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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.

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.

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. Otherwise, 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: