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No. 71420-1-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

(King County Superior Court No. 13-2-25228-7 SEA)

MICROSOFT CORPORATION,

Petitioner,

v.

BELLA ACHARYA,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

Respondent Bella Acharya is a King County resident and American citizen who has been unable to secure full-time employment since she was unlawfully terminated in September 2012 by her longtime employer, Microsoft Corporation ("Microsoft Corp."). In July 2013, Ms. Acharya brought claims against Microsoft Corp. under the Washington Law Against Discrimination ("WLAD") and Washington common law for failures by its management, Human Resources Department, and Legal and Corporate Affairs Group ("LCA")—all located in Redmond, Washington—to prevent, deter, and remedy gender discrimination and retaliation committed against her.

Microsoft Corp. responded by seeking dismissal based on improper venue and *forum non conveniens*, arguing Ms. Acharya should be forced to prosecute her claims in Switzerland—a country where she has never lived, worked, or visited on Microsoft business, where not one of her supervisors or co-workers was located, and where not a single event relevant to this dispute occurred. Microsoft Corp.'s motion was properly denied, and it sought discretionary review by this Court.

Microsoft Corp.'s position continues to be meritless, self-serving, and the product of a corporate shell game designed to divest Ms. Acharya of fundamental civil rights guaranteed to her under Washington law,

including the WLAD, which was enacted to protect the people of Washington from discriminatory misconduct that "threatens not only the rights and proper privileges of [Washington's] inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010. Indeed, if accepted, Microsoft Corp.'s position would foreclose entirely Ms. Acharya's ability to seek recourse for the discrimination and retaliation to which she was unlawfully subjected.

Ms. Acharya respectfully requests that this Court now affirm the trial court's appropriate denial of Microsoft Corp.'s motion to dismiss.

II. RESTATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

1. Whether the trial court abused its discretion by refusing to enforce a forum selection clause that is unconscionable, violates public policy, and would deny Ms. Acharya a meaningful day in Court.
2. Whether the trial court abused its discretion by refusing to dismiss Ms. Acharya's claims based on *forum non conveniens*, where Ms. Acharya's claims arose from actions taken by Microsoft Corp. in Redmond, Washington, the key witnesses are located in Redmond, and dismissal would prevent Ms. Acharya's claims from proceeding because she cannot afford or manage to prosecute them in Switzerland.

III. STATEMENT OF THE CASE

Respondent Bella Acharya is an American citizen who was born and raised in the United States. CP 282. She joined Microsoft Corp. in 1991, immediately upon graduating from college. CP 282. Starting in 1993, she began working at Microsoft Corp.'s headquarters in Redmond, where she stayed for the next 15 years. CP 283. For that entire period of time, Ms. Acharya lived in King County, Washington. CP 282-83.

Throughout her tenure at Microsoft Corp., Ms. Acharya was a well-regarded member of its Advertising Business Group, where she consistently received superlative performance reviews. CP 36-38, 295.

A. Microsoft Corp. Relocates Ms. Acharya to the United Kingdom

In 2008, while working in Redmond, Ms. Acharya discussed the possibility of assuming a new role within her group with her direct supervisor, Shawn McMichael. CP 285-86. Originally, the role Ms. Acharya discussed with Mr. McMichael was conceived as Redmond-based, and not associated with any foreign subsidiary of Microsoft. CP 285. For business reasons, Microsoft Corp. later decided it would be more efficient for Ms. Acharya to be physically located in London, where she would continue to manage an international sales team based in Redmond, and continue to report to Mr. McMichael, who was also based in Redmond. CP 285-86.

Microsoft Corp. has repeatedly argued that Ms. Acharya's temporary re-assignment to London resulted purely from her own initiative, as though the company effectively rewarded Ms. Acharya's ambition without regard to its own business interests. CP 79-80. This is demonstrably false, and its backhanded compliment of Ms. Acharya is purely strategic. *See, e.g.,* CP 365-66 (letter from Microsoft Corp. HR employee, noting that transferring Ms. Acharya would help Microsoft Corp. "accelerate our ability to build … business in Europe.").

At Microsoft Corp.'s request, Ms. Acharya agreed to work out of London "for a couple of years." CP 286. She always understood and expected, however, that she would return to her home in King County and Microsoft Corp.'s Redmond headquarters after completing her assignment abroad. CP 286.

B. Ms. Acharya "Resigns" From Microsoft Corp. and Is "Hired" by a European Subsidiary

For tax purposes associated with its corporate structure, Microsoft Corp. compelled Ms. Acharya to "resign" and to "accept" employment with one of its wholly-owned subsidiaries, Microsoft Global Resources GmbH ("MGR"). CP 286, 140-41. MGR is a European corporation headquartered in Switzerland, where it represents itself as an "employment agency" with approximately five employees and a capitalization of 20,000

Swiss francs (*i.e.*, approximately $22,192 U.S. dollars). CP 298-88, 328, 566. MGR uses Microsoft Corp.'s website as its own. *Id.*

Ms. Acharya understood that Microsoft would maintain total control over MGR, including Ms. Acharya, her direct reports, and the management above her. CP 283-88, 297, 358, 360-66. Microsoft Corp. assured her that she would remain in the same group and report to the same direct supervisor and management structure as she had while based in Redmond. CP 283-88, 297, 358, 360-66.

Jenny Countryman, an employee of Microsoft Corp.'s Human Resources Department ("HR") in Redmond, acted as Ms. Acharya's point-person for her transition to London. CP 285, 297, 390. Tina Purdy, who signed Ms. Acharya's MGR employment agreement and offer letter as "Group Manager of Microsoft Global Resources," is a Senior HR Manager employed by Microsoft Corp. in Redmond. CP 285, 393. Ms. Acharya never communicated with anyone at MGR in Switzerland or Microsoft Ltd. in the U.K. about the MGR employment agreement or offer letter. CP 285, 297, 339, 358-70, 390-91.[1]

Ms. Acharya's employment agreement with MGR contains a forum selection clause stating that:

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[1] Ms. Acharya was informed in conjunction with being "hired" by MGR that she would be "assigned" to another Microsoft subsidiary, Microsoft Ltd., which is apparently headquartered in the U.K. CP 180, 298, 305.

> [a]ny dispute, controversy or claim arising under, out of or in relation to this Employment Agreement ... shall be referred and finally determined by the ordinary courts at the domicile of MGR in Switzerland.

CP 303. The agreement also contains an "applicable law" provision, which states "[t]he terms of this agreement shall be construed in accordance with and governed in all respects by the laws of Switzerland (without giving effect to principles of conflicts of laws)." CP 303.[2]

Microsoft Corp. contends that, with respect to Ms. Acharya's service in London, these above clauses divested her of all protections that would otherwise have been afforded to her under the WLAD and Washington common law. Br. of Pet'r. 23. At the time of her "resignation" from Microsoft Corp. and "hiring" by MGR, however, Microsoft Corp. personnel told Ms. Acharya she was merely undertaking a temporary assignment to London on behalf of a group controlled and managed by Microsoft Corp. employees in Redmond. CP 286-287.

Moreover, the MGR contractual documents were presented to Ms. Acharya on a "take it or leave it" basis. CP 286-287. The email from Ms.

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[2] The MGR employment agreement further states that if the country to which Ms. Acharya is assigned has "local labor laws" that apply to her, then the agreement "will be supplemented or, as local law requires or permits, superseded by any applicable employment conditions." CP 298. Microsoft Corp. has taken the position that "Ms. Acharya's employment contract with MGR provides that Swiss law will govern any employment dispute, to be supplemented by UK law in accordance with Ms. Acharya's employment contract and the Rome II Regulation, (EC) No 864/2007." CP 78.

Countryman transmitting the documents states that she was writing to "***confirm*** the terms and conditions of your MGR (Microsoft Global Resources) international assignment offer…" CP 297 (emphasis added). No one associated with Microsoft, MGR, Microsoft Ltd., or any other Microsoft entity suggested that these terms and conditions were in any respect negotiable. CP 287. Nor did anyone advise Ms. Acharya to consult with a lawyer before signing the documents or explain to Ms. Acharya what her rights would be under Swiss law, as compared to her rights under the laws of Washington and the United States. CP 287. Without such information, Ms. Acharya was in no position to evaluate the meaning and import of the forum selection and choice of law clauses.

C. Ms. Acharya Continues to Be Supervised and Governed by Microsoft Corp. Employees Working in Redmond.

Little changed for Ms. Acharya when she moved to London and continued to work for the Redmond-based Advertising Business Group. She continued to report to Mr. McMichael, the same Microsoft Corp. manager as before. CP 283-84. Microsoft Corp. continued to require that she undergo trainings and testing modules on its employment policies, just like when she worked in Redmond. CP 288. This included, for example, annual mandatory training and testing on the Microsoft Corporation Standards of Business Conduct. *Id.* Ms. Acharya and her Redmond-based

team continued to be paid monetary compensation and benefits out of Microsoft Corp.'s budget. CP 328.[3] The management structure above her likewise remained the same, with Ms. Acharya and her co-workers all reporting to supervisors in Redmond. CP 283-84. Moreover, her group continued to be controlled and supervised by Microsoft Corp. management in Redmond. CP 283-84. A W-2 form Microsoft submitted to the IRS for 2012 (while Ms. Acharya was located in London) identifies her employer's location as Redmond. CP 328.

After she physically relocated to London, Ms. Acharya remained subject to internal policies and procedures of Microsoft Corp., not those of MGR. CP 287-88. Her corporate computer access was limited to Microsoft Corp.'s global intranet system—which is where Microsoft Corp. makes its employment policies available to its employees, rather than in a paper "handbook" format—just like before her temporary assignment to London. CP 287-88. In fact, Ms. Acharya was never granted access to the internal policies of MGR, Microsoft Ltd., or any of Microsoft's European subsidiaries. CP 287-88. While certain MGR or Microsoft Ltd. policies were apparently available to others through the "HRweb" portal of

[3] During a reorganization of Microsoft Corp. in 2010, Ms. Acharya was "moved" into the Microsoft Advertising Group, although she and her team continued to receive compensation and benefits out of the Redmond-based Advertising *Business* Group's budget. CP 283.

Microsoft Corp.'s intranet system, Ms. Acharya could not access them, because Microsoft Corp. continued to assign her the same identification and log-in information she had before relocating to London. CP 287-89.

Consistent with this treatment of Ms. Acharya as a Redmond-based employee, HR and labor relations employees working for Microsoft Corp. in Redmond were the ones who purportedly "investigated" her complaints about the discriminatory and retaliatory treatment she received. CP 288-91, 330. Not only were no European and/or MGR employees involved in that investigation, but the record further reflects that Microsoft assessed Ms. Acharya's complaints under "federal and state" employment laws, not the laws of Switzerland. CP 288-91, 330. In her written communications with Ms. Acharya, including a memo entitled "Review of Investigation," Redmond-based ERIT investigator Judy Mims never suggested that Ms. Acharya's complaints were being assessed under anything other than the laws of Washington and the United States. CP 383-388.

