

## EXECUTIVE RISKS INTERNATIONAL UPDATE

### LITIGATION HIGHLIGHTS Q2 2011

Out of the global hurly burly of recent economic, political and governance issues, we have selected five potentially significant litigation developments in the area of global financial and executive risks to focus on here:

- A decision by the Dutch courts, which might be viewed, in part, as an answer to last year's seminal *Morrison* decision by the U.S. Supreme Court
- An Italian court holding corporate executives criminally liable for the tragic deaths at a local German steel plant
- The new U.K. Bribery Act and other significant milestones in anti-bribery enforcement
- Recent developments in France on punitive damages awards
- Foreign asset seizures

### BEWARE THE DUTCH COURTS

In 2010, many were jubilant that the U.S. Supreme Court reined in global shareholder suits against non-U.S. companies, where the shares were purchased on foreign exchanges by non-U.S. shareholders (the so-called f-cubed suits), in its seminal decision in *Morrison v. National Australia Bank*.<sup>1</sup> Moving forward into January of 2011 we see investors demanding that Fortis NV be held liable for fraud regarding its purchase of ABN Amro Holding NV and clamoring for potentially billions of dollars in damages against the company – not in the U.S. – but in a suit brought in the Netherlands.

A foundation of international investors, the Stichting Investor Claims Against Fortis filed its declaratory judgment complaint in the Utrecht Civil Court.<sup>2</sup> The foundation included 140 institutional investors (including many of Europe's largest pension funds) and more than 2,000 individual claimants, including investors from the United States, the Middle East and Europe who would clearly be f-cubed plaintiffs.<sup>3</sup> And they are not without experience, the Director



of the Stichting having previously worked with Grant & Eisenhofer (a significant plaintiff's law firm in the States) in negotiating a 2007 class action settlement in the Netherlands valued at more than US\$450 million with Royal Dutch Shell.<sup>4</sup>

We wait impatiently to learn how the Dutch courts will treat this type of suit.

### DIRECTOR LIABILITY IN HEALTH AND SAFETY ISSUES

Many of us are familiar with the U.K.'s Corporate Manslaughter Act,<sup>5</sup> but not everyone may be aware that similar issues are being raised in a variety of jurisdictions. A tragic 2007 case in which seven workers died in a ThyssenKrupp plant in Turin, Italy recently resulted in a jury in Italy sentencing

the leader of the German steel group to a prison term of 16 years and six months for premeditated killing. The CEO had been indicted along with five other executives of the steel group. The families of the victims alleged that the company had deferred required repairs at the plant based on an impending plant closure, and that this decision resulted in the accident. The prosecutor accused the defendants of having “knowingly accepted” the risk of fire.<sup>6</sup>

## **GROWING INTERNATIONAL ANTI- BRIBERY ENFORCEMENT**

While the U.K. Bribery Act took effect on July 1, and Foreign Corrupt Practices Act investigations and prosecutions continue unabated in the U.S., the rest of the world has not been asleep. In the past few months, we’ve seen local enforcement in jurisdictions as diverse as Canada, China, Kuala Lumpur and Poland.<sup>7</sup>

Significantly, Russian President Dmitry Medvedev, who has made controlling corruption his signature issue, signed a bill outlawing foreign bribery and allowing prosecutors to seek large fines instead of prison sentences.<sup>8</sup> The new law brings Russia closer to the Organization for Economic Cooperation’s anti-bribery convention, a key anti-corruption benchmark and a prerequisite for full membership to the OECD, which Russia has sought since 2009.

Under the new Russian law, bribing a foreign official, personally or through an intermediary, is a crime punishable with a fine of up to 90 times the amount of the bribe, or with a prison term of up to 12 years and a fine of 70 times the amount of the bribe.<sup>9</sup> The same penalties apply to those found guilty of passing bribes, such as consultants.

Companies that pay bribes to foreign officials to secure a business advantage can be fined up to 100 times the amount of the bribe. The fine structure for corporate offenses is slightly different, qualifying large bribes as having a value of more than one million rubles and “especially large” bribes as having a value of more than 20 million rubles.

The law defines a foreign official as “any person, whether elected or appointed, that holds any position at the legislative, executive, administrative or judiciary body of a foreign state, and any person performing a public function for a foreign state, including any public agency or public

enterprise.” The new law demonstrates a striking shift in attitudes toward international corruption.

Unlike the U.S. Foreign Corrupt Practices Act, the new Russian law provides for administrative but not criminal sanctions against companies. It also includes a defense for extortion and frees bribe-givers and go-betweens from liability if they voluntarily report their crime to the authorities or facilitate the investigation.

