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Welcome to the first issue of International News for 2012. In this issue we focus on international collaboration between our offices in Europe, the United States and our strategic alliance with MWE China Law Offices in Shanghai.

We start in China where there has been significant growth in foreign direct investment between the People’s Republic of China and the United Kingdom. A new double tax treaty between the two countries is intended to improve investment opportunities further. We examine its impact and discuss recent changes in UK domestic tax law that will reinforce the benefits for a Chinese company using a UK holding company for its European operations.

We move on to the challenge of economic sanctions. The complexity of sanctions and the speed with which governments implement them to address fast moving political situations create serious compliance challenges. It is therefore vital that businesses have access to internationally focused legal advice that can keep them abreast of this rapidly changing landscape.

The choice of governing law for a contract between parties from different jurisdictions is a vital decision. The potential for dramatically different outcomes exists even between legal regimes as closely related as those of England and Wales and the various states of the United States. We examine some of the key pitfalls of which companies should be wary.

Jurisdiction extends beyond the reach of a country’s land mass. Generally, countries with shorelines can claim all sovereign rights in waters extending 12 nautical miles (22 kilometres or 14 miles) from a baseline measured at low tide and have certain rights extending into the Exclusive Economic Zone, which reaches 200 nautical miles (370 kilometres or 230 miles) from the baseline. We look at the extension of patent rights into the waters surrounding South Africa, the United Kingdom and the United States.

Our Features section starts with a look at gender diversity on UK corporate boards. The business-led approach of the United Kingdom has fallen somewhat short of the targets proposed by last year’s Davies report. Following a 5 March 2012 report that showed limited progress across Europe, the European Commission has launched a public consultation seeking views on possible action at EU level to redress the gender imbalance on corporate boards.

Our attention then turns to merger regimes with an examination of the rules relating to minority shareholdings in the European Union. The EU Commission has recently taken a closer look at the competitive concerns relating to the acquisition of non-controlling stakes. The number of cases reviewed by China’s Ministry of Commerce (MOFCOM), the authority in charge of merger control, has more than doubled from 79 in 2009 to 168 in 2011. Most large, cross-border mergers, acquisitions and joint ventures must now successfully pass MOFCOM review in addition to reviews by the European Commission and US Department of Justice and/or Federal Trade Commission.

Staying in China, the increasing investment in pharmaceutical research and development by foreign companies in China means the reliability and efficiency of the drug and device development process is a critical priority. In response, the Chinese Government has taken measures to reduce application procedures and increase the efficiency of the drug-approval process.

On 1 January 2012, the EU Emissions Trading Scheme (ETS) came into force for EU airlines and non-EU international airlines. US airlines and their trade association filed a suit in the High Court of England and Wales (EWHC) asking it to “quash the measures” of the ETS in the United Kingdom. The EWHC referred the case to the Court of Justice of the European Union, which found that the ETS was valid. At a meeting held in Moscow on 21–22 February 2012, 23 countries issued a declaration against the ETS to non-EU airlines, raising the possibility of a major dispute between the European Union and non-EU airlines. We examine ways in which this could be resolved.

The new arbitration rules of the International Chamber of Commerce (ICC), which became effective on 1 January 2012, include new Emergency Arbitrator Provisions. By filling a potential jurisdictional vacuum, these provisions are likely to render ICC arbitration even more attractive than it was under the previous version of the ICC Rules.

For decades, Europeans have been debating a unified patent system. The issue seemed resolved in 2011, but a fresh dispute over whether the Central Division of the Unified Patent Court should be in London, Paris or Munich has tempered the optimism. We look at the arguments both for and against siting the Central Division in Munich.

If you have any comments on this issue or would like to contribute to International News, please contact me at hnineham@mwe.com.

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In the last few years, there has been significant growth in foreign direct investment (FDI) between the People’s Republic of China and the United Kingdom. Statistics published by the PRC Ministry of Commerce indicate the United Kingdom was one of the leading 10 countries by volume of FDI in China from 2009 to 2011. The volume of Chinese investment in the United Kingdom is significantly greater than in other European countries, and is continuing to increase rapidly as the Chinese government encourages Chinese companies to invest in the European Union.

Chinese investment in the United Kingdom takes a variety of forms. Much of the investment in the United Kingdom involves the establishment of sales and marketing functions, with the UK operation set up to serve as a base for the Chinese investor’s operations in Europe. The UK government has stated publicly that it welcomes increased Chinese investment in infrastructure projects, a notable example being the acquisition by the China Investment Corporation of 8.68 per cent of the holding company of Thames Water in January 2012.

The New Tax Treaty
The new double tax treaty between the United Kingdom and China, signed on 27 June 2011, is clearly intended to improve investment opportunities further. The new treaty replaces the 1984 treaty between the two countries and is expected to come into force later in 2012, following completion of ratification procedures.

The changes brought about by the new treaty are likely to be of most interest to UK investors in China; they are unlikely to have much effect on the already relatively favourable regime for direct investment in UK companies. However, recent changes in UK domestic law will reinforce the benefits for a Chinese company using a UK holding company for its European operations.

Investment from the United Kingdom into China or Through a UK Holding Company
For UK investors in China, the main benefit of the new treaty is a reduction in the rate of dividend withholding tax from 10 per cent to 5 per cent on shareholdings of 25 per cent or greater in a Chinese company. China will not tax capital gains accruing on the disposal by a UK
company of holdings of less than 25 per cent in Chinese companies (other than property-rich companies), although it will still impose a 10 per cent charge on capital gains where the UK investor holds a direct or indirect 25 per cent holding in the Chinese company.

Historically, UK or EU investors have often used intermediate holding companies in jurisdictions such as Hong Kong, Ireland, Luxembourg or Singapore to achieve tax-efficient structures for investment into China. The benefits offered by the new treaty may render such structuring unnecessary and thus encourage direct investment by UK investors into China.

If one also takes into account the longstanding exemption in the United Kingdom for capital gains arising on the disposal of 10 per cent shareholdings in trading companies and the exemption from tax for foreign dividends that was introduced in 2009, a UK company appears to be a competitive vehicle for investment in Chinese entities by investors based elsewhere in the European Union. It should be noted that the UK regime for interest deductions on loans taken out to pay for foreign equity investments remains relatively generous and Chinese companies will normally fall within the white list for the purposes of the United Kingdom's controlled foreign company (CFC) rules, meaning the profits of a Chinese company will not be brought taxed in the United Kingdom.

Investment from China into the United Kingdom or Through a UK Holding Company

The increasingly competitive UK domestic law regime is in many respects more generous than the new treaty, meaning the treaty will not offer any additional benefits to Chinese investment into the United Kingdom. Substantive investors in the United Kingdom will benefit from reductions in the rate of corporation tax, which is scheduled to be reduced progressively to 23 per cent by 2014/15.