While working in London, Ms. Acharya maintained her primary residence in King County and continued to pay property taxes on it for the entire period of time she was abroad. CP 282-83. She also kept current her Washington State driver's license. CP 282-83.

D. Ms. Acharya Is Subjected to Discrimination and Retaliation by Her New Male Supervisor.

After more than 19 years of service and a superlative performance record, in 2010 Ms. Acharya began reporting to a new, male supervisor, Olivier van Duüren. CP 283-84, 288. Mr. van Duüren was himself an employee of Microsoft Ltd., anther European subsidiary. Br. of Pet'r 5. Ms. Acharya later learned that Mr. van Duüren had a history of discriminatory conduct toward his female direct reports, and she soon became a target herself. CP 294. Mr. van Duüren impliedly referred to Ms. Acharya as a "bitch." CP 288. He accused her of being a "queen sitting on a throne," and taunted her for allegedly appearing "emotional." CP 288-89. All of the female employees who reported directly to Mr. van Duüren (except for his administrative assistant) left the group. CP 7-8. Not surprisingly, Ms. Acharya began receiving unjustifiably poor performance reviews—for the first time in her Microsoft career—from Mr. van Duüren. CP 292-94.

In reliance upon the specific instructions and assurances in Microsoft Corp.'s employment policies, Ms. Acharya raised her discrimination and retaliation concerns about Mr. van Duüren with his direct supervisor, Axel Steinman, a manager located in Redmond. CP 288-89. Mr. Steinman did not refer Ms. Acharya to an MGR employee. CP

288-89. Instead, he said he would discuss Ms. Acharya's concerns with "HR." CP 289. He then relayed those concerns to Redmond-based employees of Microsoft Corp. in HR, LCA (legal affairs), and the Employee Relations Investigation Team ("ERIT") within LCA. CP 289.

As part of a pattern and practice of Microsoft Corp., these HR/LCA/ERIT investigators in Redmond issued perfunctory "findings" that Ms. Acharya's claims had no merit, and refused to take any corrective action or remedial measures against Mr. van Duüren. CP 288-91, 330. (Microsoft Corp. argued in its opening brief that Ms. Acharya failed to allege its Redmond-based employees of Microsoft Corp. discriminated and retaliated against her. Br. of Pet'r 6. This is inaccurate, and belied by the Amended Complaint.[4]) Ms. Acharya then began trying to transfer out of her group to a position physically located in King County. CP 289-91. However, in one of Ms. Acharya's routine telephonic "one-on-one" meetings with Mr. McMichael (still a Microsoft Corp. manager in Redmond), he told her that Mr. van Duüren had been "poisoning the well"

[4] By way of example only, *see* CP 40 (Am. Compl.) ¶ 4.14 ("Microsoft HR ignored Acharya's concerns and chose to 'protect' [Mr. van Duüren], blame her, and assist him in his discriminatory and retaliatory efforts...."); CP 35-36 ¶ 3.2 ("Discriminatory decisions that harmed Acharya were made in King County, Washington. For example ... decisions affecting her work assignments, pay, performance ratings and/or reviews, and promotional opportunities, among other terms and conditions of her employment...."; CP 44 ¶ 5.4 ("By and through the acts and omissions alleged herein, Microsoft discriminated against Acharya....").

about her in Redmond with Microsoft's Xbox Group, while Mr. van Duüren was in Redmond on a business trip in or about March-April 2012. CP 290. Mr. McMichael further told Ms. Acharya that, as a result of Mr. van Duüren's efforts during his visit to Redmond, she would be denied a job in Redmond and should seek employment outside Microsoft. CP 290.

Microsoft Corp. terminated Ms. Acharya on September 30, 2012. CP 291. She promptly returned to the United States and her home in King County. CP 282-83.

E. Procedural Background

Ms. Acharya filed claims against Microsoft Corp. based on the discriminatory and retaliatory acts and omissions its employees committed, in violation of Washington law. CP 32-57. The crux of Ms. Acharya's case is that Microsoft Corp. employees working in Redmond failed to prevent, deter, or remedy gender discrimination and retaliation by Mr. van Duüren, whom Microsoft Corp. supervised and controlled from Redmond. *Id.* She also asserts claims regarding retaliatory acts committed by Mr. van Duüren while he was physically present in King County that undermined Ms. Acharya's 2012 application for a new position—as well as Microsoft Corp.'s unlawful response to those acts. CP 42.

Ms. Acharya's claims are focused on a pattern and practice of discrimination and retaliation by Redmond-based employees of Microsoft

Corp., CP 32-57, which assures its employees that it will not tolerate discrimination or retaliation against them. CP 255. Microsoft Corp. encourages, and even requires, its employees to raise their concerns about discrimination and other misconduct with management, HR, LCA, and/or ERIT. CP 255.

Microsoft Corp. moved to dismiss Ms. Acharya's claims, asserting that she "name[d] the wrong defendant in the wrong court." CP 77. Microsoft Corp. first claimed that Ms. Acharya was not its employee while she was working in London, and that dismissal was warranted because MGR is a necessary party not subject to jurisdiction in Washington. CP 78. Microsoft Corp. has apparently abandoned this position on appeal. Second, Microsoft Corp. asserted that the forum selection clause contained in Ms. Acharya's contract with MGR is enforceable and mandates dismissal for improper venue. CP 78. Third, Microsoft Corp. claimed that Ms. Acharya's claims should be dismissed on the grounds of *forum non conveniens*. CP 78-79.

The trial court denied Microsoft Corp.'s motion. CP 733-35. This Court then granted Microsoft Corp.'s motion for discretionary review.

IV. ARGUMENT

A. Standard of Review

The Washington Supreme Court has held that decisions on the enforceability of forum selection clauses are reviewed for an abuse of discretion. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). Microsoft Corp. does not argue otherwise. The same standard of review applies to a motion for dismissal based on *forum non conveniens*. *Lisby v. PACCAR, Inc.*, 178 Wn. App. 516, 521, 316 P.3d 1097 (2013); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981) ("The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion.").

"A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *Hundtofte v. Encarnacion*, 330 P.3d 168, 172 (Wash. 2014). "A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *Id.* (internal quotation marks and citations omitted).

"Dismissal is an extraordinary remedy, one to which a trial court should turn *only as a last resort*." *City of Seattle v. Holifield*, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010) (quoting *State v. Wilson*, 149 Wn.2d 1,

12, 65 P.3d 657 (2003)) (emphasis original). Here, the trial court correctly exercised its discretion by refusing to dismiss Ms. Acharya's case.

B. The Forum Selection and Choice of Law Clauses Do Not Apply to Ms. Acharya's Claims Against Microsoft Corp.

As a threshold matter, Ms. Acharya's claims are against Microsoft Corp., not its European subsidiary MGR. Yet the forum selection and choice of law clauses Microsoft Corp. seeks to enforce are contained in Ms. Acharya's contract with MGR, and not in any agreement she had with Microsoft Corp. For that reason alone, the trial court properly exercised its discretion by refusing to impose on Ms. Acharya the burden of prosecuting her claims in Switzerland.

Microsoft Corp. was clearly Ms. Acharya's exclusive or joint employer while she was temporarily assigned to London, notwithstanding her purported "resignation" and subsequent "hiring" by MGR. *See, e.g., Becerra v. Expert Janitorial, LLC*, 332 P.3d 415, 421 (Wash. 2014) (joint employment relationship analyzed under the "economic reality" test, which takes into consideration any factors the court deems "relevant to its assessment of the economic realities"); *c.f., Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 72, 244 P.3d 32 (2010), *aff'd,* 174 Wn.2d 851, 281 P.3d 289 (2012) ("whether a defendant is a plaintiffs' joint employer is a mixed question of law and fact and is properly a

question for the jury") (citing *Ling Nan Zheng v. Liberty Apparel Co., Inc.*, 617 F.3d 182, 185–86 (2d Cir. 2010)). For example, Microsoft Corp. employees based in Redmond facilitated her transition to Europe, managed and controlled her group, supervised and controlled her direct manager, Mr. van Duüren, and handled every aspect of her complaints regarding discrimination and retaliation. *See* CP 283-291. Microsoft Corp. identified Ms. Acharya as its Advertising Business Group International Sales Manager "***based*** out of London." CP 361-62 (emphasis added). Microsoft Corp. HR promoted the idea of assigning Ms. Acharya to London in order to "help accelerate ***our*** ability to build the E&D Ad business in Europe." *Id.* (emphasis added).

Microsoft Corp. policies governed Ms. Acharya's employment while in London, her complaints were assessed under American "state and federal law," and the address of her "employer" was represented to the IRS as Redmond, Washington. As to MGR, Ms. Acharya never had any dealings with its HR Department (if it even exists), was never managed by anyone employed by it, never visited its Swiss "headquarters" for any purpose, and did not have access to its employment policies (if they even exist). Indeed, there is no evidence that Ms. Acharya dealt with anyone from MGR for any purpose during her assignment to London. Microsoft

Corp., by comparison, consistently continued to manage, control, and evaluate her activities.

Microsoft Corp. argues in its opening brief, without citing to any authority, that "even if some of Acharya's claims were against Microsoft Corporation, they would still 'arise[e] under, out of, or in relation to' her MGR employment," and therefore be subject to the forum selection clause. First, ***all*** of Ms. Acharya's claims are against Microsoft Corp. Second, Microsoft Corp. cannot rely in its motion to dismiss on purportedly restrictive covenants set forth in Ms. Acharya's contract with another company, to which it was not a party.

C. The Trial Court Appropriately Refused to Dismiss Ms. Acharya's Claims Based on Unconscionable Forum Selection and Choice of Law Clauses.

Denial of Microsoft Corp.'s motion to dismiss was also proper because the forum selection and choice of law clauses were each procedurally and substantively unconscionable, and thus unenforceable.[5]

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[5] Microsoft Corp. makes the curious argument that Ms. Acharya did not argue unconscionability to the proceedings below. In fact, she raised the argument repeatedly in her opposition to Microsoft Corp.'s motion to dismiss. See CP 258, n.8; CP 274, n.34; CP 276, n.39. She did so again (repeatedly) in her answer to Microsoft Corp.'s petition for discretionary review. *See* Resp. Ans. to Pet'r Mtn for Disc. Rev. 2-3, 3 n.7, 12 n.21, 18, 20 n.45.

1. The forum selection clause at issue is void as substantively unconscionable.

a. *Substantive unconscionability standard*

"Substantive unconscionability involves those cases where a clause or term in the contract is one-sided or overly harsh." *McKee v. AT&T Corp.*, 164 Wn.2d 372, 396, 191 P.3d 845 (2008) (choice of law and dispute resolution clauses of contract found unenforceable on the grounds of substantive unconscionability).

