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Jurisdiction and Venue Clauses in Commercial Contracts: When Home Court Advantage is a Disadvantage

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Most contracts are never tested. But when they are, it can have material impact on profitability. Lawyers tend to see contracts when there is a problem: a commercial dispute or financial stress of a counter-party. Inevitably, clients seek ideas to avoid such problems in the future. As a result, we are often asked to make contracts better.

Consider a choice of jurisdiction and venue clause in cross-border contracts. Typically, companies select the home court advantage by selecting their state as the exclusive jurisdiction and venue for any dispute.

However, we recommend considering the "end game" (contract dispute) when drafting contracts and selecting jurisdiction and venue. Some considerations:

1. For a judgment for a breach of contract to have impact, it needs to be enforceable where the counter-party has assets, that are at risk of execution.

2. The July, 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the "Hague Foreign Judgment Convention") has been ratified by the European Union and Ukraine. The United States has signed the treaty, but it will not be in effect until it is ratified, which could take several years. Thus, the U.S. is currently not a party to any functioning bi-lateral or multi-lateral international treaty on the reciprocal recognition and enforcement of foreign judgments.

   By contrast, the 1958 New York Convention (the United Nations Convention on the Recognition and Enforcement of Arbitral Awards) has 172 Contracting States, including the U.S. and most of its trading partners. As a result, many cross-border contract disputes are resolved by arbitration.

   However, if the dispute is the failure to pay a clear and enforceable obligation, arbitration could result in a compromise of the obligation. In these cases, the party owed money may prefer litigation.

3. Companies should consider a jurisdiction and venue clause that provides a choice of jurisdiction and venue that includes where the counter-party has assets.

An interesting case from Quebec involved a U.S. lender/investor, U.S. affiliates of a Quebec company group, and a Quebec guarantor illustrates the pitfalls of jurisdiction and venue clauses. The contract documents drafted by the lender provided for exclusive jurisdiction and venue in Florida. When the borrowers defaulted, knowing the guarantor's assets were in Quebec, the U.S. lender initiated litigation in Quebec. The guarantor appropriately filed for and obtained a dismissal of the Quebec proceeding since the contracts provided Florida was the exclusive jurisdiction and venue for all disputes.

The U.S. lender then filed suit in Florida, and obtained judgments totaling almost $7 million. The contract documents further provided that the borrowers and guarantors waived all defenses, actions and counterclaims, effectively eliminating the ability to defend the U.S. lender's claims. The contracts also contained releases of any claims of the borrowers and the guarantors against the lenders.

In the Florida litigation, the borrowers and guarantors asserted facts and defenses relating to the lender's fraudulent behavior, false representations, and failure to act in good faith during contract signing. The lender filed a motion to dismiss such claims based on the waivers and releases in the contract terms. The Florida court granted the motion to dismiss the claims of the borrowers and the guarantor, and ultimately entered a judgment in favor of the lender.

With the Florida judgment in hand, the lender initiated "homologation" litigation in the Quebec Superior Court to recognize and enforce the Florida judgment in Quebec, where the borrowers' and the guarantor's assets were located.

Ultimately, the Quebec Superior Court refused to enforce the Florida judgment as it was in contravention of Quebec's public policy of equity and good faith in contractual relationships. Under the Quebec Civil Code, foreign judgments will be recognized, with certain exceptions. Two exceptions germane to this case are:

1. The decision was rendered in contravention of the fundamental principles of procedure.

2. The outcome of a foreign decision is manifestly inconsistent with public order as understood international relations.

In short, the Quebec court determined that the contracts and the Florida litigation contravened Quebec's public policy.

Quebec is probably one of the friendlier jurisdictions towards U.S. judgment enforcement. Imagine the same scenario in many other countries, such as two large U.S. trading parties, China and Mexico.

Due to poorly thought through jurisdiction and venue clauses, the U.S. lender struck out twice, no doubt at great legal expense. The contract dispute outcome could have been avoided with a "smart clause" regarding jurisdiction and venue.