International Contracts:

Maximize Enforcement

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The contract is the linchpin of any international transaction. Your efforts to assure its enforceability will pay significant dividends.

THE SIGNIFICANT GROWTH of international trade and cross-border relationships dominates business newspaper and magazine headlines. International trade now accounts for close to 20 per cent of gross domestic product, a virtual 100 per cent increase from just 10 years ago.

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Ballooning trade deficits have also created a source of tension between our country and its leading trading partners.

Despite the increasing reliance on world trade as a reality of American life, many lawyers' approach to negotiating contracts between parties from different countries has not undergone the same profound change. This article will explore contracts between parties from different countries and suggest provisions which may be more helpful or important in these agreements than in agreements between purely domestic parties. The article will then discuss alternative means of enforcing the international contract and suggest ways to approach selection of a tribunal. Finally, we will examine the practical realities of international agreements, namely, the precarious chances of enforcement.

SUGGESTED CONTRACTUAL PROVISIONS • After negotiating and documenting the essential business features of the transaction, many lawyers' eyes glaze over more mundane and recurring provisions. In fact, the vituperative epithet "boilerplate" has been used to justify typically cursory discussion of certain sections which, in the international context, could materially affect the ability of the parties to realize their bargain. The following describes some of these provisions and their dramatic importance in the international context.

Forum Clauses

This type of clause specifies the location and many times the court (for example, federal or state court) where any dispute arising under the contract may or must be resolved. Even if the parties are not required to litigate in the forum selected in the contract, it may be helpful in overcoming an objection by one party that such court lacks jurisdiction. A well-crafted forum selection clause may also provide that:

- Neither party may remove the dispute from that court; and
- A party waives any right to claim that the forum is not convenient to the party.

Courts will typically enforce these clauses as long as there is some logical nexus between the parties, on the one hand, and the forum, on the other. *See, e.g., M/S Bremen v. Zapata Off-Shore Company,* 92 S.Ct. 1907 (1972) (enforcing a forum clause since the parties did not have vastly disproportionate bargaining powers and were relatively sophisticated).

Also, courts will sometimes analyze and consider classic conflict of law considerations such as some relationship among the headquarters, states of incorporation, or place of negotiation, execution, or performance of the contract.

Forum Clauses Help the Parties To Focus on Substance

A forum clause is particularly useful in removing many procedural elements of parties' disputes and enables the parties and court to focus on and resolve the substantive issues. In some cases, when the forum selected is particularly inconvenient to one party and the clause (and contract) is not contested, the inconvenienced party may be more inclined to settle the matter purely to avoid fishing in chilly waters.

In the international context, the utility and necessity of these clauses are magnified. If these clauses are useful between parties in, say, Indiana and Colorado, imagine the exponential utility for parties in Turkey and the United States.

Governing Law

These clauses usually designate that the laws of a particular country or state apply regardless of conflict of laws principles. Sometimes they will be modified to recognize that federal law may apply in narrow circumstances. For example, in a contract involving the purchase of a radio station, the contract may be governed by Illinois law except with respect to radio license issues which will be governed by U.S. law. Like forum clauses, courts will typically enforce them. Also, like forum clauses, these clauses are useful in minimizing tangential disputes.

Governing Law Clauses Especially Important in International Contracts

In contracts between domestic parties, governing law clauses tend to be hotly negotiated, but in many cases they are of marginal importance. In the international context, the governing law provisions take on greater importance. The confidence and ability of a party to understand the risks inherent in submitting its agreement to be governed by the laws of a foreign country is diminished. Concomitantly, the willingness and ability of a court to enforce or correctly interpret and apply the laws of a foreign country also declines, particularly in a civil law jurisdiction.

The governing law provision can take on further importance when stronger parties attempt to impose unfair choices on weaker parties. For example, in Proposed Article 2B to the Uniform Commercial Code ("UCC") (the "Proposed Article"), a choice of law clause is enforceable even if it is the law of a foreign country. Proposed Article §2B-106(a). As drafted, this section would permit a U.S. software vendor, for example, to require a U.S. licensee to sue under Iraqi law, even if Iraqi law is fundamentally unfair on the topic, and U.S. law would provide a fairer result.

