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Hague Convention Letters of Request / Letters Rogatory – recent case shows court's approach

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The recent case of Aureus Currency Fund and Credit Suisse Group AG v Mitesh Parikh provides a useful guide as to how the English court is approaching Letters of Request from foreign courts.
Aureus applied for the examination of Mr Parikh in England and Wales as part of its ongoing US class action against a number of banks in respect of alleged FOREX rigging. Of 16 banks which Aureus was suing, 15 had settled. Credit Suisse was the lone holdout. Mr Parikh is a former Goldman Sachs banker, and Aureus had already settled with this bank.

Mr Parikh challenged the Letter of Request application on two main grounds: (i) the topics were so broad that they constituted discovery rather than trial evidence, meaning the English court should disallow the whole Letter as an impermissible 'fishing expedition', and (ii) the Letter was oppressive.

Mr Parikh argued various grounds of oppression, but principally he referred to ongoing investigations that could expose him personally to a real risk of criminal liability. However, the US law of privilege would apply to any examination of Mr Parikh, in addition to English law. Therefore Mr Parikh could always 'plead the 5th' and rely on the right against self-incrimination in the 5th Amendment to the US Constitution. Mr Parikh suggested that a regulator or court might draw an adverse inference from his sheltering behind the 5th Amendment.

Mr Parikh's arguments were not successful. The English court's reasoning sheds some light on how it is treating Letters of Request in what is a discrete, but developing, jurisdiction.

1. The application was made on notice and at an oral hearing – at Mr Parikh's request. It is standard practice to apply without notice to give effect to a Letter of Request and the Civil Procedure Rules seem to envisage this approach. However, it may make sense to flag an application in advance and make the application 'on notice' at a hearing if the applicant thinks the respondent is likely to oppose – saving the applicant having to wait for a challenge, which saves time in a situation where time can be tight. Here, Aureus had actually reached out to Mr Parikh in advance.

2. Aureus had already amended the draft Order it sought before the hearing, departing in some minor respects from the Letter of Request. This could have been an issue for the English court. After all, a Letter of Request is issued by a foreign court and hence doesn't 'belong' to the applicant. However, the English court took a pragmatic line – perhaps recognising that it is invariably the applicant which drafts a Letter of Request, before asking the foreign court to give its seal of approval to the document. More generally it seems that the English court will permit an applicant to amend the draft Order, if the amendment protects the respondent. Here, Aureus' amendments reflected concerns raised by Mr Parikh's solicitors, and the court did not object. However, we doubt that the court would take the same stance with amendments that could prejudice a respondent.

3. It was highly material that the US judge had turned her mind to the relevance of the evidence sought. The English court was – quite rightly – not going to second-guess a judge with greater knowledge of the case.

4. The fact that Mr Parikh might have to plead the 5th did not of itself make the Letter of Request oppressive, even if courts could draw an adverse inference from his doing so. Aureus, in settling with 15 of the defendant banks, had entered into a settlement agreement that prevented it from suing any of those banks' former employees personally. We see it as significant that the English court viewed this as a relevant factor – i.e. the English court might have exercised its discretion differently but for this settlement. This suggests that a respondent may be able to successfully argue that having to plead the 5th (or similar) would render a Letter of Request so oppressive that the English court should not give it effect. If, for instance, a respondent were involved in current proceedings that threatened to bankrupt them, then maybe we could see the English court affording this form of protection to a prospective witness. But that would be an exceptional case.

5. The existence of related regulatory proceedings did not prevent the court from ordering an examination of Mr Parikh. We can expect more argument in this area as the lines between civil litigation, regulatory enforcement and criminal investigation become ever more blurred. It is fitting therefore that the leading judgment on this point is part of the ongoing Autonomy / MicroTechnologies saga, currently before the High Court.

6. Finally, Aureus was able to obtain an order that it could cross-examine Mr Parikh, as though he were the other side's

witness. This might seem an abstruse point, but normally a witness compelled via a Letter of Request is the witness of the party compelling them. At examination, the applicant's role is to elicit the witness's testimony, not to break it down – even though the witness might often be fairly described as 'hostile'. We suspect that the court might hesitate

to order cross-examination of a vulnerable, or even an ordinary, witness. But the court seemed to find no oppression would be caused by cross-examining a high net-worth senior financier, well able to pay for his own legal representation.

This decision demonstrates that the English court will generally take a pragmatic approach and, subject to jurisdictional thresholds being met, will give effect to foreign Letters of Request as far as possible. It offers insight to the main areas where an application may be challenged, and highlights the importance of tightly drafting the issues to be put to witnesses to minimise the risk that the request will be deemed oppressive.

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