## **FRANCE'S HIGHEST COURT ON ENFORCEMENT OF PUNITIVE DAMAGES AWARD**

The notion that punitive damages are largely an American evil that should be restricted to U.S. shores is beginning to change somewhat. Last December, France’s highest court, the Court of Cassation, rendered an important decision on the enforcement of foreign decisions granting punitive damages.<sup>10</sup> This decision was surprising on a number of fronts, particularly because France is a civil law country and punitive damages are usually awarded and enforced almost exclusively in common law countries. Punitive damages are intended to not only compensate for harm but also punish the wrongdoer and deter such conduct by others. The principles of deterrence and punishment don’t exist in French law, under which damages are intended to fully remedy the resulting harm (the principle of full compensation).

The case in point involved a U.S. purchaser of a yacht manufactured in France. During construction, the yacht broke loose in a storm and sustained serious structural damage. Repairs were made by the builder prior to delivery but not mentioned to the new owners. The builder refused to participate in the proceedings initiated in the U.S. by the owners, and a California Superior Court ordered the builder to pay \$3.25 million: \$1,391,650 for refurbishment of the yacht, \$402,084 in attorney fees, and \$1,460,000 in punitive damages. The plaintiffs sought

enforcement of the U.S. judgment in France – despite the French prohibition on punitive damages.

Generally, foreign decisions may be enforced in France if the French courts are satisfied that three conditions are met, including that enforcement of the judgment would not be contrary to international public policy. Significantly, the Court of Cassation held that, in principle, foreign judgments awarding punitive damages are *not* contrary to international public policy. The Court added, however, that an award of punitive damages *would violate* public policy if the amount awarded was disproportionate to the damage sustained and the contractual breach. The punitive damages in this case, compared to the amount of compensatory damages (\$1.46 million compared to \$1.39 million) was manifestly disproportionate in the French court’s view. Sadly for the yacht owners, this led to the refusal to enforce the punitive damage award as “manifestly disproportionate with regard to the harm sustained and the contractual breach.”<sup>11</sup>

The question yet to be determined is in what circumstances the amount awarded would satisfy the French courts as proportionate. In this case, more than one times the compensatory damages was enough to offend the French Court. But when the U.S. Supreme Court ruled that disproportionate awards in punitive damages violate the U.S. Due Process Clause and are therefore unconstitutional, the test it laid down is the single-digit ratio test: limiting punitive damages to no more than *nine* times the amount in compensatory damages.<sup>12</sup> This leaves quite a gap.

This decision can be viewed as the first step towards the recognition of punitive damages in France. Lest this be seen as a random act, it is important to note that punitive damages have also received increased attention from the legislature and inspired proposed revisions to the French Civil Code. The first proposal (the *avant-projet Catala*, 2005) allows for the payment of punitive damages in certain circumstances but holds that punitive damages are not insurable. A more recent proposal (L Beteille’s Report 558, in the name of the Senate’s Committee Law, 2009) adopts a different view and favors the insurability of punitive damages.<sup>13</sup>

## MID-SUMMER ASSET FREEZES

A growing trend in international securities prosecutions is insider trading.<sup>14</sup> An unfortunate side effect of this and other cross-border suits has been the specter of asset seizures. The U.S. Securities and Exchange Commission appears to have taken roughly two weeks to obtain asset freezes and other emergency relief against three Swiss-based entities it charged with insider trading ahead of a July 11 public announcement that Swiss-based Lonza Group Ltd would be acquiring Connecticut-based Arch Chemicals Inc. According to the SEC’s complaint, filed on July 15 within days of the alleged insider trading, Compania International Financiera S.A., Coudree Capital Gestion S.A., and Chartwell Asset Management Services purchased more than a million common shares of Arch between July 5 and July 8, mostly in accounts based in London. Immediately after the acquisition announcement on July 11, the firms began selling the recently purchased shares of Arch common stock for millions of dollars in profits.<sup>15</sup>

According to the SEC’s complaint, at the time the three entities purchased their Arch shares, they are believed to have been in possession of material-non-public information about Lonza’s proposed acquisition of Arch. “The SEC’s swift action to secure a judicial freeze order only four days after the observation of suspicious trading prevented millions of dollars from moving offshore,” said Robert Khuzami, Director of the SEC’s Division of Enforcement. In filing its complaint in U.S. District Court for the Southern District of New York, the SEC requested emergency relief noting that because the defendants are foreign entities and placed their trades in overseas accounts, there was a substantial risk that, upon clearance at U.S. brokerage firms, the proceeds of the trades would likely be transferred overseas.