Currency of Payment and Collars

Self evident, but sometimes overlooked, is the identification of the unit of currency which is the medium of exchange between the parties. For example, oftentimes first drafts of agreements between U.S. and Canadian parties will call for a purchase

price in "dollars" but not specify U.S. or Canadian dollars. Since the exchange rate between the two currencies is not one-to-one, obvious interpretative issues could arise striking at the heart of the bargain between the parties. Crafters of international agreements should, but rarely, consider hedging mechanisms to mitigate the effects of excessive currency depreciation. One approach is to hedge by buying currency futures. This involves additional expenditures of money and participation in a sometimes complicated and risky foreign exchange market. There are two other approaches: the collar technique, and making any loan in more than one currency.

The Collar Technique

Through the collar technique, the parties could agree that if the currency shifts up to a reasonable number (for example 15 to 20 per cent), then no adjustment occurs. If the swing exceeds that band, then the adversely affected party could either terminate the agreement (or require repayment of the loan) or begin adjusting for the currency swing. This collar technique attempts to protect the parties from undue currency risk while not outlaying any capital in the foreign exchange market.

Multiple Currency Loan

The other approach is to make the loan in more than one currency. For example, a $1 million loan could be restated as a loan payable in $500,000 and in 750,000 Deutsche Marks ("DM"). If the DM appreciated, then the DM tranche would be more valuable, but the dollar tranche would be less valuable by the reciprocal amount.

Force Majeure

Force majeure provisions excuse or abate a party's performance in the event that unforeseen or extraordinary events occur which would result in a severe hardship to one or more parties. The "usual suspects" such as war, strike, and extreme shortages are commonly found in many contracts. Although these provisions are typically contemplated, they are rarely triggered.

Consider the Volatility of the International Scene

These provisions take on greater importance in the international context, Although a contract negotiated between two U.S. parties may gloss over force majeure items such as war and general strike since they rarely happen over here, it is dangerous to make the same assumptions in the international context. An agreement from a U.S. purchaser of Italian leather should seriously review the implications that commonly held strikes, with various degrees of severity, could have on the enforcement of the agreement. Therefore, careful drafting of international agreements must avoid the temptation to render

these clauses obsolete or insignificant. Contract negotiators should thoughtfully design clauses which deal with more precise definitions of each triggering event and which decide when such event is truly worthy of excusing performance or merely just an insignificant (and foreseeable) nuisance.

Language

Although the language embodying the agreement is self-evident, the parties should also consider the need to specify the appropriate language in other situations. The parties could minimize confusion and enhance communication by specifying the language of notices, the language of (or translation for) the enforcement tribunal, and the language of ancillary documents such as letters of credit, consents, and other notices.

Notices

Very few sections of an agreement are as overlooked and under-read as notice provisions. These sections set forth the recipients, means of communication, and timing for sending notices. In contracts between U.S. parties, these provisions generate little confusion or excitement. However, in the context of international agreements, drafters would be well advised to consider certain logistical issues unique to international communications. For example, in U.S. contracts, notices are typically deemed received the next business day after sending a notice by overnight courier. However, most "overnight" international letters require at least two and sometimes three or four days' patience. "Business days" also vary from country to country based on custom and holiday practice. Although Good Friday is typically not considered a holiday in the United States, many European countries take off the preceding Thursday, that Friday, and the next Monday. Carefully-drafted agreements should address many of these nuances to avoid uncertainty and dispute.

Severability

Many U.S. agreements provide that the unenforceability of one section of the agreement will not imperil the remainder of the agreement. If, for example, a noncompetition covenant is not enforceable due to its overbreadth, the balance of the agreement can nonetheless be saved.

