

MEDIATION AND ARBITRATION

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Introduction

Just as the bride and groom in a wedding ceremony expect to live happily ever after, the parties to a business deal hope and expect the venture to run smoothly for their mutual benefit. In this atmosphere of high expectations, it is very easy to overlook the reality that disputes are part of every business relationship which should be foreseen and addressed before occurrence. The wise business person plans for a method to resolve these disputes. Every business relationship will have its ups and downs and may generate a wide variety of controversies along the way. Using a form document, a handshake or an agreement written on a napkin may not be sufficient to deal with a dispute.

The United States business person, accustomed to our highly litigious culture, generally considers litigation as the main method for resolving disputes. Litigation is expensive, time-consuming, cumbersome, and rarely a fully satisfactory way to resolve business disputes. Many states in the United States, including South Carolina, have formalized or are experimenting with "alternate dispute resolution" (ADR) systems, such as voluntary mediation and court ordered arbitration. There is a well developed body of law regarding arbitration. Many business persons now insure that arbitration clauses are included in their contracts to obtain the advantages of arbitration which do not exist for litigation.

Resolving International Business Disputes By Litigation

Litigation is the least efficient method for resolving international disputes. Some of the common problems with litigating an international dispute are the following:

Who to sue

Unlike the United States, governments around the world are involved in private business ventures. Thus, a distributor or joint venture partner in a foreign country may be a quasi-governmental agency or owned in part by a government entity. Because there are various doctrines or legal principles which may affect a claim against foreign governments, it is important to know who the partners are. For example, the Foreign Sovereign Immunity Act gives foreign governmental entities certain protections against being sued in a United States court. Thus, the distributor or joint venture partner may be immune from suit in the United States if it is partly owned by a foreign government entity. However, such immunity may not apply to enforcement of arbitration awards.

Where to sue

A basic principle of American law is that a court can issue a judgment only against a party that is within its jurisdiction. The concept of jurisdiction has become quite complex. Foreign defendants will often have reasonable arguments that they are not subject to the subject matter or personal jurisdiction of United States courts, and therefore, not subject to being sued in the United States. If both subject matter and personal jurisdiction cannot be shown, the claim may have to be filed in a foreign country. Many employers address this issue by using "jurisdiction" clauses in their commercial agreements which stipulate that the parties are subject to jurisdiction upon a certain court for purposes of litigating or arbitrating a dispute.

What law would apply?

In lawsuits between citizens of different states, questions often arise as to which state law applies. This can be an important issue because different states recognize different types of legal claims, damages, and litigation procedures. The differences can be even more pronounced in an international dispute because many countries simply do not recognize the types of legal claims our courts have adopted. Sometimes courts do not recognize the types of damages that might be available in a United States court. Moreover, our rules of courtroom procedure have years of history and tradition arising from English jurisprudence and common law. A foreign court will likely be limited by foreign law as to the types of claims or damages that can be recovered and the procedure which may be followed in prosecuting the case.

How are court papers served?

In order to commence a lawsuit, it is necessary not only to file a claim with the court but to serve the defendant with a copy of a summons and complaint. In the United States, we have uniform rules on service of court papers which is a fairly straightforward procedure. Serving court papers on a foreign defendant can become a costly and time-consuming matter. There are various multilateral service of documents conventions, such as the United Nations Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters and the Inter-American Convention on Letters Rogatory and Additional Protocol which provide methods for service among the signatory nations. The procedures remain complex. Even a minor mistake can give a defendant a bona fide reason not to recognize a service of process. A judgment based on improper service may be set aside.

What type of information can be obtained from the other side?

In the United States, we have broad rules of "discovery," which allow litigants to obtain documents and information from both their adversaries and third-parties. Most foreign systems are different, allowing either restrictive discovery or none at all. Even in a United States Court, the procedures for obtaining depositions and evidence abroad can be cumbersome. Limitations on obtaining evidence from third-parties may be imposed by a court.

What type of judgment is available, and how is it enforced?

Television and the newspapers have promoted the impression that after the jury or judge returns the verdict, the defendant simply writes a check and the matter is closed. If a judgment is obtained in a United States court against a foreign defendant, it is necessary to file an action in the courts of a foreign country to have the judgment enforced under local law.

