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David G. Keyko

William D. Kerr

Problems With Terminating the Employment of an American Executive Stationed Abroad

By David G. Keyko*
and William D. Kerr**

One issue often overlooked by multinational corporations headquartered in the United States is whether they may freely contract with their expatriate American executives to assure that the employment relationship with such executives will be governed by United States law as the employee rotates assignment from country to country. Failure to consider this question can result in substantial financial liability to the corporation. Upon the termination of the executive's employment, the corporation may be faced with a multi-million dollar claim brought pursuant to the employee termination benefits laws of a foreign country in which the executive has been stationed. Such actions are inconvenient to defend because of their situs in a far-off part of the globe and may well result in a multi-million dollar award to the former employee.

I. An Example

A large American company sends a trusted and capable American executive to Brazil for a four-year stint as the head of the company's Latin American operations. The executive has worked for the company for over twenty years, almost all of which has been spent at the company's headquarters in New York City. Although stationed in Brazil, the executive leaves his family in the United States, continues to have most of his salary paid in the United States, pays state resident taxes and makes monthly trips to the United States to visit both his family and the company's headquarters. In order to protect itself, the company has the executive sign a waiver of the right to receive termination benefits based on foreign law.

After four years of service in Brazil, the company requests that the employee relocate to the United States. The man refuses to move unless the company continues to pay the same fringe benefits (*i.e.* housing allowance, foreign service premium, cost of living allowance and tax reim-

* Associate, Winthrop, Stimson, Putnam & Roberts, New York, New York; B.A., 1974, Yale University; J.D., 1977, New York University.

** Associate, Winthrop, Stimson, Putnam & Roberts, New York, New York; B.A., 1976, Yale University; J.D., 1983, Harvard University.

bursement) provided to him as an expatriate executive, claiming that he was entitled to such benefits because he was not being asked to relocate to company headquarters. The company informs the executive that it does not provide such benefits to its executives located in the United States. Inability to resolve the conflict leads to termination of the employer-employee relationship.

The former executive brings suit in Brazil claiming the right to termination benefits in excess of two million dollars under Brazilian law. The Brazilian claim is based on the man's long service with the company, even though most of his employment was in New York City and not in Brazil. The company subsequently learns that the waiver signed by the former employee is not enforceable in Brazil and that the company will have an uphill battle in the Brazilian courts.[1]

II. Origins of the Problem

Companies find themselves in the situation described above for two reasons. First, there is a clear conflict between United States and foreign law regarding the rights of a terminated employee. Second, foreign countries often do not apply modern conflict of laws principles to employee termination cases.

The United States stands alone in not providing benefits by law to non-unionized employees whose positions are terminated.[2] The general rule in the United States is that the employment of a non-unionized employee is terminable at any time at the will of either the employer or the employee.[3] There need be no reason for the termination and neither party is liable financially to the other because of the termination.[4] The only financial support to which the unemployed worker is entitled is unemployment insurance and welfare.

In contrast, an employee in a foreign country whose position has been terminated is usually entitled to a large payment from the former employer as severance compensation under foreign employment law.[5] The amount of the payment is often linked to the number of years of service.[6] For example, under Brazilian law, a terminated employee is entitled to receive one month's salary for every year of employment with

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[1] This example is based on a real dispute litigated in the New York State Supreme Court and in the Brazilian courts. *See* The Singer Sewing Machine Company v. Bronzo, Index No. 09991/83 (Sup. Ct. N.Y. Co.) and Bronzo v. Singer Limitada. The authors' firm was counsel for plaintiffs in the New York action.

[2] *See* Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J. L. REF. 207, 208 (1983); Rodriguez, *Termination of Employment on the Initiative of the Employer*, 5 COMP. LAB. L. 221, 221 (1982).

[3] *See* Bellace, *supra* note 2, at 208.

[4] *See* Hernden v. Consumers Power Co., 72 Mich. App. 349, 249 N.W.2d 419, 422 (1976); King v. Cornell Univ., 81 A.D.2d 712, 712, 439 N.Y.S.2d 445, 446 (3d Dept. 1981); Geary v. U.S. Steel Corp., 456 Pa. 171, 175, 319 A.2d 174, 180 (1974).

