

Collecting Commercial Debt in the US Need Not Be Daunting

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If a business creditor located outside the USA should research collection procedures against commercial debtors situated in the United States, it would likely conclude that it would involve significant problems and cost. It is true that there are difficulties in recovering US debts, yet American businesses have faced the same problems for decades and achieve excellent results.

American businesses have found solutions that are equally applicable to foreign business creditors. Unfortunately, the nature of the problems are not clearly understood outside of the United States and not frequently publicized. This is unfortunate in a world where international commerce has increased dramatically in volume and importance, and with it, the number of debts owed to foreign companies by businesses in the United States, the world's largest single market. An understanding of these solutions requires some explanation of the causes of the problems.

Defining the Problem

One Nation, 55 Legal Systems

Though the United States is one nation, it is comprised of 55 legal systems. The US is essentially the product of a compact whereby the 50 states have ceded certain powers to their federal government. A fundamental premise of US law remains the notion of a federal government with limited power in parallel with individual states that retain all powers not ceded exclusively to the federal government in the US Constitution. The result is that the US is not one, but 55 distinctive and sometimes parallel legal systems, comprised of the 50 states, 4 territories and a separate and distinct federal legal system.

Obstacles to Collection

Whether a creditor is based in the US or elsewhere in the world, collection across the fifty-plus legal systems in the US raises issues that would not arise in the unitary legal systems that generally exist in the rest of the world.

Any individual collection matter may be capable of being filed in multiple legal systems and may possibly require action in more than one jurisdiction to achieve ultimate recovery in American courts. Furthermore, choices of venue and law often have a considerable positive or negative impact on the likelihood of success and costs of any collection effort.



Another challenge involves collecting from a multiple-state debtor. If a company trades in a number of states, it is likely that it will have bad debt in multiple states. Although incurring the debt in one state, the debtor may be based, or have its principal operations in, another state. In such circumstances, there is the issue of which state is more advantageous in which to act or commence suit. In the US, contract law is primarily a state law matter. Federal jurisdiction is often available to foreign businesses through diversity jurisdiction when the litigants are citizens of different states or nations. Federal jurisdictions



in the US require diversity of citizenship and an amount in dispute of over \$75,000, exclusive of interest or attorneys' fees. However, though federal jurisdiction is available, state contract law is likely to provide the basis for the decision, even in an action started in a federal court. State proceedings may still be an alternative option for proceeding and may be preferable in a given situation.

A further complication arises from the fact that US bankruptcy law, frequently resorted to by debtors attempting to evade their obligations, is a federal matter. Thus a case can involve a mixture of federal and state issues. This can result in parallel proceedings with actions in both state and federal courts, or proceedings in either state or federal systems.

Attorneys Cannot Practice In Every US Jurisdiction

Attorneys are admitted by state bars, and admittance in one state does not automatically confer the right to practice in another state. The vast majority are licensed to practice in only one state, and occasionally additional states. Furthermore, each state has significantly different procedural rules, as do the federal courts around the country. As a result, practitioners in state courts are not necessarily knowledgeable in locally-situated federal courts.

This fragmentation of legal practice has a direct impact on collection procedure. The collection process in the US, as in most countries, generally starts with non-legalistic collection efforts in an attempt to collect a matter amicably. Since the US is a litigious society, the success of the attempt to collect without legal action often hinges on the debtor's belief that the creditor is prepared to resort to legal action if necessary. This is particularly true with respect to foreign business creditors, partly because debtors are often aware of the tendency of foreign creditors to write off the delinquent account if non-lawyer methods fail. Lay collection agencies generally call on the help of attorneys when necessary, but few attorneys are able to handle a volume of collections in multiple-state scenarios because of licensing issues, forcing collectors to deal with a multiplicity of law firms. This creates greater costs, and more importantly, serious delays. As with collection anywhere in the world, delay drastically reduces the prospects of recovery.

Commonly Cited Solutions Are Imperfect

Four choices are available for the foreign business creditor seeking to collect debt in the US:

1. A claim may be submitted to a collection agency for collection, but if amicable collection is not successful, the debt is written off as a complete loss, in the event the creditor will not take on the expense of legal action.
2. Another alternative is to use non-lawyer collection agencies, and when amicable payment is not achieved and legal action is necessary, accept their choice of law firm or attorney in the given location of the debtor where suit must be brought.
3. An additional approach is to engage individual collection lawyers in each state where representation becomes necessary on an ad-hoc basis so as to be able to sue in

whatever state jurisdiction may be required to enforce payment. The selection of untested attorneys inherently carries risk.

4. The final choice is to resort to one of the mega law firms that may have offices in a number of state jurisdictions, and therefore attorneys licensed in various states where legal action may be brought to enforce payment.

Unfortunately, large law firms typically have an extensive cost base that filters through into higher fees, and they often disfavor collection work. Adopting the policy of writing off debt whenever non-lawyer collection activity fails is a very expensive alternative which produces unnecessary losses. Evaluating and working with law firms across the US on an ad-hoc basis is both time consuming and costly to manage, and the lawyer chosen may prove unreliable. Furthermore, this approach can conflict with the need to plan litigation strategy in advance in order to both maximize the opportunity to recover and minimize the cost of doing so. In US collections, the early bird gets the worm as surely as anywhere else in the world. Relying on non-lawyer collectors to choose local counsel in a foreign environment is at the risk of possible costly, improper choices affecting venue and other important issues critical to success if litigation becomes essential.