Investors considering using a UK holding company should note the United Kingdom has for many years imposed no withholding tax on dividends, other than dividends paid by real estate investment trusts (which will be taxed at 15 per cent under the new treaty). The United Kingdom also does not impose capital gains tax on disposals of interests in UK companies by non-residents unless the non-resident has a permanent establishment in the country, which has one of the most extensive tax treaty networks in the world.

A UK resident company can also take advantage of two EU Directives. The EU Parent-Subsidiary Directive eliminates withholding tax on most dividends paid by companies resident in EU Member States in which a UK company has a 10 per cent interest. The Interest and Royalties Directive eliminates withholding taxes on interest and royalties paid to a UK company by EU-resident companies in which the United Kingdom entity has a 25 per cent direct shareholding, or where another EU company has a 25 per cent direct shareholding in both. This threshold is scheduled to be reduced to 10 per cent and to extend to indirect shareholdings from 2013.

Following the enterprise income tax reform in January 2008, a Chinese resident company can claim an indirect foreign tax credit for the foreign income taxes born by its subsidiary in the United Kingdom, subject to certain minimum shareholding percentage requirements. In addition, under the Chinese CFC rules implemented in January 2008, the United Kingdom is a white list territory, meaning Chinese tax authorities will not assert taxing rights over retained profits in a UK subsidiary that are not distributed back to Chinese resident company.

Other Provisions

The new treaty contains a number of specific provisions designed to prevent the use of conduit companies to facilitate “treaty-shopping”. The provisions deny treaty relief where the main purpose of the creation or assignment of rights is to take advantage of the treaty. It also contains a general article permitting both countries to apply their own domestic anti-avoidance rules. Provisions of this nature are increasingly common in the United Kingdom's treaties and mean that an investor using a UK holding company should consider the degree of substance it needs in order to secure the benefits of any treaty with a third country.

In addition, the new treaty demeans the provision of services over a period of more than 183 days in any 12-month period to constitute a permanent establishment. The treaty also comprehensively addresses the taxation of capital gains and miscellaneous income, which its predecessor did not.

Conclusion

Existing UK and Chinese investors should consider reviewing their investment holding structures and tax strategies for cross-border investment. If an investor in either country has used another jurisdiction as a springboard to invest in the other country mainly for tax purposes, the investor should consider whether it is appropriate to simplify the holding structure to reduce redundant operational/administrative costs and avoid the potential risk their existing structure may be viewed as treaty-shopping.

For new Chinese and EU investors planning their overall EU/China investment strategies, the United Kingdom might now be a more attractive option.
Long used by governments to punish rogue countries, regimes, entities and individuals, trade and economic sanctions impact an ever-widening range of goods, technology and services. Recent developments in Iran, Syria and Libya, for example, resulted in far-reaching sanctions by Australia, Canada, the European Union and its 27 Member States, the United Nations, the United States and others. The complexity of sanctions and the speed with which governments implement them to address rapidly changing political situations create serious compliance challenges. Companies are therefore well advised to implement compliance from management through all levels of sales, logistics and finance.

The stakes are extremely high because compliance failures—even unintentional ones—can result in the imposition of substantial fines, debarment from government contracts, damage to public reputation and even imprisonment. Recent penalties illustrate the risks and the high governmental enforcement priority for trade sanctions. These include fines of up to US$536 million imposed by US and UK regulators against financial institutions and major businesses. Individuals may also be subject to prison sentences of up to 10 years in the United States and the United Kingdom.

Anyone involved in cross-border transactions therefore needs to determine if their conduct and that of persons acting on their behalf is regulated by trade sanctions. At a minimum, businesses must understand: which countries, regimes and individuals are targeted by trade sanctions; who is obliged to comply; which transactions are prohibited or restricted; and which authorisations may be available or required for any restricted action.

Businesses should also consider the long reach of US and EU sanctions. US sanctions generally apply to “US persons” wherever they are located in the world and to anyone located in the United States. Similarly, EU sanctions apply to “EU persons” wherever they are located in the world and to anyone located in the European Union. Adding to the breadth of coverage, US rules prohibit “facilitation”, which means neither persons nor companies subject to the rules may support a transaction undertaken by another party, including a foreign affiliate, from which a US person would be prohibited from engaging in directly. EU rules likewise prohibit covered persons from infringing sanctions rules indirectly.

Companies should take appropriate steps to minimise the risk of infringing trade sanctions by introducing the following safeguards:

- Establish internal procedures to ensure prompt legal review in the event a transaction with a sanctioned party is identified.
- Check that the due diligence checklist for merger or acquisition transactions includes an assessment for compliance with trade sanctions.

"Businesses must understand which countries, regimes and individuals are targeted by trade sanctions."
Differences Between English and US Law: Choose Your Words Carefully

By Scott Arrington

The choice of governing law for a contract between parties from different jurisdictions is a vital decision. This is particularly true where differences between the laws are subtle: the potential for dramatically different outcomes exists even between legal regimes as closely related as those of the various states of the United States and England and Wales. Parties should therefore undertake careful analysis to ensure their intentions are maintained.

One key difference between US and English law that can cause unintended results relates to word choice and stylistic requirements. For example, “best endeavours” should generally be used in English law contracts while “best efforts” is generally preferable for US law documents. Using terms that differ in any way from the specific wording that has been interpreted frequently by the courts increases the risk that they will deem the parties to have intended something different, when they have not. On the stylistic front, the laws of many US states require certain indemnity terms to be conspicuous for them to be enforceable, while English law generally does not.

Along similar lines, each set of laws requires express waiver of the application of different statutes and treaties if the parties do not wish them to apply. In the United States, for example, parties to a contract for the sale of goods between a US entity and an entity of another country that is party to the United Nations Convention on Contracts for the International Sale of Goods (CISG) must expressly state in the contract they do not want the convention to apply, if that is their intent. The United Kingdom, however, has not ratified the CISG, so it will not apply to an English law contract. Similarly, English law contracts must state expressly that the parties opt out of the Contracts (Rights of Third Parties) Act 1999 in order to prevent third parties from having certain rights. Under the laws of most US states, however, parties do not need to reference a particular statute and need only evidence an intent to limit third-party beneficiary rights.

US and English law also sometimes enforce the same contractual language, but with different results. One of the most commonly overlooked differences between US and English law in this respect deals with limitations of liability. When parties exclude “indirect and consequential losses” in a US law contract, they are expressly—and almost always intentionally—excluding the losses of revenue, production and profit that may stem from any breach of the contract, because “indirect and consequential losses” under the laws of most US states include such losses. English law, however, often considers such losses to be direct—not indirect—losses. The difference in enforcement of the exact same language can have dramatic effects.

Perhaps the most dangerous differences, however, are those that arise regardless of the express language of the contract. For example, many US states impose an implied duty of good faith and fair dealing in performance of contractual obligations, while English law is not likely to. As a result, parties to a US law contract can sometimes recover contractual damages for certain actions—if deemed bad faith—that they would be unable to recover under English law.

