International Guaranties

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In this age of globalization, many companies domiciled in other countries have created subsidiaries to do business in the United States. Often, those subsidiaries do not have their own financial statements, and sometimes, even if they have separate financial statements, their net worth is insufficient to assure the other party to a transaction that they have the financial where-with-all to pay and perform in accordance with their undertakings in their agreement. Under those circumstances, the other party may request a guaranty from the foreign parent company.

Guaranties by a foreign company, which I refer to in this Article as "foreign guaranties", present special issues of which the drafter would be well advised to be aware. In the typical domestic guaranty, an action under the guaranty may be brought in the domicile of the guarantor, and sometimes in the place of residence of the party benefiting from the guaranty. It is a matter of reviewing the jurisdictional and venue provisions in the applicable state, and determining the rules for service of process. In any case, the action is brought in the United States and any judgment is entitled to full faith and credit in other states in which assets of the guarantor may be located. That may not be the case with international guaranties.

There are four basic problems with international guaranties which should be dealt with in the body of the guaranty itself. The first relates to consent to jurisdiction, the second to service of process, the third to choice of law. The final major issue, and perhaps the most important, is the issue of enforcing any judgment obtained in a United States court in the home country of the guarantor.

Let us assume, for the sake of this article, that the guaranty relates to a lease for premises in Chicago, Illinois, the landlord being an Illinois limited liability company having its principal place of business in Cook County, Illinois, the county where Chicago is located, and the guarantor being a German company. In a diversity action in the Federal District Court for the Northern District of Illinois, the action may be brought where all the plaintiffs or all of the defendants reside. Although the Federal statutes provides for that jurisdiction, and although it is established law that parties cannot, by agreement, confer jurisdiction (as opposed to venue) where it does not otherwise exist, it is helpful to have language in the guaranty agreeing to jurisdiction (as well as venue) if the international company can be properly served with process. Hence the guaranty may contain the following language regarding jurisdiction:

> With respect to any dispute or legal action of any kind arising from the terms of this Guaranty that any party may have, either during the term of this Guaranty or thereafter, it is expressly agreed that such action shall be brought either in the Circuit Court of the State of Illinois in the County of Cook (or in the Federal District Court for the Northern District of Illinois, to the extent such court has jurisdiction thereof), and that such court shall be deemed to be the court of sole and exclusive jurisdiction and venue for the bringing of such action. The foregoing consent to jurisdiction and venue shall not constitute general consent by Guarantor to jurisdiction and venue in the State of Illinois for any purpose except as provided herein and shall not be deemed to confer rights on any other person or entity.

The final sentence affords the guarantor protection against other actions in the chosen jurisdiction by providing, in effect, that the consent to jurisdiction and venue (and service of process) is limited to this guaranty.

The second issue relates to the service of process. Since the process of the Circuit Court of Cook County or the Federal District Court for the Northern District of Illinois does not extend to Germany, provision has to be made for the appointment of someone in the State of Illinois to accept service of process so that the case may be commenced. That can also be dealt with in the guaranty, designating each of the tenant and the Secretary of State of the state where the contract

is to be performed as the agent for the guarantor to accept service of process. In our example, the following language may be suitable for that purpose:

> Guarantor agrees that (a) Tenant and (b) the Secretary of the State of Illinois, shall each hereafter have full authority and be duly empowered to accept service of process on behalf of Guarantor in connection with the enforcement of this Guaranty, and Guarantor hereby appoints Tenant and such Secretary of State as its agents for purposes of acceptance of service of process in connection with the enforcement of this Guaranty, so long as a copy of any such legal proceeding served upon Guarantor through Tenant or the Illinois Secretary of State is promptly furnished to Guarantor by an international courier service at the following address: _____.

Note that the language provides for a copy of the complaint to be sent to the defendant in its home jurisdiction.

The choice of law language is fairly typical:

> It is expressly understood and agreed by Guarantor and Landlord that all matters arising out of this Guaranty, including the validity or any provisions hereof, are to be governed by, interpreted and construed in accordance with the laws of the State of Illinois (without giving regard or effect to any conflicts of law rules or other choice of law rules).

Of course, in each instance, references in the quoted language to Illinois and Cook County are merely illustrative and the appropriate state and county (if appropriate) should be inserted if the reader is using the examples.

The final issue, enforceability of the judgment in the home country of the guarantor, is more problematic. It is unlikely that the drafter of the guaranty knows the law of that country sufficiently to advise the client that if it obtains a judgment against the guarantor in the courts of the United States, it will be able to enforce that judgment in the foreign country without having to bring a totally new action and prove its case again—an expensive and time consuming outcome. Some countries may have laws providing for the enforceability of foreign judgments, provided that they are not obtained in a manner contrary to the public policy of that country.

A way to have some level of comfort with that issue is to require that the guarantor provide an opinion from its attorney in the country where the judgment is proposed to be enforced, stating that it will be enforceable without a new trial on the law and facts. The results disclosed by those opinions can be quite surprising. Some years ago, I represented a landlord who requested a guaranty from a German company. Fortunately we did request such an opinion and were shocked to learn that the taking of pre-trial discovery was against public policy in Germany. Accordingly, if our client had done discovery in connection with its action against the guarantor—a very typical trial preparation tool, it could not have enforced the judgment. I do not know whether the opinion was accurate and I do not know if that continues to be the law in Germany today, but if an action under that guaranty had been required, my client would certainly have not done pre-trial discovery without further investigation of German law.

If the foreign guarantor is unwilling or unable to provide such an opinion, it may be incumbent on the party seeking the guaranty to hire its own attorney in the guarantor's home country, or to seek advice from an American firm with attorneys licensed to practice in that country. Retrying the issues in a foreign country may be very difficult and expensive, and may require the trial to be conducted in a hostile, or at least unfriendly, forum.

Conclusion

If a party to a transaction involving the United States subsidiary of a company domiciled in a foreign country deems it necessary to obtain the guaranty of the parent company to conclude the deal, it is incumbent on that party to seek to assure that the guaranty has real value. That assurance can be accomplished by inserting provisions in the guaranty not usually required in guaranties from United States companies, and also assurances that, under the law of the foreign country, a judgment obtained in the United States court will have the anticipated value when col-

lection on the judgment is sought in that country. After all, a guaranty, even from a very strong company, is no good if the guarantor cannot easily be sued, and a judgment is no good unless it is feasible to collect it.

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