International Law for Solo Practitioners and Small Firms

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Many solo and "small firm" practitioners whose practice is predominantly county or state-centered may believe that "international law" has no relevance to what they do. This results in part from a preconception as to what international law entails. For our purposes, attorneys are most likely to be involved in matters of private international law. Private international law is defined in Section 101 the Restat. 3d of the Foreign Relations Law of the United States "as law directed to resolving controversies between private persons, natural as well as juridical, primarily in domestic litigation, arising out of situations having a significant relationship to more than one state." Beyond choice of law issues, though, there are a variety of other contexts in which the law of other countries becomes relevant, which may better be referred to as foreign law rather than international law, and contexts in which the United States has by statute or under principles of comity recognized certain law applicable to situations involving foreign entities. This article, by no means exhaustive, highlights three basic areas in which solo and small firm practitioners are likely to encounter foreign law issues.

Contracts

Regardless of the direction of current trade policies, importing and exporting will remain important and significant components of the economy. According to an export fact sheet released April 5, 2016, by the U.S. Department of Commerce International Trade Administration, approximately 98 percent of U.S. companies exporting goods in 2014 were small or medium-sized companies with less than 500 employees.

Since Jan. 1, 1988, the United States has been signatory to the United Nations Convention on Contracts for the International Sale of Goods (CISG), a treaty governing formation, breach and remedy issues in contracts. It is implicated where the principal business units of the contracting parties are located in separate contracting countries, making the contract international for purposes of the CISG. It applies to commercial goods and, unlike what American lawyers are generally accustomed to, employs more subjective standards, and allows oral contracts and understandings. It applies different formation rules and solutions to the "battle of the forms" than does the Uniform Commercial Code, applies a "receipt" rule as opposed to a "mailbox" rule, and imports certain other concepts relating to contracts more common to civil law rather than common law jurisdictions. Like the Uniform Commercial Code, it will not apply to a contract that is predominantly for services, but unlike the Uniform Commercial Code, it provides remedies for specific performance, specifically addresses interest, and has a complete opt-out provision. If parties do not want it to apply at all, they must expressly disclaim it in the contract. Most jurisdictions that have addressed the issue have held that

simply designating a state's law as the choice of law will not constitute an opt-out, since the state's law will include treaties to which the United States is a party as the supreme law of the land.

The philosophical and legal differences between the CISG and the American U.C.C. are far more involved than simply hinted at here. The most comprehensive online resource to learn more about the CISG is the website for Institute of International Commercial Law at Pace University (http://iicl.law.pace.edu/cisg/cisg).

Dispute Resolution

An accident involving a foreign-made product can occur in even the remotest of locations in the United States, triggering issues as to personal jurisdiction over, and service of, foreign-based defendants. Apart from tort litigation, contracts should have a carefully thought out choice of law and choice of forum provision or, if arbitration is desired, an appropriate arbitration clause. A forum selection clause, if it uses mandatory rather than permissive language, to designate a court in the United States, will generally be enforced as a matter of federal law, and in most states as a matter of state law, unless there is no substantial relationship of the parties to the chosen forum and no other reasonable basis for the choice, or it is against public policy. Choice of law designates the substantive (as opposed to procedural) law, and such choices, even where the law of a foreign country is selected, will generally be enforced by state and federal courts in the United States, provided they are not barred by public policy or bear no reasonable relationship to the forum. Scope is important; if not attended to, different law may apply to contract and tort claims.

Unless otherwise dealt with in contract, where no provisions for service are made (as in, for example, a tort case based on accident), service on foreign entities will be required through the Hague Convention on Service of Process where the entities are in signatory countries. While Article 10 of this service convention does provide for service by mail in certain circumstances, depending upon the particular country's reservations, declarations or notifications, American courts are split on whether Article 10 is applicable to service of process itself or only service of judicial documents, regardless of the foreign country's law. Regardless, one must always start with the Service convention if applicable, even if there is an exclusion that takes one back out of it.