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Patents are often said to be defined by their claims and, as such, are analogous in the parlance of real property to the “metes and bounds” of a deed to real property. What, therefore, are the metes and bounds in terms of offshore waters? This question arises frequently in the context of offshore drilling and the related exploration of the sea floor.

Coastal Zones

Generally, countries with shorelines (coastal states) can claim all sovereign rights, including the establishment of patent rights, in territorial waters extending 12 nautical miles (22 kilometres or 14 miles) from a baseline measured at low tide. This limit was specified in the United Nations Convention of Law of the Sea of 1982 (the Convention). Within 12 nautical miles of the baseline, the coastal state is free to set laws, regulate use and use any resource.

Beyond the initial 12 nautical mile limit, there is a zone, comprising a further 12 nautical miles from the limit of the territorial waters, known as the contiguous zone. In the contiguous zone, a state can continue to enforce laws in four specific areas: customs, taxation, immigration and pollution, if the infringement started within the state’s territory or territorial waters, or if this infringement is about to occur within the state’s territory or territorial waters.

The next zone is the Exclusive Economic Zone (EEZ), which extends 200 nautical miles (370 kilometres or 230 miles) from the baseline. Within this area, the coastal nation has sole exploitation rights over all natural resources. Nations also have certain rights to the continental shelf, which is defined as the natural prolongation of the land territory to the continental margin’s outer edge, or 200 nautical miles from the coastal state’s baseline, whichever is greater.

To date, 162 countries and the European Community have joined the Convention. The United States has agreed to the bulk of the Convention and even signed it, but has not yet ratified it. Despite this, the United States has adopted, by way of a Presidential Proclamation issued by Ronald Regan in 1983, the definitions of the various coastal zones as specified in the Convention.

Patent Rights in UK Offshore Zones

That patent infringement can occur within the territorial waters of a coastal state is perhaps expected, but the other zones present more uncertainty. For example,
the question of whether a patent can be infringed in the EEZ is less clear, and countries have dealt with this question in disparate ways. Some have interpreted the language of the Convention as allowing the extension of patent rights into the EEZ, while others have declined to do so.

The United Kingdom has faced particular issues in defining the territorial scope of patent infringement in the context of offshore waters, owing to its island status, the history of the British Empire and the existence of oil fields in the North Sea. Ordinarily, a UK statute (in this case, the Patents Act 1977, which applies to both UK and the UK designations of European Patents) would take effect only in the United Kingdom itself. However, there are a number of provisions that provide for the extra-territorial applicability of the act.

Section 132(2–3) provides that the Patents Act applies to the Isle of Man and to the territorial waters of the United Kingdom respectively. Section 132(4) provides for two further extra-territorial extensions. The first is to any areas designated under Section 1(7) of the Continental Shelf Act 1964. Numerous designations have been made since 1964, primarily to encompass various oil fields and fishing grounds in close proximity to UK waters. By these designations, all provisions relating to patents apply to the extended areas.

The second extension relates to areas specified under Section 10(8) of the Petroleum Act 1998. In those areas, the Patents Act applies only in connection with the exploration of the sea bed or of subsoil, or exploitation of their natural resources, although this is extended to installations concerned with exploration, exploitation, transport by pipes and provision of accommodation.

In Rockwater Ltd v Coflexip SA [2003] EWHC 812 (Pat), the extensions under Section132(4) to cover certain offshore oil fields was not disputed, and the patent was held valid and infringed on appeal.

**Patent Rights in US Offshore Zones**

US federal courts have declined to recognise US patent rights within the EEZ, and have held specifically that neither the high seas nor the EEZ of the United States can be considered US territories when determining the extent of coverage of US patent law. WesternGeco v Ion Geophysical Corp. et al., No. 4:09-cv-1827, S.D. Tex. 2 March 2011, was the outcome of suits brought by a physical services company, WesternGeco, against a seismic solutions company and a data collection company (collectively, the Defendants), alleging the Defendants had infringed five of WesternGeco’s US patents.

A seismic vessel had towed an array of airgun and hydrophone streamers for data acquisition and utilised an allegedly patent-infringing system and control software for streamer control and positioning. WesternGeco alleged the Defendants had conducted a three-dimensional seismic survey in Chukchi Sea, off the coast of Alaska. The explored area was located in the Outer Continental Shelf (OCS), about 100 miles northwest of Wainwright, Alaska, and approximately 150 miles west of Barrow, Alaska. The Chukchi survey location was approximately 100 miles off the coast of Alaska, an area considered to be within the OCS and the EEZ of the United States. The Defendants presented arguments that none of WesternGeco’s allegations were actionable under US patent law because they occurred outside the United States.

The court held that the Chukchi Sea, when considered as high seas and/or the EEZ of the United States, cannot be the territory of the United States. This decision was reached because the language in the Presidential Proclamation recognises the EEZ to be “beyond the territory and the territorial sea of the United States”, and recognises the United States as having sovereign rights and jurisdiction over the EEZ (March 2011 Order at 37, quoting Presidential Proclamation No. 5030, Mar. 10, 1983, 48 Fed. Reg. 10605 (1983)). In a later phase of the case, the court examined the legislative history of the controlling 1952 Patent Act and the circumstances of the Presidential Proclamation. The court concluded the EEZ was not a “territory or possession” according to the Patent Act and the Presidential Proclamation reaffirmed such a conclusion. The court also noted it was reluctant, in the face of such evidence, to extend patent protection into the EEZ, because in doing so it would effectively step into the shoes of Congress, which has the sole power to enact federal law in the United States.

**Patent Rights in South African Offshore Zones**

South Africa, taking a different course, has held that its patents are effective within its EEZ. In Schlumberger Logelco Inc. v Coflexip S.A. (700/98 [2000] ZASCA 25), the court heard an appeal in which Schlumberger Logelco alleged infringement arising from the pumping of crude oil from the sea floor in the EEZ to a platform, again, within the EEZ. The court noted the controlling Maritime Zones Act, the object of which is to bring South African law in line with the Convention, provided that “any law in force in [South Africa] applied to ‘installations,’ such as pipelines, within the EEZ.”

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UK Corporate Governance: Gender Diversity on Corporate Boards

By Hugh Nineham and David de la Marck

There are a number of initiatives around the world to increase gender diversity on top corporate boards. The UK Government commissioned Lord Davies in 2010 to develop a business strategy to increase the number of women on boards of listed companies. Commenting on the UK Government’s aim to “remove the obstacles to UK plc benefiting from the skills and experience of women”, Business Minister Edward Davey noted “this is not just about gender equality, but about improving performance, and ultimately productivity too.”

High corporate governance standards are particularly relevant to companies with large numbers of shareholders. This is because shareholders are distant from the company’s day-to-day management and unable to provide an effective check on its directors. Board structure, however, offers a mechanism to address the risks associated with the separation of ownership and management.

