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Jurisdictional Audits

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MULTINATIONAL companies should weigh carefully the practical implications of recent decisions by U.S. courts and the rules of other countries concerning where they may be found subject to suit. In particular, every corporation with multinational operations should regularly conduct a jurisdictional audit to determine whether the parent company may be subject to personal jurisdiction for claims unrelated to a subsidiary's activities in that jurisdiction.

Under the due process clause of the Constitution, "general jurisdiction" exists over a defendant engaged in "continuous, permanent and substantial activity" in the forum even if the claims asserted are unrelated to such activity. "Specific jurisdiction" exists only for a suit "arising out of or related to" the defendant's activity in the forum. *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414-16 (1984). In both instances, U.S. courts apply a "reasonableness" test focusing on whether asserting personal jurisdiction over the defendant satisfies "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The U.S. Supreme Court recognizes the burden of asserting jurisdiction over an alien defendant and stresses the need to consider the potential impact on the "procedural and substantive policies of other nations." *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 115 (1987).

In *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), the 2d U.S. Circuit Court of Appeals held that Dutch and British multinational companies had become subject to personal jurisdiction of the U.S. court due to the activities of their investor relations office in New York that was operated by a second-tier U.S. subsidiary of these companies. Brought under the Alien Tort Claims Act, the suit concerns claimed international human rights violations in Nigeria having no U.S. connection. The 2d Circuit also denied the application of forum non conveniens as a basis for dismissing the case.

Both the New York Stock Exchange and the U.S. Council for International Business supported the defendants in their unsuccessful effort to have the jurisdictional ruling overturned by the Supreme Court, which denied certiorari. These amici curiae emphasized the ruling's potentially damaging impact on U.S. capital markets and interests abroad.

The facts behind the 2d Circuit's 'Wiwa' decision

The defendants in *Wiwa*—Royal Dutch Petroleum Co. and Shell Transport and Trading Co.—jointly control and operate the Royal Dutch/Shell Group and are listed, directly or indirectly, on the New York Stock Exchange. The 2d Circuit described the group as a "vast, international, vertically integrated network of affiliated but formally independent oil and gas companies." Id. at 92. Neither company maintains a branch or office in the United States. All allegations in the complaint related to actions of a wholly owned Nigerian subsidiary of Royal Dutch and Shell Transport, Shell Petroleum Development Co. of Nigeria, which "engages in extensive oil exploration and development activity in the Ogoni region of Nigeria." Id. Shell Nigeria also had no branch or office in the United States, and none of the alleged conduct in the complaint is said to have occurred here.

The 2d Circuit held that the defendants were subject to the personal jurisdiction of the U.S. courts based on the activities of an investor relations office that was operated by a Delaware subsidiary (Shell Oil Co.) of a first-tier U.S. subsidiary (Shell Petroleum Inc.) of Royal Dutch and Shell Transport. The court grounded its ruling on two key findings: that the office was the "agent" of the parent companies, and that the activities of the office were quantitatively and qualitatively sufficient to be held to be "continuous and systematic general business contacts" of the parents in New York. Id. at 98.

As to the agency issue, the court found that the defendants "fully funded" the office expenses, that the sole function of the office and its manager was "to perform investor relations services on the defendants' behalf" and that they gave "[all] of their time to the defendants' business" and sought the defendants' approval on important decisions. Id. at 96.

Distinguishing precedents that found no jurisdiction over non-U.S. parent companies with offices supporting New York Stock Exchange listings, the 2d Circuit held that the activities of the Shell Group's office were broader than required for such support and resulted from a "discretionary determination to invest substantial sums of money in cultivating their relationship with the New York capital markets." Id. at 97. Finally, the 2d Circuit found that the office evidenced every one of the characteristics

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that have been held to constitute a substantial "physical corporate presence" in New York attributable to the parent companies, including having and maintaining an office, bank accounts, phone listing, public relations work and employees.

