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UNITED STATES

Proposed Law Would Require Non-US Manufacturers to Appoint Agents for Service of Process, Submit to Jurisdiction in US Courts

The US Congress is currently considering a proposed law that would require foreign manufacturers of several types of products to appoint agents for service of process and submit to jurisdiction in the United States, or have their products barred from importation.

The Foreign Manufacturers Legal Accountability Act (FMLAA) would require foreign manufacturers of a "minimum value or quantity" of "covered products" – such as consumer goods, drugs, devices, cosmetics, chemicals, biological products and pesticides – to appoint agents for service of process in a state with a "substantial connection" to the importation, distribution or sale of the products. The foreign manufacturer must also consent to personal jurisdiction in the state and federal courts for the state in which it has appointed its agent for service of process.

The FMLAA will prohibit the importation into the United States of any covered product or product components if the product – *or any part of it* – was manufactured or produced outside the United States by a manufacturer that has not appointed an agent for service of process or submitted to jurisdiction.

Exactly which foreign manufacturers will be affected by the FMLAA is hard to predict, given that the FMLAA will apply only to manufacturers of a "minimum value or quantity" – a threshold that has not yet been specified. In fact, there is considerable debate about the exact contours of the FMLAA and which industries it will cover. If the FMLAA ultimately becomes law, it will be up to certain federal agencies to determine the value or quantity that will trigger the obligations of the FMLAA.

The FMLAA could present a significant logistical hurdle for companies that sell products in the United States – particularly those that source components from numerous overseas suppliers. Depending on the "minimum value or quantity" threshold determined for the different types of products, foreign companies could see their products stopped at the border if they are unable to certify that all component manufacturers have appointed agents for service of process in the United States. Unfortunately, exactly how the FMLAA would be enforced is hard to predict, given that enforcement is left to the US Department of Homeland Security, which oversees US Customs and Border Protection.

Of course, the fact that a foreign manufacturer may be required to submit to personal jurisdiction in the United States may have little bearing on the ability of a US-based plaintiff to collect a judgment. For example, if a company has no assets in the United States, the plaintiff would still need to resort to foreign law to enforce any judgment the plaintiff obtains.

Whether the FMLAA will become law is hard to predict. On one hand, it seems to have considerable support in Congress, given a general perception in the United States that it is difficult to hold foreign companies legally accountable in the United States. In fact, this legislation appears to stem from difficulties experienced by plaintiffs serving process on China-based defendants that, they allege, sold defective drywall products in the United States.

Some trade experts believe that the FMLAA, as currently drafted, would violate the United States' World Trade Organization commitments, which prohibit import restrictions other than duties and charges outlined in the General Agreement on Tariffs and Trade Article XI. Accordingly, they believe that this bill may have difficulty getting past further hurdles in both the House of Representatives and the Senate.

Several revisions to the FMLAA appear to be in the works, including a compromise proposal that would require domestic importers to declare to US Customs that the foreign companies with which they do business have a registered agent in the United States and would subject importers to penalties for false declarations. Whether any further revisions will be incorporated into the FMLAA is yet to be seen.

Regardless of whether the FMLAA ultimately becomes law, it is clear that there is increasing frustration on the part of US plaintiffs' lawyers and their allies in Congress with the perceived inability to hold foreign companies accountable in US lawsuits. This should be of interest to any foreign manufacturers that expect to sell their products in the United States.

– Joseph A. Meckes, San Francisco

Private Fund Adviser Regulation Under the Dodd-Frank Wall Street Reform and Consumer Protection Act

On 21 July 2010 the United States promulgated a new financial reform bill, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act). The Act contains a variety of provisions that will regulate "private fund advisers" for both hedge and private equity funds and will significantly change the regulatory regime governing private fund advisers. The following is a short summary of some of the Act's key provisions with respect to regulation of private fund advisers. Please note that while foreign private advisers will generally be exempt from the provisions of the Act, they should ensure they meet the criteria for the exemption described below.

