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Ontario Court of Appeal Highlights Importance of Dispute Resolution Provisions

By John Siwiec

Ontario's Court of Appeal ruled recently that Ontario courts cannot dispense with, substitute or validate service of Ontario court documents on a defendant in a country that refuses to facilitate service of those documents.

The Court's decision should be an important warning for Canadian companies doing business internationally.

If a plaintiff cannot serve court documents, then it cannot proceed with its claim.

In *Khan Resources Inc. v. Atomredmetzoloto JSC*, 2013 ONCA 189, an Ontario mining company tried to sue its Russian joint venture party in Ontario. When it came time to serve the Russian company in Russia, the Russian government refused.

With its decision, the Ontario Court of Appeal told Khan that Ontario courts cannot help it overcome its problem.

Service of Documents Outside of Canada

Service of court documents outside of Canada can be difficult and slow. There is an international treaty, the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters* ("Convention"), that provides the standard method to serve court documents on a defendant in another country. However, that country can refuse to serve the defendant for sovereignty or national security reasons.

The *Convention* requires member countries to designate a "central authority" to process foreign court documents before serving them. It also provides for alternatives, including service through regular postal channels or judicial officers. Countries, however, can opt-out of these alternatives (and are classified as "objecting" states). In such cases, foreign court documents can only be served through that country's "central authority".

Along with Canada, 68 countries have signed onto the *Convention*. However, unlike Canada, 43 are qualified as "objecting" states, which include some of the world's largest economies: China, Germany, India, Japan and the Russia Federation.



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Khan's Failed Attempt to Serve Ontario Court Documents

When Khan tried to serve Atomredmetzoloto in Russia, it needed to proceed through the Russian central authority in accordance with the *Convention*. Atomredmetzoloto was affiliated with the Russian government and the central authority refused claiming "sovereignty or national security reasons".

Rather than appeal the determination in Russia, Khan asked the Ontario court to dispense with or validate service under the Ontario *Rules of Civil Procedure*. Initially the court ruled in Khan's favour, but was set aside on first appeal.

The Ontario Court of Appeal, on a further appeal, upheld the ruling of the first appeal. It held that the *Convention*, as incorporated under the *Rules of Civil Procedure*, provides a complete code for service on foreign defendants in countries that are parties to the *Convention*. The Court ruled that Ontario courts do not have discretion to substitute, dispense with or validate service when the *Convention* applies.

With can Khan not being able to serve Atomredmetzoloto, its Ontario lawsuit could not proceed. Khan's only option now seems to be to sue in Russian courts – likely not an appealing alternative.

Mitigating Risks in International Business

The Ontario Court of Appeal's decision highlights one of the risks in international business. There are two options that can help avoid problems of service in a foreign country:

1. using arbitration instead of the courts to resolve disputes, or
2. if Canadian courts are to be used to resolve disputes, providing for a Canadian agent on which court documents can be served.

Arbitration. Agreeing to use arbitration often provides the best alternative to mitigate the risks in international business – international arbitration claims are relatively easy to serve. An arbitration clause in the contract can provide for the arbitration to be administered by an arbitral institution like the International Court of Arbitration of the International Chamber of Commerce. Under an institutionally administered arbitration, rules of service are governed by the arbitration rules, most of which provide that the institute itself will effect service on the defendant.

Arbitration has several other advantages. Arbitration awards are often much easier to enforce internationally than court judgments. Also, international arbitration is neutral and impartial – neither party to the contract is subject to the courts of the other party.

Canadian companies doing business abroad should carefully consider whether their contracts should contain an arbitration clause. They should also make sure that they get expert advice on the best arbitration clause for their particular circumstances.

Canadian Agent for Service. Another option is to include a Canadian Agent for Service. Such an Agent would be contractually committed to accept service of any claim against the counterparty where the local rules of service would apply.

While using an agent for service has its advantages, it does not alleviate the difficulties that can arise in enforcing a Canadian judgment in another country.

Conclusion

It is important that consideration be given to the potential issues with dispute resolution prior to the conclusion of an international contract. Failure to do so is a missed opportunity to diminish the risks associated with international business that can entail serious consequences.

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