano Convention 2007. This is the Convention in place between the EU and the European Free Trade Association members Norway, Switzerland and Iceland. It is broadly in the same terms as the Brussels I Regulation (Regulation (EC) No 44/2001), so the rules in place before the recast Brussels Regulation took over on 10 January 2015.

There is no requirement that the UK becomes a member of EFTA in order to join the Convention. Any state can apply to join, but unanimous agreement is required from the contracting states. If the UK goes the 'hard' Brexit route, that might prove difficult to obtain from the EU. Even if there is agreement, there may be some delay as the Convention just requires that the contracting states endeavour to give their consent within a year of the invitation to join. The Convention requires parties to have regard to, rather than be bound by, decisions of the CJEU, which is likely to be far more palatable to the UK Government.

The key difference between the recast Brussels Regulation and the Lugano Convention is that the risk of a torpedo action remains under the Lugano Convention. A torpedo action is a way of delaying the chosen court from hearing the case – a potential abuse which has been put right under the recast Regulation.

There is talk of a revised Lugano Convention, mirroring the recast Brussels Regulation, so that would mean Lugano in effect catching up with the Brussels Regulation as it has done in the past. That will no doubt take some time to happen but in the longer term, if the UK joined the Convention, it would mean in essence the same rules as currently apply being in effect.

Hague Convention on Choice of Court Agreements 2005

The fourth possibility is that the UK joins the Hague Convention on Choice of Court Agreements 2005 in its own right (it is currently a member by virtue of the EU's accession on behalf of Member States). This is possible without any other country having a right of veto and relatively simply by depositing the appropriate documents. The Convention would then come into force three months later. The UK could of course join Hague as an interim measure while seeking to put other arrangements in place. That is something we, amongst others, are encouraging the government to do, and to make clear that it is going to do, so the markets have some certainty.

The Hague Convention is not a complete answer as it only applies to exclusive jurisdiction agreements – so not to non-exclusive agreements, and one way clauses may be treated (there is some controversy over this) as being non-exclusive for the purposes of the Convention. Nor does it apply where there is no jurisdiction clause.

There are also some uncertainties where at least one party is EU domiciled and no party is domiciled in a non-EU Hague country (ie Mexico, Singapore and, in this scenario, the UK). There are also some timing and interpretation issues depending on when the jurisdiction agreement was entered into.

No Agreement

The final possibility, which seems highly unlikely at least longer term, is that nothing is put in place. That would then mean that each country applies its own domestic rules on jurisdiction and enforcement of judgments.

So in the UK, a German domiciled defendant would be in the same position as a defendant domiciled in New York when it comes to jurisdiction and a German judgment in the same position as a New York judgment when it comes to enforcement. That doesn't mean enforcement won't be possible, but the procedures are likely to be slower and the type of enforceable judgments more restricted. In principle, however, there is unlikely to be a problem enforcing a money judgment given by a court chosen by the parties, which is obviously a common commercial scenario. That certainly seems to be the case in Germany, Spain and France for example.

Conclusion

It is likely to be some time before we know what will replace the current rules on jurisdiction and enforcement of judgments when the UK leaves the EU. The government White Paper acknowledges that "an effective system of civil judicial cooperation will provide certainty and protection for citizens and businesses of a stronger global UK", which suggests it is aware of the issues, but no further detail is provided. A number of options are available, but signing up to Hague (where no consent is required) and the Lugano Convention (which does require EU agreement) seem most likely to achieve the government's objectives of preserving the rules currently in place, without being bound by decisions of the CJEU.

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DISPUTES CLAUSES IN CHINA-RELATED CONTRACTS **WILL YOURS BE EFFECTIVE?**

Herbert Smith Freehills has launched the latest edition of its practical guide, "**Governing law and dispute resolution clauses for China-related contracts**".

Popularly known as 'The Dragon Book', the guide helps in-house lawyers negotiating China-related commercial contracts to understand the workings of Mainland Chinese law as it affects choice of law and other options for resolving disputes.

Every commercial contract in the world should state the law by which it is governed and cover what will happen if things go wrong – will disputes will be resolved by arbitration or litigation; where will the process take place?

However, Chinese law restricts both the choice of law and the types of dispute resolution that can be used for China-related contracts, so drafting the relevant clauses in these contracts is not straightforward.

The Guide will help you understand:

- when the restrictions apply and
- how to draft your China-related contracts so you do not fall foul of them

The guide also explains a number of common traps to avoid to ensure your dispute resolution and governing law clauses are effective.

Since the first edition of The Dragon Book was published, the scale of China business has grown enormously, and disputes have naturally grown as deal volume increases.

"As Chinese investors extend their reach yet further, including as part of the One Belt, One Road initiative, it is inevitable that we will see an increasing number of disputes involving Chinese parties. Understanding how best to structure your contract to resolve these disputes when they do arise, and enforcing the ultimate outcome, is a vital piece of the investor's toolkit" said Hong Kong partner May Tai.

For further information on the guide and to request a copy please visit hsf.com/dragon-book.

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