These provisions take on greater importance in the international context. The contract drafter can usually anticipate the potential quagmires and troublesome areas in domestic law. But the same cannot always be said about foreign law; the drafter may not know what provisions may be looked at with a jaundiced eye by a foreign court. Mexican courts, for example, have been known to invalidate entire contracts if the typically innocuous and boilerplate provision dealing with the choice of governing law does not select Mexican law.

Enforcement Tribunal

Selection of a judicial or alternative dispute resolution ("ADR") mechanism merits close attention in every contract. In the international context, this consideration takes on greater importance since factors such as cost of enforcement, quality of the panel, likelihood of removing xenophobic favoritism of one of the litigants, and likelihood of enforcement of the decision reached by the panel, weigh heavily in determining the appropriate panel. The balance of this article will examine these issues.

JUDICIAL OR ALTERNATIVE DISPUTE RESOLUTION FOR THE CONTRACT? • Once the parties draft and negotiate the contract, the selection of the most beneficial enforcement tribunal takes on paramount importance. The best-drafted agreement, laden with the many provisions discussed above (and others), will provide little solace should the agreement be misinterpreted or not be enforced.

These immutable concerns are magnified in the international context. The decision between selecting a judicial solution or ADR will sometimes exceed in importance the actual written words of the agreement. This article, therefore, will explore the factors which parties should consider in deciding whether to select a judicial determination or ADR. The analysis usually hinges on whether the party is a large behemoth or a financially smaller company.

The Large Company's View: Reasons To Select ADR

The larger company's financial ability to put its smaller counterpart at a tactical disadvantage is magnified in the international context given the additional cost and time of litigating over large distances. In considering which tribunal to select, a large company will typically favor ADR after it weighs the following considerations.

"Home Cooking": Knowledge of Panel

The benefit of the local forum is obvious whether a judicial resolution or ADR is selected. Home cooking (particularity when an adversary's culinary tastes may differ extremely from yours) is a distinct advantage in any litigation. However, although parties cannot typically select the judge who will try their case, they do have considerable voice in the selection of the arbitration panel. The frequent defendant will have undoubtedly a large data base of knowledge of and experience with the local pool of arbitrators. The frequent defendant will understand the biases and predilections of an arbitrator and be better able to select or reject that arbitrator. Not unlike a voir dire for the selection of a jury, the litigants may choose, and reject, a selected list of arbitrators. Although the panel which is ultimately agreed upon by the parties will undoubtedly be impartial and fair, human nature suggests that even the most impartial decisionmaker would, assuming all other aspects of the case were evenly weighed, be disposed to parties who speak the same language, share the same culture, background, and values, or are likely to be associated with in the same community sometime in the future.

Confidentiality of Proceedings

ADR awards, unlike many judicial decisions, are not reported. A large corporation may consider this an important and comforting factor to isolate the dispute and not open the floodgate to copycat or similar disputes with other litigants. The loss of a significant monetary amount, while painful, will not be telegraphed to the world and the circling contingent of plaintiffs' litigators. Further, disclosure of a dispute may communicate or suggest sales or business practices which could injure a litigant's reputation, even if they ultimately prevail. The absence of precedential value or collateral estoppel effect may also appeal to a litigant who is concerned about the cascading effect of multiple pieces of litigation over the same sales tactic or inherently defective product. The benefits of confidentiality are as important in the international context since greater geographic distance hardly muffles the sound and fury of litigants' claims.

Consistency of Forums

A large company, while confronting significant amounts of litigation, and perhaps unable to contain the plaintiff base through minimizing reported decisions, nonetheless may desire to limit the site or sites of the dispute resolution. (The securities and franchising industries, for example, commonly require disputes resolved in courts of their choosing, usually the site of their headquarters.) A single forum may facilitate the defense of many claims through the saving of travel time, mitigation of the administrative burden of engaging and monitoring many law firms in far off places, and reduction of the cost of training law firms regarding the nuances of the company's practices and policies. Courts will also typically enforce forum selection clauses, but may be more receptive to public policy or equitable arguments challenging the particular selection.

