

Focus

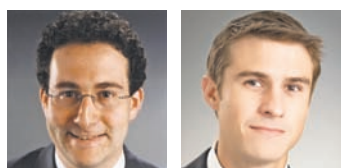
CROSS BORDER LAW



SAULHERRERA / ISTOCKPHOTO.COM

Navigating multiple jurisdictions

A well-written agreement can ensure international injunctive relief



Joshua Feinstein
Jeffrey Fiut

There is no more powerful tool for enforcing a contract than an injunction. An injunction that avoids or promptly cures a breach is of great value precisely because it prevents harm for which money damages may be inadequate. Instead of enduring years of uncertainty pursuing a money judgment, the wronged party receives the relief it requires while the problem can still be fixed.

Cross-border transactions, however, pose special problems when injunctive relief is sought. Sub-

stantive and procedural differences between legal systems may complicate matters. Moreover, it may be necessary to obtain relief in multiple jurisdictions simultaneously, or in a jurisdiction that cannot even be readily foreseen at the time of contracting.

Imagine, for example, a stockholders agreement between a U.S. entity and a Canadian entity concerning shares in a Mexican joint venture. The agreement forbids the shareholders from transferring control over their shares to third parties without consent. The Italian parent of the U.S. entity, however, announces its plan to sell the U.S. entity to a French conglomerate, effectively transferring control of the U.S. entity's shares in the Mexican joint venture. The Canadian entity wants to stop the deal, which is scheduled to close in Paris. Where should it sue? Which law

“

Cross-border transactions...pose special problems when injunctive relief is sought. Substantive and procedural differences between legal systems may complicate matters.

Joshua Feinstein & Jeffrey Fiut
Hodgson Russ

will govern? What must it prove?

Fortunately, a few well-chosen contract terms can greatly enhance the likelihood of obtaining injunctive relief in the event a cross-border agreement is breached. Chief among these is a clause requiring mandatory, binding arbitration should a dispute arise.

About 148 countries are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards—also known as the “New York Convention,” under which a court will generally recognize and enforce foreign arbitration awards unless one of the narrow exceptions in article V of the convention applies. So, the convention permits the quick leveraging of an arbitration award obtained in a single proceeding across multiple jurisdictions.

The rules of many arbitration societies expressly allow interim

awards on an expedited basis at the outset of the proceedings in the same manner that a preliminary injunction or temporary restraining order might be obtained at the outset of a judicial proceeding (For example, see UNCITRAL Arbitration Rules, Article 26; American Arbitration Association (“AAA”) International Dispute Resolution Procedures, Article 21; AAA Commercial Arbitration Rules and Mediation Procedures, R-34). So, the contract should specify arbitration before a specific arbitration society whose rules provide for interim relief.

Your agreement should also include a choice of law provision, and identify the place of arbitration and the language of the proceedings. If these terms are not spelled out in the contract, the parties may waste valuable time

Rules, Page 15

Focus CROSS BORDER LAW

Rules: Good clauses avoid harm

Continued from page 13

wrangling over procedural issues, thus defeating the value of an injunction.

In addition, your agreement should contain terms that may be necessary under the agreed-upon governing law to enhance the availability of both interim and permanent injunctive relief.

For example, under U.S. law, three terms will greatly enhance the available of injunctive relief. The first should state that certain breaches cannot be remedied by monetary damages. This term will help you prove that the breach caused irreparable harm—a key requirement for obtaining preliminary injunctive relief (*Global Telesystems, Inc. v. KPNQwest, N.V.*, 151 F. Supp. 2d 478, 482-83 (S.D.N.Y. 2001)). A second valuable term is one providing that injunctive relief is the appropriate remedy in the event of certain breaches—i.e. a breach of a confidentiality clause or a non-compete provision. The tribunal may view this term as an admission that the breach caused

irreparable harm (*Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 69 (2d Cir. 1999)). The third term is a waiver of the bond requirement for certain specified breaches, which will not only save money, but will also prevent the delay that accompanies posting a bond.

Lastly, regardless of which law applies, the contract should permit the arbitration tribunal to grant interim injunctive relief. Even where the arbitration rules permit interim relief, an express contract term giving the tribunal this authority will bolster its willingness to act.

In many instances, obtaining an interim award from an arbitration panel will, by itself, be sufficient to obtain the breaching party's compliance. If the latter does not comply, it risks angering the tribunal, which presumably has retained jurisdiction pending a final award. But you may still seek judicial confirmation in whichever jurisdictions you deem necessary. As we have seen, the New York Convention is designed to permit ready con-

firmation and enforcement of arbitral awards internationally. In the U.S., courts have also held that interim awards can be confirmed and enforced in the same manner as final arbitral awards (*Publicis Commc'n v. True North Commc'ns Inc.*, 206 F.3d 725 (7th Cir. 2000), applying New York Convention; *Southern Seas Navigation Ltd. v. Petroleos Mexicanos*, 606 F. Supp. 692 (S.D.N.Y. 1985), applying U.S. Federal Arbitration Act).

Arbitration provides a quick, effective, and cost-effective forum for resolving cross-border business disputes. Including a few well-chosen clauses in your next contract will further enhance the effectiveness of arbitration by enhancing your ability to obtain prompt injunctive relief, thus avoiding harm before it is too late.

Joshua Feinstein, a partner at Hodgson Russ, handles U.S. legal aspects of business litigation matters for a wide range of Canadian clients. Jeffrey Fiut is also a litigator at Hodgson Russ.

THE LAWYERS WEEKLY

NEXT WEEK IN FOCUS:

- ↘ Labour & Employment
- ↘ Immigration



AT JAMS, YOU FIND EXPERIENCE. KNOWLEDGE. FAIRNESS. SERVICE.

AND AN UNSURPASSED PANEL OF NEUTRALS.



GORDON E. KAISER, ESQ.



HARVEY J. KIRSH, ESQ.



HON. J. EDGAR SEXTON, Q.C.



HON. KONRAD VON FINCKENSTEIN, Q.C.

Founded in 1979, JAMS is the world's largest private provider of alternative dispute resolution services. Our prestigious panel of nearly 300 mediators and arbitrators is supported by highly experienced case managers. We focus on resolving complex, multi-party, business/commercial cases—including cross-border disputes—in which the choice of neutral is critical. We handle an average of 10,000 matters per year worldwide. Our spacious facility in the TD North Tower was designed with your privacy and technology needs in mind and includes nine conference and caucus rooms, a client business centre, and coffee bars.

For more information or to schedule a case, please contact Business Manager Bob Bhalla at 416.861.1084 or bbhalla@jamsadr.com.

JAMS TORONTO RESOLUTION CENTRE
77 King St. West | Suite 2020 | Toronto, Ontario M5K 1A1 | www.jamsadr.com

THE RESOLUTION EXPERTS

