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Globalizing the Battleground Between US and Chinese Companies

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In 2007, sixty-nine percent of recalls carried out by US companies involved products manufactured in China or that contained Chinese-made components. The recalls ranged across all types of consumer products, from toys and pet food to toothpaste. While these recall numbers have decreased somewhat since 2007, the sheer number of Chinese-made products and products that contain Chinese-made components in the marketplace remains high.

In the consumer class actions that inevitably follow, many US manufacturers seek to join their Chinese suppliers. Much of the commentary surrounding this litigation has focused on the strategies Chinese companies have used or can use to frustrate US companies pursuing indemnity or contribution lawsuits. But this is not the whole story. Indeed, a topic that largely has been ignored is the potential for global litigation, in which US companies may seek to initiate litigation or the enforcement of judgments in jurisdictions other than the US and China.

Chinese Defense Strategies and Litigation Tactics

Suing foreign companies is always more difficult than suing domestic ones. But, in defending these lawsuits, Chinese companies are able to employ litigation strategies that are particularly effective because of the perception of many US companies that their only options are to litigate in the US or China.

One strategy is for a Chinese company to challenge personal jurisdiction. This may be successful because it is far from obvious that a US court will find personal jurisdiction given that many Chinese companies conduct business exclusively in China and never on American soil. Indeed, the US Supreme Court in *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 US 102 (1987), explained that the exercise of personal jurisdiction depends on notions of due process, including foreseeability, purposeful availment, and reasonableness. Many courts have used this analysis to hold that due process would not support calling a company that does business exclusively in China into a US court.[1]

Litigating in China may avoid these personal jurisdiction problems, but while the situation is improving, this approach still is fraught with difficulties. For example, some perceive Chinese law as limiting the ability to compel evidence production and placing obstacles in the enforcement of injunctions and seizure of assets. Also, some Chinese courts have had difficulty in enforcing their rulings, and this may create disadvantages for US companies seeking recourse in China.

Even assuming that personal jurisdiction could be established, a second strategy for a Chinese company is simply to take a default judgment. While a prevailing party may collect damages by attaching assets or securing money judgment liens on property, including lands, tenements, goods, and chattels, many Chinese companies have no

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assets in the US upon which collection could be made. Moreover, no agreement exists between the US and China with respect to the enforcement of judgments, so attempting to enforce a US judgment in China has proven futile. Seizing on all this, the goal of this strategy is favorable to the Chinese company—ideally, China.

Under this strategy, a Chinese company may choose to litigate the merits and, at any stage of the litigation, elect to take a default judgment. Since US companies perceive that their only options are to litigate in the US or China, a Chinese company knows that it can first try to win on the merits, but later default and force the US company to try to enforce the resulting judgment in China or to litigate in China.

The Global Battleground

These perceptions, however, are wrong. Because many countries will enforce US judgments through their court systems, both US and Chinese companies must start "thinking globally" in deciding which course to take in their litigation. Specifically, even though a US judgment may not be enforced in China, there may be assets of the Chinese company in other countries that enforce US judgments. Indeed, China's foreign investments grew from $12.3 billion in 2005 to $57.9 billion in 2010. Approximately 170 countries and regions receive foreign investment from almost 10,000 Chinese enterprises. The US, Europe, Canada, Australia, Hong Kong, Thailand, and Russia currently receive the highest concentration. If pursued carefully, these global assets may be targeted with a US judgment. Sophisticated US and Chinese companies must understand this and act accordingly.

The first step is to locate where the company has assets and seek enforcement of the US judgment in those countries. For example, assume a Chinese defendant has assets in the United Kingdom. If a party receives a money judgment in the US, it could "convert" the US judgment to an English judgment by presenting the US judgment to the High Court and applying for summary judgment on it. Success in the English courts would hinge on the following: (1) that the US court had jurisdiction to render the judgment according to the English rules of private international law; (2) the judgment was not procured through fraud; and (3) the US judgment is not contrary to English law. If these conditions are met and an English judgment is obtained, other advantages follow, such as the ability to apply for injunctive relief to prevent the dissipation of assets.

Adding to its potential reach, an English judgment also has full recognition and enforcement among members of the European Union. Additionally, the UK has agreements for the enforcement of judgments with Australia, New Zealand, and Singapore, and a common law relationship with Hong Kong. Thus, in contrast to

the US, which has no bilateral treaty with any country on the enforcement of judgments, an English judgment is more globally transferable to seize the assets of a Chinese company.

Similarly, a US judgment also can be enforced abroad through comity, although this process is determined on a country-by-country basis. As already noted, many Chinese companies hold assets globally, for example in Canada, Australia, Singapore, and Hong Kong. Because these countries have similar legal systems as the US in terms of governing law and procedure, a US judgment could be enforced under the principle of comity to seize and recover such assets.

A Changing Legal Landscape

This changing landscape may help avoid some recalls and certain types of products litigation. However, the potential for significant litigation will remain, especially as US companies increasingly sell products in the US that are manufactured in China or that contain Chinese-made components. As US and Chinese companies go forward in the global economy, they should consider structuring their business relationships to manage their litigation risks.

For example, US and Chinese companies should consider negotiating a mutually acceptable arbitration agreement in their contracts. This is because approximately 142 countries, including the US and China, are signators to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"), although China limited its accession to arbitral awards in commercial disputes. Thus, arbitration can structure the business relationships of US and Chinese companies by providing a recognized process of risk sharing.

Of course, arbitration with Chinese companies is not a cure all. Chinese courts have an inconsistent record in enforcing arbitral awards. Also, Chinese law requires many contracts between foreign corporations and Chinese enterprises to be governed by Chinese law, and Chinese companies sometimes prefer contracts to be arbitrated under the rules of the China International Economic and Trade Arbitration Commission (CIETAC). CIETAC has disadvantages for a US company, including that its proceedings are in Chinese unless the parties agree otherwise; the quality of the arbitrators is uneven; and evidentiary procedures and filing deadlines are sometimes ignored. Nonetheless, while arbitrating in China poses obstacles, the enforceability of an award increases the chances for recovery.

US and Chinese companies should also consider purchasing and maintaining product and general liability insurance from a reputable international insurance carrier. This will provide some protection for both companies in the event a recall or other product liability issue surfaces.

Conclusion

As China advances in the global economy, options are available both to US and Chinese companies to manage their litigation risks. But when litigation does occur, US and Chinese companies must recognize that they will be litigating on an increasingly global battleground.

[1] Indeed, the US Supreme Court recently issued two decisions, *Goodyear Dunlop Tires Operations S.A. v. Brown*, No. 10-76 (June 27, 2011) and *J. McIntyre Machinery Ltd. v. Nicastro*, No. 09-1343 (June 27, 2011), which reversed decisions by North Carolina and New Jersey state courts, respectively, that found personal jurisdiction over foreign defendants.

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