Reduction of Emotion and Disproportionate Awards

The size and notoriety of a company often reduces the empathy which a trier of fact may have for the defendant or the concern that a trier of fact may have with making the right decision. As unfair as it may be, a trier of fact could develop, particularly in outrageous cases, a "they can afford it" mentality to justify awards which seem disproportionate to the underlying facts. The size of U.S. jury awards in certain celebrated cases is staggering. Although a court could, and sometimes does, reduce the size

of a jury award, the reduction should not be taken for granted and sometimes is insufficient.

Experience and Impartiality

Litigants often view an ADR panel as a more dispassionate assessor of the true facts and a fairer arbiter of the true damages suffered in a particular situation. Arbitrators tend to be more experienced and professional than typical jurors. The claims considered by an arbitrator and the amounts in issue rarely daunt an experienced panel. Panels, moreover, typically better understand the difference between compensating a victim and punishing a defendant. A corollary, however, may be that arbitrators typically would understand, while juries may not, that some claims may be covered by insurance, and therefore be more sympathetic to a plaintiff than if they were otherwise unarmed with that knowledge.

International use of juries is limited in many countries to criminal matters and a handful of civil issues. Reported decisions regarding emotional and excessive awards in nonjury cases are substantially less common.

Enforcement of Outrageous Provisions

An ADR panel is more inclined than a court to enforce outrageous or unfair provisions of contracts. Although a court may use its equitable powers to minimize the impact of adhesion or unfair contracts which large companies may impose on small companies, arbitrators tend to have a more modest approach to righting the problems of the world. To use the example of the Proposed Article, a forum clause would be enforceable even if it required a licensee to bring all claims in a foreign country. Proposed Article §2B-107. A U.S. small business licensee could be required to sue a domestic large company licensor in Hong Kong applying Iraqi law. A court may be less inclined than an arbitration panel to honor such a provision.

The Smaller Company's View: Reasons To Select ADR

A smaller company will typically avail itself of ADR as a counterweight to some perceived advantages of a larger corporation: the ability to seize every opportunity, and attendant cost, inherent in the judicial process.

Typically Less Expensive and Time-Consuming

ADR is commonly perceived to be faster and less expensive than conventional judicial resolution. Although initial decisions of courts in Cook County, Illinois may take five years to reach a jury decision, a typical commercial arbitration in the same locale might consume six to 12 months. Moreover, since the breadth of substantive issues and the discovery process may be circumscribed in ADR, many opportunities for cost savings exist.

Although both large and small companies have a desire to resolve litigation, a larger company may not mind waging a war of attrition and wearing down, financially and administratively, the smaller adversary. The mere existence of litigation may be more of an impediment for a smaller company to obtaining debt or equity financing and therefore may encourage a smaller company to resolve it faster.

In recent years, however, the shibboleth that ADR is cheaper and quicker has not been held universally. Many ADR panels now command high fees and costs. Additionally, many courts have streamlined their processes, ordered meaningful settlement conferences, and taken an active role in mediating disputes. Federal courts, moreover, have typically had a reputation for being more efficient than many state courts. Therefore, in choosing between judicial resolution or ADR on the basis of cost and time savings, the parties should analyze the forum of the dispute resolution and should no longer automatically assume that ADR is cheaper and faster.

Reasons To Favor ADR Common to Both Larger and Smaller Litigants

Court-based litigation often tempts plaintiffs to conduct fishing expeditions into defendants' past practices, business strategies and past cases. These tactics are not always an abuse of the judicial process, and may in any event be circumscribed by a court.

The ADR process, however, will tend to better narrow and focus the issues on what are really germane to the resolution of the substantive disputes between the parties. This narrower focus can speed resolution, reduce costs, minimize animosity between the parties, and provide a clearer array of issues to resolve or settle.

Quality of Adjudicators May be Superior to Judges

Although the judicial system boasts of many fine judges, at both the federal and state levels, there are many fine judges who have retired and enjoy lucrative and well-regarded careers as arbitrators or mediators. Many practitioners would concur with the view that, on balance, the quality of analysis and understanding tends to be superior among ADR panels than judicial triers of fact. This ADR edge could be particularly useful in complex cases such as antitrust or patent infringement disputes involving arcane or fact-intensive concepts and ideas. Resolving disputes with foreign parties also enables the parties to research and be comfortable with the skill and background of the arbitrators they select.