In Washington, a forum selection clause is substantively unconscionable if it leaves the plaintiff "with no feasible avenue for seeking relief" under a statutory scheme that safeguards a "strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 836-41, 161 P.3d 1016 (2007) (finding forum selection clause substantively unconscionable on public policy grounds because it left the plaintiff with no recourse under Washington's Consumer Protection Act); *see also Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 321, 211 P.3d 454 (2009) (forum selection clause in arbitration agreement, which would have required a Washington resident to arbitrate in his employer's principal place of business in Denver, ***Colorado***, voided as substantively unconscionable because it "effectively undermine[d] an employee's ability

to vindicate his statutory rights" under Washington law); *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598, 605-06, 293 P.3d 1197 (2013) (forum selection clause in arbitration agreement, which would have required a Washington resident to arbitrate in the defendant's principal place of business in Orange County, ***California***, voided as substantively unconscionable because it imposed prohibitive costs on the plaintiff).

b. *The unconscionable burden on Ms. Acharya*

In this instance, enforcing the forum selection clause in Ms. Acharya's contract with MGR would require an underemployed mother residing in Kirkland to prosecute her claims against Microsoft Corp. in Switzerland—a country where she never lived, worked, or visited for business, to which she has no ties, and to which it would be cost prohibitive for her to travel. CP 291-92.[6] This would impose a burden on Ms. Acharya that exceeds by a wide margin the burdens found substantively unconscionable by this Court in *Walters*, 151 Wn. App. 316, 321, 211 P. 3d 454 (2009) (venue in Colorado) and our Supreme Court, sitting *en banc*, in *Gandee*, 176 Wn. 2d 598, 603, 293 P.3d 1197 (2013)

[6] Ms. Acharya is financially and otherwise unable to hire counsel in Switzerland and return there to pursue her claims against Microsoft Corp. (which, not surprisingly, has stipulated to jurisdiction in Switzerland). CP 291-92.

(venue in California). For that reason alone, the trial court's denial of Microsoft Corp.'s motion to dismiss should be affirmed.

Microsoft Corp. has taken the position that there is nothing "harsh" about forcing its employees to litigate claims against it in Switzerland. Br. of Pet'r 19. This cannot be squared with reality or the law. Microsoft Corp. is one the largest companies in the world, with tens of thousands of employees and billions of dollars in assets. CP 345-56. Ms. Acharya is a single individual who, after being unlawfully terminated, has continuously struggled to make a living. CP 291-92. For example, between September 2012 (when she was terminated by Microsoft Corp.) and November 2013, her total income was $28,580 (gross before taxes, including unemployment benefits). CP 291.[7] Forcing her to litigate in Switzerland because of boilerplate language in a contract with a Microsoft subsidiary—with which she had no dealings, to which she did not report, and whose employment policies (if they exist) she was prevented from accessing—would be unconscionable.

Switzerland provides a "gravely inconvenient" forum that would deprive Ms. Acharya of a meaningful day in court. *See Dix*, 160 Wn.2d at

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[7] Ms. Acharya was the primary wage-earner in her marriage. CP 291-92. Her husband was unemployed while she worked from London, and was unable to secure full-time work upon their return to Washington. CP 291-92. The financial disparity between the parties is enormous. CP 345-356 (Microsoft revenue for the quarter ending on September 30, 2013 was $28.53 billion).

835 (*citing Voicelink Data Servs. Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 937 P.2d 1158 (1997)). In these circumstances, the forum selection clause is therefore unenforceable in Washington. *Dix*, 160 Wn.2d at 835.

Additionally, it "shocks the conscience" that Microsoft Corp. would require a Washington employee to relinquish the robust civil rights afforded to her under the WLAD and force her to litigate disputes half way around the world, simply because the company's business interests are better served by having the employee temporarily relocate abroad. *See Gandee*, 176 Wn.2d 598, 603, 293 P.3d 1197 (2013).

c. *Washington's fundamental policy interest*

In Washington, "a forum selection clause is invalid if it "violates fundamental public policy of the State of Washington and Washington's interest in the determination of the issue materially outweighs the chosen state's interest." *W. Consultants, Inc. v. Davis*, 177 Wn. App. 33, 41, 310 P.3d 824 (2013) (*quoting Saleemi v. Doctor's Assocs., Inc.*, 176 Wn.2d 368, 384, 292 P.3d 108 (2013)) (internal quotations omitted).

Enforcement of the forum selection clause here would contravene Washington State public policy of the "highest priority"—embodied in the WLAD—as well as in the Washington Constitution (including right to trial by jury, and the Equal Rights Amendment to the Washington Constitution). *See, e.g., Marquis v. City of Spokane,* 130 Wn.2d 97, 109,

922 P.2d 43 (1996); *Blaney v. Int'l Ass'n Mach. & Aero. Workers Dist. No. 160*, 151 Wn.2d 203, 212, 87 P.3d 757 (2004).

Ms. Acharya has asserted claims against Microsoft to enforce her statutory civil rights claims under the WLAD, a civil rights statute patterned on Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, *et seq.* ("Title VII"). The WLAD "contains a sweeping policy statement strongly condemning many forms of discrimination." *Allison v. Hous. Auth. of City of Seattle*, 118 Wn.2d 79, 86, 821 P.2d 34 (1991). Washington courts uniformly hold that the WLAD is to be given an especially "liberal" construction (even broader than Title VII in some respects), in order to effectuate its "broad" and "highest priority" public policy purposes. *See, e.g., Marquis*, 130 Wn.2d at 109; *Blaney*, 151 Wn.2d at 212.

Moreover, the Washington Supreme Court routinely enforces the WLAD extra-territorially to protect employees working outside this state for Washington employers. *See Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 98-99, 864 P.2d 937 (1994) (citing WASH. CONST. art. 4, § 6; and *Orwick v. Seattle*, 103 Wn.2d 249, 251, 692 P.2d 793 (1984)); *c.f., Parry v. Outback Steakhouse of Florida, Inc.*, No. 8:06-CV-00804-T-17, 2006 WL 2919018, at *4 (M.D. Fla. October 11, 2006) (applying Florida Civil Rights Act—also mirroring Title VII—and Florida venue, to claims

of Florida citizen who worked abroad for Outback Steakhouse of Florida's foreign subsidiary in Cayman Islands).

In *Burnside*, the Court emphasized that the WLAD applies to Washington employers and their employees working outside of Washington because our State Constitution confers on the Superior Courts of Washington "broad original jurisdiction"; "[e]xceptions to that jurisdictional grant are narrowly construed"; and "limiting the statute's application to Washington inhabitants would effectively allow Washington employers to discriminate freely against non-Washington inhabitants, thus undermining the fundamental purpose of the act, deterring discrimination." 123 Wn.2d at 98-99 (citing WASH. CONST. art. 4, § 6; and *Orwick*, 103 Wn.2d at 251).

Other courts have likewise refused to enforce employer-drafted forum selection/choice of law clauses against plaintiffs asserting claims under Title VII and analogous state civil rights laws (like the WLAD), because doing so would contravene the important public policy interests reflected in these statutes—including reducing obstacles for aggrieved parties seeking to enforce their civil rights against parties possessing substantially greater resources. *See, e.g., Peterson v. Nat'l Sec. Tech. LLC*, No. 12–CV–5025, 2012 WL 3264952, at *6 (E.D. Wash. Aug. 9. 2012) (denying defendant's motion to change venue, due to Washington State's

substantial interest in having WLAD claims adjudicated within Washington) (quoting *Allison*, 118 Wn.2d at 86); *see also, e.g., Red Bull Assocs. v. Best Western Int'l*, 862 F.2d 963, 967 (2d Cir. 1988) (emphasizing that "[w]hile individuals are free to regulate their purely private disputes by means of contractual choice of forum, we cannot adopt a per se rule that gives these private arrangements dispositive effect where the civil rights laws are concerned."); *Bruce v. City of Gainesville*, 177 F.3d 949, 951 (11th Cir. 1999) ("[i]n Title VII cases as well as cases under the ADA, the enforcement of civil rights statutes by plaintiffs as private attorneys general is an important part of the underlying policy behind the law. Such a policy ensures an incentive for 'impecunious' plaintiffs who can ill afford to litigate their claims against defendants with more resources."); *Thomas v. Rehabilitation Services of Columbia, Inc.*, 45 F. Supp. 2d 1375, 1379 (M.D. Ga. 1999) (liberal or broad venue provisions under Title VII render unenforceable any private agreement limiting a plaintiff's choice of forum for bringing a Title VII suit in contravention of the statute); *Smith v. Kyphon, Inc.* 578 F. Supp. 2d 954, 961 (M.D. Tenn. 2008) (same).

Microsoft Corp. argues that "Washington has no interest in applying its law to employment claims made by an employee of a Swiss company for events occurring in Europe." Br. of Pet'r 24. But when that

employee is jointly or exclusively employed by a Washington corporation, resides in Washington, and suffers discrimination and retaliation both abroad and at the hands of personnel based in Washington, then Washington's interest in the matter cannot seriously be contested.

2. The choice of law clause at issue is void as substantively unconscionable.

Where a contract's choice of law "blatantly and excessively favors the employer in that it allows the employer alone access to a significant legal recourse," it is void as substantively unconscionable. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 318, 103 P.3d 753 (2004).

Here, Ms. Acharya's case cannot and will not proceed in Switzerland, rendering dismissal of her claims in Washington improper. As an initial matter, she would be deprived of the assistance of counsel because, as "a general rule, Swiss law does not allow lawyers to take cases on a contingency-fee basis," which is the only way Ms. Acharya, like most WLAD claimants, can afford counsel. CP 404 (contingency-fee arrangement are "very rare" in Switzerland). Microsoft Corp. argues otherwise, but its expert on Swiss law fails to mention that only Swiss citizens are entitled, in certain instances, to the appointment of counsel in civil cases at public expense. *See* Francis William O'Brien, *Why Not*

Appointed Counsel in Civil Cases? The Swiss Approach, 28 OHIO ST. L.J. 1 (1967) (citing Judgment of Oct. 8, 1937, BGE 63 I 209 (Switz.))

Under Swiss law, Ms. Acharya would be subjected to a 180-day statute of limitations (or filing) period, rather than the 3-year statute of limitations to which she is entitled under her WLAD and common law claims. CP 403. Similarly, her damages would be capped at not more than 6 months of salary or wages and/or limited to a low amount (i.e., less than $100,000), contrary to her rights to full compensatory damages under the WLAD and *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984). CP 402-3. Likewise, emotional distress damages are "rare" in Switzerland, and future pay loss awards are "at least very rare." CP 403.

In Switzerland, Ms. Acharya would also have no "private attorney general" fee-shifting rights available to her, whereby the prevailing employee alone is entitled to recover attorneys' fees under the WLAD. CP 404. If Microsoft prevailed, M. Acharya would be responsible paying its attorneys' fees under Swiss law, a risk expressly eschewed by the WLAD. As an additional matter, Swiss courts lack a jury system, which is a right guaranteed in cases like this by the Washington State Constitution. WASH. CONST. art. I, § 21 ("The right of trial by jury shall remain inviolate....").

