Not losing it in translation

HANDLING CROSS-BORDER LITIGATION

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Representing a U.S. entity in litigation in a foreign jurisdiction, i.e., cross-border, presents various nuances and challenges beyond the substance and facts of the dispute itself. Over the past several years, we have represented a U.S. company in related toxic tort matters around the globe. This article will share some observations and perspective from that experience.

Challenges of course arise from the differing procedures encountered. The process employed in the U.S. courts is considerably different from the process employed in civil law jurisdictions (e.g., European Union nations except the United Kingdom, Ireland and Cyprus, South Korea, Japan, etc.). First and foremost, a civil law tribunal does not ultimately try a matter before a jury with live testimony; rather, the judges decide on the parties' written submissions. Accordingly, the other litigation basics – discovery, motion practice, evidentiary standards, use of experts, etc. – are different.

But, another area of nuance and challenge relates to what is lost in translation, both literally and figuratively. As a very practical matter, engaging a top-notch translator is imperative (as is making sure to budget for such costs, which might not be insignificant, particularly insofar as verbatim translations are done, as is frequently the case). The figurative nuance and challenge in cross-border litigation arises out of how to replicate or adapt a U.S. strategy in the foreign forum. This requires good collaboration with cross-border counsel, balancing U.S. tactics with the local practice.

JURISDICTION, *FORUM NON CONVENIENS* AND RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

The challenges in litigating a cross-border action should not be overlooked at the very outset of a dispute, when a party considers if and where to appear. For example, a case involving claims of toxic exposure in a foreign country might be brought against a U.S. company operating there, or those foreign plaintiffs might sue in their own country. In the former circumstance, the initial reaction might be to seek dismissal based on *forum non conveniens* grounds,

since the acts and witnesses are located in the foreign jurisdiction, thereby avoiding U.S. procedure allowing for a class or coordinated mass action and the common risks of a runaway jury award. In the latter scenario, the initial notion might be to simply default, relying on a lack of personal jurisdiction.

A *forum non conveniens* transfer needs to be considered carefully under the idiom, "be careful what you wish for." An extreme example of this might be the protracted dispute involving Ecuadorian pollution claims against Chevron, which, after transfer to Ecuador, resulted in a multi-billion dollar judgment (and ensuing years of litigation over its legitimacy in multiple venues, including findings of fraud in the U.S. courts). A party needs to assess how the foreign litigation might compare with a U.S. litigation; among other things, the evidentiary standards are likely to be more lax, *Daubert* safeguards will not exist, there will be little discovery, etc. The decision is not necessarily as open-and-shut as it might initially appear.

"Recognition and enforcement" of a judgment ultimately rendered is another contingency implicated in the decision regarding where to appear in a cross-border dispute. In contrast to "the full faith and credit" afforded to judgments of one state in another state, which allows for their enforcement against assets present in the other state, for a foreign country judgment to be enforceable, it first must be "recognized" as valid. Based on international comity, the laws and courts tend to favor recognition of foreign country judgments, although a foreign country judgment may be denied recognition on grounds such repugnancy to the public policy (e.g., a foreign defamation judgment being repugnant to Free Speech rights), or lack of due process. But the judgment debtor faces a high burden in resisting recognition.

Deciding where to appear in a cross-border dispute must include consideration of the recognition and enforcement scenarios, including possible grounds for non-recognition and where the party has assets its adversary might attempt to seize to satisfy a judgment. The latter element comes into play because recognition of foreign country judgments is a matter of state law and there is some variation among the states, which utilize some version of either a 1962 or 2005 uniform act, or rely on common law principles of international comity in some states. Note that the 2005 uniform act provides a less burdensome "due process" challenge in that it allows for a challenge based on the process in the particular proceeding in which the judgment was rendered, whereas the 1962 version required a showing of a systemwide lack of due process. So, if an anticipated recognition venue is governed by the 2005 uniform act, a due process challenge could be viable, but one will need to make a record in the foreign proceedings to show where due process was deprived.

LITIGATING UNDER FOREIGN RULES

Needless to say, the process and rules in a foreign venue will be different from the U.S. courts; it will be important to gain an understanding of these as early as possible as part of the decision-making as to which forum to seek and to plot out strategy and tactics for the case. Comparing U.S. and civil law litigation as an example, the following are key areas of distinction.

Submission on papers. In a civil law jurisdiction, the case will be submitted on the papers. There will not be a trial with live testimony before a jury. There may be an oral argument before the panel of judges, but this will typically not involve live testimony and the parties will be limited to the arguments and evidence presented in their papers. Corresponding to the lack of live testimony, foreign courts tend to prefer documentary and objective evidence.

Unlike the typical opening/opposition/reply briefing sequence under U.S. procedure, in a civil law system, the parties proceed by exchanging multiple rounds of briefs until the parties and/or the court determine that the briefing is sufficient and should be closed. Because of limits on discovery, this briefing might become a bit of cat-and-mouse, as one might limit their own evidence to avoid disclosing documents that otherwise might not be revealed.

Lack of discovery and lax evidentiary standards. Unlike the U.S. system, in a civil law jurisdiction, discovery is limited and available only by consent or the court's permission. A request for discovery needs to be tailored to specific, identified pieces of evidence. Given the lack of live trial testimony, depositions are generally unavailable.

Inasmuch as, again, a matter is not tried before a jury in a civil law jurisdiction, one is likely to encounter relatively lax evidentiary standards and the introduction of all sorts of material; for example, we have seen newspaper articles and books submitted as exhibits. Perhaps compare this circumstance to a bench trial where a judge will accept exhibits and reserve on their admissibility and weight.

The confluence of these two factors presents a double-edged sword. On one hand, a party is less likely to be compelled to produce documents and evidence and will avoid large-scale disclosures. On the other hand, a party will not know the extent and content of the adversary's evidence and needs to consider anything and everything as fair game. It is important to remain vigilant and apprised of the universe of material pertinent to your case, including public sources of documents.

Expert and scientific testimony. The matter of expert testimony also differs. A major difference from the U.S. system, which typically involves competing expert testimony presented to the fact finder, is a civil law court's reliance on a court-appointed expert to report to the court on technical issues. A party might submit expert testimony as part of its case (and its expert might argue before the court-appointed expert), but in the context of strategy for party experts, it would seem preferable to rely as much as possible on objective, peer-reviewed literature and on academic experts rather than consultant experts. To the extent feasible, even if one has an existing roster or expert team, one should consider retaining experts in the jurisdiction. As with the evidentiary scheme noted above, there is generally no standalone *Daubert*-type challenge to expert testimony; rather, such arguments are wrapped into a party's other arguments.

A goal in handling most cross-border litigation will be to replicate or adapt a U.S. litigation strategy to ensure that the client's case is presented as fully as possible. This will inevitably involve some give-and-take with your cross-border counsel, that is, after being told, "that's not the way it's done here." While the local rules will sometimes be stretched (or bent), it is important to keep in mind the need to protect the "due process" record for recognition and enforcement by making requests, even if they are to be denied. Striking an appropriate balance between the competing systems, in collaboration with cross-border counsel, are key to handing cross-border litigation.

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