Ethics Watch

The Duty of Competency in International Transactions: Part II

By Nathan M. Crystal

This column is the second of two dealing with the duty of competency in international transactions. These columns focus on matters that general practitioners rather than specialists are likely to encounter. The previous column examined the duty of competency in general, service of documents in international transactions, and gathering evidence abroad. This one discusses formalization of documents, choice of forum provisions, and enforcement of judgments. These are only some of the specific topics on which lawyers should have personal general knowledge to comply with their duty of competence.

Formalization of documents

In many legal proceedings and transactional matters in the U.S., a notarized document is necessary or requested by one of the parties. Notarization serves two purposes: the notary obtains identification showing that the person appearing before the notary is in fact who he purports to be, and the notary administers an oath in which the person executing the document states that it is true and correct to the best of that person's knowledge. In federal court it is not necessary to file notarized documents (affidavits); instead, 28 U.S.C. §1746 provides for the use of "declarations," statements made under penalty of perjury, without the need of formal notarization.

When the matter is international, formalization of a document becomes more complex. There are two difficulties. First, the concept of a notary in most civil law countries is quite different from that in the U.S. In civil law countries notaries are public officials, like U.S. notaries, but they are also law-trained, highly respected legal professionals. Compared to the U.S. the number of notaries in other countries is quite low—for example, less than 8,000 in Germany.

Civil law notaries participate in transactions much more than their U.S. counterparts. By law, at a minimum they generally must be present and authenticate property transfers, formation and incorporation of companies, bank loan contracts, donations of assets, drafting of wills, and many commercial transactions.

Civil law notaries have a greater role as public officials than their common law counterparts. Civil law notaries can draft public acts (also called "authentic acts"). In the U.S. notaries generally cannot issue public acts, although there are a few exceptions (Florida, Alabama, and Louisiana). A public act is a document that is drafted entirely by the notary (you can recognize it because it is generally written in the first person). A public act has high probative value of the authorship of the document, of the parties' declarations, and of the other facts that the notary certifies as happening in front of him. In addition, a public act has the enforceability of a judgment, meaning that in case of a breach of an obligation by a party, the other party may start an execution procedure without waiting for a court decision on the breach. Moreover, in a few countries, public acts are the only documents that can be entered into public registries.

Besides issuing public acts, civil law notaries authenticate private acts ("authenticated acts"). An authenticated act is a written private document that is signed by its authors in front of a public official (in this case a notary) who certifies their identities after obtaining proper documentation. While a civil law authenticated act is much the same as a notarized document in the U.S., the participation of civil law notaries makes the document more authoritative. Civil law notaries as public officials are considered custodians of the "public trust" (or "legal certainty" or "authenticity"). As a result, the verification of parties' identities and of powers of attorney is generally lengthier than in the U.S.

In addition, because civil law notaries are also legal professionals, they have the obligation to give legal advice. Their advice must be impartial. Civil law notaries, therefore, do not simply authenticate the signature on a private act, they read the text, explain the legal consequences, and give independent advice.

American lawyers need to be aware that when they ask for a "notarized document" in a transaction, both ambiguity and complexity result: ambiguity because it is unclear whether they are asking for an authentic act or an authenticated act, and complexity because the participation of a civil law notary can be time consuming, much more expensive than in the U.S., and in some cases a serious obstacle to the transaction (for example, when a civil law notary refuses to authenticate a power of attorney for a U.S. transaction that he does not understand). Similarly, if a foreign lawyer asks a U.S. lawyer for a notarized document, the American lawyer needs to be aware of the different conception and role of notaries in the U.S. and clarify what the foreign lawyer needs (for example, he should make sure that the foreign lawyer is not asking for a public document, which is something that a U.S. notary cannot issue.).

Because of the jurisdictional limitations of notaries, a second problem arises in formalization of documents involved in cross-border transactions. In the U.S. notarization of documents in another state is generally accepted provided the notary attaches the notarial seal, but the same is not true when the transaction is international.

Fortunately, there is a widely ratified international treaty, the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (the "Hague Apostille Convention"). Under the convention member countries agree to accept as an official document a public document of another country to which is affixed an apostille. An apostille is a certificate issued by a competent authority of a country. The apostille certifies the authenticity of the signature of the public official who signed the document, the capacity in which the person signed, and where appropriate the identity of the seal or stamp that the document bears. The apostille does not relate to the content of the underlying document or of the other signatures contained in the document (for example, if a notary notarizes the signature on a power of attorney, the apostille certifies the notary's signature, not the signature of the grantor of the power). Among the types of documents that can be apostilled are the following: documents emanating from an authority or official connected with a court or tribunal of the State; administrative documents; notarial acts; and official certificates that are placed on documents signed by persons in their private capacity.

To be eligible for an apostille, a document must first be issued or certified by an officer recognized by the competent authority of the country that will issue the apostille. Each signatory country designates the competent authority for various types of documents. For example, in the U.S. public documents issued by officials of U.S. states are generally apostilled by the secretaries of state of the various states.

