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Best Chances for Exporters to Europe to Get Paid under European Jurisdictions

International trade is growing every day. Globalization makes it easy to export products to other countries, while treaties between nations are facilitating trade and solving customs issues. The European Union (EU) is in the process of harmonizing legal remedies for pursuing debts in court and out of court. It is also providing rules for all member states to accelerate payments as in, for example, the late payment directive of Feb. 16, 2011.

The key issue for a seller of goods is making sure that it will be paid in due course. Handling such an issue for a seller is rather easy when it is selling on its domestic market, since it is familiar with the legal and business environment. However, when a seller is exporting goods, this is another story, as it has to navigate in an unfamiliar environment, often in a foreign language, with different currencies and business practices, pitfalls, etc. This may prove to be quite challenging for an exporter.

That being said, selling goods to Europe should not deter exporters, especially U.S. exporters, as there is a sophisticated environment in Europe with legal systems and business practices that are well-established and efficient. In fact, debt collection in Europe for American exporters is probably more efficient and cheaper than it would be to pursue a claim in the U.S. One reason for

after an exchange of pleadings: one oral hearing in court and, in some situations, the taking of evidence on the relevant issues of a case.

There is basically no discovery. This means that in complicated cases, there will not be a large number of lawyers paid by the hour to look through all the emails and documents of the party that has been sued.



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this difference is the recovery of costs in Europe. This means that the winning party in a legal dispute can recover the court and lawyers' costs from the losing party; this can rise to 100% of the fees and costs, which are often regulated by a special law. In some jurisdictions, such as in France, at least a share of the fees can be recovered. In the U.S., the plaintiff basically has to pay its own costs, even if the plaintiff wins 100%.

The procedural rules in court are also different. In Europe, a court case is guided by the judge, not by the lawyers. The judge sorts out, on the basis of the pleadings of the parties, the relevant issues of a case. Only on these relevant issues will the court order the taking of evidence. As a general rule, European cases are decided

Often, U.S. exporters are very careful in pursuing claims in Europe because they fear the costs. There is no reason to do so because if the exporter's claim is justified, the exporter recovers lawyers' fees and court fees and gets default interest of a minimum 8% per year over the reference rate of the European Central Bank (ECB).

Some key points must nevertheless be kept in mind in order to have the best chances to get paid under European jurisdictions. EuroCollectNet Lawyers (ECN), an international association of debt-collection attorneys, has published two books addressing those issues: *Outlines of Debt Collection in Europe* and *Credit Management—Securities in Europe*. These books may be downloaded for free on the ECN website at www.eurocollectnet.com (see the "Publications" section of the website).

Some of the salient issues in the field for exporters include the following:

Proper Backup Documentation

The U.S. exporter can deal with these cases without an American lawyer, thus saving money. The credit management team can deal directly with the cases, as they are easy to handle. Experienced European lawyers who deal with business-to-business (B2B) cases can be found in directories such as *American Lawyers Quarterly* or *General Bar*, or they may be found on the website of the same directories or in a number of international lawyer networks. The newest access is www.networkworldwide.com, a list of lawyer's networks worldwide. It has been set up by the Association of International Law Firm Networks. There are three groups: international networks, regional networks and specialty networks on fields of law, including tax law, insurance law, labor law and, for the credit manager, the B2B debt collection. It goes without saying that all the lawyers contacted via these sources speak fluent English and no translation is needed.

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The lawyer contacted will generally ask for the following documents exporters need to vindicate their rights in court in Europe: a signed contract, purchase order, acknowledgement of purchase order, delivery receipts, invoices, and agreed (signed) terms and conditions. In the majority of European countries, it is not necessary to translate these documents as long as they are in English. There are exceptions, however, which can be verified with the lawyer in advance.

Statute of Limitations

Exporters should be aware that there is no unified system in Europe; it may vary from one jurisdiction to another. For example, the statute of limitations for B2B claims is three years in Germany and five years in France. It also makes no sense for credit managers to wait on an unpaid invoice longer than six months. The recommendation is to start the case in Europe 30 days after the due date at the latest with the local lawyer chosen. Further delay only causes additional problems.

Statutory Interest Rate in Absence of Contractual Provisions

Within the EU, there exists a statutory interest rate in the absence of contractual provisions that is applicable and which is based on points above the ECB interest rate for main refinancing operations. Here again, it varies from one country to another. As a rule of thumb, a minimum of 8% and up to 10% in France, above the base rate, may be factored into the cost.

