collective wisdom®

SZABO ASSOCIATES, INC. VOLUME 14, ISSUE 3, SEPTEMBER 30, 1999

**Dear Friends:**

As technology brings countries and cultures closer together by facilitating communication and trade, more and more of our clients are conducting business internationally. Of course, just as in the domestic business arena, not all foreign debtors pay! This issue's feature article, written by Steven A. Frieze, a Szabo attorney and partner in the London firm of Brooke North, addresses some important issues regarding foreign claims. We would like to thank Mr. Frieze for his valuable contribution to our newsletter.

On August 30th, Szabo Associates recognized employees nominated for outstanding achievement at our annual Quality Awards Party, which is part of our ongoing Total Quality Management Program. Congratulations to all nominees for a job well done! And speaking of achievements, Szabo Cable Division Manager Robbie Knight has had a busy schedule the last few months conducting Credit and Collections workshops for Time Warner Cable Adcast, Adelphia Media Partners, and Cable One.

We look forward to attending the Advertising Media Credit Executives Association convention in Cleveland on October 16th through 21st, and we hope to see many of you there.

Have a wonderful fall season!

Best wishes,

Pete Szabo, President
Szabo Associates, Inc.

# Foreign Claims ...
## How and Where Do You Sue?

*We wish to thank Steven A. Frieze, a Szabo attorney at law, for contributing the following article. Mr. Frieze obtained his law degree from Trinity College, Oxford in 1968 and was admitted as a solicitor of the Supreme Court of England and Wales in 1971. He became a partner in the firm of Brooke North in 1976 and has specialized in debt recovery litigation and insolvency for most of his professional life. He has written a number of books on civil court procedure and bankruptcy matters and is currently the editor of "Insolvency Intelligence," a journal used by lawyers and bankruptcy trustees. He served as a part-time District Judge for 12 years until 1994. He has been a member of the Commercial Law League of America since 1985 and, as a result of his connection with U.S. lawyers and collection agencies, now handles a large volume of claims in England for U.S. and other claimants.*

A foreign debtor refuses to pay. You are thinking about filing a claim against the debtor. Before you proceed, ask yourself why you are in this situation and what you can do to avoid it in the future. It is bad enough having a debt owed you when the debtor is in your home state or at least in your own country, but there are obviously more difficulties in obtaining payment from a foreign debtor.

So what can you do to avoid such a situation? The best method of payment is, of course, payment in advance, which is not always possible. Wherever possible, avoid foreign sales on "open account." Letters of credit are used less frequently now than they used to be, but they are still a perfectly safe way of ensuring that you will receive payment for services sold to a foreign customer. Include in any contract with a foreign debtor a clause stating that any dispute will be dealt with exclusively by the courts of a particular state within the U.S. Please note, however, that while such jurisdiction clauses have their advantages, they may not give you the "home court" advantage that you expect.

Any judgment obtained as a result of legal action taken against a foreign debtor in the U.S. will not be easily enforced in another country. No U.S. judgments are enforceable in any European countries without starting a fresh legal action. In such action, it is not necessary to prove the case all over again, but it is necessary to show that the U.S. court did have jurisdiction over the dispute. The foreign court applies its own rules when deciding if the U.S. court had jurisdiction in the first place. If the foreign court decides that under its rules it would not have exercised jurisdiction over this case, then the judgment will be totally unenforceable and it will be necessary to start again from scratch.

Furthermore, some countries protect their nationals very assiduously. For example, if a Frenchman is made subject to proceedings in a foreign country, any judgment obtained against him by default will not be enforceable against him in France. Accordingly, a Frenchman can legitimately ignore proceedings taken against him in the U.S. since he knows that any judgment obtained will not be enforceable against him in France.

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# *Foreign Claims —*

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On the positive side, it is unfair to say that in most countries judges tend to take the side of their countryman and discriminate against a foreigner. In civil matters, the judiciary worldwide (with certain notable exceptions) can be expected to be impartial.

All this means is that you, a U.S. creditor, more often than not must litigate against a foreign debtor in that debtor's country, and while there will be inevitable problems arising from differences in culture and attitudes about litigation, you can ultimately get a fair trial.

Here are just a few things to bear in mind when if you find yourself pursuing litigation in a foreign country:

1. It is highly desirable to find a lawyer who can communicate with you in English. It is both time consuming and expensive to have all communications to and from your own lawyer translated. Furthermore, much is lost in translation, and you cannot "read between the lines" if you are not communicating directly. It also means that you cannot speak to the lawyer since he may not be able to understand you or vice versa. Nowadays there are lawyers in most countries who can communicate very efficiently in English, and it should not be too difficult to find someone suitable to deal with your case. It may be necessary for documents relating to the case to be translated into the foreign language, but it will probably not be necessary to translate every single document (order, invoice and correspondence) as a preliminary step to litigating in that country. Most countries require no more than an assertion that you are entitled to payment because you have supplied services and have not been paid for them. Only if the debtor seeks to defend the case will it be necessary to go any further. While defenses are sometimes used to "buy time," most cases do not end up in court and so you do not have to prove your case to your own lawyer before legal action commences. Assuming that you are confident in the strength of your own case, wait until some genuine dispute is raised before going to that trouble. Do not be afraid to pick up the phone and discuss the matter with your lawyer. Remember that there are time differences between the U.S. and other parts of the world, and it may be necessary for you to make a call or receive one out of normal office hours.