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<sup>1</sup> See our August 2010 ER Alert, “**F-Cubed Suits after the Recent U.S. Supreme Court Decision.**”

<sup>2</sup> While the foundation cannot bring damages claims against the company, it would be allowed to do so if the Dutch court rules for them in the declaratory judgment suit.

<sup>3</sup> From Law360’s “Fortis Dutch Fraud Suit Could Enable Non-US Claims,” January 10, 2011, [http://www.investorclaimsgainstfortis.com/Attachment/192\\_Law360%20-%20Fortis%20Dutch%20Fraud%20Suit%20Could%20Enable%20Non-US%20Claims%20-%2020110111%20\(0002726\).PDF](http://www.investorclaimsgainstfortis.com/Attachment/192_Law360%20-%20Fortis%20Dutch%20Fraud%20Suit%20Could%20Enable%20Non-US%20Claims%20-%2020110111%20(0002726).PDF).

<sup>4</sup> [http://investorclaimsgainstfortis.com/Attachment/193\\_Reuters%20-%20International%20Investors%20Join%20Forces%20in%20Support%20of%20Lawsuit%20Against%20Fortis%20-%2020110110%20\(00027443\).PDF](http://investorclaimsgainstfortis.com/Attachment/193_Reuters%20-%20International%20Investors%20Join%20Forces%20in%20Support%20of%20Lawsuit%20Against%20Fortis%20-%2020110110%20(00027443).PDF).

<sup>5</sup> Referred to as corporate manslaughter in England, Wales and Northern Ireland, and corporate homicide in Scotland, the offence came into force on April 6, 2008, <http://www.hse.gov.uk/corpmanslaughter>.

<sup>6</sup> “Deaths of seven workers: ThyssenKrupp Manager receives long prison sentence,” July 26, 2011, <http://economicsnewspaper.com/policy/german/deaths-of-seven-workers-thyssenkrupp-manager-receives-long-prison-sentence-14451.html>.

<sup>7</sup> “Canada’s Second Bribery Conviction is ‘A Start’,” June 28, 2011, <http://i-sight.com/news/canada%E2%80%99s-second-bribery-conviction-is-%E2%80%9Ca-start%E2%80%9D/>; “Former China Mobile Official Sentenced in Bribery Case,” NYT: July 22, 2011; “Former Alcatel Network employee charged with bribery,” July 19, 2011, <http://thestar.com.my/news/story.asp?file=/2011/7/19/nation/20110719111302&sec=nation>; “Philips: Alleged Bribery Case Limited to Poland So Far,” May 19, 2011, <http://www.rai-see.org/news/world/1479-philips-alleged-bribery-case-limited-to-poland-so-far.html>.

<sup>8</sup> “Russia Criminalizes Foreign Bribery,” WSJ, May 5, 2011.

<sup>9</sup> These are the maximum penalties for a “very large bribe.” A large bribe carries a fine of up to 80 times the amount of the bribe, or a prison term of up to 10 years with a fine of 60 times the amount of the bribe.

<sup>10</sup> “Enforcing foreign decisions on punitive damages,” on June 28 2011 by Rémi Passemard of BOPS (SCP Bouckaert Ormen Passemard Sportes), highlighting the decision in *X v. Fountaine Pajot*. This article was originally edited by and first published on [www.internationallawoffice.com](http://www.internationallawoffice.com), the Official Online Media Partner to the International Bar Association and an International Online Media Partner to the Association of Corporate Counsel. Register for a free subscription at [www.internationallawoffice.com/subscribe.cfm](http://www.internationallawoffice.com/subscribe.cfm).

<sup>11</sup> The decision itself, in French:

[http://www.courdecassation.fr/jurisprudence\\_2/premiere\\_chambre\\_civile\\_568/1090\\_1\\_18234.html](http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/1090_1_18234.html).

<sup>12</sup> *State Farm Mutual Automobile Ins Co v Campbell*, 123 SupCt 1513.

<sup>13</sup> Again, we attribute this information to Rémi Passemard’s informative “Enforcing foreign decisions on punitive damages.”

<sup>14</sup> Two of the most recent being: “Three convicted in insider trading trial,” in Finland, July 8, 2011,

[http://www.yle.fi/uutiset/news/2011/07/three\\_convicted\\_in\\_insider\\_trading\\_trial\\_2713152.html](http://www.yle.fi/uutiset/news/2011/07/three_convicted_in_insider_trading_trial_2713152.html); “Inside trader to appeal ‘harsh’ sentence,” in Australia, July 11, 2011, *The Australian*.

<sup>15</sup> “SEC Obtains Asset Freezes within Days of Alleged Insider Trading by Three Swiss Entities,” 2011-149,

<http://sec.gov/news/press/2011/2011-149.htm>, July 18, 2011.