Registration

The Act generally requires advisers to private funds with US$100 million or more in assets under management to register with the Securities and Exchange Commission (SEC) as investment advisers and eliminates the "private adviser exemption" from the Investment Advisers Act of 1940 (Advisers Act) for advisers with fewer than 15 clients. Registered advisers will be subject to reporting and recordkeeping requirements and periodic examination by the SEC staff. Information provided by registered advisers can be shared by the SEC with the Financial Stability Oversight Council (FSOC) for assessment of systemic risk. Advisers below the US$100 million assets under management threshold will generally be subject to state registration.

Mid-Sized Private Fund Advisers Exemption

The Act permits the SEC to issue rules requiring the registration and examination of investment advisers to "mid-sized private funds." Advisers with less than US$150 million of assets under management and that advise only private funds will be exempt from the registration requirements of the Advisers Act. However, the SEC may (i) require these advisers to maintain such records and make such reports as it determines is necessary or appropriate in the public interest and to protect investors, and (ii) implement registration and examination procedures for these advisers, which would take into account the size, governance, investment strategy and level of systemic risk posed by them.

Venture Capital Fund Exemption

The Act provides exemptions for advisers who solely advise "venture capital funds." In each case, such exempted advisers will still be subject to recordkeeping and reporting requirements to be determined by the SEC. The Act provides that the SEC will define "venture capital funds" not later than one year after enactment.

Other Exemptions: Advisers to Family Offices, Foreign Private Advisers and Advisers to Small Business Investment Companies

Generally, advisers to family offices, foreign private advisers and advisers to small business investment companies (SBICs) will also be exempt from registration. However, the term "family offices" has not yet been defined by the SEC, and there is no deadline by which the SEC must define the term. The "foreign private adviser" exemption provides that an investment adviser is exempt from registration if the adviser (i) has no place of business in the United States, (ii) has fewer than 15 clients and investors in the United States in private funds and aggregate assets under management attributable to clients and investors in the United States in private funds of less than US$25 million, and (iii) does not hold itself out to be an investment adviser in the United States, is not registered under the Advisers Act or is a business development company under the Advisers Act.

State Regulation

The Act raises the assets under management threshold for federal regulation of investment advisers from US$25 million to US$100 million. Generally, an investment adviser that has assets under management of between US$25 million and US$100 million (and that otherwise would be required to register with the SEC) must register with, and be subject to examination by, its home state. These advisers, however, must maintain such records and provide to the SEC such annual or other reports as the SEC determines to be appropriate. If the investment adviser's home state does not perform examinations, the adviser is required to register with the SEC.

CTA Registration Exemption

The Act exempts any investment adviser that is registered with the Commodity Futures Trading Commission (CFTC) as a commodities trading adviser (CTA) and advises a private fund provided that, after the enactment date, the adviser's business does not become predominately securities advice.

– C. Craig Lilly, Palo Alto

EUROPE

UK: Practical Considerations for Security Enforcement

Upon the provision of debt facilities to a borrower, a lender will often take security over assets of the borrower – and frequently of other members of the borrower's group of companies – as collateral for the performance by the borrower of its payment and other obligations to the lender. In relation to companies incorporated in England, this security will typically take the form of fixed and floating charges over all of the assets of the company. These charges should be registered against the relevant company at Companies House and on any relevant title register – for example, in the case of land, at HM Land Registry, and in the case of certain categories of intellectual property, the UK Intellectual Property Office.

Most lenders will become aware that a borrower is in difficulty through the early warning systems that are built into their lending documentation in the form of representations and covenants. Covenants may be informational (for instance the delivery of the annual accounts of the borrower each year), financial (for instance a measurement of the tangible net worth of the borrower or the group) or general (for instance a prohibition on the granting of security to a third party). Compliance with these obligations is usually tested by a review of financial information delivered on a regular basis by the borrower. Breach of the representations and covenants usually constitutes an event of default, which will entitle the lender to exercise certain rights, including the right to demand payment or repayment of the amount of the facilities that are outstanding and to enforce guarantees and security granted in respect of the borrower's obligations and liabilities.

The first step for any lender that is considering enforcing its security following an event of default is to establish exactly what rights it has and where it has those rights. This is not as obvious a point as it sounds. English case law is littered with examples of lenders that found themselves in the wrong despite having, no doubt, considered themselves to have been entirely within their rights to take enforcement steps.