[5] Rodriguez, *supra* note 2, at 239.

[6] *Id.*

the company. In calculating the amount of the salary, the value of fringe benefits is included.[7] Moreover, as a matter of public policy, the right to receive such payment may not be waived by the employee.[8] Termination benefits may be denied to an employee who is terminated for cause, however, what constitutes cause is often narrowly defined.[9] For example, under Brazilian law, cause does not include the refusal of an employee to be transferred to a new location.

The second reason corporations find themselves in a dilemma after terminating the employment of an American executive stationed abroad is the failure of foreign countries to apply modern conflict of laws principles to the situation. This must be credited to national pride and a desire to discourage the employment of Americans abroad. In recent years, foreign courts have resisted the application and enforcement of United States antitrust,[10] tax[11] and securities[12] laws against companies or operations located outside the United States.

One possible reason for the resistance to applying American rules on termination benefits to American executives stationed in foreign countries is to avoid giving American companies an incentive to fill foreign positions with American rather than foreign employees, by allowing the companies to avoid paying foreign benefits. This reasoning cannot withstand close examination. American executives stationed abroad are usually more highly paid than their local foreign counterparts. Therefore, it may well be less expensive to hire a foreign employee to fill the foreign executive position, even taking into account the possibility of having to make a termination payment to the foreign executive. Moreover, American executives are not sent abroad to save money on employee benefits, but rather are stationed in the foreign country to provide expertise gained from working in the United States.

Modern conflict of laws interest analysis,[13] as applied to the termi-

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[7] Consolidation of Labour Laws, art. 457 (Brazil).

[8] *See, e.g.*, *id.* arts. 9, 468; Labour Code, art. 18 (1972) (Romania).

[9] *See, e.g.*, Employment Protection (Consolidation) Act of 1978, § 57 (1978) (Great Britain); Labour Code, art. 130 (1972) (Romania).

[10] *See* Laker Airways, Ltd. v. Pan American World Airways, 559 F. Supp. 1124 (D.D.C. 1983) (Court discusses injunction issued by British court against plaintiff proceeding with antitrust claim in the United States against British defendants); N.Y. Times, Dec. 27, 1980, § 2, at 29, col. 4 (Legislation was passed by Great Britain, France, Canada, Australia and New Zealand making it illegal for national companies to supply information to foreign courts. The legislation also gave national companies the right to recover damages awarded against their subsidiaries in the United States from local assets of the victorious American plaintiff. The governments were motivated by the Westinghouse uranium antitrust litigation).

[11] *See* N.Y. Times, Aug. 15, 1983, at A1, col. 6 (Swiss government, under secrecy laws, seized documents that had been ordered produced by the United States District Court for the Southern District of New York pursuant to the Marc Rich tax investigation).

[12] *See* Note, *Foreign Bank Secrecy and the Evasion of United States Securities Laws*, 9 J. INT'L L. & POL. 417 (1977).

[13] For a discussion of interest analysis, see Dixon Mobile Homes, Inc. v. Walters, 48 Cal. App. 3d 964, 972, 122 Cal. Rptr. 202, 207-08 (3d Dist. 1975); Breslin v. Liberty Mut. Ins. Co., 134 N.J. Super. 357, 365-66, 341 A.2d 342, 345-47 (1975), *aff'd*, 69 N.J. 435, 354 A.2d 635 (1976); J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd., 37 N.Y.2d 220, 226-27, 371 N.Y.S.2d

nation situation, dictates the application of American law. The purpose of foreign legislation on employee termination is to protect local employees without expenditure of government funds. An American executive, once terminated, is unlikely to stay in the foreign country unless he or she has located another job, and even less likely to seek foreign welfare payments. The American's unemployment is likely to be only a burden for the United States. Thus, the United States does have a greater interest than the foreign country in applying its employment laws.

III. Planning for the Problem

Some of the uncertainty regarding whether a company can prevent an expatriate employee from receiving termination benefits in a foreign forum can be removed by careful planning. The key is careful drafting of the employment contract.