Publicity

Most business people prefer to keep their disputes private. Litigation is a public process. Before filing a lawsuit you should consider if you want your competitors, suppliers, vendors, distributors, bankers, or employees knowing about your dispute.

The difficulties of litigation often influence parties to provide for mediation or arbitration of a commercial dispute reserving some matters appropriate to the courts such as injunctive relief.

Mediation and Arbitration

Although mediation and arbitration are often discussed together, the key distinction between the two alternatives is that mediation is wholly voluntary and arbitration results in a binding judgment which can be enforced in a court.

Mediation

The concept of mediation is that the most satisfactory resolution is often one that is agreed upon by the parties themselves. Because of negative feelings that may have arisen within the relationship, it may be impossible for the parties to reach an agreement. Therefore, a neutral mediator is retained to act as a facilitator. The mediator is selected by the parties. The mediator's job is to seek out areas of agreement and bring the parties to some middle ground that resolves their differences. When an agreement is reached, it is typically reduced to writing and the parties may or may not continue their relationship under new terms.

An advantage of mediation is that its scope is limited only by the creativity of the participants. There is no limit on the nature of the agreement. The mediator cannot force any party to agree and merely acts as a moderator. Studies have shown that nearly 80% of cases in the courts are resolved in mediation. The North American Free Trade Agreement (NAFTA) treaty encourages mediation and arbitration. The American Arbitration Association (AAA), the British Columbia International Commercial Arbitration Association, the Mexico City National Chamber of Commerce, and the Quebec National Commercial Arbitration have formed the Commercial Arbitration and Mediation Center of the Americas (CAMCA), which has developed a mediation program for international commercial disputes.

You may consider using a dispute resolution clause in your contracts with foreign partners which have a requirement that disputes be mediated before any formal legal action is commenced. CAMCA has a suggested mediation clause for this purpose.

Arbitration

Arbitration has become the primary method for resolving disputes between international parties. The main reasons are (i) practical benefits; (ii) obtaining a neutral forum; and (iii) cost savings.

Arbitration can avoid many of the inefficiencies of international litigation. For example, the various bodies that administer international arbitrations have their own streamlined rules for serving parties and obtaining relevant information. There are numerous international entities that sponsor arbitration. These include the following: the American Arbitration Association, the International Chamber of Commerce, the London Court of International Arbitration, and other institutions in Stockholm, Chicago, Singapore, and Vancouver. These organizations do not "decide" disputes. Rather, they provide rules and a forum for conducting arbitrations. Quasi-governmental parties can be subject to arbitration where they would not be subject to litigation. Perhaps most importantly, international conventions and treaties provide for recognition and enforcement of arbitration awards. For example, the 1958 New York Convention for the Recognition and Enforcement of Arbitration Awards was ratified by approximately 100 countries. The Convention provides a reasonably efficient method for enforcing international arbitration awards. The 1975 Panama Convention is a counterpart to the New York Convention and provides a mechanism for enforcing arbitration awards throughout Latin America.

The prospect of litigating in a foreign country is frightening. No one wants to be subject to the local prejudices of judges and jurors in faraway places. Foreign nationals have the same fear about the United States legal system which has the image of turning out large and baseless verdicts against corporate defendants. In contrast, most arbiters are persons with knowledge, skill, and experience in business matters who will attempt to bring a dispassionate and impartial view to your situation.

Because the arbitration process is generally more streamlined than formal litigation, the cost savings compared to a lawsuit can be quite substantial. This does not mean that an arbitration cannot become complicated. Some arbitrations get quite complex. Most arbitrations of routine disputes can be handled much less expensively than in formal litigation. However, it is important to recognize that some arbitration associations charge large fees as a percentage of the dispute in controversy and prepayment of a portion of such fees to the sponsoring association by the complainant may be a requirement before an arbitration may be commenced.

Businesses operating internationally should pay special attention to building a dispute resolution mechanism into their contracts with well drafted arbitration clauses. The arbitration clause should specify the governing rules (AAA, ICC, etc.), the place of the arbitration, the scope of matters that will be subject to arbitration, the official language, the number of arbitrators, appeal rights and any other matter such as cost-shifting, attorneys fees, etc. Each sponsoring organization has its own standard arbitration clause. It is important to consider all factors which may arise in both the subject matter and procedure in resolving a disagreement.