Out-of-Court Collection

Typically, collection starts out of court with a dunning letter. The exporter should try with a maximum of two written reminders to collect the outstanding amount directly. Every further reminder means a loss of time. After this point, the issue should go to the lawyer, who will write another dunning letter with a short deadline. In some countries, it's even pos-

sible to start directly in court without a dunning letter; other countries need the reminder of a local lawyer for the start of the court case. A power of attorney is needed in some countries while in others it is not required. Some countries ask for documentation of the claim, while in others the claim can be raised without any further documents. It should be stressed that more than one dunning letter by the lawyer is not advisable. If the debtor does not react, the case should immediately go to court, as it will not improve with age.

Credit managers may question why they should employ a lawyer and not simply give the case to the local debt collection agency. The answer is that if the case goes to court, the creditor has to not only pay the lawyer and the court costs, but also the debt collection agency, thus increasing global collection costs. Also, exporting normally deals with larger claims, so the individual treatment of the case by the lawyer may accelerate the collection process.

In case of liquidity problems, it makes sense to negotiate out of court an amicable settlement for payment in installments. In Europe this can be secured, with the consent of the debtor, in the majority of the states by a notarial statement of debt, which is equal to a judgment and immediately enforceable. If the debtor does not fulfill the payment plan, one can immediately start the enforcement and does not need a judgment. Because the debtor knows this, the obligation will be fulfilled with all possible efforts.

Court Actions in Europe

A power of attorney in favor of the lawyer is not always necessary to litigate in Europe.

Quite often, payment can be claimed in court in a foreign currency (e.g., USD) and there is sometimes no need to elect domicile before the court or post a bond in order to litigate. It should be noted that translation of documents in a foreign language may be necessary.

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Court, bailiff and lawyer's costs vary by country. A significant part of such costs shall be borne by the losing party, sometimes 100%. Variation exists among costs by country in that the costs for courts and lawyers are very different in the various European countries. For example, take the court fee for a European Payment Order in various member states. Based on a value of 10,000 euro, Austria would charge 707 euro, Belgium would charge 100 euro, Bulgaria 2%, Cyprus 48 euro, England 455 British pounds, France 37.07 euro, Germany 120 euro and Luxembourg 0. It makes sense for credit management to think about the country in which to pursue claims. The exporter can influence that because a jurisdiction and applicable law can be chosen by the parties. Another idea is to concentrate all these claims in a Shared Service Centre by

assignment to pursue claims in the same court, even if the debtors are located in 10 or 15 different European countries. By doing so, credit management knows in advance the exact costs of a case regarding courts and lawyers.

Obtaining a money judgment in court in Europe may vary from weeks to months, depending on the type of proceeding to be used. Ex-parte orders (i.e., in the absence of debtor) or judgment given in summary proceedings can be a matter of a few weeks, sometimes days.

Witnesses in court are not as frequent as in the U.S., and some jurisdictions, based on the civil law system like in Spain and France, may ground their decisions on written affidavits, without resorting to any hearing of witnesses.

Enforcement of Court Judgments

Judgments may be enforced on all the debtor's assets (save some exceptions regarding individuals, states, etc.). Usually, enforcement is conducted either by officers of the court or enforcement officers like bailiffs.

If the judgment is given by a court in the EU, it need not be domesticated for being enforced in another EU country, hence this is an expedited process. So the situation is that within the EU (excepting Denmark) all judgments—disputed and undisputed—are directly enforceable. There is no recognition procedure. The court in Croatia, for example, declares its own judgment as enforceable within the complete EU. This gives the creditor in Croatia the chance to attach, in a trade fair in Amsterdam or Frankfurt, the complete equipment of the exhibiting debtor. Creditors can also freeze the accounts of the debtor in other European countries.

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Judgments issued outside EU countries, except in Switzerland, Iceland and Norway (and vice versa), benefit from a light process for being domesticated under the Lugano convention of Oct. 30, 2007, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Judgments given outside these territories, such as U.S. judgments, are not directly enforceable in Europe. They must be checked on a case-by-case basis, depending on the country under consideration and whether a treaty exists between the country in which the judgment was issued and the country in which it needs to be domesticated. The test for recognition may vary from one country to another. For example, in Germany there is a condition of reciprocity, which does not exist in France, for domesticating a foreign judgment.

Sale of Claim

Generally, it is not difficult to pursue claims in Europe. This does not mean the EU alone, but also many other European countries such as Russia, Macedonia or Georgia. To avoid all risks, there is still a possibility of selling the claim. For B2B claims, there are a number of interested companies and platforms available.

A different model, which generally leads to a higher purchase price, has been developed by this article's authors. In this model the buyer, Rhine-Bridge UG, may check the claim, buy it and collect it via its internal process, similar to those described above. There is an application also to "sleeping assets," such as written-off claims. Under the circumstance of a written-off claim, the creditor may benefit only by selling the claim to Rhine-Bridge UG. ■

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