The English court decisions serve to caution lenders that, even if an event of default appears clear and objective on its face, it is still capable of being declared wrongfully by the lender.

In and of itself, an invalid declaration of an event of default or termination event is a nullity and creates no legal liability upon the lender. Since the declaration has no effect, it cannot constitute a breach of contract. This frequently surprises those who assume that an invalid demand must necessarily impose a liability on the lender (even if only for defamation, by analogy with the old case law on the wrongful dishonoring of checks, although in truth the analogy is somewhat stretched). The reasoning is simply that the borrower is entitled to disregard the declaration and the resulting demand, and therefore suffers no damage. Nevertheless, the scope for damage to the borrower is considerable, especially if the effect of the lender's declaration is to trigger cross-default provisions in other financing agreements to which the borrower or client is party or to cause its suppliers to refuse to continue supplying to it on credit terms.

The lender will, however, incur liability for the consequences of its own actions following a wrongful declaration. Since the lender's obligations under the credit agreement will not have been validly terminated because the declaration of the event of default or termination event was a nullity, the lender will commit a breach of contract if:

- It seeks to enforce its rights in its security or collateral; and/or
- It refuses to continue advancing funds to the borrower on the basis that it believes that it is entitled to cancel its commitment to provide finance.

A documentation review – commonly referred to as a "security review," although, in truth, it is somewhat more extensive than that – is usually recommended in order to provide the lender with the requisite comfort that its security is valid and enforceable, and that it is entitled to enforce the security in the particular circumstances. The lender's legal counsel will typically also comment on the range of enforcement options available to the lender, so that the lender can begin to consider the practicalities of enforcement. This review will have the added advantage of ensuring that the advisers to the lender are fully up to speed with the current situation of the borrower.

On a more practical level, the lender will require an appraisal of its collateral – for example, an up-to-date, on-site audit of the tangible assets, such as an inventory of plant and machinery, combined with a desktop audit of all intangibles, such as outstanding receivables, comprised within the collateral. Lenders vary in their approach to such appraisals and audits, but in cases where tangible assets have a material value or offer particular challenges – for example, in the case of retail inventory – they will frequently instruct external specialists to conduct the appraisal, in addition to advising on best strategy for realizing cash from the assets. In the overwhelming majority of cases, there will be a trade-off between the speed of realization and the price at which assets can be liquidated.

The legal review and the appraisal, taken together, will provide the lender with a clear picture of both its rights to enforce and the possible means of enforcement. A lender that typically holds fixed and floating security over all of the borrower's undertaking and the assets may tend to consider that the appointment of an administrator represents the most comprehensive solution. Ideally this decision should be deferred, if time permits, until after the lender has been able to consider the various reports, as these may suggest alternative enforcement options that would not otherwise have been taken into account by the lender.

As a separate and independent step, the asset-based lender should, as soon as it becomes aware of any event of default, issue a "reservation of rights" letter to the borrower. If the lender fails to do so and continues to operate the credit agreement (as opposed to taking immediate action to accelerate, terminate and/or enforce) it may be deemed to have waived its rights in relation to the particular event. The risk exists regardless of any "no waiver" clauses that may have been included in the credit agreement with the precise intention of avoiding just such a problem. In the 2009 case of *Tele2 International Card Company SA and others v Post Office Ltd*, the English Court of Appeal found that a "no waivers" clause would not be sufficient to override the innocent party's continued conduct of an agreement notwithstanding a breach or default of that agreement by the other party.

– Lauren Priest-Stephens, London

Russia's New Investment Protection Steps Impose Criminal Liability for False Documents and Data

Foreign investors are often wary of investing in Russia. Such attitudes are attributable in part to frequent theft, according to prominent US venture fund managers who met with Russian President Dmitry Medvedev on 25 May 2010. Such theft may be in the form of raids, i.e., illegal business seizure practices, which occur at times in Russia. These raids rely on methods such as illegally amending the shareholders' registers of joint stock companies or the uniform state register of legal entities, which contains data on participants in limited liability companies (LLCs) and other data on legal entities, as well as forging agreements on the alienation of participatory interests in LLCs. Other methods, such as holding illegal general meetings and forging their minutes, are also used.

