

RESOLVING INTERNATIONAL DISPUTES

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Every business that sells or purchases products overseas has the risk of a trade dispute with its foreign counterpart. Let's say you are disputing the quality of the product sold to you and your resulting damages. Or a foreign buyer of your product is raising a defense to payment. Or because of a spike in commodity prices globally, your foreign supplier is unwilling to fulfill your fixed price contract, causing you to default on contracts with your customers or to cover those contracts at a considerable loss. These are legitimate and common business disputes. However, resolving them with a customer thousands of miles away in a different country can be difficult, expensive and arbitrary.

Many foreign countries, particularly those that are developing countries, do not have a reliable and transparent legal system, and those that do may have a legal system that is unfamiliar to an American company. Litigation may not be a viable option. Where litigation is not a viable option, many companies have relied on arbitration. In fact, arbitration has become the most common dispute resolution process in international trade disputes. However, to take advantage of arbitration, a requirement to go to arbitration must be contained in the contract documents between the parties at the outset.

The success of your case may rest on whether the arbitration clause in the contract was thoughtfully drafted. Using an attorney with an understanding of international arbitration is crucial. There are a number of elements to be considered in a properly drafted arbitration clause:

Arbitration Rules: There are a number of international organizations that have arbitration forums and rules, including the International Chamber of Commerce and the United Nations (UNCITRAL). Numerous countries also have their own arbitration rules, some of the more commonly used being those of Sweden, The Hague, the United States, London and Singapore. The type of business transaction, the location of the parties and the applicable laws to the transaction must be considered in determining which arbitration rules should apply.

Arbitration Venue: The parties should agree in the contract on the place where the arbitration will be conducted. Neither party wants the other to have a "home turf" advantage. The location of the arbitration should be a neutral and convenient venue.

Selection of Arbitrators: Certain arbitration rules do not allow the parties to select the arbitrator, but rather leave it to the discretion of the administrator of that

organization. If this is an important issue, you should be careful in choosing which arbitration rules apply.

Number of Arbitrators: The number of arbitrators should be designated in the clause. While more expensive, having a three person arbitration panel minimizes the risk of arbitrariness in a decision. Arbitration is a binding process, and the arbitrator's ruling cannot easily be overturned.

Language: If you want to personally be involved in the arbitration process, you might require that the arbitration proceeding be conducted in English.

Discovery: Unlike the court process, in which parties are entitled to "discover" information from the other party, certain arbitration rules do not allow discovery, while others only allow what is provided in the agreement. The arbitration clause should specify the parties' rights to discovery, as well as the right to produce expert witnesses and expert testimony.

Reasoned Awards: The arbitration clause in the contract should require that the arbitration panel provide a written decision with its reasoning.

Binding Arbitration: The arbitration clauses typically provide that the arbitration is binding. The arbitration clause can provide, if the parties so desire, that mediation (either informally or through a formal process) be attempted first before turning to arbitration.

Enforcement of Awards: Once you have obtained an arbitration award in your favor, you must enforce it against the other party. That can be difficult in some countries. A number of countries are party to what is called the "New York Convention", where arbitration awards are honored in that country. Similarly, treaties between the U.S. and certain foreign countries may provide for the enforcement of arbitration awards. While enforcement can inherently be problematic even under the best of circumstances, it is important that the arbitration award be respected and enforceable in the other party's jurisdiction.

Legal Fees and Costs: While often less expensive than litigation, international arbitration can still be expensive. It is essential that the arbitration clause allows for the awarding of legal fees to the prevailing party. Otherwise, the inability to be awarded legal fees can be a huge disincentive for enforcing one's rights under an arbitration clause. Like legal fees, the arbitration clause should provide as to who will pay the fees of the arbitration proceeding. Often the losing party is required to pay, and other times the parties agree to split the costs, regardless of who prevails and who loses.

Having a well thought out arbitration clause is critical. Having an inadequate arbitration clause or being subject to the whims of a local arbitration forum with favoritism to the local party can cost the other party the loss of its investment. Do not let the euphoria of what appears to be a great deal and the desire to minimize

transaction expenses cloud your need to protect against a significant financial risk.