

CONDUCTING DISCOVERY AND ENFORCING JUDGEMENTS ABROAD

Val H. Stieglitz, Esq.

Reprinted with permission of the South Carolina Bar. From Legal Aspects of Export Transactions, Copyright, 1999

Introduction

In the United States legal system, each party to a lawsuit is afforded an opportunity to gather evidence relevant to its case. The plaintiff is entitled to collect evidence that will assist in proving its claim. The defendant is entitled to collect evidence that will assist in defending against the plaintiff's claim. This process is known as the "discovery" process. There are specific procedural rules issued by a court system that govern the discovery process. These rules are detailed and often require legal interpretation.

There are three basic forms of discovery that are used in litigation. The first type is the use of written questions known as "interrogatories." Each party can serve interrogatories on the other which are specific questions designed to locate and determine evidence which is relevant to issues in the case that the other party must answer. The second type is known as a "request for production." Such requests generally state specific types of documents which the other side must make available for inspection and copying. The third type is conducting "depositions." Unlike written interrogatories and written requests for production, a deposition is a "live" proceeding. A person (the deponent) is placed under oath, and the deposing attorney may ask the deponent questions about the case. A court reporter records the questions and answers verbatim and creates a written transcript. This transcript can be used as evidence in a court if certain conditions are met. Through these forms of "discovery" a litigant in a United States federal or state court can obtain documents and information about its case and compel its opponent's witnesses to answer detailed questions about the case prior to trial.

Most foreign legal systems do not provide for this sort of discovery. Thus, a problem arises when a company is involved in a lawsuit in the United States but wants to obtain documents or take depositions in a foreign country. Similar problems arise when a company is involved in litigation in a foreign country. This is an intricate area of the law about which lawyers and professors write lengthy treatises. The following is just a brief overview of the issues that can arise in these situations.

Obtaining Documents and Depositions Abroad

Assume that your company is involved in litigation in the United States and that it is important to your case to obtain documents or take depositions from a witness or business in a foreign country. Your ability to obtain these documents will depend upon a number of variables.

For example, whether the foreign party or witness is subject to the jurisdiction of the United States Court will be important. An entity that is domiciled abroad but which has significant contacts with a State in the United States may be subject to that the courts of that State. In such cases, subpoenas and other procedural devices that will permit discovery can be used. If the foreign entity is not subject to jurisdiction in a United States court, obtaining discovery will generally depend upon compliance with local laws. The United Nations Convention on the Taking of Evidence Abroad in

Civil or Commercial Matters (1972 Hague Convention) may be used when parties reside in signatory countries. Some foreign nations have “blocking statutes” that essentially bar United States-style discovery. In the absence of such statutes, it may be possible to conduct discovery against foreign citizens or businesses only if the foreign entity voluntarily submits to the discovery.

In the event that the foreign entity does not voluntarily submit to discovery, it will be necessary to attempt to compel compliance, provided the United States court can assert both personal and subject matter jurisdiction. The customary method of compelling evidence is through issuance of a letter rogatory (also known as a letter of request). This formal document is issued by a United States court which is forwarded to the judicial authority of the foreign nation maintaining jurisdiction over the person from whom discovery is sought. The preparation and issuance of letters rogatory can be quite technical. Limitations on the use of letters rogatory are imposed from the reluctance of some foreign nations to permit types of discovery that would not be permitted under their own law. Also, many foreign countries distinguish between evidence sought from a party to the litigation and evidence sought from an entity that is not a party to the litigation. As a general proposition, foreign courts are reluctant to require non-parties to give evidence such as documents.

If the foreign company is a parent, subsidiary, or affiliate of a domestic American corporation, it may be possible to obtain documents by serving a document subpoena on the domestic American company under the United States discovery rules. United States rules of discovery generally require a party or a non-party served with a subpoena to turn over all documents in its possession, custody, or control. Thus, in some cases the files of a foreign subsidiary of a United States company may be deemed under the “control” of the United States company.

The 1972 Hague Convention permits depositions to be taken among the signatory nations. The requirements for making a proper request under that convention are intricate. Because of such complexity, a foreign authority may conclude that the request does not comport with local law or violates some local policy. For example, many nations do not allow one party to a lawsuit to obtain documents from the other party and may refuse enforcement of a United States discovery request with such a requirement.

Some nations have their own domestic discovery procedures which may provide a more expeditious method of obtaining discovery. A local attorney can advise on the availability of discovery under local law.

Thus, while there are various procedures, rules or conventions which may enable a domestic United States company to obtain discovery from individuals or businesses in foreign countries, these procedures may be cumbersome, unpredictable and time-consuming.

Enforcing Judgments

The idea that a lawsuit is over when the jury returns and reads its verdict is misleading. If the verdict is in favor of the plaintiff, many people assume that the plaintiff leaves the courthouse with a check from the defendant.

