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International Finance Transactions: Lessening Costs and Uncertainty of Collection

**Commentary by
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In South Florida, business dealings with Latin American entities are commonplace. Rarer is U.S.-based creditors executing a promissory note enforceable in a Latin American country along with their U.S.-focused credit agreement. When investments go sour, a foreign company may have insufficient U.S. assets, and not having a locally enforceable note can prevent recovery or make the process lengthier and costlier.

Typically, there is a default and creditors initiate a lawsuit in the United States. Even after going through a U.S.-based trial, the creditor must often localize that judgment in Latin America. This presents new challenges for creditors, particularly onerous procedural requirements or local laws that favor debtors, not to mention greater delays in collecting. Further, most Latin American countries require reciprocity with the originating country before they enforce a foreign judgment, which can be difficult to demonstrate as the United States is not a party to the major Latin American treaties concerning the recognition of judgments. These and other hurdles can be circumvented if creditors insist on executing a prom-

issory note enforceable in the debtor's country of origin concurrently with the original credit agreement.

When a locally enforceable promissory note is paired with a concurrently executed credit agreement, which can include U.S. forum-selection and governing-law clauses, the creditor can enjoy the protections it would have had without the locally enforceable promissory note and more. When properly executed, an abrogation of rights can be avoided. It additionally allows for proceedings to be initiated in the country where the debtor's assets are located. Further, having a local promissory note that satisfies local formalities can give creditors access to expedited adjudicatory processes and avoid hurdles which can bar or limit recovery. It can save creditors substantial legal fees because they avoid the need to retain at-

torneys for multiple lawsuits regarding essentially the same matter. If the creditor has substantial business in that particular country, it may make more economic sense to receive the judgment in that jurisdiction and in local currency. This should result in faster collection and a greater net amount recouped. Although executing a locally enforceable note is a net positive, a creditor must remain cautious.

Second, preparing the note requires competent local counsel at the deal's outset. Many creditors lack sufficient expertise and contacts in the legal field for the region. Retaining qualified U.S. counsel

with significant experience in Latin America can help in finding the right local counsel. By utilizing local counsel early on and allowing

them to become familiarized with the agreement from the onset, creditors may also have more effective representation and stronger ties to the local attorneys should legal issues arise. US and Latin American counsel together can help ensure that enforcement requirements are met for any document related to the transaction, such as translation, apostille or "protocolization," among other requirements.

Third, creditors may themselves be wary of executing a local promissory note due to unfamiliarity with foreign laws. Creditors, however, should be more confident, not less, that they will

be able to collect by having executed a local promissory note. With just the U.S. credit agreement, creditors are at the mercy of foreign courts in a local action. By preparing the local note, the creditor may be able to circumvent at the outset any debtor-friendly laws or procedural missteps that could bar recovery. These steps could go a long way in ensuring the collection of the debt and should be viewed positively.

In a region of economic uncertainty in which debtors may face financial difficulties, it is increasingly important for lenders to place themselves in the best position in the event of a borrower's default and subsequent actions for enforcement and collection. As with any transaction, there are risks, but these can be mitigated if creditors take the small step of concurrently executing a locally enforceable promissory note along with the US-focused credit agreement. The cost of doing so is minimal and gives creditors the best chance to make themselves whole as quickly as possible in the event of nonpayment. Creditors looking to make deals in the region should turn to U.S. attorneys who are experienced in the area to help them structure deals properly and find competent and trustworthy local counsel. Doing so will likely serve the bottom line.

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BEST POSITION

First, debtors may be wary of signing both documents, fearing double payment. This concern should be allayed if the agreements are properly structured and explained, since this approach is customary in lending transactions and language can be included specifically