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U.K. Decision Spells Trouble for U.S. Forum Selection Clauses

A U.S.-based employer with operations in multiple states typically wants to specify not only which jurisdiction's laws will apply to its contracts, but also the forum where contractual disputes can be heard. The company, after all, does not want to have to bring suit, or to be sued, in every state where it may have a customer. It makes much more sense to insist that all litigation take place in a forum convenient to the company, where the company's witnesses and records are located, which is, usually, the state whose law will be applied.

These considerations are magnified when a multinational company is putting together a global executive incentive compensation plan that will apply to executives strewn all over the planet. The New York-based company would naturally want to specify in the plan that New York law applies, and require that all disputes arising under the plan be litigated in the courts of New York, where the company and its relevant records and witnesses are located. Without the forum selection clause to force all the cases into New York courts, the courts of a dozen different countries could be called upon to interpret and apply New York law—with the predictable result of confusion, contradiction and added expense.

However logical the sentiment, the forum selection clause may not work. A recent decision by the UK Court of Appeal should serve as a wake up call for multinationals who have employees in European countries and have designated that any dispute arising out of the employment relationship will be heard in the United States.

In *Samengo-Turner v. J & H Marsh & McLennan (Services) Ltd. and others* [2007] EWCA Civ 723 (*available at:* http://www.bailii.org/ew/cases/EWCA/Civ/2007/723.html), the UK Court of Appeal ruled that notwithstanding a New York forum selection clause that the parties had agreed to, if the company wished to bring suit against its English employees for breach of the obligations set forth in a long-term incentive plan, it had to do so in England, where they were domiciled. "A multinational business," Lord Justice Tuckey declared, "must expect to be subject to the employment laws applicable to those they employ in different jurisdictions."

Julian Samengo-Turner, Ronald Whyte and Marcus Hopkins were employed as reinsurance brokers by J & H Marsh & McLennan (Services) Limited (MSL), a member of the Marsh & MacLennan group. As senior executives, they participated in the MMC 2000 Senior Executive Incentive and Stock Award Plan. As the court

This Month's CHALLENGE

Forum selection clauses — forcing executives to litigate disputes over the meaning and application of executive compensation plans in the courts where the Company's records and witnesses are located — make a lot of sense. Unfortunately, they don't work.

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Be prepared to litigate where the employees are located.

acknowledged, "it makes sense to have one central plan awarding shares in a group's parent company to senior employees who are employed by many different companies within the MM group in many different countries." The Plan was administered by MMC in New York.

Each of the three employees had signed an agreement when he was awarded a long-term incentive grant under the Plan, specifying that he would not, among other things, solicit any employee of the company to work for a competitor. In April 2007, Samengo-Turner, Whyte and Hopkins announced that they were leaving Marsh & MacLennan to work for a competitor, Integro, which was attempting to break into the London market. When half of Marsh & MacLennan's thirty-two brokers in London were recruited by Integro, Marsh suspected that the three former executives were behind the solicitations, and sued them in New York to compel them to disclose information about their activities for Integro and to force them to repay the bonus compensation they had received under the incentive plan. Only the US companies brought suit; the UK employer (MSL) was not a party.

The employees objected to the jurisdiction of the U.S. court, but District Judge Denise Cote rejected the argument, noting that the New York venue was specified in the Plan document. Moreover, any right the individuals had under English law to have employment claims heard in the UK was inapplicable, she held, because the claims were not being asserted by their employer.

Having found the New York courts inhospitable to their jurisdictional defense, the employees filed suit in the UK, seeing an injunction from that court directing the Marsh entities to discontinue the litigation in New York. There, the Court analyzed the issue under Section 5 of the European Council's Regulation 44/2001, which governs the enforcement of jurisdictional disputes in the European Union, including employment matters. Section 5, art. 18-21 states that "in matters relating to individual contracts of employment … an employer may bring proceedings only in the courts in the Member State in which the employee is domiciled" unless the jurisdiction was agreed upon by both parties *after* the dispute arose.

The UK Court of Appeal was therefore confronted with the question whether the bonus plan at issue was a "contract of employment" that was subject to Section 5's mandate; if it was, the action would have to be brought in the UK. The Court, while characterizing the employer's arguments in favor of New York jurisdiction as "formidable," nonetheless found that the bonus plan was sufficiently related to a contract of employment to come within the restrictions of Section 5, noting that "the contract need not be in one document or made at one time." In so doing, the court stated that it was "simply recogni[zing] the reality of the situation without adopting an overly formulistic approach."

Having found that (notwithstanding the terms of the bonus plan) the employer could only sue the employees in England, the Court granted an anti-suit injunction restraining all proceedings in New York, as this would be "the only way to give effect to the English claimants' statutory rights to restrain those proceedings."

The *Samengo-Turner* decision has important implications for multinationals. The decision suggests that employers may not be able to rely on "overly formulistic" distinctions between corporate entities, and should reconsider the utility of U.S. forum selection clauses in employment contracts (and other related documents) of employees who work abroad, as foreign courts may not be inclined to enforce them. To paraphrase the *Samengo-Turner* Court, employers should be prepared to litigate where their employees work.

Proskauer Rose LLP's International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world. For more information about this practice area see www.proskauer.com/practice_areas/areas/126 or contact:

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