The following terms should be considered for inclusion in a corporation's expatriate contract form:

1. A waiver of termination benefits provided by foreign law. While such a waiver is not likely to be enforceable in an action brought before a foreign tribunal,[14] it should be recognized by courts in the United States.[15]

2. A choice of law provision. A choice of law provision may well be disregarded by a foreign court,[16] but it will be given weight by a court in the United States.[17] In order to ensure that the choice is given proper

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892, 898-99, 333 N.E.2d 168, 172-73, *cert. denied*, 423 U.S. 866 (1975); Intercontinental Planning, Ltd. v. Daystrom, Inc., 24 N.Y.2d 372, 382, 300 N.Y.S.2d 817, 825-26, 248 N.E.2d 576, 581-82 (1969).

[14] *See* statutes *supra* note 8.

[15] Waivers are recognized so long as they are not found to be unconscionable or against public policy. *See* Diamond Housing Corp. v. Robinson, 257 A.2d 492, 493-94 (D.C. 1969) (waiver of notice provision in lease not unconscionable); Re Estate of Strickland, 181 Neb. 478, 149 N.W.2d 344, 354 (1967) (waiver of property rights through antenuptial agreement not unconscionable); Abramovich v. Board of Education, 62 A.D.2d 252, 254-55, 403 N.Y.S.2d 919, 921 (2d Dept. 1978), *aff'd*, 46 N.Y.2d 450, 414 N.Y.S.2d 109, 386 N.E.2d 1077, *cert. denied*, 444 U.S. 845 (1979) (tenured teacher's waiver of right to hearing before termination not against public policy); New-Again Constr. Co. v. New York, 47 A.D. 2d 759, 760, 365 N.Y.S.2d 39, 41, (2d Dept. 1975) (waiver of claims under contract unconscionable). A waiver of foreign termination benefits does not appear to be either unconscionable or against public policy.

[16] For instance, the member nations of the European Economic Community have stated that in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded him by the mandatory rules of law which would be applicable in the absence of a choice by the parties. The law applicable where no choice is made is the law of the country in which the employee habitually carries out his work. Convention on the Law Applicable to Contractual Obligations, art. 6, opened for signature June 19, 1980, 23 O.J. EUR. COMM. (No. L 266) 1 (1980). Therefore, a United States citizen who habitually worked in a member country could persuade a court to ignore a choice of American law in his employment contract.

[17] Choice of law clauses are generally respected in American courts so long as the choice made has some connection to the parties to the contract. *See, e.g.*, Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 407-08 (1927); Consolidated Jewelers, Inc. v. Standard Financial Corp., 325 F.2d 31, 34 (6th Cir. 1963); County Asphalt, Inc. v. Lewis Welding & Engineering Corp., 323 F. Supp. 1300, 1303 (S.D.N.Y. 1970), *aff'd*, 444 F.2d 372 (2d Cir.), *cert. denied*, 404

deference by a court, the state law chosen to govern the terms of the contract should have some relation to the parties to the contract. A good choice of law would be the state where the corporation is headquartered. When possible, the contract should be negotiated and signed in the state whose laws are to govern the contract, in order to give the choice of law more weight.[18] Conversely, the contract should not be negotiated or executed in a foreign country. Such actions could be used by the former executive to support a claim that the law of that country should govern the terms of the contract.

3. A consent to jurisdiction. The parties should consent to the jurisdiction of the federal or state courts in a particular state, preferably the state whose laws were chosen to govern the contract, to enforce the terms of the contract.[19] This term is necessary because it may be difficult to obtain jurisdiction over an employee who has been stationed at a foreign post and who may not choose to immediately return to the United States following dismissal.

4. A consent to the entry of an injunction. To help ensure that a court in the United States will enter an injunction precluding the employee from proceeding to collect termination benefits payable pursuant to foreign law, the employee should consent to the entry of such an injunction. This contractual clause should state that (i) the employee acknowledges that the employer is likely to succeed on the merits of the claim that the employee is not entitled to termination benefits provided by foreign law; (ii) the company will be irreparably harmed if an injunction is not granted and the employee takes action to collect termination benefits; (iii) the employee will not be harmed by the entry of an injunction; and (iv) that the entry of an injunction is in the public interest.[20]