The Financial Reporting Council (FRC), the United Kingdom’s independent regulator responsible for promoting high standards of corporate governance, believes that diversity, in all its aspects, serves an important purpose for board effectiveness. It can widen perspectives when making decisions, avoid similarity of attitude and help companies better understand and connect with their customers and workforces. For the same reason, the FRC is concerned that having a low percentage of women directors may weaken the board by creating a culture of “group think” and demonstrates a failure to make full use of the talent pool. In other words, ignoring the benefits of gender diversity is likely to undermine board effectiveness, which in turn may have negative consequences for shareholders.

Report and Recommendation

In February 2011, the steering board led by Lord Davies produced its report on women on corporate boards. The first point that Lord Davies made was that corporate boards perform better when they include the best people who come from a range of perspectives and backgrounds. His report warned that at the current rate of change it will take more than 70 years to achieve gender-balanced boardrooms in the United Kingdom. While Lord Davies made a number of recommendations to address the problem, he also noted the UK Government must reserve the right to introduce more prescriptive alternatives if the recommended business-led approach does not achieve significant change.

Lord Davies’ recommendations included the following:

1. Chairmen of FTSE 350 companies should by September 2011 announce goals for the percentage of women they aim to have on their boards in 2013 and 2015. FTSE 100 boards should aim for a minimum of 25 per cent female representation by 2015.
2. Listed companies should be required to disclose each year the proportion of women on the board, women in senior executive positions and female employees in the whole organisation.

3. The FRC should amend the UK Corporate Governance Code (the Code) to require listed companies to establish a policy concerning boardroom diversity, including measurable objectives for implementing the policy.

4. Companies should report on the matters in recommendations 1 to 3 above in their 2012 annual report, whether or not the underlying regulatory changes are in place.

5. Chairmen should disclose, in the annual report, meaningful information about the company’s appointment process and how it addresses diversity.

The FRC Effect

The timing for implementation of Lord Davies’ recommendations may help to explain why, as of the date of the monitoring report, progress had fallen short of recommended targets. In response to the Davies report, and following a consultation, the FRC announced changes to the Code requiring listed companies to report annually on their boardroom diversity policy, including gender, and on any measurable objectives that the board has set for implementing the policy and the progress it has made in achieving the objectives; and to consider diversity of the board, including gender, when evaluating board effectiveness. However, the FRC also announced these changes would not be implemented until 1 October 2012. This is because it decided the changes should be incorporated into an updated edition of the Code planned for 2012.

While the FRC stressed its decision to defer implementation should not be viewed by companies as a signal that they do not need to think seriously about gender diversity until October 2012, it is clear from the monitoring report that not all companies have decided to apply and report on the intended additions to the Code with immediate effect.

Support for the Recommendations

Having said this, there is strong support for Lord Davies’ recommendations. Regarding recommendation 1 above, the UK Government, following a consultation, intends to propose regulations requiring companies to disclose information about the percentage of women at different levels of the organisation. The proposed regulations would become effective for financial years beginning on or after 1 October 2012. Lord Davies also recommended that executive search firms should draw up a voluntary code of conduct addressing gender diversity and best practices that covers the relevant search criteria and processes relating to FTSE 350 board level appointments.

Since then, the executive search industry has agreed a voluntary code of good practice on diversity, which includes a provision that search firms should ensure that at least 30 per cent of their long lists of candidates are women. The Association of British Insurers (ABI) also acted following another recommendation of Lord Davies which urged investors, who play a critical role in engaging with boards, to pay close attention to recommendations 1 to 5 when considering company reporting and appointments to the board. The ABI, in its report on board effectiveness, recommended, among other things, that companies should ensure achieving diversity is a key objective when appointing board members.

Companies should ensure that achieving diversity is a key objective when appointing board members.

The business-led approach of the United Kingdom, which has deliberately avoided the use of quotas, has been consistent with a self-regulatory initiative at European level. The European Commission, in March 2011, called on publicly listed EU companies to sign a pledge to increase the presence of women on boards to 30 per cent by 2015 and 40 per cent by 2020. The Commission, however, following a 5 March 2012 report that showed limited progress, launched a public consultation seeking views on possible action at EU level, such as legislative measures, in order to redress the gender imbalance on corporate boards.
Although a growing number of jurisdictions have adopted a merger control regime, there is no uniform approach to the acquisition of non-controlling minority shareholdings.

Many merger control regimes, including the EU merger regulation (EUMR) and most EU Member State national regimes, apply only to transactions leading to a change in control. They do not apply to the acquisition of minority shareholdings that are not conferring (joint) control to the acquirer. As a general rule, “control” is defined as the ability to take or veto strategic decisions concerning the target company, such as budget, business plans and the appointment of management personnel.

In other jurisdictions, a minority shareholding may fall within the scope of the regime if it is above a certain level of shareholding, or even independent of the level of the shareholding, provided that certain other thresholds are fulfilled. This is the case notably in Germany, the United Kingdom and the United States.

Case Study: Germany
The German Act against Restraint of Competition applies to the acquisition of shareholdings leading to a shareholding of more than 25 per cent or more than 50 per cent, regardless of when the acquisition was made, independent of the question of control. This has the advantage of being a simple, clear criterion. In addition, German merger control is relatively light on information requirements. Unlike the Hart-Scott-Rodino Act filing requirement in the United States, or the “Form CO” used by the European Commission, a notification in Germany may—in straightforward cases—amount to not much more than a few pages describing the transaction, the activities of the parties and market shares based on preliminary market definitions. Therefore, although the German merger control regime covers a large number of transactions, in many cases the relevant authority and businesses can deal with the notification requirement relatively easily.

There is, however, one complicating factor: an additional test makes a notification compulsory in cases where the acquisition of a minority shareholding leads to a “competitively significant influence”. While it has been established that this covers

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The Commission announced its intention to assess whether there is an enforcement gap in Europe.
influence below the level of control and can apply to the acquisition of shareholdings even below 10 per cent, depending on additional factors, the exact scope of the test remains unclear. A similar situation arises in the United Kingdom, where a test of “material influence” catches those transactions that fall below the threshold of control. This leads to uncertainty for businesses around the world as to whether they would have to notify the German competition authority of the acquisition of minority shareholdings in Germany and often even expert counsel cannot give a definitive answer.

Many market commentators have argued this test should be abandoned in favour of the general trend of only investigating controlling shareholdings under merger control rules.

**Non-Controlling Minority Shareholdings: An “Enforcement Gap” in Europe?**

The EU Commission has long advocated restricting merger control to the acquisition of controlling stakes. However, the tide seems to now be turning. The Commission has recently taken a closer look at the competitive concerns relating to the acquisition of non-controlling stakes.

In November 2011 the Commission announced its intention to conduct a study on the economic importance of minority shareholdings in the European Union. As a first step, the Commission wants to create a database that maps out existing minority shareholdings that it could then use to identify a potential enforcement gap. If there is an enforcement gap, the Commission’s second step would then be to determine whether it should be enabled to review transactions involving minority shareholdings.