It is also important that lawyers understand the limited significance of an apostille. The apostille will state that "This Apostille only certifies the signature, the capacity of the signer and the seal or stamp it bears. It does not certify the content of the document for which it was issued." Therefore, the existence of an apostille does not preclude the possibility that the document is a fraud or part of a fraudulent transaction.

Choice of forum and enforcement of judgments

Choice of forum can occur in three ways: in contractual matters by agreement of the parties in advance of any dispute (so called "forum selection clauses"), regardless of the type of matter by agreement of the parties after a dispute has arisen, or by one of the parties selecting a forum for the litigation among those fora that have jurisdiction of the parties and the matter. The issues of choice of forum and enforcement of judgments are intertwined because in evaluating a choice of forum, a party and its lawyers must consider whether a judgment of the chosen forum will be enforceable in the jurisdiction in which the defendant has assets. The attitude of courts toward contractual choice of forum clauses varies from country to country. See Nathan M. Crystal & Francesca Giannoni-Crystal, *Enforceability of Forum Selection Clauses: A "Gallant Knight" Still Seeking Eldorado*, 8 S.C. J. Int'l. L. & Bus 203 (2012).

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There is no general treaty for enforcement among nations of judicial decisions; enforcement is simply a matter of comity. However, two treaties to which the United States is a party have a major impact on choice of forum because these treaties provide for enforcement of judgments rendered by tribunals in one country that is a party to the treaty (and in some cases judgments of tribunals in countries that are not parties to the convention) in another country that is party to the treaty.

The first and oldest of these treaties is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (commonly called the "New York Convention"). Almost 150 countries are parties to the Convention. The Convention is the foundation for international arbitration because, with limited exceptions, it requires member countries to give effect to arbitration agreements and to enforce awards rendered in other countries by arbitration panels.

The New York Convention has been a powerful force behind the development of international arbitration because the Convention provides an enormous benefit to the parties of arbitration agreements—confidence that an arbitration award will be enforced in any country that is a party to the Convention. In addition, arbitration offers other advantages: the parties can choose the arbitrators, tailor the procedures to their needs, and provide for confidentiality of the proceeding. Arbitration, however, presents some disadvantages, such as cost (in some countries the arbitrators' fees are much higher than court costs), lack of reported decisions, and limited possibility of appeal.) Many international commercial contracts now provide for arbitration of any dispute arising from the agreement. Even if a contract does not provide for arbitration, the parties may, after a dispute arises, agree to have the dispute resolved by arbitration. The New York Convention has spawned the growth of a number of international organizations that provide arbitration procedures and a supply of qualified arbitrators. In advising clients about arbitration of international disputes, lawyers need to become familiar with the advantages, disadvantages, and costs of various providers. See *Institutional v. "ad hoc" arbitration*, www.out-law.com/en/topics/projects--construction/international-arbitration/institutional-vs-ad-hoc-arbitration/.

Provider organizations typically

suggest model clauses that lawyers can incorporate into their contracts choosing the organization to provide arbitration services. *See, e.g.*, the drafting suggestions of the International Centre for Dispute Resolution, available at the Centre's website. Competent drafting, however, requires lawyers to consider modifications, deletions, and additions to such clauses.

In the 1990s the Hague Conference on Private International Law attempted to prepare a convention for the international recognition of court judgments in addition to arbitration awards. However, the project was unsuccessful because consensus could not be achieved on a number of jurisdictional issues. The Conference decided to narrow its work and to develop a product to complement the New York Convention dealing with choice of court agreements. The result was the Hague Convention of 30 June 2005 on Choice of Court Agreements.

The Convention applies to exclusive choice of court agreements in civil or commercial matters, excluding employment, consumer, and certain other contracts. The Convention has three principal provisions. First, the chosen court must hear the case if the agreement complies with the Convention. In particular, the chosen court cannot refuse to hear the case on forum non conveniens grounds. Second, a court other than the chosen court (the "seized" court) must dismiss any proceeding brought before the court unless one of the exceptions to the Convention applies. Third, any judgment rendered by the chosen court must be recognized and enforced in other contracting states unless one of the exceptions established by the Convention applies. To date Mexico is the only country that has ratified the treaty. However, both the European Union and the United States have signed the treaty, and it is anticipated that the treaty will go into force in those countries in the reasonably foreseeable future.

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International matters are a growing part of the practice of law, even for general practitioners. In handling such matters general practitioners do not comply with their duty of competency by simply hiring and relying upon foreign counsel. Too many cultural, linguistic, and legal differences exist between countries to justify an American lawyer in relying exclusively on the knowledge of a foreign lawyer. "Indirect knowledge," i.e. knowledge through a foreign counsel, is insufficient. The American practitioner must be personally aware of certain basic international/foreign issues ("general personal knowledge"). Only if lawyers have such general personal knowledge are they able to spot issues, to supervise local counsel, to plan ahead effectively, to give timely advice to clients, and to avoid crises. These columns have highlighted some but not all of the issues that lawyers may encounter in international transactions (it would be impossible to be exhaustive because the general knowledge that lawyers need depends on their areas of practice) to assist them in complying with their obligation to provide competent representation to their clients in international matters. ■