On 1 July 2010 President Medvedev signed Federal Law No. 147-FZ (the Federal Law), aimed at countering raider attacks. The Federal Law went into effect on 5 July 2010. The previous antiraider package, adopted as Federal Law No. 205-FZ, went into effect on 21 October 2009, amending the procedure for a transfer of participatory interests in LLCs and introducing obligatory notarization of such transactions, among other things.

The Federal Law imposes criminal liability for any falsification of the uniform state register of legal entities or the register of securities holders, falsification of resolutions passed by a general shareholders (participants) meeting, and the seizure of alien assets through threats or violence. Such offenses are punishable by fines ranging from RUB100,000 to RUB500,000 (approximately US$3,000 to US$17,000) or by imprisonment – up to 10 years if the resulting consequences are grave.

The Federal Law also makes officials liable for the entry of expressly false data into uniform state registers and for any willful destruction or forgery of documents used to make any such entry.

– Sergey A. Treshchev and Elena E. Yurkina, Moscow

New Restructuring/Reorganization and Transfer Procedures for Endangered Germany-Based Credit Institutions

On 13 July 2010 Germany's Federal Ministry of Justice and Finance published a discussion draft of an Act for the Restructuring and Orderly Liquidation of Credit Institutions, for the Establishment of a Restructuring Fund for Credit Institutions and for the Extension of the Limitation Period of Corporate Law Management Liability (Restructuring Act).

The discussion draft of the Restructuring Act relates in particular to new pre-insolvency measures that aim to prevent insolvency through the restructuring or reorganization of endangered banks in Germany as contemplated in the Key Points on Financial Markets Regulation of the German Federal Cabinet, issued on 31 March 2010. The Restructuring Act also introduces measures that obligate banks to transfer all or part of their assets to another bank by order of Germany's Federal Financial Supervisory Authority (BaFin) if the bank's existence is endangered and the result of its closing would pose a potential systemic risk to the financial system.

In the future the BaFin will be empowered to manage the restructuring or reorganizing of the endangered banks, to issue the transfer order and to cooperate with Germany's Federal Authority for Financial Market Stabilization (FMSA) (Article 4).

Bank Reorganization Act

The Restructuring Act contains in particular the Bank Reorganization Act, which introduces three different measures for restructuring:

- Restructuring proceedings would require the appointment of a restructuring adviser to implement the restructuring plan in close cooperation with the BaFin (Article 1, Sections 2 to 6):
- In case such restructuring measures cannot be implemented successfully, reorganization proceedings shall be initiated that will affect the rights of the bank's shareholders and its creditors (Article 1, Sections 7 to 23);
- Ultimately, if the BaFin decides that the bank's existence is endangered, which might cause systemic risk for the financial system, the BaFin is empowered to issue a transfer order forcing the bank to transfer all or part of its business to a public or private bank (Article 2, Sections 48a to 48s of the draft German Banking Act).

Establishment of a Restructuring Fund (Article 3)

Further, the Restructuring Act introduces a restructuring fund based on the Act for the Establishment of a Restructuring Fund for Credit Institutions, which shall be administered by the FMSA. The restructuring fund shall be financed through a bank levy, whereby the specific amount of the annual contributions shall be calculated in relation to the systemic risk of the bank's failure. The payment obligations relate only to banks in accordance with Section 1 Clause 1 of the German Banking Act and not to financial institutions pursuant to Section 1 Clause 1a of the German Banking Act. The amount of the annual contributions shall be calculated based on figures from the bank's most recent financial statements, in particular the subscription relevant liabilities and the nominal value of the bank's off-balance sheet derivative transactions. As stated in the Restructuring Act, even if the bank does not make any profit, it must pay a minimum contribution as a percentage of the regular contribution. The bank levy is therefore discussed extensively by the involved parties.

Extension of the Limitation Period of Corporate Law Management Liability (Article 5)

Finally, the Restructuring Act introduces an extension of the limitation period for liability claims against management and board members of Germany-based banks from five years to a maximum of 10 years (Article 5).

Further Steps

The discussion draft lists the proposed implementation date for the Restructuring Act as 31 December 2010. However, whether this date can be achieved mainly depends on the legislative process for the remainder of the year.

– *Dr. Andreas Fillmann, Frankfurt*

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