2. A foreign lawyer may require a Power of Attorney from you in order for him to act on your behalf. Do not be afraid of this. It does not mean that the lawyer is given carte blanche to handle your case in any way that he wants, and in particular, to settle the case without reference back to you. The lawyer is still acting on your behalf and must act in accordance with your instructions. First, make sure that the lawyer knows what your instructions are, and get confirmation in writing. If you have any doubt regarding the integrity of your lawyer, get another one. Do not give the lawyer too much leeway. Doing so may tempt him to obtain a settlement at the lower end of your range rather than to go for more—just because it is easier to settle at a lower figure.

3. Many countries operate legal systems under which the loser is responsible for the winner's legal fees and expenses. In some cases, the amounts payable are fixed by reference to a scale or tariff. In other cases, the amounts payable are unlimited. Accordingly, if a U.S. creditor gets involved in litigation abroad and is unsuccessful, he may find that, in addition to failing to recover the debt, he has to meet substantial legal fees and expenses. Likewise, the foreign debtor will know that if he loses the case, then he will have to pay not only the debt owing and his own legal fees and expenses but also the legal fees and expenses of the winning party, the U.S. claimant. In some countries with such costs rules, it may be necessary for the U.S. claimant litigating abroad to put up a security deposit for the likely amount of legal fees and expenses that he would have to pay if unsuccessful, and this can act as a deterrent to bringing action abroad. Someone against whom a legal action is brought is not obliged to give security for costs—only the claimant is required to do so, and in many systems it is only a foreign claimant or a corporation that can be demonstrated to be in financial difficulties that will be required to give security for costs. This is a form of discrimination against the foreign claimant. Nonetheless, the foreign court will look at the case and see how strong it is before deciding whether or not the claimant bringing the action should be required to put up security for the legal fees and expenses of the other party. The security can be in the form of cash or a bond.

Even in those countries which have a rule that the loser pays the winner's legal fees, it does not mean that the winner recovers <u>all</u> his legal costs. In England, for example, it is usual to recover something between 66% and 75% of legal fees and expenses which the lawyer charges his client (assuming the case is not being pursued on a contingency fee basis).

4. In some jurisdictions, it is not necessary to convert the claim into the currency of the country concerned. In other words, it is possible to bring a claim in U.S. dollars. This has the advantage of protecting the U.S. claimant from fluctuations in the exchange rate and is of particular advantage in coun-

tries whose currencies, because of inflation and other factors, regularly fall in value against the strong foreign currencies such as the dollar, and where a substantial delay in obtaining a judgment could result in a dramatic decrease in the value of your claim.

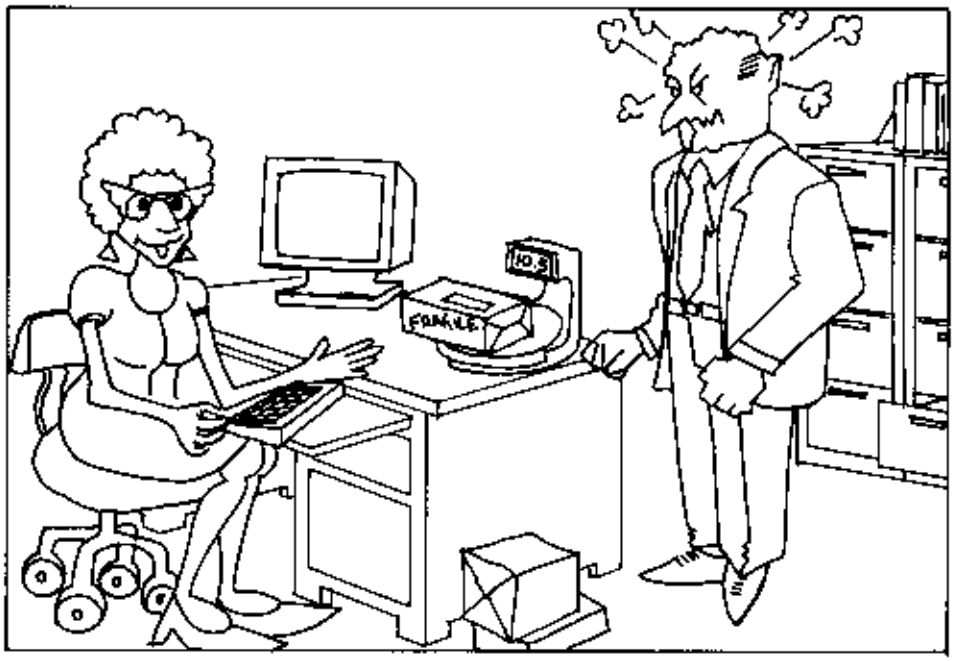
5. Even if the Terms and Conditions of Business do not entitle the claimant to interest on his outstanding debt, many countries allow a claimant to automatically claim interest on the outstanding debt from the date the debt became overdue. In England, the rate of interest currently allowed on such debts is 8% per annum. The award of interest is at the discretion of the judge but almost invariably is given provided that the claimant can show that he has not acted with undue delay. The recovery of interest (in addition to the debt itself) is a useful contribution towards the cost of litigating.