Do U.S. corporations face similar concerns in foreign courts? While few countries rely on the common law jurisprudence of U.S.-style "general jurisdiction," courts in civil-law countries place much greater emphasis on the relationship between the claim and the court. For example, Art. 6(1) of the E.U. Regulation 44/2001 (Dec. 22, 2000) provides that, in order to avoid conflicting judgments on closely connected claims, a court may assert jurisdiction over a defendant having no contacts with the forum if that court has jurisdiction over a locally domiciled co-defendant. Further, some civil-law countries permit limited personal jurisdiction over a defendant based solely on attachment of a minimal amount of the defendant's assets, a basis of jurisdiction the Supreme Court held unconstitutional absent special circumstances. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

What should a well-advised multinational corporation with a subsidiary in another country consider in a jurisdictional audit? The issues presented are subtle because such a subsidiary always serves the business interests of its parent company, and distinguishing among the interests being advanced is often difficult. Further, U.S. courts rely on both agency and alter ego theories to attribute subsidiary conduct to a parent company.

Any jurisdictional audit should be tailored to the circumstances of the particular company and should consider various attributes of the parent and subsidiary operations and the relationship among the affiliates. An audit can only suggest steps to reduce exposure and cannot substitute for other necessary action, such as compliance programs. Also, the law on some issues (e.g., Web sites and their jurisdictional implications) is most unsettled. A well-designed audit of a subsidiary's operations might begin by carefully considering the following factors:

Factors to be considered in a jurisdictional audit

■ *Structure and purposes*. If the parent company owns, directly or indirectly, a separately incorporated subsidiary with distinct functions, does the subsidiary enjoy sufficient autonomy in its operations, financing and decision-making to avoid being found to be acting solely for the parent? Does the subsidiary have responsibilities for issues of concern only to the subsidiary's operations or those of other affiliates rather than only those of the parent company?

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■ *Directors and officers*. When officers and directors of the subsidiary are also officers and directors of the parent company, what measures are taken to clarify the capacity in which the officer or director is acting when dealing with the subsidiary? Do responsibilities and titles overlap, or can an individual's actions be readily isolated and demonstrated? Whether through written policy or actual practice, is approval of the parent company officers necessary for important subsidiary business decisions?

■ *Funding and employment*. Does the subsidiary enjoy a stream of income from its local operations that would preclude a finding that reliance on parent funding demonstrates an agency relationship? Does the office have employees who are engaged in activities that serve the interests of the subsidiary, or are all employees acting solely for the parent?

■ *Sales activities including Web sites*. Does the subsidiary conduct its own sales functions with its own personnel? Do officers and employees of the parent company (and its affiliates) provide much of the staffing for the subsidiary's marketing? Who has approval authority for parent-company contracts and where are those having such authority located? Does the subsidiary have a Web site for its products or services separate from the parent company's? Does the subsidiary respond to inquiries to the parent's Web site? If so, for itself or for the parent?

■ *Ownership of property and bank relationships*. Does the subsidiary own its operating assets? Is the title to any property used by the subsidiary, including everything from computers and software to intellectual property rights, held in the name of, or licensed to, the subsidiary and, if not, why not? Does the subsidiary operate bank accounts only in its own name or also to pay parent expenses?

■ *Formalizing any parent-subsidiary relationship*. If the subsidiary undertakes assignments for the parent, are these formalized in an agreement establishing an independent contractor rather than agency relationship? If the subsidiary does act in certain respects as an agent of the parent, is this relationship committed to writing and carefully defined to avoid such activities being considered "continuous and systematic" presence?

■ *Signature of agreements*. Is the parent a party to or guarantor of any agreements entered into by the subsidiary? If so, what recitals appear in the agreement and what other steps make clear that the parent is not purporting to conduct business where the subsidiary is located?

■ *Documentation*. Do the subsidiary's books and records, including personnel files, support the legally distinct identity of the subsidiary from the parent?

Thoughtful corporate counsel of multinational companies will quickly raise other important questions that should be part of a regular jurisdictional audit of every corporate affiliate operating in another country. The main point is to begin the process and avoid unwanted surprises about where a multinational parent company is subject to suit. NLJ