Recent Decisions Limit Claims Against Foreign Corporations, But Not U.S. Discovery Rules

Ever since Aerospatiale, litigants have used U.S. federal discovery rules against a foreign corporation. Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 544 (1987). In Accessdata Corp. v. ALSTE Techs. GmbH, 2010 WL 318477 (D. Utah Jan. 21, 2010), for example, defendants objected to disclosing e-mails based on the German Data Protection Law. Id. at *1. The court cited Aerospatiale, holding that “it is well settled that [blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.” Id. at *2.

Recent developments outside the discovery context, however, have made foreign corporations hopeful that U.S. discovery may be curtailed. The imposition of more robust pleading requirements have allowed for dismissal of implausible complaints. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Courts have also cut back on federal causes of action. Koibel v. Royal Dutch Petroleum Corp., 621 F.3d 111, 145 (2d Cir. 2010) (restricting corporate liability for alleged international law violations under the Alien Tort Statute); Morrison v. Nat'l Australian Bank Ltd., 130 S. Ct. 2869 (2010) (disallowing Rule 10b-5 federal securities fraud claims against foreign corporate defendants where the security was purchased on a foreign exchange); Cedeño v. Intech Group, Inc., 733 F. Supp. 2d 471 (S.D.N.Y. 2010) (applying Morrison to limit reach of RICO).

It would be wrong, however, to conclude that these substantive decisions will lead U.S. plaintiffs to abandon efforts to seek U.S.-style discovery against foreign corporations. Indeed, such discovery appears to be on the rise. There are at least two reasons why this might be the case.

First, in the wake of Morrison, plaintiffs have increasingly turned to U.S. federal courts to assert foreign law claims. In one notable example, lead plaintiffs’ in securities litigation against Toyota recently amended their complaint to add claims under Japanese securities laws to represent a sub class of investors who purchased Toyota stock overseas. See In re Toyota Motor Corp. Sec. Litig., Consolidated Complaint, 2010 WL 3940921 (C.D. Cal. Oct. 4, 2010) at Count III (alleging violations of Article 21 2 of Japan’s Financial Instruments and Exchange Act). As courts restrict the use of certain U.S. laws against foreign corporations, one can expect an increase in foreign law claims in U.S. courts, and thus more U.S.-style discovery against foreign corporations.

Second, even if Morrison results in more claims against foreign corporations into foreign tribunals, there will be an increased drive to obtain discovery through U.S. courts for use in those proceedings. This can be done using 28 U.S.C. § 1782, which
allows a federal district court to order discovery in aid of a foreign proceeding. See Hereaues Kulzer GmbH vs. Biomet, Inc., 633 F.3d. 591 (7th Cir. 2011). Indeed, anecdotal evidence suggests such discovery will not cease. At a May 2011 gathering in Frankfurt, Germany attended by practicing lawyers and judges (which the author attended), one judge was asked if he would permit evidence gathered in the U.S. to be used even if it could not have been gathered in Germany. “That may be true,” the judge responded, “yet here it is in front of me, why should I ignore it?” Lawyers everywhere should take note.