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International Litigation »

Drafting Fee Agreements for International Cases

By Eric S. Sherby

International business disputes are on the rise, and that trend is likely to continue. A consequence of that increase is that lawyers who don't necessarily specialize in the international field increasingly find themselves representing clients from abroad or assisting local clients with disputes involving foreign parties.

As with any new type of client matter, the lawyer handling an international case should, obviously, have the client sign a retention agreement. What is less obvious is that a standard fee agreement —drafted for domestic cases—isn't likely to be adequate for an international case.

Practitioners, regardless of their level of international experience, need to ensure that fee agreements address the special issues most likely to arise during an international representation.

Importance of the Written Fee Agreement

In some jurisdictions, a lawyer has an ethical duty to ensure that a new client signs a fee agreement. Independent of any ethical requirement, there are a number of reasons why it's of particular importance in the international arena to have a signed retention agreement.

More "False Starts." Potential clients (both plaintiffs and defendants) tend to "throw in the towel" more frequently in international disputes. The would-be client might tell the lawyer in their first meeting that he'll fight until the bitter end, but that same client might conclude—*after* the attorney invests significant time in reviewing factual and legal issues—that the international fight takes a greater toll than initially expected.

By having the client sign a retention agreement at an early stage, the lawyer can help the client focus—early—on the cost-benefit analysis of litigating the dispute. In addition, signing an agreement early reduces the likelihood of a false start (or at least minimizes the amount of time that the lawyer might waste on a false start).

Heightened Concern about Being "Caught in the Middle." In most international cases, there is a need for legal counsel in more than one country. Whenever it's likely that foreign counsel will be retained, there's

a corresponding likelihood that, if something goes sour in the relationship with your client, the other law firm will look to *you* to pay at least some of its bill. (The same goes for private investigators and translators, discussed below.) Having a written fee agreement—preferably signed by each law firm—reduces misunderstandings and decreases the chance that you'll be caught in the middle.

International Cases Take Longer. Almost by definition, international cases take longer to reach closure than do domestic cases.

As with any business relationship, the longer it continues, the greater the likelihood of personnel changes, which result in differing recollections and contradictory understandings as to what was agreed upon years earlier. For the lawyer (even if not for the client), this business relationship is too important to allow any misunderstandings. The written agreement is the best way to avoid them.

Key Provisions in the Fee Agreement

Although a standard fee agreement will be a good starting point for an international agreement, you should supplement it to address the following issues.

Division of Responsibilities. In typical domestic litigation, a client is represented by *one* law firm. As noted above, that isn't so in the international arena—in which there is always at least one party litigating away from home, and, therefore, almost always at least one party that needs to have two law firms involved.

The client, understandably, doesn't want to pay double. Therefore, the retention agreement should include as clear of a delineation as possible as to the respective roles of the law firms involved. For example, if there is a need to prepare a chronology of events, the fee agreement should state which law firm will be responsible for preparing it, and the role of the other firm should be to review and comment on the draft prepared by the first firm.

Expenses and Deposits into Your Escrow Account. Out-of-pocket expenses in international disputes tend to be greater than in domestic cases. In domestic disputes, rarely does the lawyer need to translate documents for the client. Not so in many international cases. Even if non-U.S. clients speak English well enough to perform a business deal, when they read their first affidavit or document demand, they might very well insist on receiving translations into their native tongues.

Although a client can, without going through counsel, hire a translator to translate legal documents, as a practical matter, it's usually the law firm that retains the translator. Therefore, it's usually the law firm that pays the translator's bills and then looks to the client for reimbursement.

Because translators typically charge much less per hour than do lawyers, it's easy to lose track of how quickly those costs add up. But add up they do.

Another example is private investigation costs. At the beginning of a case, a potential plaintiff often needs a good PI as much as it needs a good lawyer—especially when there is a concern as to the collectability of an eventual judgment.

Even for defendants, a PI at the outset of the case might be essential —especially in a dispute that will be litigated in a jurisdiction where formal discovery is less extensive than what the client might be used to.

To ensure that the law firm is promptly reimbursed for translation costs and PI fees, the fee agreement should provide that the client will deposit funds in the lawyer's escrow account to cover third-party expenses, the client will be given a reasonable period of time (usually five days) to review the translation or the PI report (or any other written work product of a service provider), and the lawyer is authorized to pay the bill from the funds in the lawyer's escrow account at the end of that time period.