Although Microsoft Corp., not surprisingly, would prefer to avoid the robust protection Washington offers its residents from discriminatory

and retaliatory treatment by their employers, its effort to strip Ms. Acharya of all of her rights under the WLAD through a non-negotiable employment contract and related corporate shell game "shock[s] the conscience." *Gandee*, 176 Wn.2d at 603. Moreover, Ms. Acharya lacks the financial resources and is otherwise unable to retain counsel and prosecute her claims in Switzerland, even if she had asserted them against MGR (she did not). The choice of law clause is substantively unconscionable.

3. The forum selection and choice of law clauses are void as procedurally unconscionable.

Under Washington law, procedural unconscionability constitutes "the lack of a meaningful choice, considering all the circumstances surrounding the transaction including [t]he manner in which the contract was entered, whether the party had a reasonable opportunity to understand the terms of the contract, and whether the important terms [were] hidden in a maze of fine print." *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344-45, 103 P.3d 773 (2004) (internal quotation marks and citations omitted); *Zuver*, 153 Wn.2d at 304.

In the context of employer-drafted agreements, a provision requiring that an employee forego his or her right to a jury trial for an employment dispute is procedurally unconscionable, absent evidence that an employee was explicitly presented with the provision and the employee

"explicitly agree[d] to waive the right in question." *See Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 762 (9th Cir. 1997).

Microsoft asserts that the forum selection and choice of law clauses are not unconscionable because (1) Ms. Acharya "came up with the idea to lead-up an International Sales Team," Br. of Pet'r 3; and (2) she had a copy of the agreement for "a month" before she signed it. Br. of Pet'r 4. These assertions lack merit.

First, it borders on the absurd to suggest that by agreeing to move temporarily to a foreign country for the express purpose of advancing her employer's business interests, an employee may be charged with having voluntarily initiated the divestment of her own civil rights. This is true regardless of whose idea the project was. (Certainly the forum selection and choice of law clauses were not Ms. Acharya's idea; nor was it her idea to "resign" from Microsoft Corp. to join one of its Swiss subsidiaries.) Microsoft Corp. implies that it was doing Ms. Acharya a favor by granting her wish to spend some time in London. In fact, Microsoft Corp. wanted Ms. Acharya to relocate temporarily to London in order to save itself money and, among other things, "accelerate [its] ability to build … business in Europe." CP 361-62.

Second, while Ms. Acharya cooperated with her manager to define the position Ms. Acharya filled in London, it was originally planned for

Redmond. CP 285. Even when the decision was made to temporarily transfer Ms. Acharya to London, she expected to continue reporting to her Redmond-based manager (and skip-level manager), and be governed by Microsoft Corp.'s corporate policies. CP 283-85. She was told by her HR representative in Redmond that she would continue to work for Microsoft Corp. CP 283-88, 297. In practice, that understanding was fulfilled.

Third, while Ms. Acharya may have had physical possession of the MGR employment agreement and offer letter for a number of weeks, the record establishes that these documents were presented to her on a "take it or leave it" basis.[8] Indeed, the transmittal letter purported to "***confirm*** the terms and conditions of your MGR (Microsoft Global Resources) international assignment offer..." CP 297 (emphasis added). Ms. Acharya certainly was not invited to negotiate, and the record is clear that doing so would have been little more than an exercise in futility. CP 286. Moreover, without information about what her rights would be under Swiss law, she was hardly in a position to make an informed decision regarding the forum selection and choice of law clauses.

A party moving to dismiss an action for improper venue on the basis of a forum selection clause must demonstrate, among other things,

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[8] Microsoft Corp.'s statement that "Acharya *reviewed* [the MGR contract documents] for a month before she signed" is unsupported. Br. of Pet'r 4 (emphasis added).

that "the clause was reasonably communicated to the party resisting enforcement." *Altvater Gessler-J.A. Baczewski Int'l (USA) Inc. v. Sobieski Destylarnia S.A.*, 572 F.3d 86, 89 (2d Cir. 2009). In this instance, the presentation to Ms. Acharya of resignation/employment documents on a "take it or leave it" basis does not constitute "reasonable communication" regarding the rights she was being required to forfeit. Moreover, it is axiomatic that a waiver of one's constitutional and civil rights must be "voluntary, knowing and intelligent." *In re Matter of James*, 96 Wn.2d 847, 851, 640 P.2d 18 (1982); *see also, e.g., Altvater*, 572 F.3d at 89. In this instance, by purporting to limit Ms. Acharya's remedies to Swiss law, Microsoft Corp. effectively stripped her of a number of fundamental rights, including her rights to a jury trial and to one-way fee-shifting under the WLAD. It did so without providing Ms. Acharya any information about the rights she would have under Swiss law, and how those rights compared to the rights she was purportedly relinquishing under the laws of Washington and the United States. No one associated with Microsoft Corp. or any of its European subsidiaries ever pointed out the forum selection and choice of law clauses to Ms. Acharya, much less discuss with her the fact that, by signing the agreement, Microsoft would contend that she had given up certain fundamental rights.

In short, the forum selection and choice of law clauses in Ms. Acharya's employment agreement with MGR were the product of overreaching and overweening bargaining power, and are therefore invalid on the grounds of procedural unconscionability. *See Peterson,* 715 F.3d at 280; *Nelson*, 127 Wn.2d at 13; *Voicelink Data Servs.*, 86 Wn. App. at 618 (forum selection clause will not be enforced if there is "some evidence ... to establish fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigating in the selected forum so as to deprive that party of a meaningful day in court....").

D. *Atlantic Marine* Is Not Dispositive.

Microsoft Corp. insists that a 2013 decision by the United States Supreme Court, involving a commercial dispute between a Virginia corporation and Texas corporation as to which federal district court should hear their case, resolves this appeal in its favor. *Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013). It further argues that *Atlantic Marine* should persuade this Court to adopt a virtually irrebuttable presumption in favor of enforcement of the forum selection clause at issue. Br. of Pet'r 9. Microsoft Corp. presented this argument to the trial court on its motion to dismiss, and the trial court appropriately exercised its discretion by rejecting it.

Initially, several key points warrant the Court's attention with respect to *Atlantic Marine*. First, the question presented in that case was ***where*** the case would proceed within the federal court system—not ***whether*** it would proceed at all. Here, contrary to Microsoft Corp.'s self-serving assertion that Switzerland represents a fair and reasonable forum, the reality is that if Ms. Acharya's lawsuit is dismissed, she will be unable to pursue any of her claims and left with no legal recourse whatsoever. In addition to the prohibitive legal hurdles she would face in Switzerland, the record demonstrates that she is financially and otherwise unable to retain counsel and travel there to prosecute her claims. CP 291-92.

Second, Microsoft Corp. concedes that *Atlantic Marine* does not bind this Court. Br. of Pet'r 12. Indeed, as of this filing, *Atlantic Marine* has been cited in 261 judicial opinions, ***259*** of which were issued by federal courts. Third, even if this Court follows *Atlantic Marine*, the trial court's denial of Microsoft Corp.'s motion should be affirmed.

1. Distinguishing *Atlantic Marine*.

In *Atlantic Marine*, a construction subcontractor (Atlantic Marine Construction Co.) filed suit in Texas federal district court against a general contractor (J–Crew Management, Inc.) in alleged contravention of a forum selection clause, and the general contractor moved to transfer the action to Virginia federal district court under 28 U.S.C.A. § 1406(a), Fed. R. Civ. P.

12(b)(3), and, alternatively, 28 U.S.C.A. § 1404(a). The federal district court concluded that the forum selection clause was only one of many factors to be considered when determining venue, and that the convenience of the parties justified keeping the case in Texas. *Atl. Marine,* 134 S. Ct. at 576. The general contractor petitioned for a writ of mandamus to direct the trial court to dismiss or transfer the case, but that request was denied by the Fifth Circuit Court of Appeals. *In re Atl. Marine Const. Co., Inc.*, 701 F.3d 736, 743 (5th Cir. 2012).

The Supreme Court granted certiorari and reversed. *Atl. Marine,* 134 S. Ct. at 573. Microsoft Corp. broadly (and mistakenly) interprets the holdings of the case, which were that:

1. With respect to transferring venue ***within the federal court system***, the proper procedural mechanism by which to enforce a forum selection clause is through a motion under 28 U.S.C.A. § 1404(a), not 28 U.S.C.A. § 1406(a) or Fed. R. Civ. P. 12(b)(3);
2. When a defendant in federal district court files motion under § 1404(a) to transfer venue based on a ***valid*** forum selection clause, the court should grant the motion "except in unusual cases"; i.e., where "public interest factors"—as opposed to the convenience of the parties and witnesses—disfavor transfer; and

3. Under the particular facts presented, no such extraordinary circumstances existed so as to preclude the transfer of venue from federal court in Texas to federal court in Virginia.

Atl. Marine, 134 S. Ct. at 573-75. In *dicta*, the Court observed that when a ***valid*** forum selection clause points to a state or foreign forum, federal district courts should evaluate a motion to transfer "in the same way that they evaluate a forum-selection clause pointing to a federal forum." *Id.* at 580.[9] The Court noted that under the facts presented in *Atlantic Marine*, "there was no dispute that the forum-selection clause was valid." *Id.*

Thus, to be clear, Microsoft Corp.'s position here is that *dicta* contained in a non-binding decision by U.S. Supreme Court regarding the transfer of federal cases pursuant to a valid forum selection clause mandates that Ms. Acharya's claims under the WLAD and Washington common law be dismissed, and that her case be litigated (if at all) in Switzerland. For a plethora of reasons, this argument fails.

The Supreme Court's analysis in *Atlantic Marine* "presuppose[d] a contractually valid forum-selection clause," and thus did not include any evaluation of the unconscionability issues raised here. *Atl. Marine,* 134 S.

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[9] The Court noted that while 28 U.S.C.A. § 1404(a) "has no application" to forum selection clauses that point to a state or foreign forum, the doctrine of *forum non conveniens* does, and should be applied in the same manner as § 1404(a). *Atl. Marine*, 134 S. Ct. at 580.

Ct. at 581 n.5. The Court made that limitation very clear, noting that "[t]he enforcement of valid forum-selection clauses, ***bargained for by the parties***, protects their legitimate expectations and furthers vital interests of the justice system." *Id.* (internal quotation marks omitted) (emphasis added). This is so, the Court reasoned, because in situations where the forum selection clause is the subject of a bargaining process, "[w]hatever inconvenience [the parties] would suffer by being forced to litigate in the contractual forum as [they] agreed to do was ***clearly foreseeable*** at the time of contracting." *Id.* at 582 (internal quotation marks omitted) (emphasis added).

Where a forum selection clause was not the product of bargaining, however, and is separately unconscionable for a variety of reasons—as is the case here—*Atlantic Marine* simply does not apply. This is particularly true where the inconvenience to the non-moving party is not "clearly foreseeable." Here, the "inconvenience" to Ms. Acharya consists of the divestment of her civil rights under the WLAD and, in practical terms, the complete inability to seek recourse in Switzerland against Microsoft Corp. for its discriminatory and retaliatory misconduct. This was neither "bargained for" nor "foreseeable" when Ms. Acharya was presented with the MGR employment agreement on a "take it or leave it" basis.

