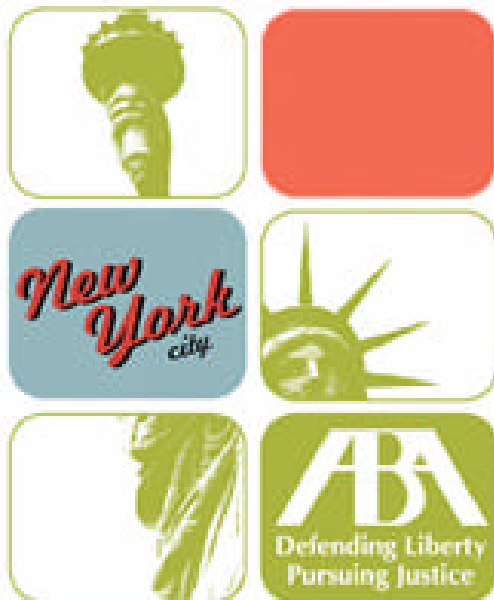


Defining the Boundaries:

The Use of Private Contractors in Contingency Operations



**American Bar Association
Annual Meeting**

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Foreign Contractors: Jurisdiction, Internal Investigations and Congressional Oversight



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Jurisdiction Over Foreign Contractors

- Foreign contractor with no U.S. offices
- U.S. government contracts performed outside of the United States
- Alleged tort occurred outside the United States
- Is there personal “general” jurisdiction within any U.S. state or federal district?

General Jurisdiction

- Does the forum state's long-arm statute authorize jurisdiction?
- Due process analysis
 - Minimum contacts in the forum state?
 - Does not offend traditional notions of fair play and substantial justice

General Jurisdiction

- **Lessin v. First Kuwaiti Gen. Trading & Contracting Co., No. H-05-1953 (S.D. Tex. 2007)**
 - U.S. soldier injured in Iraq after being stuck in the head by a truck's ramp assist arm
 - Default judgment
 - Motion to vacate under FRCP 60(b)(4)
 - Jurisdictional facts:
 - Defendant hired by Huston company
 - Contract identified Texas law as governing law for disputes
- **Dismissed: not sufficient minimum contacts; burden on the foreign defendant; all evidence and witnesses in Iraq**

General Jurisdiction

- *Baragona v. Kuwait Gulf & Link Transport Co.*, CA No.: 05-cv-1267(WSD) (N.D. GA)
 - U.S. soldier killed in traffic accident in Iraq
 - Show cause re jurisdiction
 - Alleged jurisdictional facts:
 - U.S. government contracts formed between defendant and DoD entity located at Ft. MacPherson, GA
 - Contracts administered from Ft. MacPherson
 - Payments from Ft. MacPherson
- Court found “personal jurisdiction”
- Default judgment
- Motion to vacate under FRCP 60(b)(4)

General Jurisdiction

- *Baragona* case currently undergoing narrow jurisdictional discovery
 - Does merely entering a contract with the USG subject a foreign contractor to jurisdiction of the U.S. courts?
 - Does unilateral action by the USG re where it administers a contract and pays a foreign contractor establish sufficient minimum contacts in the US?

Practical Issues

- Responsible contractors embrace accountability
- The human condition
 - Multiple stressors
 - Cultural differences
 - Language barriers

Practical Issues

- Internal Investigation
 - War zone
 - Who do you send?
 - Prepare a written report?
 - Rely on law enforcement report?
 - Evidence spoliation
 - Controlling events 7,000 miles away
- Communications with injured parties or relatives of victims (a.k.a., future plaintiffs)

Practical Issues

- Congressional oversight
 - Plaintiff lawyers request and obtain hearings and meetings with Members
 - Hearings provide aid to the plaintiff and detriment to the defendant
 - Free discovery and discovery before dispositive motions
 - Unfavorable forum for defendant
 - Public relations and reputation implications
 - Committee may issue report of factual findings before trial
 - Parallel civil or criminal proceedings

Practical Issues

- Congressional oversight (continued)
 - Congress does not recognize the attorney-client privilege or work product doctrine*

**except in Congressional proceedings against Members*

Practical Issues

- United States v. Phillip Morris, Inc., 212 F.R.D. 421 (D.D.C 2002)
 - Committee issued subpoena for documents
 - Committee chairman threaten to seek contempt
 - Phillip Morris produced documents
 - Subsequent civil litigation
- PRIVILEGED WAIVED
 - Company “failed to make efforts reasonably designed to protect and preserve the privilege”

Practical Issues

- Phillips Morris did not:
 - Meet with the Chairman or committee members to voice concerns
 - Request an opportunity to submit arguments on the merits of the privilege claims to the committee
 - Make arguments to the committee as a whole regarding the merits of the claim
 - Obtain a ruling from the Chairman on the privilege claims
 - Obtain a vote by the Committee to enforce the subpoena

Practical Issues

- How do you prepare the company?
- Plan ahead and think through legal issues
- Create an infrastructure
- Form a rapid response team
 - PR, legal, investigators, lobbyists
- Run simulations with the team
- Expect the best from your personnel, but plan for the worst