**Competition Concerns Relating to Minority Shareholdings**

At least in theory, there may be competition concerns relating to minority shareholdings that fall short of conferring control, as they are still capable of reducing the incentives of the parties to behave independently of their competitors. Examples include the following:

- Minority shareholdings could create incentives for the acquiring firm to raise its prices unilaterally.
- The acquiring firm may still influence materially the decisions of the target company in relation to key competitive parameters such as price, quality or strategic expansion, so as to confer a competitive advantage on the acquirer’s other interests in the market.

- Cross-shareholdings across companies could also, in principle, facilitate coordination between competing firms if they enable the sharing of confidential market information.

**Closing a perceived enforcement gap must be balanced against the costs of doing so.**

**Is a Regulatory Response Needed?**

It is clear the Commission does not have the relevant and effective means to address potential competition issues relating to minority shareholdings that fall below the existing threshold of control. But this does not automatically mean the Commission should be given those means. Rather, in deciding whether or not to take action to fill this “enforcement gap”, the pro-competitive effects of regulatory intervention must be balanced against the costs:

- Competition authorities would need more resources. Given the very limited amount of transactions that may actually raise competition issues, the resources needed to review all of them are unlikely to be worth the cost.
- There would be an increase in the regulatory burden placed on businesses. This burden would be higher under the EUMR’s system of mandatory notifications than, for example, the United Kingdom’s system of voluntary notification, or the US and German systems that are substantially lighter on information requirements.
- Extending jurisdiction beyond the clear-cut threshold of control to a vague “influence” test would add substantially to the regulatory uncertainties in merger assessments. One important benefit from the current system is clarity: the concept of “control” is clear enough to give businesses and regulators guidance on which transactions require a notification to the Commission.

The Commission should limit the review to acquisitions above a certain fixed threshold (e.g., 25 per cent) and not introduce a vague “material influence” or “competitively significant influence” test. Furthermore, the Commission should introduce a special form for the review of shareholdings below the threshold of control that would require as little information and analysis as possible, so businesses and regulators do not spend time discussing the notification of harmless financial investments.
It is now just over three years since China’s Anti-Monopoly Law (AML) was introduced. China’s AML regulators, especially the Ministry of Commerce (MOFCOM), the authority in charge of merger control, have moved quickly to make a mark on international business. Now, most large, cross-border “concentrations” (mergers, acquisitions and joint ventures) must successfully pass MOFCOM review in addition to reviews by the European Commission and US Department of Justice (DOJ) and/or Federal Trade Commission (FTC).

Significant Increase in Cases Reviewed
The number of cases reviewed by MOFCOM each year has more than doubled from 79 in 2009 to 168 in 2011. There has also been tremendous growth in the number and variety of concentrations that MOFCOM has reviewed.

One of the reasons for the significant increase is that more corporations have realised merger control filing is necessary in China. Also, as enterprises are growing, the thresholds set for merger control notification are becoming easier to reach. The thresholds are RMB 400 million revenue (US$63.5 million) in China for each of two parties involved, and RMB 2 billion (US$317.5 million) for all parties’ aggregate revenue in China, or RMB 10 billion (US$1.59 billion) for all parties’ aggregate worldwide revenue. So far there has been no indication these thresholds will change, despite significant appreciation of the RMB (compared to the US Dollar) over the last five years.

MOFCOM’s Published Decisions
Eleven decisions were published by MOFCOM by the end of 2011, one blocking an acquisition and 10 cleared with conditions. There have been another two conditional decisions by the time of writing, at the end of February 2012. One clear development is that MOFCOM’s competition analysis/assessment is becoming much more elaborate and detailed. The published decision relating to the first case involved only a few sentences, while the most recent stretched to several pages. MOFCOM is also now less likely to be criticised by the international media and professionals for its decisions.

Another notable development is that MOFCOM has now applied various types of remedies (both behavioural and structural) to cases involving Chinese
companies. These include decisions affecting large, State-owned enterprises.

MOFCOM has emphasised it does not discriminate between concentrations that involve foreign enterprises and those that involve only Chinese enterprises, and it does not treat enterprises differently based on the nature of the ownership of the parties involved in the concentration (e.g., private or public). Indeed, MOFCOM’s clearance of Nestlé’s acquisition of Chinese candy firm Hsu Fu Chi is a sign that China is prepared to accept multinational companies taking over famous Chinese brands.

There are two other issues that have been clarified by recent merger control decisions. The first concerns joint ventures. In giving approval to GE China’s joint venture with Shenhua Coal, MOFCOM made it clear that formation of a joint venture can require MOFCOM clearance under China’s AML (www.mwechinalaw.com/news/2011/chinalawalert1111b.htm/). This has been reinforced by a 2012 decision giving conditional approval to the formation of another joint venture.

The second issue that has been clarified is that MOFCOM will consider minority shareholdings in other competitors as grounds for requiring divestiture or other remedies before giving approval to a transaction. In its approval of Alpha V’s acquisition of Savio, MOFCOM scrutinised closely the potential influence by minority shareholdings of Alpha V in the only other competitor on the market before giving conditional approval.

Prospects for MOFCOM

Several challenges remain for MOFCOM in its treatment of large concentrations, particularly those that are also being reviewed by other jurisdictions, such as the European Union or the United States. A common criticism is that MOFCOM takes much longer to complete its review process than other merger control authorities; it has become normal practice that MOFCOM’s review will enter Phase II before clearance. There are also complaints of the unpredictability and less than transparent way in which MOFCOM uses its discretion to formally accept a case or not. Experience suggests it takes at least several weeks (and can take more than a month, or even longer) for MOFCOM to accept a case for review under merger control rules. In these circumstances it is advisable when planning concentrations involving China to assess the lengthy MOFCOM review process and make the filing as soon as practicable in order to meet any deadline for closing a transaction.

MOFCOM is aware of the concerns over delays to approval. Shang Ming, the director of the Anti-Monopoly Bureau of MOFCOM, has indicated MOFCOM acknowledges these concerns and is strengthening communications with its counterparts in the European Union and the United States so simple cases can be singled out for a “fast track” review in a system similar to the EU “short form” filing.

Faster and more efficient procedures for merger control approval can be expected in the future, via channels that include the China-EU Competition Policy Dialogue and the Memorandum of Understanding on Anti-monopoly and Anti-trust Cooperation with the DOJ and FTC.

Because of the detailed information and argumentation required to be submitted to MOFCOM, and the increasingly sophisticated approach of MOFCOM, international concentrations involving China (as well as investment in China where applicable), will require experienced counsel to conduct pre-review consultation and communications face-to-face with MOFCOM. They will also need to understand whether the transaction falls within the scope of review and be able to put a position directly and effectively to MOFCOM.

