notaries public . . . acknowledge documents that are to be used overseas,"[33] the lack of civil law notaries in the US cannot be blamed for this refusal, nor would the introduction of civil law notaries in the US definitely eliminate this problem. Absent treaties, no country is obligated to give "full faith and credit" to acts formed in another country. If the law of the receiving country does not *require* the acceptance of a foreign instrument, its authorities might lawfully refuse it. A rejection can happen, for example when a civil law notary who must close a real estate transaction is presented with a probate order from an American court to prove the seller's title to the property. Indeed, civil law notaries have a duty to verify property title and might not accept the court order for that purpose.[34] There are possible practical solutions, however: the American seller can obtain a sworn opinion by an independent American lawyer, or better by an independent legal expert, duly apostilled/legalized. While the civil law notaries have discretion to accept or reject the opinion letter as proof of title (and while some civil law notaries may prefer legal opinions from other notaries), the greater the authority of the opinion drafter, the more likely the notary will be persuaded.

CONCLUSION

As we discussed in the introduction, the duty of competency in international transactions requires more than simply hiring competent foreign counsel; the duty includes a level of personal knowledge of a number of issues. With regard to "notarization of documents," the duty of competency in our view requires lawyers to know the important differences between civil law and common law notaries; the fact that notarization by a civil law notary may be time consuming, expensive, and even unnecessary for many US transactions; and practical ways to deal with notarization problems in inbound and outbound transactions.

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[33] *See The Florida Civil-Law Notary: A Practical New Tool For Doing Business With Latin America*, note 21 above, at 2.

[34] The example is readapted from *The Florida Civil-Law Notary: A Practical New Tool For Doing Business With Latin America*, note 21 above, at 1.

Ethics Watch

The Duty of Competency in International Transactions: Part I

By Nathan M. Crystal

Game players are familiar with the increasing degree of difficulty and skill required as the player moves from lower to higher levels. A similar increase in complexity occurs when a lawyer moves from an intrastate or an interstate matter to an international level, whether litigation or transactional.

Rule 1.1 of the Rules of Professional Conduct requires lawyers to provide competent representation to their clients and defines that obligation as follows: "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The definition encompasses three aspects of competency: knowledge of the law, skill in applying the law, and responsibility in doing so both thoroughly and promptly.

When the matter becomes international, it almost always involves not only the law of another country, but law based on fundamentally different conceptions from the lawyer's home jurisdiction. Countries with civil law systems frequently have rules that are diametrically opposed to the rules familiar to common law lawyers. For example, in the U.S. it would be a breach of the duty of competency for a lawyer to fail to prepare a major witness for a deposition or trial, but in other countries, even the U.K., such preparation is usually prohibited.

In international settings cultural differences may hinder the conclusion of matters or increase risk. My partner, an accomplished international lawyer, has described to me situations that illustrate the problems. In negotiations with a company from an Asian country, when her team would raise an issue, the counterparty would appear to express its understanding and agreement on the point, but then continued the same disputed provision in subsequent drafts. The culture of that country frowned on "confrontational" negotiation. In negotiations with a party from another country, a different problem developed. A former colleague of hers is now in-house counsel for a company located in a former USSR country. He told her that in that country signed contracts were viewed not as obligations, but as opportunities for further negotiation when the counterparty found the provisions of the contract to be unfavorable. A story told to us by another lawyer is both humorous and enlightening. The negotiation involved the sale of a certain product from a foreign company based in the Far East to a U.S. company. The American company suggested that the contract include a maximum failure rate of the product of one percent; this rate was rejected by the foreign counterparty. The American company then made an offer to increase the failure rate to two percent, which was also rejected. The negotiations continued until the Americans reached the level of five percent, which was also rejected. The Americans were extremely frustrated by the negotiations, but they were finally able to conclude the agreement successfully when they learned that the problem was not that the failure level offered by them was too low; the problem was that the counterparty found any failure level inappropriate. They were insulted that the Americans would consider that their product could fail at all.

Given this complexity in international matters, the reaction of the general practitioner may be to say, "I'll just rely on foreign counsel with regard to the international aspects of the transaction." Such reliance is not, however, sufficient to comply with the duty of competency. There are too many cultural, linguistic, and legal differences between countries, coupled with false similarities between jurisdictions to justify a lawyer in relying exclusively on the knowledge of a foreign lawyer. My partner calls this the "Lost in Translation Problem." On the other hand, it is unrealistic to expect a lawyer to have detailed knowledge of the law and practices of other jurisdictions. What is necessary, practical, and consistent with the duty of competency is a general level of personal knowledge, i.e. counsel must be personally aware of certain issues independently from the "indirect" knowledge that derives to the lawyer from association with a local counsel. Only if the lawyer possesses this personal general knowledge is he able to spot issues, to supervise local counsel, to give timely advice to his client, and to overcome the "lost in translation problem."