Favoritism of Panel to Local Party

Although no one would ever admit that favoritism of a local litigant oc-

curs, it is only human nature to suspect that it occasionally occurs, particularly in a close case. Of course, some decisionmakers may go overboard in the other direction just to dispel any notions of favoritism. Some might feel that a court would tend to show more bias than an ADR panel since a court, particularly if a jury is the decisionmaker, tends to be less educated and less professional. Others may feel that an ADR panel would be more biased since its decision is typically non-appealable. In the international context, ADR seems to be the universal equalizer particularly when the parties devise their own rules and can select their own panel.

Greater Likelihood of Enforcement in Foreign Country

As the next section will discuss in greater detail, enforcement of a foreign judicial determination in the defendant's courts should not be taken for granted. Courts frequently entertain claims of procedural flaws in the rendering of a foreign judgment or decline enforcement on grounds of public policy. International treaties have not required, or have provided loopholes, for conferring full faith and credit on foreign court rulings. International treaties, however, have provided means for enforcing arbitration awards in the defendant's country.

Reasons To Disfavor ADR Common to Larger and Smaller Litigants

Although there are many virtues justifying the use of arbitration, especially in attempting to enforce an agreement between parties from different countries, the parties should consider two particular shortcomings not discussed above.

Greater Tendency for Split Decisions

Although little empirical evidence exists to support this proposition, many feel that ADR panels strive to avoid reaching the hard decisions and will attempt to reach a middle ground compromise. Although courts will sometimes attempt to reach a political (or euphemistically, a "Solomonic") decision, ADR panels tend to render such verdicts with more regularity. Very often, practitioners complain that, after months of and ADR, the result was very close to the midpoint of the parties' ranges of damages sought. Clearly, this conservativism, and perhaps predictability, avoids the rash and extreme jury awards. Conversely, split decisions can call into question the merits of protracted ADR litigation and whether true justice prevailed.

No Right of Appeal Increases Risk of Arbitrariness or Injustice

Most arbitration decisions, unlike judicial determinations, are final, binding, and non-appealable. Certainty of result and finality of the contest frequently justify relinquishing the due process inherent in the right to appeal. Parties should be mindful that the tradeoff of certainty and finality is the abandonment of meaningful protection in the event of a perceived odious ADR decision. Although judges frequently rule with the dominion and stature befitting their mastery over their own courtroom, they are mindful, and frequently chastened, that their rulings may be reversed. Arbitrators have no such tempering yoke and therefore no avenue remains for an aggrieved party in the event that injustice, real or imagined, has been inflicted.

INTERNATIONAL ENFORCEMENT OF JUDICIAL OR ARBITRAL AWARDS • Congratulations! You have drafted and negotiated a wonderful contract, interspersed with many of the clauses discussed in the first part of this article. You have also carefully analyzed the appropriate forum in which your client's dispute was resolved and have received a judicial or ADR determination in your home country. Now comes the hard part. Will you be able to enforce the judgment in the courts of the defendant's home country where its assets lie? Will you even be able to persuade the courts of the defendant's home country to enforce the agreement to arbitrate?

A number of treaties exist which attempt to address the circumstances under which full faith and credit or comity will be given in one country to the judicial or ADR decisions dispensed in another. This article will not discuss the nuances or intricacies of every treaty, but only highlight their existence and possible pitfalls.

