Forum Non Conveniens: Be Careful What You Ask For

In defending a United States defendant in an action involving a foreign accident and foreign claimants, it is almost a knee jerk reaction to file a motion to dismiss on forum non conveniens grounds. In a thought provoking article, “Be Careful What You Ask For – the Forum Non Conveniens Dilemma,” Cozen O’Connor lawyers Richard Dunn and Raquel Fernandez bring this practice into question. Mr. Dunn and Ms. Fernandez urge a different standard for analyzing whether to file the motion. The question that should be asked is whether it is beneficial for the U.S. defendant company to be subject to the laws and procedures in the foreign jurisdiction.

Thus, it is critical to understand the foreign jurisdiction’s law before your client is stuck there in litigation. A few of the considerations to think about include:

(1) Can your client get out of the case on summary judgment? Many foreign jurisdictions do not provide for summary judgment. Therefore, all matters before a court must be tried to conclusion, which may potentially lengthen and increase the cost of proceedings;

(2) How much time will your client have to prepare its case? Some foreign jurisdictions allow a short time for defendant to mount its defense, which may be an important consideration in a complex product liability case where it is necessary to hire and prepare appropriate experts. Moreover, the documentary evidence that supports your client’s case has to be translated into the foreign jurisdiction’s official language;

(3) Will discovery be allowed? In some foreign jurisdictions, there is nothing akin to the discovery procedures that benefit parties in the United States;

(4) Will expert testimony be allowed? Often, the foreign court will place great emphasis on the government accident investigation report rather than on the expert evidence. In some jurisdictions, your client’s liability may be determined by the government authorities charged with investigating the accident, although they may not be competent;

(5) What is the role of the judge? Is the court the sole trier of fact?;

(6) Are there multiple claimants? You should determine whether all of the claimants involved in the incident can be consolidated before the same tribunal. If each claimant is able to file suit in his or her own locale, the client may need to defend numerous actions before numerous judges in different locations; and

(7) What are the attitudes towards the United States and American businesses in the foreign jurisdiction?

Anti-American bias and corruption figured prominently in Chevron’s environmental litigation in Ecuador. In the early 1990’s, Ecuadorian claimants filed suit in the United States alleging that Texaco’s operations polluted the rain forests and rivers in Ecuador, resulting in environmental and personal injury damages. The lawsuit was dismissed in 2002 on forum non conveniens grounds and the case was refiled in Ecuador the following year. In February 2011, an Ecuadorian court entered an $18,000,000,000 judgment against Chevron (which had earlier acquired Texaco).
Scott A. Edelman, a partner at Gibson Dunn in Los Angeles, made a compelling presentation at a recent IADC meeting concerning serious irregularities and a lack of impartiality in the conduct of that case. Chevron alleges that the plaintiffs’ lawyers are guilty of fraud and misconduct and have filed a civil lawsuit under RICO in New York federal court against the trial lawyers and consultants involved. Chevron’s suit alleges that these attorneys and consultants used the Ecuador lawsuit to threaten Chevron, mislead U.S. government officials, and harass and intimidate Chevron employees, to extort a financial settlement from the Company. Chevron further alleges that plaintiffs built their case through fabricated evidence and a campaign to incite public outrage.

It is likely that the pervasive fraud that permeated the Ecuador litigation would not have occurred in a U.S. federal court. As a result of Chevron’s experience, a U.S. defendant would have to think twice about filing a forum non conveniens motion if there was any likelihood that the case would end up in Ecuador or somewhere similar.
Toxic Tort Litigation Blog

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