Priority Action on Failure to Submit Concentrations to MOFCOM

Companies should take particular note of MOFCOM’s clear statement that in 2012 one priority is to investigate and sanction parties to a concentration who fail to properly submit notification of a concentration, nor have it cleared by MOFCOM. In line with this priority, MOFCOM introduced in January 2012 new “Preliminary Regulations on Investigation and Treatment of Failure to Notify Business Operator Concentration” (see www.mwechinalaw.com/news/2011/chinalawalert0112b.htm/ for more information). MOFCOM also announced that later in 2012 it will introduce new regulations on the investigation and treatment of concentrations suspected of having failed to be notified to or cleared by MOFCOM.

It can be seen that there are a number of developments that foreign companies need to consider carefully. For example, if a concentration has not been notified to MOFCOM, how does a foreign multinational deal with this issue? How can a merger control notification be speeded up? How does a potential buyer or seller of a company overcome the problem that an earlier transaction that should have been notified to MOFCOM has not been? These are all challenges that MOFCOM will hopefully publish guidance or decisions on in the future.

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China Improves Clinical Trials and Speeds Up Drug Licensing

By Henry Chen

With increasing investment in research and development by foreign companies in China, assuring the reliability and efficiency of the drug and device development process is a critical priority. However, this investment comes at a time of increasing concern over the efficiency and integrity of the clinical trial process in China and of complaints that the drug-licensing process has become a bottleneck for the introduction of new drugs and devices in China.

There are three phases to the drug licensing process in China. Stage 1: Apply to conduct a clinical trial. Stage 2: Conduct the trial. Stage 3: Apply for a license to import drugs (for non-Chinese drugs) or to manufacture drugs (for Chinese drugs).

It takes around 155 working days to complete Stage 1. Typically, the Center for Drug Evaluation (CDE), a drug review body under the State Food and Drug Administration (SFDA), will require an applicant to provide supplementary documents within four months to support the application for the clinical trial. In Stage 3, the application for a license to import drugs takes approximately 185 working days, while a license to manufacture drugs takes even longer. Stage 2, the clinical trial, can easily take up to four years. Therefore, the entire process of obtaining a drug license could take between four and six painstaking years, although it is possible to speed up the process under some special circumstances. The Chinese Government has taken measures to reduce application procedures and increase the efficiency of the drug-approval process.

CDE Reform

Under the old system, technical evaluations of drugs were delivered to one of four CDE review departments, each operating its own pharmacology and toxicology divisions. The CDE is creating a single department in charge of both that will review all drugs. The CDE has also established an independent support division to conduct biostatistical analysis, and a management department that will oversee and coordinate nine divisions, and communicate with drug sponsors. In addition, a research and evaluation department has been added to draft technical review guidelines and conduct assessments of reviews. The CDE aims to approve an application for clinical trial within six months.

Encouraging Innovation Over Generics

The SFDA has changed its system to adopt a strict review and approval policy on generic drugs and give more leeway to the review and approval of innovative drugs if the drugs have clinical value and can be mass-produced. As a result of the new policy, in 2010 the SFDA approved 889 drugs, of which only 640 were generic drugs. Compared with 2005, approvals of generic drugs decreased 11-fold.
Improving Clinical Trials
On 2 December 2011, the SFDA issued the Guiding Principles for Administration on Phase I Clinical Trials on Drugs (for Trial Implementation), which aim to regulate and streamline Phase I clinical trials in China. These principles became effective the same day they were issued and are an important development for industry and research facilities.

Some observers take a sceptical view of the principles as just a compilation of existing clinical best practice statements. Other observers are more optimistic that the principles can have a positive impact on the life sciences sector.

The entire process of obtaining a drug license could take between four and six years.

Safety Considerations
The principles are intended to protect more effectively the rights and safety of trial subjects and to enhance the research quality and management of Phase I clinical trials.

To achieve these goals, the principles clearly delineate the rights and duties of sponsors, laboratories and ethics committees, which are the equivalent of an Independent Review Board in the United States.

The principles require that a trial subject must sign a letter of informed consent that, generally speaking, must specify the objective of the Phase I clinical trial and describe the possible benefits and risks. The laboratory must maintain regular communication with trial subjects in order to uncover any adverse reactions quickly. A sponsor must give appropriate economic compensation to a trial subject and, if a subject is harmed on account of participation in the trial, the sponsor must assume the costs of treatment and provide reasonable additional compensation.

The laboratory must meet the various requirements issued by the SFDA and be accredited by the China National Accreditation Service for Conformity Assessment. It must have adequate physical facilities and equipment, as well as quality management systems.

The laboratory director and principal investigator, if they are different people, must have at least five years’ experience each in handling clinical trials.

The principles emphasise risk prevention and management. The sponsors, researcher and ethics committee have to work together closely to manage and control risks. The ethics committee must closely monitor trial risks, trial plans, the informed consent form and process, the qualification and experience of laboratories and associated researchers, trial subject recruitment and adverse events. A sponsor must evaluate any possible risk prior to a clinical trial and reach a consensus with each participating laboratory regarding risk management. In turn, the ethics committee has the responsibility of reviewing risk-control measures and monitoring their implementation. The committee also has the right to suspend or terminate a clinical trial.

Efficiency Considerations
The principles require that sponsors and laboratories enter into a research agreement to specify the interests and rights of each party. Among other terms, the agreement must specify funding terms, the scope and process of clinical trials and any permitted sub-contracting.

A sponsor may engage a Contract Research Organisation to carry out some work and tasks, but the sponsor remains responsible for the sub-contracted work and tasks.

The original data must be first-hand information obtained from the trial and the equipment and methods used to generate study data must be inspected and verified. However, the principles do not specify which party is responsible for inspection and verification.

The sponsor, principal investigator and laboratory director must each co-sign a final report that will be submitted to the CDE. In addition, the head of the laboratory must sign the analysis report on any biomedical samples, which will also be signed off by the laboratory.

If nothing else, the principles are a prelude to the reform of the entire drug licensing system in China. Optimists are encouraged, for example, by ongoing efforts by the SFDA to draft two regulations: the Standards on the Administration of Quality of Drug Registrations and the Standards on the Administration of Drug Reviews to streamline further clinical trials and the agency’s own review process. These rules establish an Expert Advisory Committee in respect to drug registration administration. In addition, internal and external supervisory mechanisms will be established to supervise the drug review and approval process. It remains to be seen whether the SFDA will issue similar principles for Phase II, III and/ or IV clinical trials.

Cross-Border Collaboration
The Chinese Government attaches great importance to learning from and collaborating with other governments and international organisations. For example, in drafting the above principles, the SFDA referred to British Pharmaceutical Industry and European Medicines Agency clinical trial guidelines. The Chinese Government has also negotiated with the Taiwanese and other non-Chinese Governments on possible cooperation regarding clinical trials. According to Reuters, on 15 December 2010, the director of the Taiwan Food and Drug Administration explained that the Taiwan and Chinese Governments, after a cooperative agreement on pharmaceuticals is executed, will encourage Taiwanese and Chinese clinical facilities to cooperate with each other on clinical trials. Hopefully, the clinical trial data established in one country will be acceptable to the other.

