4. National procedural rules

4.0 INTRODUCTION

Upon the assumption that there is substantive jurisdiction under national law over the foreign enterprise abroad, the next question for the civil suitor or administrative body anxious to institute proceedings must be whether national rules of procedure provide for the furtherance of proceedings against such an enterprise.

Various issues arise here. It may be desirable to obtain from abroad further evidence in the form of documents or testimony of witnesses for use at the projected trial. It will usually be necessary, especially where administrative offences are involved, for decisions of the cartel authorities to be formally notified to the defendant (see e.g. Germany, EEC), and where it is decided to pursue the issue in the courts, it will be necessary for process to be served. Finally, the effectiveness of national antitrust policy must depend upon the ability to put into practical effect the relief granted by the courts. Thus the enforcement of favourable judgments against foreign defendants is also a crucial issue.

Acts such as the gathering of pre-trial evidence and the service of process may be regarded as having a different legal nature in different legal systems. Few States would contest that the service of process is an act of public authority of the State whose courts are being called upon to exercise jurisdiction, and therefore the performance of such an act upon the territory of another State, without that State’s permission or consent, would be an infringement of the sovereignty of that State. But what of pre-trial discovery procedures? American courts accept a very much broader availability of such discovery than do other jurisdictions. Also, under American law, much of the procedure for discovering and producing evidence is left to the parties. Generally, there is no prior judicial authorisation or control. By contrast, for example, in French civil or commercial actions evidence is only submitted in written form and procedures for oral evidence do not come into play unless the court considers the documents submitted by the parties to be inconclusive. ‘At this stage control of the evidence gathering process passes from the parties to the judge, to whom the French Code of Civil Procedure grants broad and exclusive powers’ (Code de Procedure Civile Tit. VII (Fr.); Judicial Administration of Evidence, Source: Jacques Borel, Stephen M. Boyd; ‘International Lawyer’, from ABA Annual Meeting in New York on Aug. 7, 1978). Whether an American Lawyer engaged in a spot of ‘legal tourism’* in a civil law country

* A ‘legal tourist’ is an American lawyer who instalts himself in a deluxe hotel room for as little as one day or as long as six weeks, with a degree of circumspection which demonstrates great deference to the
for the gathering of pre-trial evidence can be said to be improperly performing a public judicial act and thus infringing the foreign State's sovereignty, must be open to argument.

Clearly, much will depend upon the forum in which the issue will be discussed and where the issue falls in that legal system. An American court is unlikely to take arguments against subsequent production of such evidence based on an allegation of illegality against the methods used in obtaining it. *(See e.g., In re; Uranium Antitrust Litigation, 480 F. Supp. 1138 (N.D. Ill. 1979).* Presumably, the attitude of a French court within whose jurisdiction such an unsupervised deposition had been conducted would be very different.

The above discussion is designed to illustrate only that national rules of procedure develop as an integral part of the legal system which they serve, and tend towards the same political bias as shown by the substantive law aims which they are designed to facilitate within that system. In practice, the forum within which procedural issues of this nature are heard is bound always to be crucial.

It is proposed to commence with an examination of purely extraterritorial national procedures, in the strict sense of procedures which take effect outside the territorial boundaries of the state concerned, and to leave for subsequent examination other methods whereby a foreign enterprise may be brought within the jurisdiction of a national court for acts performed abroad, for example, by the application of the enterprise entity doctrine or by fastening upon an arm of the enterprise located within the territorial jurisdiction.

4.1 USA

4.1.1 Written requests for information (discovery orders)

Under the Antitrust Civil Process Act, 15 USC § 1311-1314 (enacted in 1962), the Antitrust Division of the Department of Justice has authority to issue 'civil investigative demands' ('CIDs') for the purpose of obtaining documentary material or oral testimony pertinent to antitrust investigations. Such a demand may be served upon a person not found within the territorial jurisdiction of any court of the United States, in such manner as the Federal Rules of Civil Procedure (Fed. R. Civ. P.) provide for service in a foreign country. Rule 4(i) Fed. R. Civ. P. is the relevant rule, and provides for a number of ways in which papers may be served in foreign countries, such as by mail, personal delivery, and in the manner prescribed by the law of the foreign country.

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principle of professional confidentiality. Once installed, 'legal tourists' use their best efforts to obtain, primarily by means of depositions, the testimony of witnesses and the documents with which they hope successfully to represent the interests of their clients in a United States court. Citizens of France, the United States and third countries are invited unceremoniously to testify in what might irreverently be described as a three-star chamber.