

Exposure to U.S. Litigation - Myth or Reality for European Businesses?

U.S. Litigation Today:

Still a Threat For European Businesses or Just a Paper Tiger?

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Agenda

1 Exposure of European businesses to U.S. jurisdiction

2 Increasing litigation and higher fines ...

3 ... coupled with significant differences of the U.S. system support the building of myths ...

4 ... but the reality is not as bleak.

5 Today's program

The quest for certainty of European businesses ...

When subject to U.S. jurisdiction / how to prevent being exposed to U.S. jurisdiction ?

- Operations in the U.S.
- Services are offered in the U.S.
- Foreign operations have an impact on the U.S. market ?
- Products end up on the U.S. market ?
- Use of U.S. Dollar ?

... is difficult to reconcile with U.S. rules ...

U.S. courts apply their own rules, creating uncertainty for European businesses as to U.S. jurisdiction

- Personal Jurisdiction
 - „Minimum contact“ (U.S. Supreme Court, *International Shoe Co. v. Washington*, 1945)
- Subject matter jurisdiction

... and with the extraterritorial scope of U.S. laws

Rule:

« U.S. law governs domestically but does not rule the world. »

U.S. Supreme Court, Microsoft Corp. v. AT&T Corp., 550 U. S. 437, 454 (2007)

Exception:

Certain laws have extraterritorial effect, eg

- Alien Tort Claims Act (ATCA)
- Racketeer Influenced and Corrupt Organizations Act (RICO Act)
- Trading with the Enemy Act (+ various sanctions laws)
- Foreign Corrupt Practices Act (FCPA)
- Securities Act / Securities Exchange Act

The case of Wegelin & Co. ...

Swiss Bank Is Indicted in Tax Case

By BLOOMBERG NEWS FEB. 2, 2012



Wegelin & Company, the 270-year-old Swiss private bank, [was indicted in New York](#) on Thursday on federal charges that it had helped Americans evade taxes.

The indictment follows charges filed Jan. 3 against three Wegelin bankers accused of conspiring to help American clients hide more than \$1.2 billion in assets from tax authorities. Wegelin announced on Jan. 27 that it had agreed to a sale to Switzerland's Raiffeisen Group.

Wegelin was indicted in federal court with three bankers at its Zurich branch, Michael Berlinka, Urs Frei and Roger Keller. Prosecutors said that from 2002 to 2011, more than 100 American taxpayers conspired with the defendants and others to hide accounts from the Internal Revenue Service. The bank held more than \$1.2 billion in undeclared assets this year, according to the indictment.

Prosecutors said Wegelin and the three bankers had wooed American clients fleeing UBS, the largest Swiss bank.

... is a prominent example ...

- Wegelin had no operations in the U.S.
- Only link to the U.S.: the bank accessed the U.S. banking system to effectuate U.S. Dollar transactions through a correspondent bank in the U.S.
- Indictment in February 2012
- Guilty plea in January 2013

... as is the probe into Swiss association FIFA

FIFA Officials Arrested on Corruption Charges; Blatter Isn't Among Them

By MATT APUZZO, STEPHANIE CLIFFORD and
WILLIAM K. RASHBAUM MAY 26, 2015



FIFA officials were escorted out behind sheets at the Baur au Lac hotel in Zurich, Switzerland, on Wednesday. Photo by Pascal Mora for The New York Times

ZURICH — Swiss authorities conducted an extraordinary early-morning operation here Wednesday to arrest several top soccer officials and extradite them to the United States on federal corruption charges.

As leaders of FIFA, soccer's global governing body, gathered for their annual meeting, more than a dozen plain-clothed Swiss law enforcement officials arrived unannounced at the Baur au Lac hotel, an elegant five-star property with views of the Alps and Lake Zurich. They went to the front desk to get keys and proceeded upstairs to the rooms.

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Litigation in the U.S. is on the increase ...

- Statistically significant increase in use of litigation in the past 15 years

	No. of cases in 2001 (thousand)	No. of cases in 2016 (thousand)	Increase in relation to 2001
Product Liability	12,307	39,879	325%
Patents	2,520	5,080	200%
Banking	214	262	22.5%

Number of cases in U.S. District Courts (Source: Judicial Business of the U.S. Courts – Statistics 2001/2016)

... and fines in 2016 are higher than ever (eg FCPA) ...

4 All Time Top
Ten Cases in
2016

#	Company	Total Resolution	DOJ Component	SEC Component	Date
1	Siemens AG	\$800,000,000	\$450,000,000	\$350,000,000	12/15/2008
2	Alstom S.A.	\$772,290,000	\$772,290,000	—	12/22/2014
3	KBR/Halliburton	\$579,000,000	\$402,000,000	\$177,000,000	02/11/2009
4	Teva	\$519,000,000	\$283,000,000	\$236,000,000	12/22/2016
5	Braskem/Odebrecht	\$419,800,000	\$354,800,000	\$65,000,000	12/21/2016
6	Och-Ziff	\$412,000,000	\$213,000,000	\$199,000,000	09/29/2016
7	BAE Systems*	\$400,000,000	\$400,000,000	—	02/04/2010
8	Total S.A.	\$398,200,000	\$245,200,000	\$153,000,000	05/29/2013
9	VimpelCom	\$397,600,000	\$230,100,000	\$167,500,000	02/18/2016
10	Alcoa	\$384,000,000	\$223,000,000	\$161,000,000	01/09/2014

... with a particular focus on non-U.S. companies

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Not only are U.S. civil procedure rules different ...