U.S. 939 (1971); Wyatt v. Fulrath, 16 N.Y.2d 169, 173, 264 N.Y.S.2d 233, 235-36, 211 N.E.2d 637, 639 (1965). Some courts have, however, almost totally disregarded such clauses or used them as but one of the factors to be considered in determining what law should govern. *See, e.g.*, LaBeach v. Beatrice Foods Co., 461 F. Supp. 152, 155-56 (S.D.N.Y. 1978); Southern Int'l Sales Co. v. Potter & Brumfield Div. of AMF, Inc., 410 F. Supp. 1339, 1341-43 (S.D.N.Y. 1976); Haag v. Barnes, 9 N.Y.2d 554, 559-60, 216 N.Y.S.2d 65, 69, 75 N.E.2d 441, 444 (1961).

[18] The traditional rule is that the construction and validity of a contract are governed by the law of the place of the negotiation and execution of the contract. *See, e.g.*, Molinar v. Western Electric Co., 525 F.2d 521, 527 (1st Cir. 1975), *cert. denied*, 424 U.S. 978 (1976); P.S. & E., Inc. v. Selastomer Detroit, Inc., 470 F.2d 125, 127 (7th Cir. 1972); Chesapeake & Potomac Tel. Co. v. Allegheny Constr. Co., 340 F. Supp. 734, 739 (D. Md. 1972); Ladd v. Ladd, 265 Ark. 725, 731, 580 S.W.2d 696, 699 (1979). Modern conflicts analysis still uses the place of the making of the contract as a factor. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1971).

[19] Consent to jurisdiction is upheld where the forum selection is not unreasonable at the time of litigation. *See* National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964); Furbee v. Vantage Press, Inc., 464 F.2d 835, 836-37 (D.C. Cir. 1972); Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 344-45 (3d Cir. 1966); Caribe Marketing Corp. v. Good-O Beverages, Inc., 86 A.D.2d 567, 568, 446 N.Y.S.2d 294, 295 (1st Dept. 1982).

[20] In New York and some other states, an injunction need not be shown to be in the public interest. *See* W.T. Grant Co. v. Srogi, 52 N.Y.2d 496, 438 N.Y.S.2d 761, 420 N.E.2d 953 (1981). Even in such states, however, the contract should state that an injunction will be in the public interest, as it is generally required by federal courts. *See* Yakus v. United States, 321 U.S. 414,

5. Non-exclusive remedies for breach. The contract should provide that if the employee makes a claim for termination benefits provided by foreign law, then the corporation may withhold certain payments, services and options (*i.e.* unexercised stock options, tax reimbursement, moving expenses, severance pay, certain pension funds,[21] and placement services) which otherwise would be provided to the employee. Such a clause may impose such a large and immediate cost upon the former employee that he or she will not choose to pursue a claim under foreign law. The contract should explicitly state that this clause is not meant to afford the employee a choice between the benefits which may be withheld and the benefits provided by foreign law. In addition, it should state that these remedies are non-exclusive.

6. Emphasize United States ties. The contract should clearly state that the employment contract is a United States agreement in order to ensure that a court will apply United States, and not foreign law, to interpret the contract. This may be accomplished by using a variety of clauses which cumulatively have this effect. Where possible, the contract should be between the employee and a United States corporation, although the contract may indicate that services will be provided for the benefit of a foreign subsidiary. The arrangement might be structured to have the United States company pay the executive's salary and be reimbursed by the foreign subsidiary for services rendered. Many expatriate employees prefer to be paid a large portion of their salary in the United States to avoid foreign tax.[22] Such a practice is also helpful in tying the contract to the United States. Another factor is the contracted for services. The foreign assignment should be described as being for a limited term and, where possible, the expectation that the employee will be returning to a post in the United States should be explicitly stated. Where the foreign assignment will still require services to be rendered by the executive in the United States, such as attendance at meetings and the filing of reports, this should also be emphasized.

IV. Enjoining an Employee from Claiming Termination Benefits

If a former executive takes steps to pursue a termination benefits claim before a foreign tribunal, chances are that no matter how the employment contract has been drafted, the corporation will be unable to completely defeat the claim in the foreign proceeding. The company, however, is not totally defenseless. An action may be commenced in the

440-41 (1944); New York Pathological & X-Ray Laboratories, Inc. v. Immigration & Naturalization Service, 523 F.2d 79, 81 (2d Cir. 1975); Hall v. Austin, 495 F. Supp. 782, 791 (E.D. Mich. 1980).