Similar dialogues are being held with other countries such as South Korea and Japan. Although there is no breakthrough in any of these dialogues yet, they do underscore the Chinese Government’s commitment to speeding up market authorisation.

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The International Civil Aviation Organization (ICAO), a United Nations specialised agency under UN Protocol No. 45, is an intergovernmental organisation, chartered by the Chicago Convention in 1944, which governs civil international aviation. There are 191 Member States in the Chicago Convention and the ICAO. All European Union Member States are in the Convention and the ICAO, but the European Union is not itself a party to the Convention or the ICAO.

On 1 January 2012, the EU Emissions Trading Scheme (ETS) came into force for EU airlines and non-EU international airlines. Under the ETS, an airline must surrender an allowance for each ton of CO₂ emitted on flights to, from or within the European Union. Before the ETS came into effect, US airlines and their trade association filed a suit in the High Court of England and Wales (EWHC), asking it to “quash the measures” of the ETS in the United Kingdom, as the ETS was unlawful under international treaties and customary international law. The EWHC referred a preliminary ruling to the Court of Justice of the European Union (CJEU) on international law questions concerning the ETS, including the effect of the Chicago Convention. On 21 December 2011 (Case C-366/10), the CJEU ruled that the ETS directive was valid on two grounds. But in its decision on the international law question, the CJEU said it “cannot examine the validity” of the ETS in the EWHC’s reference to the Chicago Convention, because the European Union is not bound by the Convention.

Under Article 84 of the Chicago Convention, a dispute between ICAO Member States can be heard by the ICAO Council, but Council Member States involved in that dispute may not cast a vote in the Council. A Member State may appeal the Council’s decision to the International Court of Justice (ICJ) or to an ad hoc arbitral tribunal. Further, UN Protocol No. 45 authorises the ICAO Assembly or its Council to request an advisory opinion from the ICJ on a matter that falls within the scope of their activities under the Chicago Convention.

On 23 ICAO Member States issued a declaration against the ETS.

At a meeting held in Moscow on 21-22 February 2012, 23 ICAO Member States, none of which were EU Member States,
issued a declaration against the ETS to non-EU airlines (the Moscow Declaration). In the Moscow Declaration there is a basket of measures and actions (referenced as Attachment A) that the signatories could take in response to the ETS. It specifically mentions “a proceeding under Article 84 of the Chicago Convention”. There is no mention in the Moscow Declaration of seeking an ICJ advisory opinion, although it might be referred to obliquely under “[any] other actions/measures” in Attachment A. The ICAO has not requested an advisory opinion from the ICJ but, in the past, there have been two similar Article 84 disputes involving international airlines, i.e., the EU “hushkit” dispute and Pakistan’s action against India.

Hushkit Dispute
In the hushkit dispute, the United States brought an Article 84 action against the EU Member States in 2000, on a 1999 EU regulation prohibiting the use of hushkits to reduce engine noise on aircraft in EU airports, because it was against the Chicago Convention and the ICAO. Omega Air and others had previously filed a suit in the EWHC and in the High Court of Ireland to prevent enactment of the prohibition. Those Courts referred preliminary rulings to the CJEU (Cases C-27/00 and C-122/00), including whether the EU regulation was incompatible with the Chicago Convention and the ICAO.

Before the CJEU issued its decision, the ICAO Council adopted noise standards for aircraft engines and the European Union replaced its more stringent hushkit prohibition in favour of measures tracking the ICAO provisions. After that compromise, the CJEU then approved the earlier hushkit regulation on the grounds that, under EU law, “no factor” had been disclosed with respect to the Chicago Convention that would affect the validity of that regulation.

Pakistan’s Action Against India
The other Article 84 dispute was an action brought by Pakistan against India in 1971 under the Chicago Convention, where India suspended Pakistan’s civil aircraft flights over Indian territory. This arose out of a “hijacking” incident on an Indian aircraft that flew across the border between India and Pakistan. India contended that this matter was covered by a prior agreement in which the parties had suspended or terminated the Chicago Convention.

The Council disregarded India’s arguments and allowed Pakistan’s application to go to the Council for resolution. India then appealed this determination to the ICJ. In its decision, the ICJ stated that “the Council would inevitably be obliged to interpret and apply the Treaties, and thus to deal with matters unquestionably within its jurisdiction.” Consequently, the ICJ sent Pakistan’s application back to the Council for its final decision.

Macedonia v Greece
In addition, a noteworthy ICJ opinion on such international treaties was rendered two weeks before the CJEU’s ETS decision. In Macedonia v Greece, the ICJ stated that the CJEU interpreted the treaty establishing the European Economic Community and under prior agreements to that treaty, the CJEU “has concluded that this language refers to the ‘rights’ of third countries and ‘obligations’ of treaty parties, respectively.” The ICJ cited CJEU decisions, including paragraph 34 of the CJEU’s decision in Commission v Sweden (C-249/06), in which the CJEU said

"The purpose of that provision [in Article 307 EEC] is to make it clear, in accordance with the principles of international law, that application of the Treaty is not to affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations [citations omitted]."

Further, in its Sweden decision, the CJEU stated that Sweden had investment treaties with third countries prior to its entry into the European Union and there was a risk of conflict with measures that might arise from application of those investment agreements.

If some Moscow Declaration Member States with airlines flying to and from EU airports were to seek a resolution under Article 84 of the Chicago Convention, the Council’s decision could be unfavourable to the ETS, as the EU Member States on the Council could not vote on that dispute. If there was a preliminary appeal similar to India’s appeal to the ICJ, or if there was a final appeal to the ICJ, then the ICJ could look at the treaties under Article 84. Thus, if a dispute were brought under Article 84, then the contesting ICAO Member States and the Council might well decide on a compromise similar to the one that resolved the hushkit dispute.

The Moscow Joint Declaration can be found at www.ruaviation.com/docs/1/2012/2/22/50/.
As discussed briefly in International News, Issue 3, 2011, the new arbitration rules of the International Chamber of Commerce (the 2012 ICC Rules), which became effective on 1 January 2012, include new Emergency Arbitrator Provisions (in Article 29 and Appendix V) that allow for the grant of urgent interim measures by an emergency arbitrator. These measures, which include preserving the status quo and conserving evidence, can be ordered by the emergency arbitrator in circumstances where the full arbitral tribunal has not been constituted and is therefore not itself empowered to order such measures.

By filling a potential jurisdictional vacuum, these provisions are likely to render ICC arbitration even more attractive than it was under the previous version of the ICC Rules.