The Dog Wags the Tail—the Tail Doesn't Wag the Dog. Often, there is a need to hire a private investigator in more than one country. If the PI selected in Country 1 is a member of an international network of investigators, when it comes time to retain a PI in Country 2, he's likely to recommend that the member of his network in Country 2 be hired.

Sometimes it's a good idea to use an investigation network—but only sometimes. When retaining a PI in more than one country, do *not* assume that "one size fits all." If counsel in Country 2 is going to have to interact with whichever PI will be hired there, then that lawyer should probably be the one to select the PI.

Legal Research. In recent years, American clients have learned quite well how to object to legal bills that include time charges for legal research, but their non-U.S. counterparts are, arguably, years ahead of them. It's not uncommon to hear "Why do you need to do *research*—you went to law school, didn't you?"

Also, non-U.S. clients aren't used to a 50-state legal system, and they have difficulty understanding why (for example) a New York law firm needs significant time to familiarize itself with the substantive law of Ohio.

To address the legal research issue up front, my firm's standard fee agreement states "The Client understands that, in connection with almost any civil litigation, there is a need for legal research." Such an acknowledgment (obviously) won't guarantee that any particular quantity of research time is acceptable, but it makes it difficult later for the client to argue that it had no idea that the lawyer's work on its case would entail legal research.

Belt and Suspenders (Redundant Measures). Your fee agreement should be clear enough that the client won't feel a need to retain other counsel to review it, but there will betimes when the prospective client tells you that it intends to have counsel in its home jurisdiction review your draft fee agreement. That's not necessarily bad for your firm; if you ever have to enforce a judgment or an arbitral award in that country (see

below), it could be helpful to have had your fee agreement reviewed by the client's counsel there. That way, when the client tells you that its other counsel has reviewed your fee agreement, the agreement should include the sentence "The Client acknowledges that it has had a full opportunity to have this agreement reviewed by [name of foreign law firm] before executing it."

Venue. Regardless of whether the fee agreement includes an arbitration clause, the standard practice is that the venue for resolving disputes is in the law firm's city.

The situation obviously becomes complicated when there are two law firms involved and neither will agree to litigate or arbitrate abroad. It's not uncommon for the client to agree that any dispute between it and Law Firm 1 will be resolved in City A, while any dispute between the client and Law Firm 2 will be resolved in City B. Although such an arrangement exposes the client to the possibility of having to litigate (or arbitrate) related disputes in two fora, the client is usually no worse off than it would be if it were to execute two separate retention agreements—one with its local counsel and another with its counsel abroad.

Arbitration. If a law firm has to sue for its fees, it usually prefers to keep news of that suit out of its local newspapers. Also, most lawyers who have to sue clients for unpaid bills don't need (want) a jury. Assuming that the client is based in a country that is a party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, it will usually be easier to enforce an arbitral award than it would be to enforce a court judgment.

For these reasons, when a law firm has to sue for its fees, it usually prefers arbitration over litigation. (Although there might still be some malpractice insurance carriers that want their insureds to stay out of arbitration, those carriers are a dying breed, and the issue can usually be resolved by a quick email to your insurance agent.)

Some states require that the fee agreement expressly inform the client of its rights to have a fee dispute resolved through a statutory ADR mechanism. My firm's retention agreement routinely gives the client the *option*—it can take advantage of its statutory ADR rights or it can agree to arbitrate before the arbitral institution that we set forth in our fee agreement.

The client who has a choice will have a more difficult time arguing that its hands were tied as to arbitration.

Your fee agreement should provide that the arbitrator will have the discretion to award costs to the prevailing party and that, in any proceeding to enforce an arbitral award, the prevailing party will be entitled to receive 100 percent of its legal fees and costs.

Finally,draft with the client in mind.That means draft *clearly*. A client recently asked me to review a fee agreement from a U.K. law firm. The agreement was comprised of a "main agreement" and an "annex." The

main agreement provided that, in the event of any conflict with the annex, the terms of the main agreement would govern, yet the annex provided that, in the event of any conflict with the main agreement, the terms of the annex would govern.

Suffice it to say that my client had second thoughts about retaining that law firm.

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