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INTERNATIONAL

Preparing for Dispute Resolution in International Business: Understand Key Jurisdictional Differences, Draft Contracts Wisely




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When a U.S. company expands internationally, disputes can arise with international business partners, presenting risks seldom faced in domestic commercial disputes. Addressing certain key issues at the outset of a partnership is critical to circumscribing such risks. This article offers some high-level points to keep in mind about international arbitration and practical guidance regarding dispute resolution clauses. The treatment here is far from exhaustive.

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International Litigation– Key Issues to Keep in Mind

Differences Between Civil Law and Common Law Jurisdictions

Once exposed to litigation in foreign courts, U.S. lawyers quickly learn that litigation in the U.S. is unique. Jury trials, punitive damages and especially discovery are unknown to much of the world. Many of the striking contrasts between U.S. and foreign litigation are attributable to differences between common law and civil law systems. For instance, under many civil law systems, cases are presented primarily on the basis of written evidence, parties must rely on evidence in their possession or voluntarily disclosed by third parties, the judge primarily questions witnesses and the successful party bears attorneys' fees.

Enforcing Judgments in International Litigation

Companies conducting business abroad are often exposed to a greater risk of being sued outside the U.S. Accordingly, it is important to be knowledgeable about (i) the bases on which foreign judgments will be enforced in the U.S. and (ii) the bases on which U.S. judgments will be enforced abroad.

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Enforcement of Foreign Judgments in the U.S.

The U.S. is not a signatory to any treaty providing for the enforcement of judgments from other countries. Nevertheless, foreign-country judgments have long been recognized and enforced in the U.S. In the seminal U.S. Supreme Court case *Hilton v. Guyot*,[1] international comity provided the basis for enforcing foreign-country judgments. Some courts still look to factors identified in *Hilton*—the opportunity for a full and fair trial abroad, trial conducted upon regular proceedings, and proceedings following due citation or voluntary appearance of adversary parties—for determining whether to enforce a foreign judgment.

An alternative to enforcing foreign judgments under the non-statutory comity standard is the Uniform Foreign Country Money Judgments Recognition Act (the ''Act''), which has been adopted in 32 states, the District of Columbia and the U.S. Virgin Islands. Section 4 of the 2005 revision to the Act provides various circumstances in which a domestic court may not recognize a foreign-country money judgment: (i) in cases where the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with due process, or (ii) in cases where the foreign court did not have jurisdiction over the defendant or subject matter at hand.

Additionally, a U.S. court need not recognize a foreign-country judgment for various reasons, including: (i) if the defendant did not receive notice of the proceedings in sufficient time to enable him or her to defend, (ii) the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case, or (iii) the judgment is repugnant to the public policy of the particular state or of the U.S.

Still, these provisions demonstrate that a foreign judgment could be enforced even if the foreign country did not provide the same procedures (e.g., oral testimony, cross-examination of the other side) as found in the U.S. As the drafters of the Act explained, ''a mere difference in the procedural system is not sufficient basis for nonrecognition. A case of serious injustice must be involved.''[2]

Enforcement of U.S. Judgments Abroad

Because the U.S. is not a party to any treaties or conventions on the recognition of foreign judgments, U.S. judgments are not enforced abroad as easily as those of countries that are. Nevertheless, many countries will enforce a U.S. judgment if it meets the statutory requirements of the country where such recognition and enforcement are sought. Foreign courts look to several factors, including: (i) that the U.S. court which rendered the judgment had jurisdiction over the foreign defendant according to the standards of jurisdiction of the country where enforcement is sought; (ii) that the U.S. judgment is final and enforceable under the applicable U.S. federal or state law; and (iii) that enforcement of the judgment in the foreign country does not violate that country's public policy. Courts in many countries employ greater scrutiny if the U.S. judgment was obtained by the default of the foreign defendant and are unlikely to enforce punitive damages awards.

[1] 159 U.S. 113 (1895).

[2] Foreign Country Act, 13 ULA 268, § 4 cmt.

Interested in This Topic?

For further analysis of international dispute resolution, the authors will present a Bloomberg BNA-sponsored webinar, *Litigation and Arbitration: Dispute Resolution Strategies in International Technology Business*, on July 16 from 1-2 p.m. For more information and to register, go to http://www.bna.com/litigation-arbitration-dispute-w17179891701/.