In this column and the next one I will attempt to identify some of the areas of general personal knowledge that lawyers involved in international matters need to have. These articles deal with the needs of the general practitioner, not the specialist. In areas such as intellectual property, domestic relations, and taxation, there are many international treaties and practices with which a competent practitioner must be familiar. These columns focus on the following five topics: service of documents in international matters, obtaining evidence abroad, notarization of documents, choice of forum and law provisions in contracts, and enforcement of judgments.

1. Service of documents in international matters

The United States is a party to the Convention on the Service

Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of November 15, 1965, commonly called the "Hague Service Convention." The Convention is one of many drafted by the Hague Conference on Private International Law (HCCH). The HCCH maintains an excellent website that contains very useful theoretical and practical information about its various conventions. See *www.hcch.net/index_en.php*. The primary purpose of the Service Convention is "to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time." The Convention establishes procedures for mutual assistance among signatory countries to simplify and expedite the service of documents. Statistical data collected by the HCCH show 66 percent of requests are executed within two months.

The Hague Service Convention applies when four requirements are met: (1) The law of the forum requires that a document be transmitted from one State party to the Convention to be served in another State party; (2) the address of the person to be served is known; (3) the document is a judicial or extrajudicial document; and (4) the document relates to a civil or commercial matter. If the Convention applies, it is the exclusive method of service abroad. See *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 534 n.15 (1987) (where the Court stated that Article 1 of the Service Convention provided a "model exclusivity provision").

The Convention deals with the procedure for transmission of documents abroad, not with substantive requirements. Thus, whether an American court requires a document to be served abroad is a question of American law; if American law does not require service abroad then the Convention need not be used. With regard to service of process in federal court in the U.S., Rule 4(f) of the Federal Rules of Civil Procedure deals with service of individuals in foreign countries and 4(g) deals with service of entities. If the service will be in a country that is a party to the Hague Convention, the Convention must be used. If the country is not a party, then other options must be considered. See Federal Rule 4(f)(2). South Carolina does not have a rule equivalent to Federal Rule 4(f), but does require service on each defendant. Since South Carolina requires service, the Hague Convention becomes mandatory if service will be in a Hague Convention country. If service will not be in a Hague Convention country, then probably service should follow the procedures of the country where service will occur; by using this method the plaintiff increases the likelihood that a judgment obtained in the U.S. will be recognized in the foreign country. The next column discusses the issue of enforcement of judgments obtained either in arbitration or judicial proceedings.

The Convention provides one main method and various alternative methods of service. The main method is through a Central Authority designated by that country in which service will occur. The Convention provides for a model form to be used for service. While failure to use the model form will not necessarily invalidate the service, the plaintiff should make every effort to have service performed with use of the model form to avoid creating uncertainty about the validity of the service.

2. Gathering of evidence abroad

Discovery is a unique feature of American procedure and is almost unknown in civil law countries. In other countries parties are normally obligated to produce only those documents to which they refer in their pleadings. If one party wishes to obtain access to specific documents held by another party, the party must ask the court to order the other party to disclose these specific documents.

Not only is discovery generally unknown in civil law countries, but it is also difficult to obtain discovery when the request is in connection with a U.S. proceeding. The U.S. is a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of March 18, 1970 (Hague Evidence Convention), a treaty to which many civil law countries are parties. Under this Convention evidence can be obtained abroad. However, many civil law countries have used the reservation right under Article 23 of the Convention to limit the scope of their treaty responsibility and to avoid responses to certain requests from abroad. As a result, there are countries, such as France and the U.K., that oppose requests of discovery that they consider to be "fishing expeditions." Other countries, such as Germany and Italy, refuse to execute pre-trial discovery requests altogether.

Many civil law countries, such as France, the U.K., Germany and Italy, have gone even further in their attempt to limit U.S. discovery requests made on their citizens or residents. These countries have enacted statutes (called "blocking statutes") that criminalize the very act of providing information requested in the course of foreign legal proceedings when the request is brought outside of the procedures established by the Hague Evidence Convention.

Besides the blocking statutes, U.S. discovery requests might find a significant hurdle in the privacy laws enacted by many countries, such as the privacy laws passed by members of the European Union pursuant to Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data.

In summary, a U.S. litigant seeking discovery abroad faces material obstacles. The country where discovery is sought may have adopted a reservation under Article 23 of the Hague Evidence Convention preventing discovery of the information. The U.S. Supreme Court has held that the Hague Convention is not the exclusive way for a U.S. litigant to

obtain discovery abroad. See *Societe Nationale Industrielle Aerospatiale v. United States District Court,* 482 U.S. 522 (1987) (holding that the Hague Evidence Convention does not pre-empt the discovery provisions of the Federal Rules of Civil Procedure). Even so a U.S. litigant will still face difficulties obtaining discovery abroad because the person to whom discovery is sought may be forbidden by a foreign blocking statute or privacy law from disclosing the information being sought.

Evidence gathering abroad is an area in which association of foreign counsel who will be familiar with evidence-gathering restrictions in his country is particularly important. However, foreign counsel will often be unfamiliar with American procedure, particularly American discovery rules. With a general knowledge of the difficulties of obtaining evidence in foreign countries, coupled with the specific knowledge of the foreign counsel, the U.S. lawyer should be able to competently serve the needs of his client. ■