In the United States court systems, after the jury (or the judge, if the lawsuit is one that is tried by the judge instead of a jury) returns a verdict, a “judgment” is entered in the records of the Clerk of Court for the amount of the verdict. A judgment collects interest from the date it is entered. The defendant will have a period of time in which to appeal the judgment. If the defendant decides not to appeal, it may well write the plaintiff a check for the judgment amount. If the defendant simply decides not to pay the judgment, the plaintiff must find a way to collect on the judgment.

In the United States, there are procedures for collecting a judgment. As a result of the judgement, the plaintiff becomes a secured creditor of the defendant with a lien on the assets which are the subject of the judgment and may be able to force a sale of these assets to satisfy the judgment. Because each state is required by the United States Constitution to give “full faith and credit” to judgments of courts in other states, there are procedures for officially recording and enforcing judgments among the 50 states of the United States.

The enforcement process becomes less certain when the defendant is a foreign business or individual. If you have obtained a judgment against a foreign business in a legal action brought under the laws of a foreign nation, you will be able to utilize the procedures under the law of that jurisdiction for collecting your judgment. A local attorney will be required to assist in collecting any such judgment.

If you have obtained a judgment against a foreign company under the laws of one of the states of the United States and wish to enforce that judgment abroad, the collection process is difficult. There is no international treaty whereby judgments obtained in one country are recognized and enforced in another. Many observers attribute this fact to a concern by governments that its citizens not be subject to foreign laws. For example, the product liability laws in the United States are more developed than in many European nations which do not favor a system under which their manufacturers can be subjected to collection of judgments rendered under United States product liability laws. Nevertheless, many countries continue their efforts to negotiate a treaty on recognition and enforcement of judgments between the participant nations. Presently, there is such a convention for arbitral awards known as the United Nations Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention).

Typically, a foreign court that is being asked to enforce a judgment obtained in another country will look to the procedures employed in obtaining the judgment (to ascertain whether the defendant was accorded the legal procedural rights deemed important by the foreign nation. The court may also consider whether the foreign judgment was obtained from a type of legal claim that is recognized in the legal system of the defendant’s domicile. The United States allows litigants to recover on many legal theories that are not recognized in other countries. Understandably, a foreign court may be reluctant to recognize a civil judgment obtained against one of its citizens when the claim is based on a legal theory that it does not have a legal foundation under its legal system. In short, the matter of enforcing a judgment may be uncertain, time-consuming, costly, and subject to factors that are not in your control.

In contrast, consider a scenario which involves an attempt to enforce a judgment that was obtained in the United States in a foreign court. Twenty-eight states in the United States have adopted the Uniform Foreign Country Money Judgments Act. There are certain conditions under which a United States court will refuse to enforce a judgment under this treaty but the treaty does provide a system through which it may be possible to enforce foreign judgments in the United States. Under the

treaty, United States courts are not required to recognize and enforce judgments for collection of taxes, fines, or penalties rendered in foreign courts.

If you have obtained the judgment pursuant to an arbitration proceeding, collection may be easier. In contrast to the situation when one private company has sued another private company in a foreign court, there is an international treaty governing enforcement of arbitration awards. While there is no treaty under which countries are bound to recognize and enforce the judgments obtained under foreign judicial systems, many countries with significant trading relationships participate in the New York Convention providing for enforcement of arbitration awards. Therefore, using an arbitration clause in an international commercial export contract may have a greater likelihood of enforcement than a dispute resolution or default clause which affords only a right of litigation.

The New York Convention provides that each participating State shall recognize arbitration awards as binding and enforce them in accordance with the rules of procedure of the country where the judgment is relied upon. The United States Congress has passed legislation adopting and implementing the provisions of the New York Convention. In order to enforce an award, a party must present to the local judicial authority the original or a certified copy of the judgment and the arbitration agreement. The defendant has the burden of proving the award invalid based on certain grounds set forth in the treaty. These defenses allow some room for local courts to apply local judicial policies but the preference is in favor of enforcing the award.

Summary

The general procedures that apply to discovery and enforcing judgments abroad can be summarized as follows. First, the United States has well developed discovery procedures which generally cannot be applied directly against a foreign business or an individual in a foreign country. If a foreign business has a close enough relationship with a domestic United States business, it might be possible to assert United States jurisdiction to reach the foreign business to apply such rules. If United States discovery rules do not apply, discovery may be possible in some form if the foreign nation participates in the 1972 Hague Convention or through letters rogatory. There is no assurance that either of these two methods of discovery will succeed and local courts may choose to deny or restrict the discovery.

Second, there is a method whereby arbitration judgments can be enforced in foreign countries which are signatories to the New York Convention. There is no international system whereby a judgment can be enforced in a foreign court. Therefore, it is prudent to consider inserting arbitration clauses in international commercial agreements.