[21] Certain vested pension benefits pursuant to plans qualified under the Internal Revenue Code may not be withheld. For the rules on vesting, see I.R.C. § 411 (1983).

[22] Certain foreign countries impose tax at a higher rate than the United States. Furthermore, compensation received in a foreign country may be subject to double taxation or foreign withholding.

United States by the company to obtain both a declaration that the executive is not entitled to termination benefits provided by foreign law and a permanent injunction precluding the executive from pursuing a claim for such rights. The company should also seek a preliminary injunction to prevent the foreign action from proceedings while litigation is pending in the United States.

Relief, such as a preliminary injunction, granted by a court in the United States will be effective if the former executive is within the reach of the court or will be in the future. If the former executive does not intend to return to the United States, the threat of being held in contempt of court for failure to cease proceedings before a foreign tribunal may have little impact.

Although courts in the United States will not enjoin another court from hearing a claim,[23] an injunction will be issued precluding the parties from proceeding in another forum.[24] A preliminary injunction may be issued upon one of two bases: first, courts will enjoin a party from proceeding with a foreign action when the purpose of the suit is to evade the law of the domicile of the parties; and second, an injunction will be issued if the standard three or four part test for a preliminary injunction can be satisfied.[25]

Due to the common acceptance of modern conflict of laws principles, the substantive law applied to decide a case usually does not vary substantially, no matter where the suit is brought. The first of the two theories pursuant to which an employee's foreign action may be enjoined was developed before the modern conflict of laws rules. At that time, it was possible to bring suit in a particular state to avoid the application of an unfavorable law. This practice was later viewed as a fraud on the court, however, and a rule was developed to enjoin its use. An early example of the problem and its solution is *Dinsmore v. Neresheimer*.[26] The *Dinsmore* case involved a suit by the sender of packages against a courier service which was to have transported the packages. The packages were mailed in New York, but never reached their destination because they were lost by the courier service. The contract pursuant to which the packages were mailed provided for a limit on claims for loss of the pack-

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23 A court has no jurisdiction over a court in another state or country so it may not issue an injunction against the power and authority of such a court. *See* Steelman v. All Continent Corp., 301 U.S. 278, 291 (1937); Re W. F. Hurley, Inc., 553 F.2d 1096, 1102-03 (8th Cir. 1977); McKendry v. McKendry, 280 A.D. 440, 440, 114 N.Y.S.2d 101, 102 (4th Dept. 1952) (per curiam).

24 A court may issue an injunction against the prosecution of a foreign action since it proceeds in personam against the defendant. *See* Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105, 108-09 (2d Cir.), *cert. denied*, 345 U.S. 964 (1953); Western Electric Co. v. Milgo Electronic Corp., 450 F. Supp. 835, 837 (S.D. Fla. 1978); Berkshire Int'l Corp. v. Marquez, 69 F.R.D. 583, 589 (E.D. Pa. 1976); Crawley v. Bauchens, 57 Ill. 2d 360, 312 N.E.2d 236, 239 (1974); H.M. Hamilton & Co. v. American Home Assurance Co., 21 A.D.2d 500, 502, 251 N.Y.S.2d 215, 217 (1st Dept.), *aff'd*, 15 N.Y.2d 595, 255 N.Y.S.2d 262, 203 N.E.2d 649 (1964).

25 *See supra* text accompanying note 20.

26 32 Hun. (N.Y.) 204 (1st Dept. 1884).

ages. Such a waiver had been held to be valid under New York law. Plaintiff sued the courier company in Washington, D.C., where limitations on damages were not recognized and were unenforceable. The court restrained the plaintiff from pursuing his action in Washington, ruling that to permit such a suit to continue would be to allow plaintiff to perpetrate a "fraud" on the courier company.[27]

The rule enjoining litigants from proceeding in a foreign court where the purpose of such an action is to avoid the law of the domicile of the parties is generally followed in New York and other jurisdictions.[28] The practice has been upheld by the United States Supreme Court in *Cole v. Cunningham*.[29] In *Cole*, the Supreme Court approved an injunction granted by a Massachusetts court prohibiting a Massachusetts creditor from prosecuting an action in New York. The suit was brought in New York in order to avoid the Massachusetts bankruptcy law on preferences.