Atlantic Marine is also distinguishable because it involved two companies negotiating a commercial arrangement at arm's length. Such is not the case in the employer-employee setting, particularly where the employer is one of the world's largest and most powerful corporations. This distinction is critical to the *Atlantic Marine* decision, as the Court explained that, in a mutually negotiated contract, the forum selection clause was "presumably [agreed to] in exchange for other binding promises by the defendant." 134 S. Ct. at 582. That simply did not happen here. Nor were Washington's substantial public policy considerations, as expressed in and regarding the WLAD, present in *Atlantic Marine*.

2. Washington Appellate Courts are not relying on *Atlantic Marine*

Atlantic Marine does not supersede Washington's substantive and procedural concerns regarding unconscionable and unenforceable forum selection clauses. Nor does it overrule *sub silentio* the long-line of established employment law precedent discussed above. Among other things, Microsoft Corp.'s argument that Washington courts should follow *Atlantic Marine* defies precedent and flies in the face of strong public policy concerns inherent in the WLAD.

Perhaps this is why not one Washington State appellate court decision has cited to *Atlantic Marine,* and only two state appellate courts

anywhere in the United States have done so. Instead, the vast majority of state appellate courts continue to analyze forum selection and choice of law provision under their own procedural law, and continue to consider issues of public policy unique to their respective states. Importantly, the validity of forum selection clauses has been analyzed by state appellate courts—often in the context of an employment contract dispute—dozens of times across the country since the publication of *Atlantic Marine* without relying on, or even citing to, that opinion. *See, e.g., Lujan v. Alorica*, No. 08–12–00286–CV, 2014 WL 4656625, at *1 (Tex. Ct. App. Sept. 19, 2014) (holding a forum-selection clause unenforceable in an employment contract under Texas law); *OTK Associates, LLC v. Friedman*, 85 A.3d 696, 719 (Del. Ch. 2014) (holding a forum-selection clause unenforceable in a shareholder agreement under Delaware and New York law); *Love's Window & Door Installation, Inc. v. Acousti Engineering Co.*, No. 5D14–1555, 2014 WL 4471631, at *1 (Fla. Dist. Ct. App. Sept. 12, 2014) (refusing to enforce forum selection clause based on compelling reasons not to do so present under Florida law); *Lapolla Industries, Inc. v. Hess*, 750 S.E.2d 467, 476 (Ga. Ct. App. 2013) (holding a forum-selection clause in employment agreement unenforceable under Georgia law); *Bryant v. AP Industries*, No. COA12-1456, 2013 WL 4460024, at *4 (N.C. Ct. App. 2013) (applying North Carolina law to

reverse trial court's order granting defendants' motion to dismiss on basis of forum selection clause).

Moreover, just because the U.S. Supreme Court sets up a test for interpretation of a federal statute or rule does not mean the Washington Supreme Court would (or even "probably" would) adopt it. For example, our Supreme Court has specifically refused to adopt the U.S. Supreme Court's heightened-pleading standard from *Ashcroft v. Iqbal*, regarding Fed. R. Civ. P. 12(b)(6), despite the fact that CR 12(b)(6) is virtually identical to it. 556 U.S. 662, 129 S. Ct. 1937 (2009); *see also Washburn v. City of Fed. Way*, 178 Wn.2d 732, 750, 310 P.3d 1275 (2013) (refusing to import the federal standard for dismissal under Fed. R. Civ. P. 12(b)(6) into CR 12(b)(6) jurisprudence, emphasizing that "[a]ny party asking us to adopt the federal interpretation of a rule bears that burden of overcoming our reluctance to reform rules practice through judicial interpretation rather than rule making") (citing *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 100, 233 P.3d 861 (2010) and *Iqbal*, 556 U.S. at 662).

In short, *Atlantic Marine* is simply not the watershed case Microsoft Corp. makes it out to be. While federal courts are bound by it, even they have recognized it is inapposite in a case like this, and have refused to extend it in the manner advocated by Microsoft Corp. *See, e.g.*, *RELCO Locomotives, Inc. v. AllRail, Inc.*, No. 4:13-cv-00394, 2014 WL

1047153, at *8 (S.D. Iowa March 5, 2014) (applying traditional *forum non conveniens* analysis, rather than *Atlantic Marine*); *Stewart v. American Van Lines*, No. 4:12-CV-394, 2014 WL 243509, at *5 (E.D. Tex. January 21, 2014) (declining to apply *Atlantic Marine* outside the context of "two businesses which can deal at arm[']s length," particularly where "transfer...would have effectively deprived [plaintiff] of redress").

3. Assuming *Atlantic Marine* applies, Microsoft Corp.'s motion was properly denied.

Even if this Court elects now to adopt the standard set by *Atlantic Marine*, Microsoft's motion to dismiss was still appropriately denied. The U.S. Supreme Court noted "public interest" factors may result in non-enforcement of a forum selection clause. *Atl. Marine*, 134 S. Ct. at 582. A forum selection clause therefore remains unenforceable if "the challenger shows 'that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court' or that 'enforcement would contravene a strong public policy of the forum in which suit is brought.'" *Monastiero v. appMobi, Inc.*, No. C 13–05711, 2014 WL 1991564, at *5 (N.D. Cal. May 15, 2014) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)).

The public interest factors which this Court should consider (assuming it applies *Atlantic Marine* to this case) include "the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law." *Monastiero*, 2014 WL 1991564, at *5.

Washington has strong public policy concerns that negate the enforcement of Microsoft Corp.'s unconscionable forum selection and choice of law clauses. Further, courts in Washington and elsewhere have held that fundamental civil rights like those in Title VII and state civil rights laws patterned on Title VII are not "waiveable" through employer-drafted choice or law and forum selection clauses like these.

The WLAD, RCW 49.60.030(2), provides in pertinent part:

> Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended . . . .

This provision "is to be construed liberally in order to encourage private enforcement." *Blair v. WSU*, 108 Wn.2d 558, 570, 740 P.2d 1379 (1987). The purpose of WLAD is "to deter and to eradicate discrimination

in Washington" and "a plaintiff bringing a discrimination case in Washington assumes the role of a private attorney general, vindicating a policy of the highest priority." *Walters*, 151 Wn. App. 316, 321-25, 211 P.3d 454 (2009).

Microsoft Corp. argues that courts (notably, only federal courts) have applied *Atlantic Marine* in the employment context, despite the prevailing public interest issues unique to this area of law. Br. of Pet'r 10-11. However, neither federal employment case cited by Microsoft Corp. actually supports that position. In *Longo v. FlightSafety Int'l, Inc.*, 12-CV-2413, 2014 WL 880410, at *7 (E.D.N.Y. Mar. 6, 2014), there was no discussion whatsoever of public policy issues attendant to the employee's claim, and the employee made "no suggestion that enforcement of the forum-selection clause would be unreasonable or unjust." Similarly, in *Monastiero*, the U.S. District Court for the Northern District of California noted that the employee failed to provide sufficient concrete examples of public interest factors that weighed against dismissal for *forum non-conveniens*, and instead focused on the inconvenience of the selected forum for his witnesses. 2014 WL 1991564, at *5.

The case at bar presents substantial and irrefutable concerns that lie at the heart of the WLAD. It is well-settled that courts will not enforce forum selection or choice of law clauses in cases arising under anti-

discrimination and other civil rights laws when doing so would contravene important public policy interests. *See, e.g.*, *Red Bull Assocs.*, 862 F.2d at 967. Here, one of the Washington's largest employers is trying to force a Washington resident, who was temporarily assigned to one of its international offices, to litigate on the other side of the world, thereby thwarting enforcement of Washington civil rights laws of the "highest priority." This is clearly a matter of "public interest" that compels affirming the trial court's denial of Microsoft Corp.'s motion.

E. The Trial Court Aptly Refused to Accept Microsoft Corp.'s Analysis of *Forum Non Conveniens*

Microsoft's final assignment of error—that the trial court abused its discretion by refusing to dismiss Ms. Acharya's complaint based on the doctrine of *forum non conveniens*—is likewise without merit.

"The doctrine of *forum non conveniens* grants a court the discretionary power to decline a proper assertion of its jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum." *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 20, 177 P.3d 1122 (2008) (internal quotation marks omitted). "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Myers v. Boeing Co.*, 115 Wn.2d 123, 128-29, 794 P.2d 1272 (1990)

(quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S. Ct. 839, 843, 91 L. Ed. 1055 (1947)).

1. All relevant evidence is located in Redmond, Washington, and/or readily available to Microsoft Corp.

First, the trial court appropriately disregarded Microsoft Corp.'s self-serving and blanket assertions that: (1) "nearly all pertinent witnesses live in European Union ('EU') countries, and they are employed by European companies," and (2) "a substantial portion of the documents relevant to this . . . dispute are located in at least five different European Union countries." CP 78.

The record reveals that the opposite is true. The witnesses Ms. Acharya needs to call regarding her claims are current and former Microsoft Corp. managers and HR/ERIT employees located in King County, and the bulk of the documents relevant to Ms. Acharya's claims are documents in the control of and accessible to Microsoft Corp. in King County. CP. 283-288. Moreover, Ms. Acharya does not intend to call or depose Mr. van Duüren, or anyone else located in Europe, to support her claims (unless Microsoft Corp. intends to call them at trial). CP 270.

Ms. Acharya's claims under the WLAD arise from the pattern and practice of Microsoft Corp., whose HR/LCA/ERIT investigators in Redmond issued perfunctory "findings" that Ms. Acharya's claims of

discrimination had no merit. CP 10. Further, her retaliation claim is based, in part, on Mr. van Duüren attempts to sabotage Ms. Acharya's efforts to secure another Microsoft position in King County, while he was in Redmond on Microsoft business. CP 11.

2. European privacy laws are not a barrier to discovery in Washington.

This case does not require assessment by a foreign tribunal of "complex rules and regulations concerning the international export of employee data," as Microsoft Corp. asserts. CP 79. To the contrary, there is no evidence in the record that any documents sought by Ms. Acharya are actually subject to European privacy laws.

In its opening brief, Microsoft Corp. alleges several times that evidence Mr. Acharya requested is "located in Europe." *See* Br. of Pet'r 28-29. But the citations to which it refers—CP 117-18, 131-32, 449-50, and 454-57—do not support that proposition. Specifically, Microsoft Corp. cites to declarations by two of its expert witnesses and one of its lawyers, none of whom testifies that documents requested by Ms. Acharya are physically located in Europe and physically inaccessible from the U.S. To be clear, the lawyer's declaration states that the *last known addresses* of certain individuals *referenced* in Ms. Acharya's requests for production are in Europe. CP 449-50. But the declaration makes no representation

about the location of the documents themselves. Nor does it represent that Microsoft Corp. is unable to access the documents from the U.S. Put simply, as to documents previously sought from Redmond-based Microsoft Corp. (not any of its European subsidiaries) by Ms. Acharya through discovery, the record does not establish that "Europe's complex data-privacy laws" would be implicated if this litigation proceeds in Washington.

