UPDATE

INTERNATIONAL LAW

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RESOLVING DISPUTES WITH INTERNATIONAL CUSTOMERS AND SUPPLIERS

Many companies successfully sell products and services to customers in foreign countries and source products from overseas suppliers. Even in successful international relationships, however, disagreements can develop over product quality, performance standards, payment, ownership of intellectual property, and other business issues.

One key to avoiding irreconcilable differences with an international customer or supplier is to negotiate, at the outset of the transaction, a written agreement that clearly spells out the rights and responsibilities of each party. The contract should also specify what mechanism will be used to resolve differences if there is a dispute that the parties cannot resolve by themselves.

Problems with International Litigation

As a general rule, suing the foreign customer or supplier in a U.S. court is not a viable option because the foreign party usually does not have enough contacts with the state in which the lawsuit is filed to be subject to personal jurisdiction. Even if sufficient contacts exist, unless the foreign customer or supplier has assets in the U.S. that can be seized and liquidated, a U.S. court judgment may be worthless as a practical matter. That is because the U.S. is not a party to any international convention requiring other countries to enforce judgments handed down in our courts, and most countries are not willing to enforce a U.S. court judgment unless the case is heard again in their own courts.

Suing the foreign customer or supplier in court in its home country may be an even less appealing option, as commencing a lawsuit in a far-away court can be costly and time-consuming and lead to unpredictable consequences.

In addition to the problems that can arise when suing a foreign customer or supplier in court in the U.S., the customer or supplier could retaliate by filing its own suit in its home country. If that happens, the parties will be involved in litigation in two jurisdictions. Such dual litigation will be expensive and may result in inconsistent rulings, thus creating even more complicated international legal issues.

Advantages of Arbitration

For these reasons, parties to international transactions usually agree to resolve disputes by binding arbitration instead of through traditional court litigation. While not a perfect mechanism, arbitration presents several advantages in the international context.

The main advantage is that awards are usually enforceable in most countries, thanks to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention). Most of the over 130 countries that have ratified this treaty will usually decline to litigate disputes subject to arbitration and honor an arbitration award rendered in accordance with the treaty.

Another advantage of arbitration is that parties can stipulate how, when, where, by whom, and under what rules and conditions the arbitration will be conducted. Parties can

choose from several organizations that facilitate international arbitrations and that provide rules to govern the process—the best known are the International Chamber of Commerce (ICC), the American Arbitration Association's International Center for Dispute Resolution, and the London Court of International Arbitration. There are also significant national arbitration organizations in a number of countries.

The most prominent arbitral organizations are well respected and their awards can be easier to enforce in the absence of voluntary compliance—but they charge hefty fees. For example, the ICC has a sliding scale of fees depending on the amount in dispute. For one ICC arbitrator to resolve a $2,000,000 dispute between two parties, the parties can plan to pay at least $50,000 each in ICC and arbitrator fees and expenses—excluding their own attorney's fees and expenses.

Parties can avoid arbitral organization fees by choosing "ad hoc" arbitration, which is arbitration that is not conducted under the supervision of any organization. Problems can arise in an ad hoc arbitration if there is an impasse, however, as no organization is administering the proceedings. In addition, the parties would still have to pay an arbitrator's fees and expenses.

Crafting the Dispute Resolution Clause

The ICC recommends that parties wanting to use its dispute resolution services include the following language in their arbitration clauses:

> All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

An arbitration provision in an agreement with a foreign customer or supplier should also specify the place of arbitration. This is a critical issue. It is important that the arbitration take place in a country that is a signatory to the New York Convention. Also, in negotiating where the arbitration will take place, keep in mind that local law may govern some procedural rights of the parties.

In addition to the place of arbitration, the arbitration provision should specify the language in which the arbitration will be held and whether the dispute will be resolved by one arbitrator or three. English is the language understood by most international business persons and arbitrators. Arbitrations conducted by a single arbitrator are less expensive and easier to schedule than those conducted by three arbitrators. On the other hand, three-arbitrator tribunals may give greater assurance that errors will be avoided in large cases.

Parties to an international contract should determine whether they want all issues that arise out of or relate to their contract to be subject to arbitration, or whether they prefer that some issues be left for resolution in another way, such as by expert evaluation. In addition, the parties should consider stipulating time frames in which arbitration may be invoked and in which the arbitration must be completed.

Arbitration clauses may exclude certain remedies, like punitive damages. And they may stipulate that either party can take its counterpart to court when injunctive relief is necessary; for example, to immediately enforce intellectual property rights.

Another issue to consider in negotiating an arbitration provision is whether to require non-binding negotiation and mediation as preliminary steps before binding arbitration.

Stages of Arbitral Process

A party can initiate international arbitration by filing a formal claim with the organization administering the arbitration and paying the required filing fees. A response to the allegations in the claim is usually due 30 days after receipt of the claim; the response will often set out counterclaims.