This rule was applied and a preliminary injunction was granted to the corporation in *Singer Sewing Machine Co. v. Bronzo*.[30] The court found that the employee was trying to avoid the law generally applied with respect to contractual waivers by suing in Brazil.

If a court decides to apply the traditional three or four part test used for preliminary injunctions to decide whether to enjoin the employee from proceeding abroad, a good argument can be made that the test is satisfied. This test is (i) the likelihood of success on the merits; (ii) irreparable injury absent granting of the preliminary injunction; (iii) a balancing of the equities in favor of the party seeking the injunction; and (iv) whether the public interest is furthered by the granting of an injunction. The fourth element of the test is sometimes not required.[31]

[27] See also Vail v. Knapp, 49 Barb. (N.Y.) 299 (Sup. Ct. Rensselaer Co. 1867) (action in Vermont restrained where Vermont would not recognize certain substantive rights recognized by New York law); Webster v. Columbian Nat'l Life Ins. Co., 131 A.D. 837, 116 N.Y.S. 404 (1st Dept.), *aff'd*, 196 N.Y. 523, 89 N.E. 1114 (1909) (insurance company being sued in New York on a life insurance claim enjoined from instituting an action in Massachusetts because Massachusetts, unlike New York, would have permitted the insurance company to compel the testimony of a physician); Rothschild v. Naamlooze Vennootschap Gebroeders Pappenheim's Tabakshandel, 194 Misc. 479, 87 N.Y.S.2d 189 (Sup. Ct. N.Y. Co. 1949) (restraining suit brought in the Netherlands for a declaration that the plaintiff in a New York action was not a creditor or shareholder of Dutch company, and thus had no right to the assets of the Dutch company, on ground that court was capable of determining the question under the law of the Netherlands as to the proper relationship of plaintiff to the Dutch company); Danzis v. Metropolitan Life Ins. Co., 23 N.Y.S.2d 733 (Sup. Ct. N.Y. Co. 1940) (enjoining declaratory judgment action instituted by insurance company in Florida after plaintiff, Florida resident, brought suit against the company in New York, on ground that the plaintiff had the right to choose the forum, which would be lost if the Florida action were allowed to proceed); Cotnareanu v. Woods, 155 Misc. 95, 97, 278 N.Y.S. 589, 592 (Sup. Ct. N.Y. Co. 1935) (New York court enjoined defendant New York resident from proceeding in Delaware stating: "[Defendant], a resident of this state, is seeking to evade and circumvent [New York's] laws by instituting proceedings in a foreign jurisdiction. There is ample authority for granting of an injunction under such circumstances.").

[28] *See* Annot., 6 A.L.R. 2d 896 (1949).

[29] 133 U.S. 107 (1890).

[30] N.Y.L.J., June 28, 1983, at 7, col. 1.

[31] *See supra* note 20.

The question of likelihood of success is a conflict of laws issue. If the law of a jurisdiction within the United States is applied, the corporation will prevail. Conversely, the former employee will win if foreign law is applied. Modern interest analysis[32] dictates that American law is properly applicable to the dispute. One case employing modern conflicts analysis in the context of an employment contract calling for service abroad, *LaBeach v. Beatrice Foods Co.*,[33] reached a similar conclusion. In that case, the employer moved for summary judgment based upon a release given by the employee. The employee defended by claiming that the validity of the release was to be governed by Nigerian law because the contract pursuant to which the release was given called for the employee to work in Nigeria and the employee did work in Nigeria. The court rejected the proposition that Nigerian law applied, reasoning as follows:

> Illinois is the jurisdiction with the most significant contacts in the instant case. The only Nigerian contact is the place of performance of the contract; the parties to the contract are not Nigerian residents, nor was the contract executed in Nigeria. On the other hand, [the employer] has its principal place of business in Illinois, and both parties clearly intended and expected Illinois law to apply. Hence, the rights and duties of the parties to the contract at issue are to be governed by the law of Illinois.[34]

The second part of the test, irreparable damage, may be shown by demonstrating that if an injunction is not granted, the plaintiff company will be unable to recover (i) the award of a judgment in a foreign country in favor of the former employee, and (ii) the cost of defending an action in a foreign country.