Moreover, Microsoft Corp.'s production in this case to date makes clear that documents requested by Ms. Acharya are in fact in its custody and control in Redmond. *See e.g.,* CP 335-37 (performance review data of Ms. Acharya and Mr. van Duüren produced by Microsoft); CP 472-525 (various Microsoft emails to and from employees physically located in Redmond and Europe, including Mr. van Duüren).

Even if Microsoft Corp. could meet its burden of establishing that any of the documents requested in this case are protected by European data-privacy rules regarding "employee personal information" (they are not), materials produced by Microsoft Corp. in discovery show that:

- "US courts have so far not accepted such [European law] provisions as providing a defence against discovery in relation to US litigation";
- "Under the Restatement (Third) of Foreign Relations Law of the United States [§ 442], a court may order a person subject to its jurisdiction to produce evidence even if the information is not located in the United States";

- "It is important to note that the US judge considers that if the company is subject to US law and possesses, controls, or has custody or even authorized access to the information from the US territory (via a computer) wherever the data is 'physically' located, US law applies without the need to respect any international convention such as the Hague Convention."

Article 29 Data Protection Working Party, *Working Document 1/2009 on Pre-Trial Discovery for Cross-Border Civil Litigation* (Feb. 11, 2009)[10] at 5, 7, 9-10 (citing, *inter alia, Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. Iowa*, 482 U.S. 522, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987)); *see also, e.g., Marc Rich & Co., A.G. v. U.S.*, 707 F.2d 663, 667 (2d Cir. 1983) ("the test for production of documents is control, not location.").

3. Dismissal was not appropriate, as transferring this case to Switzerland would prevent it from going forward.

In Washington, a trial court's determination of whether to dismiss on the basis of *forum non conveniens* "necessarily requires the court [] consider whether the case will proceed in the alternative forum." *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 21, 177 P.3d 1122 (2008). As discussed above, the reality presented by Swiss law and Ms. Acharya's circumstances is that dismissal would result in the permanent termination of Ms. Acharya's claims. For all intents and purposes, she would be

[10] Pursuant to RAP 10.4(c), a copy of the foregoing document is included in the Appendix.

denied any recourse against Microsoft Corp. for the discriminatory and retaliatory misconduct to which it subjected her. In Washington, that result outweighs any inconvenience to the moving party. *See, e.g., McKee*, 164 Wn.2d at 386 (forum selection clause violates public policy and is unenforceable where it "seriously impair[ed]" plaintiff's ability to go forward on a Consumer Protection Act claim, and where "there [was] no feasible alternative for seeking relief.")

In this instance, of course, Microsoft Corp.—a multinational corporation with billions of dollars in assets—faces no such inconvenience. But even if it did, Ms. Acharya's complete inability to pursue meaningful relief in Switzerland should lead this Court to affirm the trial court's denial of Microsoft Corp.'s motion to dismiss.

V. CONCLUSION

For the foregoing reasons, Ms. Acharya respectfully requests that this Court affirm the trial court's denial of Microsoft Corp.'s motion to dismiss.

DATED this 14th day of October, 2014.

McNAUL EBEL NAWROT & HELGREN PLLC

By: _____
Jerry R. McNaul, WSBA No. 1306
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DECLARATION OF SERVICE

On October 14, 2014, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

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I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED this 14th day of October, 2014, at Seattle, Washington.

Lisa Nelson, LEGAL ASSISTANT

Appendix

ARTICLE 29 DATA PROTECTION WORKING PARTY

00339/09/EN
WP 158

Working Document 1/2009 on pre-trial discovery for cross border civil litigation

Adopted on 11 February 2009

Executive Summary

This working document provides guidance to data controllers subject to EU Law in dealing with requests to transfer personal data to another jurisdiction for use in civil litigation. The Working Party has issued this document to address its concern that there are different applications of Directive 95/46 in part as a result of the variety of approaches to civil litigation across the Member States.

In the first section of this document the Working Party briefly sets out the differences in attitudes to litigation and in particular the pre-trial discovery process between common law jurisdictions such as the United States and the United Kingdom and civil code jurisdictions.

The document goes on to set out guidelines for EU data controllers when trying to reconcile the demands of the litigation process in a foreign jurisdiction with the data protection obligations of Directive 95/46.

Introduction

The issue of transborder discovery, particularly in relation to data held in Europe but required in relation to legal proceedings, for example, in the United States is one which has come to the fore recently. Often companies with a US settlement or subsidiary are under significant pressure to produce documents and materials (including items stored electronically) in relation to litigation and law enforcement investigations brought in the US. The material that is required will frequently contain personal data relating to employees or third parties, including clients or customers.

There is a tension between the disclosure obligations under US litigation or regulatory rules and the application of the data protection requirements of the EU. There is also the issue of the contrast between the geographical and territorial basis of the EU data protection regime and the multinational nature of business where a corporate body can have subsidiaries or affiliates across the globe. This is of particular relevance to the European affiliates of multinational companies which can be caught between the conflicting demands of US legal proceedings and EU data protection and privacy laws which govern the transfer of personal information.

The Working Party recognises that the parties involved in litigation have a legitimate interest in accessing information that is necessary to make or defend a claim, but this must be balanced with the rights of the individual whose personal data is being sought.

Although this paper sets out guidelines it is to be noted that resolving the issues of pre- trial discovery is beyond the scope of an Opinion by the Working Party and that these matters can only be resolved on a governmental basis, perhaps with the introduction of further global agreements along the lines of the Hague Convention.

1. Concept of Pre-Trial Discovery

There are various aspects of US litigation law and procedure where data held by European firms may be affected. Some of the most common include:

- Pre-emptive document preservation in anticipation of proceedings before US courts or in response to requests for litigation hold, known as "freezing".

- Pre-trial discovery requests in US civil litigation;
- Document production in US criminal and regulatory investigations;
- Criminal offences in the US relating to data destruction.

This paper will only deal with the first two issues and recognises that these have implications for the litigation process and the question of transfers of personal data to a third country. Pre-trial discovery can include not just discovery within the context of legal proceedings but also the preservation of data in relation to prospective legal proceedings.

The aim of the discovery process is to ensure that the parties to litigation have access to such information as is necessary and relevant to their case given the rules and procedures of the jurisdiction in which the litigation is taking place. Within common law countries for example, the disclosure requirements are not limited to personal data or only electronic documents. Information sought may include special sensitive personal data e.g. health data as well as personal emails (the provision of which may conflict with duties under telecoms or secrecy regulations) and the data of third parties, for example, employees or customers.

Although the civil litigation rules in the UK refer to the term "document", this does include electronic documents including email and other electronic communications, word processed documents and databases, in addition to documents that are readily accessible from computer systems and other electronic devices. It also includes documents stored on servers and back-up systems and electronic documents that have been "deleted". It extends to metadata i.e. any additional information stored and associated with electronic documents.

The increasing use of electronic records when previously reliance would have been only on hard copy documents has meant that more information than ever before is available. The ease with which electronic records can be downloaded, transferred or otherwise manipulated has meant that the discovery process in litigation often gives rise to a vast amount of information which the parties need to manage to determine which parts are relevant to the particular case in hand. In contrast with stored paper records, the volume of electronically stored information is vastly greater and the storage capacity of the various memory products now means that more information is obtainable and discloseable with greater ease.[1]

Differences between Common Law and Civil Code jurisdictions

The first issue that arises is the difference in civil code and common law jurisdictions, not just in relation to litigation generally, but, in particular, in relation to pre-trial discovery. The scope of discovery differs greatly between common law and civil code jurisdictions and is seen as a fundamental part of the litigation process in the former. The ability to obtain and, indeed, the obligation to provide information in the course of litigation is part of the process in common law jurisdictions. This is based on the belief that the most efficient method for identifying the issues in dispute is the extensive exchange of information prior to the matter being heard by the court. This is particularly the case in the United States where the scope of pre-trial discovery is the widest of any common law country.

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[1] According to figures from the Advisory Committee on Civil Rules in the US, 92% of all information generated today is in digital form and approximately 70% of those records are never reduced to hard copy. As a result almost all litigation discovery now is e-discovery and the US has taken steps to introduce rules to deal with this area.

Common Law – United States

In the US, once litigation has been commenced, companies must comply with the obligations imposed by US litigation procedure, not just under Federal but also under the State rules of civil procedure which encourage parties to exchange materials prior to trial.[2] This includes not just the discovery of relevant information but also of information that itself may not be of direct relevance but could lead to the discovery of relevant information (the so-called "smoking gun"). This is in contrast to the situation that exists in many European civil code jurisdictions where "fishing expeditions" are forbidden.

Rule 26f of the US Federal Rules of Civil Procedure requires that the parties "meet and confer" to allow both parties the opportunity early in the process to discuss and reach agreement on the issues surrounding discovery. One aim of this meeting is to plan for the preservation of the evidence including data and documents necessary for the litigation.

However, US courts too can restrict via stipulative protective order voluntarily or if one party requests it, the scope of excessively broad pre-trial discovery requests as they have the power under the Rules to limit the frequency or extent of use of discovery methods for various reasons including obtaining the information from a more convenient source, or where the burden or expense of the proposed discovery outweighs its likely benefit. The courts may also make via this Protective Order to protect a person or party from annoyance, embarrassment, oppression or undue burden or expense by, for example, ordering that disclosure or discovery may be had only on specified terms and conditions, including the method or the matters to be considered.
It is likely therefore that a judge in a US court will grant a request for discovery as long as that request is reasonably aimed at the discovery of admissible evidence and does not contain impracticable demands.

United Kingdom
A similar but more limited approach is taken in the United Kingdom where, under Rule 31 of the Civil Procedure Rules, a party must disclose documents upon which it intends to rely and any other document which adversely affects its own case or which affects or supports any other parties' case or which is required to be disclosed by a relevant court practice direction. Unlike the US, the UK (like another common law jurisdiction, Canada) have data protection obligations.

Civil Code countries
By way of contrast with the transparency required discovery process in the US and other common law countries, most civil code jurisdictions have a more restrictive approach and often have no formal discovery process. Many such jurisdictions limit disclosure of evidence to what is needed for the scope of the trial and prohibit disclosure beyond this. It is for the party to the litigation to offer evidence in support of its case. Should the other side require that

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[2] For example, Rule 34(b) of the Federal Rules of Civil Procedure provides that
"Any party may serve on any other party a request to produce and permit the party making the request or someone acting on the requestor's behalf to inspect, copy, test, or sample any designated documents or electronically stored information – including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations stored in any medium from which the information can be obtained...and which are in the possession, custody or control of the party upon which the request is served."

information, the burden is upon them to be able to know and identify it. The French and Spanish systems, for example, restrict disclosure to only those documents that are admissible at trial. Document disclosure is supervised by the judge who decides on the relevance and admissibility of the evidence proposed by the parties.