Treaties Regarding Enforcing Foreign Judgments

The United States is not a party to any international convention governing the recognition and enforcement of foreign judgments. *See e.g.*, Robert C. Casad, *Civil Judgment Recognition and the Integration of Multiple-State Associations* 155 (1981); William C. Honey and Marc Hall, *Bases for Recognition of Foreign Nation Money Judgments and Need for Federal Intervention*, 16 Suffolk Transnat'l L. Rev. 405 (1993). The United States has negotiated but never concluded a bilateral judgment enforcement treaty with the U.K. nor ratified the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards, 18 I.L.M. 1224 (1979). Many of our states, however, have become parties to the Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 261, which provides for some measure of recognition and enforcement of final judgments for liquidated monetary claims. Although U.S. courts, in practice, have traditionally been quite liberal in recognizing and enforcing foreign judgments in the United States, foreign courts have not universally reciprocated. U.S. courts will likely enforce a for-

eign judgment if the court is satisfied that proper due process safeguards have been followed (such as proper notice, and personal and subject matter jurisdiction). A U.S. court may also consider whether any fraud was involved in procuring the judgment and whether any compelling public policy principles compel circumscribing enforcement. Although most courts in the modern world make a passing attempt to provide due process and other procedural safeguards, a U.S. litigant may nonetheless attempt to challenge procedural lapses even of the most civilized nations. For example, it is not clear whether a U.S. litigant could challenge a civil judgment issued in Great Britain on the grounds that the absence of a jury deprived the defendant of due process protections.

Other nations have joined treaties which provide recognition and enforcement of a foreign judgment. The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 29 I.L.M. 1413 (1990) (among European Community member states) and the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 28 I.L.M. 620 (1989) (among European Community and European Free Trade Association members) provide for universal recognition and enforcement of judgments entered from one treaty nation to the other.

Non-treaty Nations

Non-treaty nations, however, have not treated other nations' court decisions with the same comity. Litigants are often afforded two bites at the apple by challenging the judgment of a rendering court in the non-prevailing litigant's home country. Typical grounds for challenge are that the judgment is void against public policy or due process safeguards were not afforded some or all of the parties.

Foreign courts typically offer public policy grounds to deny recognition and enforcement of a U.S. judgment. Excessive jury awards, treble damages, excessive abuses of the discovery process, strict liability and products liability, even the presence of a jury, have been public policy grounds asserted by foreign courts in refusing to recognize and enforce the judgment of a U.S. court. German courts in particular have been known not to give deference, as against public policy, U.S. punitive damage awards or damages based on strict tort liability. Brazil, Switzerland, and France will refuse to enforce a judgment against their citizens unless there is a "clear indication" of the national's intent to submit to the foreign court's jurisdiction. *See* Christopher J. Voss, *Recognition and Enforcement of Foreign Money Judgments,* Office of Chief Counsel for International Commerce (1993), http://www.tradecompass.com. Several nations (such as Norway, Sweden, the Netherlands, and Saudi Arabia) will not recognize a foreign judgment unless an enforcement treaty exists with the rendering nation. *Id.* U.S. litigants should carefully consider whether these grounds may render their judgment in the United States subject to serious challenge in the foreign country and therefore whether initiating the suit in the foreign country in the first place would be more prudent.

Enforcement of Foreign Arbitration Awards

Perhaps counterintuitively, arbitration awards have a greater likelihood of being enforced abroad than U.S. judicial decisions. The United States and 107 other nations are parties to the New York Convention. The New York Convention requires each contracting nation to recognize and enforce an arbitration award. The same due process and public policy exceptions to enforcement are available to disgruntled litigants. In practice, however, most courts will enforce a member nation's arbitration award. A cogent rationale to explain why an arbitration award has a greater likelihood of being enforced than a judicial determination, although the same due process and public policy standards are applicable, is not obvious.

CONCLUSION • The increasing interdependence of world markets is a reality lost on a rapidly shrinking number of U.S. businesses. Even smaller businesses that once saw their market as exclusively a domestic one are now turning their eyes toward the opportunities emerging on distant shores. The implication for the attorney is the ever-increasing likelihood of having to guide a business client through the subtleties and nuances of an international contract. These contracts often contain provisions that are familiar, but which take on an added significance in the international transaction. The wise client will not hesitate to tell you all about the transaction, the foreign company or parties, and the goals of the business arrangement. And as a wise advisor, you should take every step to learn about these things as a backdrop to creating a document that will fulfill the client's goals.