Attorney Client Privilege in the International Context

As companies grow their foreign business, in-house lawyers are often hired outside the U.S. It is imperative that the company not assume those foreign lawyers will be cloaked with the same attorney-client privilege that applies in the U.S.

Although common law countries, such as England, Canada and Australia, have privilege laws for in-house lawyers that closely resemble U.S. law, the law differs significantly in many other countries. In France (and many other civil law countries), for example, outside lawyers enjoy the privilege, but not in-house lawyers. In others, such as Mexico, there is no privilege per se; nevertheless, the same result can be achieved through confidentiality obligations. There are also a host of countries (e.g., China, Switzerland, Argentina and Japan) in which the law is either in flux or has never been certain enough for in-house lawyers to know with confidence whether they are protected by the privilege.

Also significant in this regard is European Union law because it will apply to E.U. investigations, regardless of the law of the E.U. country in which the investigation is taking place. In September 2010, the highest court of the European Union, the European Court of Justice, ruled that under E.U. competition law, the privilege does not extend to communications with in-house lawyers.

International Arbitration

Understandably, parties often prefer to arbitrate than subject themselves to the risks and uncertainties of litigation in local courts outside the U.S. In addition to a neutral tribunal and forum, arbitration offers the advantage of a reliable and uniform system of enforcing awards in national courts under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (''New York Convention''), a treaty ratified by almost all major trading nations.

Arbitration or Litigation?

The answers turns on several factors, such as: (i) the place of enforcement of any judgment or award, (ii) the ''quality'' and neutrality of the tribunal, (iii) the cost and speed of the process, (iv) the general convenience and (v) the presence of discovery procedures. The impact of any of these factors will naturally vary among jurisdictions, transactions and the nature of the dispute.

Place of Arbitration

The most important decision parties can make in drafting an arbitration clause is the choice of its ''legal seat,'' which determines the procedural laws governing

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the arbitration, as well, of course, as the national courts that will apply such law.

Importantly, the national law of some states prohibits the arbitration of certain kinds of disputes (e.g., patents, antitrust and insolvency). More fundamentally, under the New York Convention, the recognition and enforcement of an award may be refused by the courts of other countries if a court in the award-rendering country finds that the arbitration agreement was ''not valid under [its] law'' or the award has been set aside by a court in which the award was made. For these reasons, the choice of arbitration seat is often more important than the choice of the substantive law governing the contract.

Interim and "Emergency" Relief

Generally speaking, interim and provisional remedies are available in international arbitration so long as they are permitted under the law of the seat of the arbitration (as is the case in all major arbitration venues).

Interim and provisional relief traditionally has been granted in international arbitration by the arbitral tribunal that is constituted after the arbitration commences. Until recently, that meant that relief needed before such constitution could not be granted quickly enough and parties therefore resorted to the courts. In recent years, a number of institutional arbitrations, including the International Centre for Dispute Resolution (ICDR), the International Chamber of Commerce (ICC) and the Singapore International Arbitration Centre (SIAC), have established rules for ''emergency arbitrators,'' which provide for the immediate (often within a day or two) appointment of an ''emergency'' arbitrator with authority to grant ''emergency relief,'' pending appointment of the arbitral tribunal in accordance with the parties' agreement.

Discovery in International Arbitration

There are few provisions in international arbitration rules concerning discovery. However, when significant sums are in dispute, some exchange of documents usually occurs. The International Bar Association has adopted Rules on the Taking of Evidence in International Commercial Arbitration (''IBA Rules''), which are used with increasing frequency in international cases, often by party agreement prior to or at the time of the preliminary hearing. The IBA Rules permit parties to request ''a narrow and specific requested category of documents that are reasonably believed to exist.'' The IBA Rules also establish a method for resolving disputes about document production.

The ICDR's Guidelines for Arbitrators Concerning Exchanges of Information, which have a similar effect, apply in ICDR cases absent the parties' agreement in writing to the contrary. The major institutions also have recently adopted guidelines or protocols to encourage arbitrators and parties to deal with electronic evidence in the most efficient and cost-effective manner possible.

The nationality of the arbitrators can make an important difference in these matters. Arbitrators from civil law jurisdictions typically decline to enforce requests for broad categories of documents or prehearing witness depositions. If, however, the arbitrators or one or both of the law firms involved are accustomed to U.S. or U.K. court litigation, there will be an expectation that no evidentiary hearing should be held without some document discovery.

