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Five Things to Know About Litigating Outside the U.S.

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The U.S. legal system is a rock star; it's famous around the world for both its virtues and vices. It is simultaneously held up as a beacon for the rule of law, yet derided for its flaws and excesses. But how much do you know about other legal systems around the world? What would you do if suddenly faced with a lawsuit in Brazil, Italy, Nigeria or South Korea? In the emerging global economy, this possibility is becoming increasingly more likely. Here are five things you should know about litigating outside the United States.

1. BLOCKING STATUTES

Imagine your client has been sued in the United Kingdom in a commercial dispute and one of the key witnesses is an employee in France. You might want to pick up the phone and interview the employee. But virtually identical conduct has resulted in the criminal conviction of a lawyer for violating France's "blocking statute," which prohibits gathering information and evidence in France for use in foreign judicial proceedings. Several other countries on nearly every continent have similar laws. Do not assume you can interview witnesses and gather evidence without first understanding local laws. And remember, these are often criminal provisions, carrying penalties that include fines and imprisonment.

2. FRONT LOADING

Now, imagine you have been contacted by your client about a new class action in Argentina. The company only has five days to file its answer, which is not uncommon in civil law systems. What's worse, the answer needs to contain the company's full defense, including the evidence the company will rely on and the identity of the witnesses to be called. Two practical things can be done to prepare for a situation like this. First, develop a model defense for

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reasonably anticipated claims. Second, monitor court dockets in jurisdictions where claims are expected; it might give you a few more days of preparation before the claim is actually served.

3. LOST IN TRANSLATION

Large multinational companies usually conduct their business, including legal work, in English, but they are often involved in legal matters conducted in local languages. Don't underestimate the importance of translations during the work process. This not only means arranging for a fast, reliable, and accurate translation service, but also accounting for sufficient translation time in all steps of the drafting process.

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4. (EX) PARTE TIME

Ask any American lawyer if they are allowed to have ex parte communications with the judge presiding over a pending matter and you will get a resounding "no". The Rules of Professional Conduct and the Code of Judicial Conduct generally prohibit such communications. Similar reactions are to be expected from British and most European lawyers. You might be surprised to learn that in many countries, especially in Latin America, it is completely legal and customary to conduct ex parte meetings with the presiding judge(s) about a pending matter. This practice has been criticized by some for facilitating corruption and has been identified as a possible area for reform. As with many things, it is the abuse of the practice, rather than the practice itself, that creates the problem. When handled properly, it can be an effective and ethical way to present your side of the case to the judge. If you are inclined not to engage in this practice, keep in mind that your opposing counsel might.

5. NEUTRAL EXPERTS

In the same way we might look at ex parte communications with judges with skepticism, foreign lawyers may question appointing your own witnesses to provide expert testimony. Most jurisdictions around the world do not allow party experts. Instead, the court appoints its own expert, often from an approved list. In some situations, the parties may still use their own paid consultants to interact with the court-appointed expert or to express their views about the issues under consideration. The court usually places much greater weight on the opinion of the court-appointed expert. This is not a perfect system, as court-appointed experts often lack the experience and expertise needed on a given topic, something which is often reflected in the scope and depth of their analysis, and sometimes even the accuracy of their opinions. While in some jurisdictions it is possible to request that the court-appointed expert be replaced (if, for example, they have a connection to one of the parties, are otherwise biased, or lack the appropriate expertise), in practice this is extremely difficult to achieve.

CONCLUSION

These are just a few salient differences between legal procedures in different jurisdictions. Of course, many more exist, highlighting the fact that one cannot assume foreign litigation will proceed like it does in the U.S. •

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