Arbitration among international parties that are in signatory countries to the New York Convention or the Panama Convention provides for recognition and enforcement of arbitration awards; there is no current treaty to which the United States is a party that does the equivalent for recognition and enforcement of United States judgments abroad. Most states in the United States do have a version of one of the two uniform laws on recognition and enforcement of foreign country money judgments in the United States, but this should not be confused with attempting to have a state judgment from the United States recognized and enforced overseas.

Discovery raises additional issues. If in federal court, with jurisdiction over the foreign entity, discovery of foreign companies in U.S. litigation may be obtained through federal rules of civil procedure, as in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522 (1987). However, there are two broad issues in foreign discovery: "blocking" statues and data protection/privacy laws. Blocking statutes prevent transfer of certain types of documents or information for use in foreign litigation and can contain criminal sanctions. One solution is to use Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, which permits requests for documentary and deposition discovery, though various countries have opted out or limited what is available. Even with that, a foreign company may be placed into irrevocable conflict where it either complies with U.S. discovery demands and risks criminal liability for violation of its own data privacy laws (whether as part of the European Union or based on its own domestic litigation), or comply with its home law and risk sanctions in the U.S. litigation. The Hague Convention is not mandatory or exclusive, but can solve certain problems; where it does not apply, enforcement through the target country's laws, if voluntary cooperation is not available, may be necessary.

Under U.S. statutory law, 28 U.S.C. Section 1782 allows parties in proceedings outside the United States to obtain discovery here. What constitutes a foreign proceeding remains ambiguous; the U.S. Supreme Court in *Intel v. Advanced Micro Devices,* 542 U.S. 241 (2004) permitted a nonjudicial body of the European Commission to qualify as foreign or international tribunal, but the Fifth and Eleventh Circuits continue to exclude private international tribunals from the ability to utilize the statute to obtain discovery in the United States.

Ethics

Attorney-client confidentiality involves both rules of professional conduct and evidence. Privilege is generally a procedural issue in U.S. courts, which means the local rules would apply, but there can be assertion of foreign privilege applicability. A party has the burden of proving the applicability of a foreign privilege if it wants to assert it, as in *In re Air Crash at Belle Harbor*, 241 F.R.D. 202, 204 (S.D.N.Y. 2007). If a party does assert the viability of a foreign privilege, the court will undergo a traditional conflict of law analysis to determine if the foreign privilege applies, as in *In re Rivastigmine Patent Litigation,* (MDL No. 1661), 237 F.R.D. 69, 74 (S.D.N.Y. 2006). Practitioners should note that while most countries with developed legal systems respect client confidentiality, the extent of what we understand as attorney-client privilege varies greatly, particularly regarding in-house attorneys.

American practitioners should also be aware of applicable state rules of professional responsibility. While ABA Model Rule 5.5 provides a safe harbor for transient practice in some circumstances (e.g., an Ohio lawyer can take a deposition in Pennsylvania on her Ohio-based case without being charged with unauthorized practice in Pennsylvania), in most states that safe harbor will not apply to non-U.S. admitted attorneys. Consequently, non-U.S. lawyers could not avail themselves of that. There is now a model ABA rule for pro hac vice admission for non-U.S. lawyers. Perhaps of more relevant concern to the U.S. lawyer is ABA Model Rule 8.5, which addresses which jurisdiction's law is to be considered in a disciplinary proceeding. An American lawyer representing an American client in an arbitration proceeding in, say, London, would be subject to the ethical rules for attorneys in England under Rule 8.5, which might impose greater (or lesser) obligations on the lawyer than her home state rules. Defaulting to the most restrictive rule is not always the solution, as it may then implicate issues of competency in the representation.

Conclusion

Practicing international law does not simply mean getting on an airplane. The above much-abbreviated discussion highlights issues in just three overall areas; each topic could be (and often is) a treatise in itself. The main point is that one should not assume only domestic law applies to matters involving U.S. clients, and in today's world, international aspects are far more pervasive than the general practitioner might assume. •

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