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INSIGHTS

Exploring Service Of Process When Litigating Against Foreign Counterparties

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It's 2022, but it could be 1922 or 1822. Regardless of how far back one looks, it was, it is, and it will always be true that international business and trade is a necessary and dominant reality of our global economy. Companies across all industries, products and services (including suppliers, distributors, manufacturers, financial, accounting and legal, etc.) regularly enter into and rely upon cross-border transactions with foreign counterparties to run their businesses.

Sophisticated parties enter into written agreements detailing the terms of their business relationships. These agreements also address their respective rights and remedies if a default or legal dispute arises, including standard provisions for the governing law, exclusive jurisdiction or venue, and service of process. These terms reflect the commercial reality that disputes can (and often will) arise as an inevitable cost of doing business. If a counterparty defaults in breach of its contractual obligations, then litigation (or arbitration, subject to the parties' agreement) may be necessary to enforce the breach and recover any resulting damages.

The threshold step of any legal enforcement action is effective service of process for notifying a business that legal action has been taken against it. If the counterparty defendant is a foreign entity or individual, establishing service of process can be a difficult and delayed process.

Recently, the Southern District of New York addressed these principles and authorized service on a foreign counterparty through its last-known address without requiring signature upon delivery and through email to the counterparty's designated email address and its foreign counsel. The court in *StoneX Markets LLC v. Cuarte SL* held that service by email is

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not prohibited by federal law, nor is service by email prohibited by international agreement. Alternative service also comported with due process, the court said, because the parties' agreement provided that "all written communications to the other Party shall be sent by first class, registered, certified or express mail … or by comparable delivery service … or by email" and that the parties "irrevocably consent to service of process given in the matter for notices."

Here are three important aspects of service of process and options available for "alternative service" on a foreign defendant under the federal rules:

1. Enforcing cross-border contracts with foreign counterparties. The following fact pattern may sound familiar: Company "A" contracts to provide goods and/or services in the United States on behalf of a foreign counterparty, Company "B." The parties are sophisticated commercial players and enter into a written agreement providing that all disputes be governed under New York law, be subject to exclusive jurisdiction and venue before the New York state or federal courts (or else arbitration proceedings in New York), and must have a New York agent appointed for service of. The parties operate successfully during the initial salad days of their relationship. At some point, circumstances change for the worse and Company B defaults in breach of the parties' contract, causing damages to Company A. In response, Company A files a legal action in United States federal court.

After filing the lawsuit, the counterparty defendant does not respond, and instead has refused to accept service and/or waive formal service of process.

Regardless of the merits of the lawsuit, Company A must adequately serve Company B with the lawsuit in accordance with due process and the service of process rules in the applicable jurisdiction. In federal court, service of process generally must be made within 90 days of filing the lawsuit absent good cause, or alternative service authorized by the court.

2. Best practices for service of process upon foreign counterparties. As an initial matter, where the contractual agreement requires a foreign counterparty to appoint a United States agent for service of process, Company A should consider immediately taking steps to ensure that such appointment is made and current. This is particularly important for foreign counterparties that may have minimal connections to the forum state (or even the U.S. generally).

In addition to making service of process on the foreign counterparty's designated domestic agent, a best practice is for the parties to include provisions in their contract detailing how notices should be communicated. Policies and procedures should exist to ensure that service commitments with foreign counterparties are maintained. Upon commencing a lawsuit, Company A should provide copies of the litigation papers to the foreign counterparty pursuant to those notice provisions and it is important to document and preserve those efforts, including any responses and/or acknowledgments of receipt.

3. Options available for alternative service on the foreign counterparty defendant. Absent designation of a U.S. agent for service of process, Company A must effectuate service of process in

compliance with due process and the applicable federal and state service rules. This can be a time-consuming and complicated process when attempting to sue (and serve) a foreign counterparty defendant that otherwise has minimal contacts with the local venue. If the counterparty is in a signatory country to the Hague Convention, that is helpful, but service of process via the Hague Convention can take six to nine months – and perhaps longer given COVID-19 delays and limitations.

Fortunately, the federal rules recognize and provide an alternative method of service in such situations. Specifically, Rule 4(f) authorizes service on defendants in foreign countries 1) by any international agreed means of service that is reasonably calculated to give notice, such as those authorized by Hague Convention, 2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice, or 3) by other means not prohibited by international agreement, as the court orders. Rule 4(h) provides that service of process on foreign corporations may be made using the same methods. It is generally established that "a plaintiff is not required to attempt service through other provisions of Rule (f) before the court may order service pursuant to Rule 4(f)(3)." E.g., *Merrimack Mut. Ins. Co. v. New Widetech Indus. Co.*, No. 20 Civ. 546, 2020 WL 5879405, at *1 (D. Conn. Oct. 2, 2020 (internal quotations omitted).

In sum, there are several steps that companies should consider taking proactively to ensure their ability to bring and enforce a lawsuit in the event of a breach by a foreign counterparty. These steps will also ensure the company's ability to look to Rule 4(f)(3) as an avenue to effect service of process on a foreign defendant by alternative means, such as email and/or other processes.

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