In Germany e.g., litigants are not required to disclose documents to the other party; instead a party needs only to produce those documents that will support its case. Those documents must be authentic, original and certified but the party seeking the document must appeal to the court to order the production of the document. This appeal must be specific in the description of the document and must include the facts that the document would prove and the justification for having the document produced. If the document is in the possession of a third party, the document seeker must obtain permission from the third party. If permission is refused, the seeker must commence proceedings against the holder of the documents.

Aside from any data protection issues, it is the contrast between the "opinion of the truth" compared to the "truth and nothing but the truth" that emphasises the difference between the approach of the civil code and common law jurisdictions to questions of discovery of information including personal data.

Preventative legislation

Some countries, mainly those in civil law jurisdictions, but also a few common law countries have introduced laws *(blocking statutes)* in an attempt to restrict cross border discovery of information intended for disclosure in foreign jurisdictions. There is little uniformity in how these have been introduced, their scope and effect. Some, for example France, prohibit the disclosure from the country, of certain type of documents or information in order to constitute evidence for foreign judicial or administrative procedures. A party who discloses information may be guilty of violating the laws of the country in which the information is held and this may result in civil or even criminal sanctions.[3] .

The US courts have so far not accepted such provisions as providing a defence against discovery in relation to US litigation. Under the Restatement (Third) of Foreign Relations Law of the United States no. 442, a court may order a person subject to its jurisdiction to produce evidence even if the information is not located in the United States[4]. As supported by the decisions of various courts[5] a balancing exercise should be carried out with the aim that the trial court should rule on a party's request for production of information located abroad only after balancing:

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3 One example of this is the French Penal Law No. 80-538 which provides that:
"Subject to international treaties or agreements and laws and regulations in force, it is forbidden for any person to request, seek or communicate in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial nature leading to the constitution of evidence with a view to foreign judicial or administrative procedures or in the context of such procedures." In 2008 the French Supreme Court upheld the criminal conviction of a French lawyer for violating this statute who had complied with a request from US courts in the case of Strauss v. Credit Lyonnais, S.A., 2000 U.S. Dist. Lexis 38378 (E.D.N.Y. May 25, 2007). The lawyer was fined 10,000 Euro (about 15,000 US $).

4 It is important to note that the US judge considers that if the company is subject to US law and possesses, controls, or has custody or even has authorized access to the information from the US territory (via a computer) wherever the data is "physically" located, US law applies without the need to respect any international convention such as the Hague Convention.

5 Société Nationale Industrielle Aérospatiale v United States District Court, 482 U.S. 522, 544 n.28 (1987), Volkswagen AG v Valdez [No.95-0514, November 16, 1995, Texas Supreme Court] and In re: Baycol Litigation MDL no. 1431 (Mfd/JGL), March 21, 2003. For a more thorough analysis of the US jurisprudence see the Sedona Conference Framework for Analysis of Cross-Border Discovery Conflicts (note 5 infra).

(1) the importance to the litigation of the information requested;

(2) the degree of specificity of request;

(3) whether the information originated in the United States;

(4) the availability of alternative means of securing the information;

(5) the extent to which non-compliance would undermine the interests of the United States or compliance with the request would undermine the interests of a foreign sovereign nation.

The recent publication from the Sedona Conference on cross-border discovery conflicts sets out more a detailed analysis of the US jurisprudence and considers the relevant factors when determining the scope of cross border discovery obligations.[6] It stresses that this requires a balancing of the needs, costs and burdens of the discovery with the interests of each foreign jurisdiction in protecting the privacy rights and welfare of its citizens. The Sedona Conference Framework also notes that the French decision in the case of Credit Lyonnais has altered the perception of US courts as to the reality of enforcement of foreign preventative statutes[7].

The Hague Evidence Convention

Requests for information may also be made through the Hague Convention on the taking of evidence abroad in civil and commercial matters. This provides a standard procedure for issuing "letters of request" or "letters rogatory" which are petitions from the court of one country to the designated central authority of another requesting assistance from that authority in obtaining relevant information located within its borders. However, not all EU Member States are parties to the Hague Convention.

A further complication is provided by Article 23 of the Convention whereby "a contracting state may at the time of signature, ratification or accession declare that it will not execute letters of request issued for the purposes of obtaining pre-trial discovery of documents. Many signatory States, including France, Germany, Spain and the Netherlands have filed such reservations under Article 23 with the effect of declaring that discovery of any information, regardless of relevance, would not be allowed if it is sought in relation to foreign legal proceedings. In France, it is allowed for the competent judge to execute letters rogatory in case of pre-trial discovery if requested documents/information are specifically listed in the letters rogatory and have a direct and precise link with the litigation in case.

According to the Hague Convention, pre-trial discovery is a procedure which covers requests for evidence submitted after the filing of a claim but before the final hearing on the merits. It is of interest to note that there is a wider interpretation under UK law as an application may be made where the evidence is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated.[8] This would therefore appear to allow for a greater scope for information to be provided in the UK than in other Member States.

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6 The Sedona Conference Framework for analysis of cross border discovery conflicts – A practical guide to navigating the competing currents of international data privacy and discovery – 23 April 2008 (Public Comment Version), A Project of the Sedona Conference Working Group 6 on International Electronic Information Management, Discovery and Disclosure.

7 Sedona Framework, p. 31.

8 Evidence (Proceedings in Other Jurisdictions) Act 1975

The United States Supreme Court has ruled that the procedure foreseen by the Hague Evidence Convention is an optional but not a mandatory way of collecting evidence abroad for litigants before US courts[9]. Since then US courts have largely followed this line but occasionally they have required litigants to resort to the Hague Convention procedure[10].

Other difficulties

One of the main difficulties with cross border litigation is the control of the use, for litigation purposes, of personal data which has already been properly transferred for example to the US for other reasons under BCR or Safe Harbour. This is not a question that will be dealt with in this paper but the Working Party recognises that this may lead more readily to the disclosure of data.

2 Opinion

The working party sees the need for reconciling the requirements of the US litigation rules and the EU data protection provisions. It acknowledges that the Directive does not prevent transfers for litigation purposes and that there are often conflicting demands on companies carrying on international business in the different jurisdictions with the company feeling obliged to transfer the information required in the foreign litigation process. However where data controllers seek to transfer personal data for litigation purposes there must be compliance with certain data protection requirements. In order to reconcile the data protection obligations with the requirements of the foreign litigation, the Working Party proposes the following guidelines for EU data controllers.

Guidelines

It should be recognised that there are different stages during the litigation process. The use of personal data at each of these stages will amount to processing, each of which will require an appropriate condition in order to legitimise the processing. These different stages include:

- retention;
- disclosure;
- onward transfer;
- secondary use.

Various issues are raised in relation to retention as the Directive provides that personal data shall be kept for the period of time necessary for the purposes for which the data have been collected or for which they are further processed. It is unlikely that the data subjects would have been informed that their personal data could be the subject of litigation whether in their own country or in another jurisdiction. Similarly given the different time limits for bringing claims in different countries, it is not possible to provide for a particular period for retention of data.

Controllers in the European Union have no legal ground to store personal data at random for an unlimited period of time because of the possibility of litigation in the United States however remote this may be. The US rules on civil procedure only require the disclosure of *existing* information. If the controller has a clear policy on records management which provides for

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[9] Société Nationale Industrielle Aérospatiale v United States District Court, 482 U.S. 522, 544 n.28 (1987)

[10] See the Compendium of reported post-Aérospatiale cases citing the Hague Evidence Convention compiled for the American Bar Association by McNamara/Hendrix/Charepoo (June 1987-July 2003)

short retention periods based on local legal requirements it will not be found at fault with US law. It should be noted that even in the United States there has recently been a tendency to adopt restrictive retention policies to reduce the likelihood of discovery requests.

If on the other hand the personal data is relevant and to be used in a specific or imminent litigation process, it should be retained until the conclusion of the proceedings and any period allowed for an appeal in the particular case. Spoliation of evidence may lead to severe procedural and other sanctions.

There may be a requirement for "litigation hold" or pre-emptive retention of information, including personal data. In effect this is the suspension of the company's retention and destruction policies for documents which may be relevant to the legal claim that has been filed at court or where it is "reasonably anticipated".

There may however be a further difficulty where the information is required for additional pending litigation or where future litigation is reasonably foreseeable. The mere or unsubstantiated possibility that an action may be brought before the US courts is not sufficient.

Although in the US the storage of personal data for litigation hold is not considered to be processing, under Directive 95/46 any retention, preservation, or archiving of data for such purposes would amount to processing. Any such retention of data for purposes of future litigation may only justified under Article 7(c) or 7(f) of Directive 95/46.

Legitimacy of processing for litigation purposes

In order for the pre-trial discovery procedure to take place lawfully, the processing of personal data needs to be legitimate and to satisfy one of the grounds set out in Article 7 of the Data Protection Directive. In addition, for transfers to another jurisdiction the requirements of Article 26 would have to be met in order to provide a basis for such transfer .

There appear to be three relevant grounds, namely consent of the data subject, that the compliance with the pre-trial discovery requirements is necessary for compliance with a legal obligation under Article 7(c) or further purposes of a legitimate interest pursued by the controller or by the third party to whom the data are disclosed under Article 7(f). For the reasons set out below the Working Party considers that in most cases consent is unlikely to provide a proper ground for such processing.

Consent

Whilst consent is a ground for processing under Article 7, the Working Party considers that it is unlikely that in most cases consent would provide a good basis for processing. Article 2(h) defines data subject's consent as "any freely given specific and informed indication of his [the data subject's] wishes by which the data subject signifies his agreement to personal data relating to him being processed". The main argument underlying the US jurisprudence since the Aérospatiale case is that if a company has chosen to do business in the United States or involving US counterparts it has to follow the US Rules on Civil Procedure. However, very often the data subjects such as customers and employees of this company do not have this choice or have not been involved in the decision to do business in or relating to the United States.

Consequently exporting controllers in the European Union should be able to produce clear evidence of the data subject's consent in any particular case and may be required to demonstrate that the data subject was informed as required. If the personal data sought is that of a third party, for example, a customer, it is at present unlikely that the controller would be able to demonstrate that the subject was properly informed and received notification of the processing.

Similarly, valid consent means that the data subject must have a real opportunity to withhold his consent without suffering any penalty, or to withdraw it subsequently if he changes his mind. This can particularly be relevant if it is employee consent that is being sought. As the Article 29 Working Party states in its paper on the interpretation of Article 26(1): "relying on consent may...prove to be a 'false good solution', simple at first glance but in reality complex and cumbersome"[11].

The Working Party does recognise that there may be situations where the individual is aware of, or even involved in the litigation process and his consent may properly be relied upon as a ground for processing.