Applicability of the Emergency Arbitrator Provisions

The Emergency Arbitrator Provisions apply automatically, but parties can “opt-out” of them. In addition to the opt-out provision, there are certain situations where the Emergency Arbitrator Provisions will not apply:

- Where the arbitration agreement was concluded before 1 January 2012, in contrast with the rest of the 2012 ICC Rules, which apply to any arbitration commenced on or after 1 January 2012
- Where the parties have agreed to another pre-arbitral interim measures procedure
- Where the parties have agreed to another pre-arbitral interim measures procedure

In addition, the Emergency Arbitrator Provisions only apply to parties that are signatories to the arbitration agreement or the successors to such signatories. Accordingly, they cannot, for example, be invoked against an affiliated company of a signatory of the arbitration agreement, unless the affiliate has itself signed the arbitration agreement.

The Procedure

Where the Emergency Arbitrator Provisions do apply, the procedure will essentially be as follows:

- The President of the ICC Court will appoint an emergency arbitrator within two days of an application being made, as long as the file in the underlying arbitration has not yet been transmitted to the arbitral tribunal.
- The emergency arbitrator will be independent of the parties. There is a mechanism, with tight time limits, for challenging the emergency arbitrator before the ICC Court. The emergency arbitrator will not be allowed to sit as a member of the arbitral tribunal that will go on to decide the substantive dispute.
The emergency arbitrator will, within two days of being appointed, establish a procedural timetable, the terms of which will depend on the urgency of the measures requested, but must allow for a decision to be taken (in the form of an order) and communicated to the parties within 15 days of the appointment.

In other words, interim measures can in theory be obtained within 18 days of their being requested, or even more quickly depending on the circumstances.

Cost of Emergency Arbitrator Proceedings

The ICC will generally levy a flat fee of US$40,000 for any application under the Emergency Arbitrator Provisions. US$10,000 of this is for the ICC’s administrative expenses, and US$30,000 is for the emergency arbitrator’s fees and expenses. However, there is a provision for the costs to be increased by the President of the ICC Court if necessary, in light of “the nature of the case and nature and amount of work performed by the emergency arbitrator, the Court, the President, and the Secretariat.”

At the end of the emergency arbitrator proceedings, the emergency arbitrator will fix the costs of the proceedings and decide which party should bear them.

Effect of an Order

In the event that a party fails to comply with the order, it is likely that enforcement under the New York Convention will not be possible, because the order is not described by the Emergency Arbitrator Provisions as an “award” and, in any case, may not satisfy the requirement of finality under the Convention as it is an interim order. It may nonetheless be enforceable under other provisions of certain national laws.

The order is not modified, terminated or annulled, it will, with some exceptions, remain in force until the arbitral tribunal’s final award is rendered. The exceptions are

- When the applicant fails to file a Request for Arbitration within 10 days of the date of filing the initial application
- When the ICC Court accepts a challenge against the emergency arbitrator
- When the arbitration is terminated before rendering a final award

Emergency Arbitrator Versus Applying to National Courts

The 2012 ICC Rules specifically preserve the parties’ right to apply to national courts for interim measures. The question therefore arises, which is the better option for a party seeking urgent relief during the period before the arbitral tribunal is constituted: applying to the emergency arbitrator or applying to national courts?

The advantages of the emergency arbitrator procedure are as follows:

- It may be cheaper than proceedings before national courts.
- It avoids the need for multiple applications by multiple counsel in different jurisdictions.
- It may be more confidential than national court proceedings.
- It avoids the need to rely on national courts that cannot be trusted to be, or are perceived not to be, sufficiently independent.

The advantages of national courts are as follows:

- They may sometimes be the only alternative, either because the Emergency Arbitrator Provisions do not apply or because in certain jurisdictions (Argentina, China, Greece, Quebec and, other than for shareholder disputes, Italy) the power to grant interim relief (and, a fortiori, urgent interim relief) is reserved to the national courts.
- They will, in appropriate circumstances, accept ex parte applications (i.e., applications of which the other side is not informed until after the relief has been granted).

- Their orders are more easily enforced than an emergency arbitrator’s order, although it is unlikely that an emergency arbitrator’s order will be ignored in practice.
- Their orders may be subject to appeal, although the emergency arbitrator’s order can be reviewed by the arbitral tribunal.

It seems likely that the emergency arbitrator provisions will become the primary choice for most parties seeking urgent interim measures, even though there will always be some cases where the national courts will be preferable. The 2012 ICC Rules have rightly left open the possibility for parties to choose between the two alternatives and, in most cases, parties to ICC arbitration clauses should maintain this choice by not opting out of the Emergency Arbitrator Provisions.

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Europe’s Unified Patent System: Still Under Debate

By Alexander Harguth

For decades, Europeans have been debating a unified patent system. The issue seemed resolved in 2011, when 25 countries agreed to push ahead without Italy and Spain under an “enhanced co-operation”. Italy and Spain have so far opted out of the patent proposal due to disagreement over the proposed language regime. An agreement appeared to be within reach, but a fresh dispute over whether the Central Division of the Unified Patent Court should be in London, Paris or Munich tempered the optimism.

A plenary session at the European Parliament on the EU Patent Package, which was scheduled for 14 February 2012, has been postponed and hadn’t been rescheduled at the time of going to press. Indeed, as indicated by the EU Parliament’s Legal Affairs Committee on 30 January 2012, there will be no vote until an agreement on the Central Division’s location has been reached.

It is, at the moment, the only outstanding issue in the patent package and the participating Member States have agreed to reach a final agreement by June 2012 at the latest. But observers have pointed to other contentious issues and it is probable these will also be the cause of heated discussions.

The Location of the Central Division

An important role will be attributed to the Central Division: under the proposed plans, stand-alone patent revocation actions and actions for declarations of non-infringement will have to be commenced there. In addition, the local divisions of the Unified Patent Court, i.e., local courts of the Member States, may refer revocation counterclaims to the Central Division. This would allow the proceedings between validity and enforcement to be separated, as in German courts.

On this basis, argues France and the United Kingdom, locating the Central Division in Munich would promote the German split system and thus hinder a reasonable synthesis of the various judicial practices in Europe where validity and infringement of patents are dealt with predominantly in the same court. Furthermore, as Germany already hosts the European Patent Office, France and the United Kingdom argue that Germany would be unfairly favoured by hosting another important intellectual property institution in Europe. However, as Germany is Europe’s biggest issuer of patents and handles the majority of Europe’s patent infringement cases, it would suggest its patent enforcement system is the most valued and proven in Europe.

CJEU Involvement

There is also heavy resistance over the involvement of the Court of Justice of the European Union (CJEU). Its jurisdiction stems from Articles 6 to 8 of the proposed Regulation, which would allow the CJEU final judgment on matters of substantive patent law. The resistance is based mainly on instances where questions of interpretation in trade mark cases have been referred to the CJEU. It is argued that involving the CJEU will lead to extra costs and delay, and that judgments will be issued by judges who don’t have any solid knowledge and experience in the patent field.

These are not the only concerns. As the system may not work as planned, stakeholders claim there must be a way out. These may include a right to litigate national patents issued by the European Patent Office in national courts and a right and mechanism for patentees and countries to opt out of the system.

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