The Ultimate Solution: Commercial Law Firms with Nationwide Practices.

In the United States, law firms that concentrate in the collection of debts and enforcement of contractual rights are generally called "commercial" law firms. A few operate national and continental practices. Though such firms will probably have only one office, they have acquired a multi-state capacity to collect delinquent debts through:

1. a long-standing and tested network of local collection counsel across the United States;
2. a strong record of collection recoveries throughout the US, with and without legal action;
3. a network of clients represented throughout the US; and
4. an impressive practice in associated areas of business litigation, transactional and financial law, including bankruptcy, that are essential to managing litigation and debt recovery throughout state and federal US jurisdictions.

Such a firm is likely to employ experienced non-lawyer collectors in addition to dedicated collection attorneys and commercial litigators.

Cost-Efficiency

Commercial law firms provide legal oversight from day one. Legally-trained personnel review the facts of the matter from the outset, as well as the legal issues as they arise. Amicable collection is the first priority, but should that attempt fail, a commercial law firm is in a position to make an immediate and accurate assessment of the prospects and costs of recovery, without the loss of valuable time waiting for an attorney to get up to speed. Sophisticated commercial law firms differ from most law firms in that they handle large volumes of claims and are able to offer contingency or success-oriented fee options, allaying the cost fears overseas companies often associate with US law firms.

Because such firms deal with volumes of cases, either directly or by managing the work forwarded to their selected local counsel, they are generally adept in developing a litigation strategy or avoiding the need to resort to court action where an appropriate and client-pleasing, out-of-court resolution can be achieved. Experienced negotiators move to secure additional guarantees from a debtor to cover payment



of the principal, attorneys' fees and interest. Good collection lawyers are often able to circumvent the need for, and cost of, calling witnesses to prove up a claim before a court, and often return net recoveries to clients that exceed the full principal placed for collection.

Strategic Advantage

Some claims will end up in court and possibly involve bankruptcy issues. In the US it is essential to have knowledge of all of the alternative venues that a case may be conducted in and of the laws of the jurisdictions involved. Both state and federal jurisdictions may be available. Accordingly, there are frequently significant tactical opportunities that should be addressed as soon as litigation is contemplated. Several state jurisdictions may be available depending on where the sale or services occurred, where the debtor has its head office, where the contract was signed, where the defendant has its major assets or where the goods in question are located.

It is always of prime importance to determine the best available jurisdiction that can be invoked, which is a consideration best handled by experienced litigators. Decisions made at this stage may reduce the risks in court, significantly decrease costs and increase the success of the proceedings. Moreover, they have a material bearing on the outcome. A competent national commercial law firm will apply its knowledge of local and regional attitudes as well as potentially applicable laws in different venues, including arbitration and other alternative dispute resolution forums, to maximize the potential for success.

In the US, success may not only require a court judgment, but also the recognition of that judgment by another state where assets exist, a process known as domestication. Decisions between state and federal systems can also be enforced by their counterpart jurisdictions. Thus, a California state court would be expected to enforce a federal court judgment entered in Iowa. Such considerations should ideally be considered at the outset of the collection process, when overall collection strategy is determined. For a commercial law firm with experienced local counsel and intimate knowledge of the proceedings to date, the legal procedure between two states is easily facilitated by domestication of any judgment in the jurisdiction of a sister state.



Conclusion: What to Look For

A nationwide commercial law firm can provide a "one-stop" resource to manage all commercial delinquent debt recoveries, for both businesses and non-lawyer collection houses. The firm should have the ability to demonstrate continuous successful collection of delinquent commercial debt throughout the US, regardless of industry or nature of creditor within reasonable cost standards.

A competent commercial law firm will have a strong reputation confirming its ability to act reliably nationwide, should possess an active practice in related aspects of business law and demonstrate a client base supporting its claims to national acclaim in the collection industry and legal circles. Seek references from verifiable clients.

It is also important that the chosen "one-stop" firm understands the distinctive practices and instruments associated with international trade and is familiar with the rules and proceedings of international alternative dispute forums. Finally, look for evidence of some appreciation of the difference in legal principles and processes between your domestic legal

system and those of the US. Good transnational legal advice needs to identify and address such differences if surprises and misunderstandings are to be avoided.

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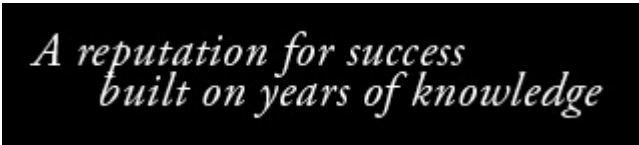
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About KMKCollections

KMK Collections is the commercial division of **Kohner, Mann & Kailas, S.C. (KMKSC)**, which arguably manages the largest volume of commercial debt recovery of any law firm in North America. Kohner, Man & Kailas, S.C. was founded in 1937 to provide businesses with more aggressive and cost-effective advocacy for their interests and contractual rights. Through 70 years in debt liquidation and commercial law, KMKSC and KMKCollections have earned an industry-wide reputation as leaders in the liquidation of delinquent commercial debt. **Kohner, Mann & Kailas, S.C.** is a business law firm listed in Martindale-Hubbell's Bar Register of Preeminent Lawyers that provides exemplary legal service in all areas of law encountered by businesses in the normal course of their operations and growth.

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