Necessary for compliance with a legal obligation
An obligation imposed by a foreign legal statute or regulation may not qualify as a legal obligation by virtue of which data processing in the EU would be made legitimate. However, in individual Member States there may exist a legal obligation to comply with an Order of a Court in another jurisdiction seeking such discovery.

In those Member States where there is no such obligation (e.g. because a reservation under Art. 23 of the Hague Evidence Convention has been made), there may still be a basis for processing under Article 7(f) for the data controller who is required to make a pre-trial disclosure.

Necessary for the purposes of a legitimate interest
Compliance with the requirements of the litigation process may be found to be necessary for the purposes of a legitimate interest pursued by the controller or by the third party to whom the data are disclosed under Article 7(f). This basis would only be acceptable where such legitimate interests are not "overridden by the interests for fundamental rights and freedoms of the data subject".

Clearly the interests of justice would be served by not unnecessarily limiting the ability of an organisation to act to promote or defend a legal right. The aim of the discovery process is the preservation and production of information that is potentially relevant to the litigation. The aim is to provide each party with access to such relevant information as is necessary to support its claim or defence, with the goal of providing for fairness in the proceedings and reaching a just outcome.

Against these aims have to be weighed the rights and freedoms of the data subject who has no direct involvement in the litigation process and whose involvement is by virtue of the fact that his personal data is held by one of the litigating parties and is deemed relevant to the issues in hand, e.g. employees and customers.

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[11] Working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995 (WP 114), p. 11.

This balance of interest test should take into account issues of proportionality, the relevance of the personal data to the litigation and the consequences for the data subject. Adequate safeguards would also have to be put in place and in particular, there must be recognition for the rights of the data subject to object under Article 14 of the Directive where the processing is based on Article 7(f) and, in the absence of national legislation providing otherwise, there are compelling legitimate grounds relating to the data subject's particular situation.

As a first step controllers should restrict disclosure if possible to anonymised or at least pseudonymised data. After filtering ("culling") the irrelevant data – possibly by a trusted third party in the European Union – a much more limited set of personal data may be disclosed as a second step.

Sensitive Personal Data and other special categories

Where the information in question is sensitive personal data, a ground for processing under Article 8 of the Directive must be found. Instead, the appropriate ground would be to rely on the explicit consent of the data subject under Article 8(a) or where the processing is necessary for the establishment, exercise or defence or legal claims under Article 8(e). There may be specific requirements in the different Member States relating to the processing and transfer of personal data overseas with which there would need to be compliance by the data controller.

Data protection is not the only issue surrounding the use of an individual's personal data. Where, for example, the personal data sought is health data, there may be other duties of confidentiality between doctor and patient. There may also be other requirements of secrecy or subsisting duties of confidentiality in relation to the information, for example legal professional privilege between lawyer and client or the secrecy of confession to a priest. In addition there may be legal protection for certain types of information, e.g. the e-Privacy Directive. In those circumstances it may not be fair or lawful to process that personal data in a way that is incompatible with the other obligations. Furthermore violations of telecommunications secrecy may carry criminal sanctions in a number of Member States.

Proportionality

Article 6 of the Directive provides that personal data must be processed fairly and lawfully, collected for specified, explicit and legitimate purposes and not used for incompatible purposes. The personal data must be adequate relevant and not excessive in relation to the purposes for which they are collected and/or further processed.

In relation to litigation there is a tension in the discovery process in seeking a balance between the perceived need of the parties to obtain all information prior to then determining its relevance to the issues within the litigation and the rights of the individuals where their personal data is included within the information sought as part of the litigation process.

It is clear from the US civil procedure rules and the principles expounded by the Sedona Conference that the approach of both the US and the EU legal systems place importance on the proportionality and the balance of the rights of the different interests.

There is a duty upon the data controllers involved in litigation to take such steps as are appropriate (in view of the sensitivity of the data in question and of alternative sources of the information) to limit the discovery of personal data to that which is objectively relevant to the issues being litigated. There are various stages to this filtering activity including determining the information that is relevant to the case, then moving on to assessing the extent to which this

includes personal data. Once personal data has been identified, the data controller would need to consider whether it is necessary for all of the personal data to be processed, or for example, could it be produced in a more anonymised or redacted form. Where the identity of the individual data subject's is not relevant to the cause of action in the litigation, there is no need to provide such information in the first instance. However, at a later stage it may be required by the court which may give rise to another "filtering" process. In most cases it will be sufficient to provide the personal data in a pseudonymised form with individual identifiers other than the data subject's name.

When personal data are needed the "filtering" activity should be carried out locally in the country in which the personal data is found before the personal data that is deemed to be relevant to the litigation is transferred to another jurisdiction outside the EU.

The Working Party recognises that this may cause difficulties in determining who is the appropriate person to decide on the relevance of the information taking into account the strict time limits laid down in the US Federal Rules of Civil Procedure to disclose the information requested. Clearly it would have to be someone with sufficient knowledge of the litigation process in the relevant jurisdiction. It may be that this would require the services of a trusted third party in a Member State who does not have a role in the litigation but has the sufficient level of independence and trustworthiness to reach a proper determination on the relevance of the personal data.

Throughout the discovery process including freezing, the Working Party would urge the parties to the litigation to involve the data protection officers from the earliest stage. It would also encourage the EU data controllers to approach the US courts in part to be able to explain the data protection obligations upon them and ask US courts for relevant protective orders to comply with EU and national data protection rules. As the Supreme Court stressed in the Aérospatiale case "American courts, in supervising pre-trial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position."[12]

Transparency
Articles 10 and 11 of the Directive address the issue of information that should be provided to the data subject.

In the context of pre-trial discovery this would require advance, general notice of the possibility of personal data being processed for litigation. Where the personal data is actually processed for litigation purposes, notice should be given of the identity of any recipients, the purposes of the processing, the categories of data concerned and the existence of their rights.

Article 11 requires that individuals are informed when personal data are collected from a third party and not from them directly. This is likely to be a common scenario where the personal data is held by one of the parties to the litigation or by a subsidiary or affiliate of such a party.

[12] 482 U.S. 522, 546 (No.15, 16a).

In such cases the data subjects should be informed by the data controller as soon as reasonably practicable after the data is processed. Under Article 14 the data subject also has a right to object to the processing of their data if the legitimacy of the processing is based on Article 7(f) where the objection is on compelling legitimate grounds relating to the person's particular situation.

As was discussed in the Opinion of the Working Party on internal whistleblowing schemes[13] there is however an exception to this rule where there is a substantial risk that such notification would jeopardise the ability of the litigating party to investigate the case properly or gather the necessary evidence. In such a case the notification to the individual may be delayed as long as such a risk exists in order to preserve evidence by preventing its destruction or alteration by that person. This exception however must be applied restrictively on a case by case basis.

Rights of access, rectification and erasure
Article 12 of the Directive gives the data subject the right to have access to the data held about him in order to check its accuracy and rectify it if it is inaccurate, incomplete or outdated. It is for the data controller in the EU to ensure that there is compliance with the individual's rights to access and rectify incorrect, incomplete or outdated personal data prior to the transfer.

The Working Party would suggest that such obligations are imposed on a party receiving the information. This could be achieved by way of a Protective Order. This has the merit of allowing a data subject to check the personal data and to satisfy himself that the data transferred is not excessive.

These rights may only be restricted under Article 13 on a case by case basis for example where it is necessary to protect the rights and freedoms of others. The Working Party is clear that the rights of the data subject continue to exist during the litigation process and there is no general waiver of the rights to access or amend.

It should be noted however that this right could give rise to a conflict with the requirements of the litigation process to retain data as at a particular date in time and any changes (whilst only for correction purposes) would have the effect of altering the evidence in the litigation.

Data security
In accordance with Article 17 of the Directive, the data controller shall take all reasonable technical and organisational precautions to preserve the security of the data to protect it from accidental or unlawful destruction or accidental loss and unauthorised disclosure or access. These measures must be proportionate to the purposes of investigating the issues raised in accordance with the security regulations established in the different Member States. These requirements are to be imposed not just on the data controller but such measures as are appropriate should also be provided by the law firms who are dealing with the litigation together with any litigation support services and all other experts who are involved with the collection or review of the information. This would also include a requirement for sufficient security measures to be placed upon the court service in the relevant jurisdiction as much of the personal data relevant to the case would be held by the courts for the purposes of determining the outcome of the case.

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[13] Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime (WP 117 00195/06/EN)

External service providers

Where external service providers are used for example as expert witnesses within the litigation process, the data controller would still remain responsible for the resulting processing operations as those providers would be acting as processors within the meaning of the Directive.

The external service providers will also have to comply with the principles of the Directive. They shall ensure that the information is collected and processed in accordance with the principles of the Directive and that the information is only processed for the specific purposes for which it was collected. In particular they must abide by strict confidentiality obligations and communicate the information processed only to specific persons. They must also comply with the retention periods by which the data controller is bound. The data controller must also periodically verify compliance by external providers with the provisions of the Directive.

Transfers to third countries

Articles 25 and 26 of the Directive apply where personal data are transferred to a third country.

Where the third country to which the data will be sent does not ensure an adequate level of protection as required under Article 25 the data may be transferred on the following grounds:

(1) where the recipient of personal data is an entity established in the US that has subscribed to the Safe Harbor Scheme;
(2) where the recipient has entered into a transfer contract with the EU company transferring the data by which the latter adduces adequate safeguards, for example, based on the standard contract clauses issued by the European Commission in its Decisions of 15 June 2001 or 27 December 2004;
(3) where the recipient has a set of binding corporate rules in place which have been approved by the relevant data protection authorities.

Where the transfer of personal data for litigation purposes is likely to be a single transfer of all relevant information, then there would be a possible ground for processing under Article 26(1)(d) of the Directive where it is necessary or legally required for the establishment, exercise or defence of legal claims. Where a significant amount of data is to be transferred the use of Binding Corporate Rules or Safe Harbor should be considered. However, the Working Party reiterates its earlier opinion that Art. 26 (1)(d) cannot be used to justify the transfer of all employee files to a group's parent company on the grounds of the possibility that legal proceedings may be brought one day in US courts[14].

The Working Party recognises that compliance with a request made under the Hague Convention would provide a formal basis for a transfer of personal data. It does recognise that not all Member States however have signed the Hague Convention and even if a State has signed it may be with reservations.

[14] WP 114, p. 15.

Whilst there may be some concerns about the length of time such a procedure could take, the courts, for example in the US, are experienced in the use of the Hague Convention and such timescales can be built into the litigation process. Where it is possible for The Hague Convention to be used, the Working Party urges that this approach should be considered first as a method of providing for the transfer of information for litigation purposes.

Conclusion

This working document is an initial consideration of the issue of the transfer of personal data for use in cross border civil litigation. It is an invitation to public consultation with interested parties, courts in other jurisdictions and others to enter a dialogue with the Working Party.

Done at Brussels, on 11/02/2009

For the Working Party
The Chairman
Alex TÜRK