The arbitrator or arbitrators are then selected. In a single-arbitrator case administered by the ICC, if the parties cannot agree on an arbitrator, the ICC will appoint one. Generally, an arbitrator must be of a nationality other than the nationalities of the parties.

There is no automatic right in arbitration to "discovery" from other parties. Nevertheless, materials that are relevant to the issues in dispute and necessary for the resolution of those issues are often shared between the parties prior to the arbitral hearing.

The arbitral hearing is scheduled, and as the date approaches the parties typically submit briefs refining the issues and laying out their cases. At the hearing each side presents evidence (documents, witnesses, and, if necessary, expert testimony) and arguments supporting its factual and legal assertions.

The arbitration culminates in the arbitrator rendering a binding final award.

Companies doing business internationally should become familiar with the international arbitration process. When entering a transaction with a foreign customer or supplier, it is advisable to discuss and document at the outset of the transaction how disputes will be resolved, and to agree on a process that will produce an enforceable result.

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RECENT INTERNATIONAL LAW TEAM APPOINTMENTS, PUBLICATIONS, SPEECHES, AND TRADE MISSIONS

- Brad Waring was appointed Honorary Danish Consul for North and South Carolina.
- Val Stieglitz was appointed to a second term as Chair of the Business Litigation Committee of the International Association of Defense Counsel.
- The Winter 2008 edition of *Southern Business and Development* magazine featured Nexsen Pruet in an article entitled "Top Ten Law Firms That Understand Economic Development."
- Nexsen Pruet was named as a "Go-To Law Firm for Technology Companies" in a survey conducted by *Corporate Counsel* magazine for its 2008 "Who Represents America's Biggest Companies?" issue.
- Five members of Nexsen Pruet's International Law Team were named in the 2008 edition of *Chambers USA: America's Leading Business Lawyers*; they are: David Dubberly, Vickie Eslinger, David Gossett, Mark Knight, and Ed Menzie.
- David Dubberly wrote "Expanding Your Business Globally: Dispute Resolution" in the May/June 2008 edition of *South Carolina Business*.
- David Dubberly spoke on the firm's international law firm networks at the annual meeting of Mackrell International in Buenos Aires on May 2, 2008.

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- Melissa Azallion spoke on visas used by international businesses planning to locate in the U.S. at the LAWorld Annual Conference in Dublin on May 1, 2008.
- Bob Coble participated in the South Carolina Department of Commerce trade and investment mission to Berlin and Hannover from April 21 to 25, 2008.
- John Hardaway spoke on patent revival and restoration practices under U.S. law at a joint meeting of the American Intellectual Property Law Association and the Japanese Patent Attorneys Association in Tokyo on April 17, 2008.
- David Dubberly spoke at the South Carolina Global Business Forum on April 15, 2008 about international dispute resolution.
- Val Stieglitz gave presentations on "Doing Business in the United States" in Kunshan, Wuxi, and Suzhou, China from March 31 to April 3 in conjunction with the Hong Kong-based law firm of Ng & Shum.
- Bob Coble participated in the South Carolina Department of Commerce trade and investment mission to Tokyo from February 25 to 29, 2008.
- Bob Coble spoke to the Midlands International Trade Association on January 30, 2008 about the City of Columbia's 2007 European trade and investment mission.
- Melissa Azallion presented an immigration law update at the LAWorld Americas Regional Meeting in Miami on January 11, 2008.
- John Hardaway spoke on "Current Trademark Issues and Their Worldwide Significance" at the International Federation of Intellectual Property Attorneys' China Symposium in Beijing on September 21, 2007.

This International Law Update is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. If you have any comments or questions about international legal issues, please contact any member of the firm's International Law Team.

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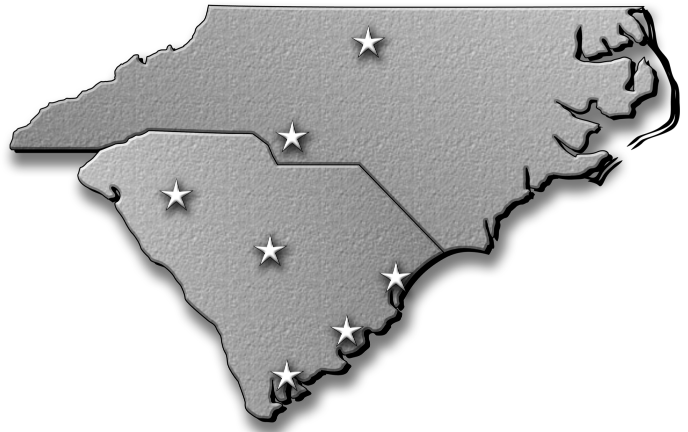

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