6. Many foreign lawyers will not act on a contingency fee basis. This is because they are not permitted to do so by the rules of their own Bar Association or because they are simply unwilling to do so. Accordingly, it is necessary in those countries for you to be responsible for your own lawyer's fees—usually on an hourly rate basis but possibly on a fixed fee basis—whatever the outcome of the case. Instructing a lawyer on an hourly rate basis is a little like writing a blank check. You have no idea what the ultimate cost is going to be. If it starts getting very expensive, you can, of course, pull out of the case, but you will then be liable for the fees and expenses of your own lawyer up to that point and possibly also for the fees and expenses of the debtor's lawyer.

Something akin to a contingency fee arrangement is now permissible in England. Known as a Conditional Fee Agreement, the arrangement allows the lawyer to recover his fees from his client only if he is successful. If successful, he then would expect to receive an additional payment—up to as much as 100% more—to reflect the risk that he has taken. Such arrangements do not normally cover the expenses incurred in litigation—such as court costs, experts' fees, travelling expenses, etc.—but this is a useful alternative to the simple hourly rate basis. Another alternative is to agree upon fixed fees for each stage of the case. Under such an agreement, you would know exactly how much the case will cost you up to any given point.

7. Whereas deposition hearings are very common in defended cases in the U.S., they are hardly ever used in other jurisdictions, and it may never be necessary for witnesses in support of a claim to have to attend court and give evidence orally. Accordingly, if your claim is relatively small, you need not fear that the time and expense of having witnesses attend a deposition and give evidence at the trial will be out of proportion to the amount of your claim. In some countries and in connection with small claims, evidence can be given by way of statement signed and sworn to be true and no one need physically attend the court at all.

There are as many different systems as there are countries in the world, and while the information in this article is hoped to be of general assistance, specific reference to a lawyer in whichever country is involved is always necessary. There are lawyers in most countries who not only can communicate with their U.S. clients in English but also have sufficient understanding of the U.S. system to be able to explain to their clients the differences between their own system and that of the U.S. Agencies such as Szabo have such contacts all over the world. Even if they are unable to collect a debt for you, they will know to whom to refer your matter to get the best results possible. ♦




"I'LL BE HAPPY TO SEND MR. SMYTHE IN LONDON THE 500 POUNDS WE OWE. I'M JUST WAITING FOR YOU TO TELL ME WHAT I'M SUPPOSE TO SEND HIM 500 POUNDS OF!"

# The Szabo Difference:
# Keeping Up with the World

There are still some companies passing up international business because they don't feel comfortable with unfamiliar credit customs and regulations.

Sometimes, caution is a wise policy. Sometimes, it's a waste of a perfectly good sale. What you need is a credit partner to help you decide which is which.

What you need is Szabo Associates. We don't know of any other collection service that does more to keep in touch with the world of international business. We have over a quarter century of experience collecting past-due business accounts, much of it in the international arena. We know the special credit customs and regulations in dozens of countries where our U.S. clients are doing a very profitable business.

But experience isn't everything in today's international markets. You have to keep up with the trends. International business is changing daily. That's no more apparent than in Europe, with the establishment of the European Union. Every country in the EU is in a gradual process of adjusting its business regulations to conform with its neighbors. That means significant changes in credit and collections practices, often in small and unpublicized measures.

At Szabo Associates, our international representatives make it their job to keep up with these changes. We keep informed on the latest currency exchange rates, political considerations, and competitive practices. We have a large data base of international advertisers and ad agencies, based on our own experiences over the years; it's one of the most comprehensive we know of. And we work with legal experts in almost every country where you're likely to do business.

But while we're very aware of the special aspects of dealing with international debtors, our fundamental techniques are the same ones that have proven so successful domestically. We still contact your debtor personally, by phone. We keep detailed records of every contact, and we share these with you. We do the job professionally and confidentially. And of course we do it on a contingency basis.

Some things make good business sense in every language. ♦

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