- Pre-trial discovery
- Jury trial
- Punitive damages
- Class action
- Loser does not pay ("American rule")
- Contingency fees

... but also the understanding of corporate criminal responsibility differs ...

U.S.		European
Individual	Corporate	Individual
“Respondeat superior” Eg Yates Memorandum		U.S.-induced trend to expand hitherto limited corporate criminal responsibility (eg Swiss Criminal Code Article 102)

... forcing businesses to settle criminal cases

- As a result of the Arthur Andersen case:
 - In the wake of the Enron scandal in 2001, the U.S. DOJ indicted auditing firm Arthur Andersen, leading to Arthur Andersen's business imploding
 - NB: Only years later, the firm was acquitted by the last instance court
- Businesses have no other option than to settle, typically through:
 - Non-Prosecution Agreement
 - Deferred-Prosecution Agreement
 - Pre-agreed plea agreements

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U.S. Supreme Court reigned in an expansionist approach to jurisdiction, ...

- **Daimler AG v. Bauman (2014) (decided 9-0)**
 - Daimler cannot be sued in California for injuries allegedly caused by conduct of its Argentinian subsidiary when that conduct took place entirely outside of the United States
- **Goodyear v. Brown (2011) (decided 9-0)**
 - Goodyear's foreign subsidiaries cannot be sued in North Carolina on claims that were unrelated to any activity by them in that state
- **Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County (19 June 2017) (decided 8-1)**
 - Insufficient connection between the forum and the specific claims at issue

... limits extraterritorial scope of U.S. laws ...

- Morrison et al. v. National Australia Bank Ltd. (2010) (decided 8-0)
 - SEC laws do not apply to private civil actions arising from the purchase of securities on foreign exchanges
- Kiobel v. Royal Dutch Petroleum (2013) (decided 9-0)
 - The presumption against the extraterritorial application of U.S. law applies to claims under the Alien Tort Statute, and nothing in the text, history, or purposes of the statute rebuts that presumption
- RJR Nabisco, Inc. v. The European Community (2016) (decided 4-3)
 - A private RICO plaintiff must establish a domestic injury

... and even corrects domestic bias of lower courts

Samsung spared \$399m payout to Apple after US court ruling

DECEMBER 7, 2016 by: **Peter Wells**

Samsung Electronics shares have ticked higher higher in Seoul after the US Supreme Court ruled the South Korean company did not have to pay Apple a \$399m penalty in a patent spat between the two consumer electronics giants.

The dispute can be traced back to 2011 when Apple sued Samsung for patent and trademark infringement, mostly related to the Korean company copying key, patented iPhone designs such as rounded corners on the front face of the device and the colourful grid of application icons on the screen.

Last December, Samsung paid Apple \$548m, a reduced amount from the initial penalty of \$930m the Korean company had been hit with when a jury found in Apple's favour in 2012.

But Samsung took the matter to court and said it should not have to pay \$399m of that amount.

On Tuesday, the US Supreme Court sided with Samsung by way of a 8-0 ruling that a patent violator does not always have to pay all the profits from the sales of products using copied designs if those designs represented only certain parts of the device and not the whole object.

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Program Outlook

9:00 **Welcome Address**

9:10 **Introduction to the subject**

Exposure to US Litigation – Myth or Reality for European Businesses ?

Thomas Werlen, Partner,
Quinn Emanuel, Zurich and Privat Docent, University of St. Gallen

9:30 **First Session : The Jurisdictional Reach of US Courts**

Goodyear and Daimler : The End of the « Doing Business » Era – What's Next ?

Linda Silberman, Professor,
NYU School of Law

Specific Jurisdiction in Products Liability Cases after *McIntyre v. Nicastro*

Samuel Baumgartner, Professor,
University of Zurich

10:20 **Discussion**

10:40 *Coffee Break*

11:00 **Second Session : Procedural Law Aspects**

Choice of Court Agreements : American Practice in a Comparative Perspective

Symeon Symeonides, Dean Emeritus and Professor,
Willamette University College of Law

Class Actions à l'Européenne – Competition for US Litigation ?

Eva Lein, Professor and Senior Research Fellow,
University of Lausanne, BIICL, London

US Discovery Rules and In-House Counsel of Swiss Companies (Markwalder Initiative)

Karen Druckman, Legal Adviser and Lecturer,
Swiss Institute of Comparative Law and University of Lausanne

12:10 **Discussion**

12:30 *Standing Lunch*

13:30 **Third Session : Extraterritorial Application of US Law**

The New Presumption against Extraterritoriality in the US Supreme Court's Case Law and the Restatement Fourth of the Law of Foreign Relations

William S. Dodge, Professor,
UC Davis School of Law, California

American vs. European Approaches to Extraterritoriality in Civil Litigation

Matthias Lehmann, Professor,
University of Bonn

Extraterritorial Application of US Sanctions Law

Susan Emmenegger, Professor,
University of Bern

US DoJ Program for Swiss Banks : Lessons Learned and Perspectives

Louis Burrus, Partner,
Schellenberg Wittmer, Geneva

15:00 **Discussion**

15:30 *Coffee Break*

16:00 **Fourth Session : Recognition and Enforcement of Judgments**

New Obstacles for the Recognition of Foreign Judgments in the US after the *Chevron v. Donziger* Case

Christoph Kern, Professor,
University of Heidelberg and University of Lausanne

Recognition of US judgments in Switzerland and Europe

Andrea Bonomi, Professor,
University of Lausanne

16:40 **Round Table Discussion**

17:15 **Closing Address**

Thank you for your attention

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