It is impossible to predict the speed with which a matter will be decided by the courts. It can be assumed, however, that the foreign courts will proceed with dispatch in deciding the former employee's claim. Moreover, the foreign court will most likely not entertain a motion to stay the action pending a decision in the United States. Therefore, there is a strong possibility that the foreign employee will receive judgment in a foreign country long before plaintiffs in an American court are able to obtain a judgment.

A large award, made and collected in a foreign country, may cause the company irreparable harm where it is unable to recover the award from the former employee. It is almost a certainty that a large portion of the award will be available for execution, and some portion of any award would have to be paid by the employee for his expenses for prosecuting a suit in the foreign country. Furthermore, the company may not be able to force the former employee to bring the money to the United States.

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32 *See supra* note 13 and accompanying text.

33 461 F. Supp. 152 (S.D.N.Y. 1978).

34 *Id.* at 156. The action was brought pursuant to the federal court's diversity jurisdiction and, therefore, New York's conflict of laws rules were applied. The contract contained a choice of law clause; however, the court made a judgment on the conflict of laws issue independent of this clause.

Thus, although the former executive may be solvent, the former employer will be irreparably injured because the employee's assets will not be available to satisfy any subsequent judgment for the company.[35]

If the former employee is not enjoined from proceeding in the foreign courts, the employer will be forced to expend large sums of money to defend against an action in the foreign country. The company will also suffer harm as the result of the time its personnel will have to spend away from their normal assignments to assist in defending against a foreign claim. These expenses will be compounded by the problem of having to proceed simultaneously with litigation in the United States and abroad. The expenses incurred as the result of being forced to proceed in the foreign country are not recoverable. Such harm has been held to be irreparable. In *Board of Higher Education v. Marcus*,[36] the court held that damages incurred as the result of lost professional work, the value of which could not be calculated, were an irreparable injury. The court stated that "an injury is irreparable when it cannot be adequately compensated in damages or there is no pecuniary standard for the measurement of damages."[37]

The balancing of the equities will tip in favor of the former employer if the parties enter into an agreement tolling the statute of limitations on the termination benefits claim based on foreign law. Should the employer prevail, the United States court can make the award or the employee can proceed in the foreign country. Without an injunction, however, the company will be irreparably damaged.

As to the public good, it is to the general benefit to prevent someone from avoiding the laws of the United States.

A three-part test for a preliminary injunction was applied in *Baittiner v. The Singer Company*,[38] where Singer sought to enjoin an employee from claiming approximately one million dollars in termination benefits which were provided by Colombian law. The former employee was an American who had been stationed in South America for almost ten years in four different countries, the last one being Colombia. After leaving the company, he chose to remain in Colombia and claimed termination benefits under Colombian law. The company claimed that under its expatriate policy, the executive's salary and benefits received were meant to be the full compensation and all foreign-based termination benefits were waived. The court, applying the three-part test (New York does not require proof of benefit to the general public), granted the requested injunction.[39]

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35 *See* 28 N.Y. JUR., *Injunctions* § 42 at 360 (1963).

36 63 Misc. 2d 268, 311 N.Y.S.2d 579 (Sup. Ct. Kings Co. 1970).

37 *Id.* at 274, 311 N.Y.S.2d at 585. *See also* Republic Aviation Corp. v. Republic Lodge No. 1987, 10 Misc. 2d 783, 169 N.Y.S.2d 651 (Sup. Ct. Queens Co. 1957).

38 Index No. 540/80 (N.Y. Sup. Co., N.Y. Co., May 9, 1980).

39 *Id.*

V. Conclusion

The matter of American-based companies sending American executives abroad is complicated by the insistence of foreign courts that foreign law should govern this employment relationship. There is no foolproof way of preventing a determined foreign-based executive whose employment has been terminated from claiming foreign-law-based termination benefits. The possibility, however, can be minimized by carefully drafting the executive's employment contract and promptly seeking the assistance of a court in the United States to prevent the former executive from suing abroad.