When lawyers of this same disposition represent both parties, or serve on the arbitral tribunal, an international arbitration can come to resemble litigation in the U.S., with detailed document requests, depositions and corresponding objections. Depositions under oath remain relatively rare in international arbitration, although informal pre-hearing ''information sessions'' or interviews with opposing witnesses and counsel may be conducted to facilitate the parties' understanding of complex information, particularly concerning technical matters or damages.

Managing International Disputes With Dispute Resolution Clauses

When a party uses properly tailored dispute resolution clauses in its underlying international agreements, several of the risks relating to use of foreign courts and foreign law can be reduced. There are four types of dispute resolution clauses that should be considered for inclusion in any international contract: (i) governing law (or choice of law), (ii) forum selection, (iii) arbitration and (iv) attorneys' fees clauses.

Governing Law Clause

Corporate counsel often revert to using the law of their company's home jurisdiction or other laws without critically examining such laws in relation to foreseeable litigation that may arise. Although such laws may be good choices, they may not be the best choice. For example, U.S. state laws often allow much broader discovery and remedies (e.g., punitive damages) than foreign countries, which may increase the company's liability as a potential future defendant.

Importantly, limitations on liability, which are widely enforced across the U.S. (assuming they are not unconscionable), often violate the public policy and/or law of foreign countries and must be considered when drafting the clause. Additionally, if the agreement involves important intellectual property rights, counsel should analyze whether the foreign jurisdiction where the company will be doing business provides the same level of protection as in the U.S.

Forum Selection Clause

As with governing law clauses, corporate counsel often select as the arbitration or litigation forum the jurisdiction where the company is headquartered. This is not ideal in every situation. For example, if a future dispute is likely to occur between a party's foreign subsidiary and a foreign business in a foreign country, then the parent company's ''home'' jurisdiction probably has very little, if any, interest in the outcome of the dispute and is not likely convenient to any of the relevant witnesses. Such cases open themselves to possible motions to dismiss based upon the inconvenience of the forum selected, as well as the availability of an alternative, convenient forum abroad. And, if a court judgment is rendered in a forum in which the defendant or respondent has no assets, there may be additional issues raised as to enforcement of the judgment.

Additionally, a forum selection clause should use unequivocal language that the parties are consenting to the ''exclusive'' jurisdiction of the preferred state. Oth-

erwise, the forum selected in the agreement may be subject to attack, especially if it is truly not convenient.

Finally, even if the parties have agreed to arbitration, a forum selection clause should always be included in an international agreement in the event the parties must petition courts for emergency or provisional relief, or if the arbitration is somehow waived. In these scenarios, parties would be consigned to the courts and it would be wise to have selected in advance a court that is most favorable.

Arbitration Clause

If parties choose to arbitrate their disputes, the arbitration clause in their agreement should contain the following essential terms:

- The place of arbitration, preferably by city, state and country. Parties should be mindful that the place of arbitration is not necessarily the place where hearings will take place because under most international arbitration rules, arbitrators can designate where hearings will occur. Thus, a party may want to separately designate in the agreement where arbitral hearings are to take place to ensure it is a desired location.
- The arbitral institution to administer the arbitration and the rules to be applied. (If certain provisions of certain rules are not favorable, a party should ''carve them out'' of the agreement).
- The number of arbitrators, any special expertise they should have and the method of their selection.
- The language to be used in the arbitration.
- The extent and scope of discovery or disclosure to be allowed. For example, the parties may want to address whether depositions will be used. Or, if discovery or disclosure of ''electronically stored information'' will create issues, procedures for dealing with them can be included.

Attorneys' Fees Clause

In the U.S., attorneys' fees are generally not recoverable by the prevailing party unless there is a contract or statute that allows for such recovery. Consequently, if a dispute is to be resolved in a U.S. forum, the international agreement should include an attorneys' fees clause if the party wants to ensure such fees will be awarded.

The rules of most international arbitral institutions allow the arbitrators to award attorneys' fees even if the agreement does not have a clause. Such a result can be avoided if the arbitration clause specifically excludes the award of attorneys' fees, notwithstanding any provision to the contrary in the arbitration rules the parties have selected.

Conclusion

A company planning to do business overseas will do well to anticipate the potential for disputes with its international partners and understand the risks that can arise when managing such disputes. Most importantly, the company should recognize that the rules and practices that apply in resolving domestic business disputes may not apply in the international arena. It is worth the effort and expense to understand the differences, the risks involved and the tools available to help manage those risks.

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