

PROTECTING YOURSELF IN INTERNATIONAL BUSINESS DEALS

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Not all roads lead to Rome. Some roads wind through our neighborhoods and lead to far away places like the Bahamas or Dubai. The prospect of doing business in a foreign legal environment may seem daunting, but in this “flat” world it is becoming essential and a few simple precautions can go a long way to protect your interests in international business transactions.

In international transactions, as in domestic ones, the agreement or agreements entered into, be they contracts, joint venture agreements or any other form of agreement, will have two main purposes. One purpose is to memorialize the rights, duties, commitments, and roles of the parties. The other is to protect the parties’ interests in the event that one party needs to enforce its rights under the agreement.

Common law countries like the United States and most of the British Commonwealth take a formal approach to contracting. A deal is not a deal until both parties have signed on the bottom line. You can withdraw at any time, even if you previously “agreed to agree.” Civil law countries – in other words, most of the rest of the world – operate differently, however. Words put to paper may be binding before we, in the U.S., might think that they are. Any preliminary agreement or expression of intent must therefore be entered into cautiously. Another key difference between civil and common law countries is the concept of “consideration.” In the United States, a gratuitous promise is not binding. A promise is only binding if given in consideration for another promise. In civil law countries, on the other hand, gratuitous promises will often be binding in a court of law. It should also be noted that few if any countries other than the United States use juries for civil disputes.

Enforcement of a contract in case of dispute involves additional complications. A number of countries, 65 at last count and including the United States, are member of the Hague Convention on the Service [of civil process] Abroad. For business deals in those countries, access to the courts through the filing of a lawsuit may be possible, even though it will likely be complicated, costly, and time consuming. To commence a case, service by international mail is not possible. Instead, formal service must be effected through the designated governmental authority (in the US, the Department of Justice and specifically the U.S. Marshall) and by using specific forms adopted by the member states called Request of Service Abroad of Judicial Documents. The time to answer is significantly extended. The papers must be translated into the

recipient nation's language. However, except for the increased formalities, service of process has the same traditional force as domestic service.

Insuring access to judicial process in countries which are not members of the Hague Convention can be achieved by including an international arbitration clause in the operative contracts. This allows a dispute to be resolved through international arbitration in a neutral forum and will be given effect in virtually all countries which are members of the United Nations, as that form of arbitration is conducted pursuant to UNCITRAL's (the United Nations Commission on International Trade Law) arbitration rules. While arbitral adjudication will not necessarily address enforcement and collection issues (only 90 of the UN's 250+ member nations have signed the New York Convention of the *enforcement* of arbitral awards), an UNCITRAL arbitration clause will go a long way to offer protection for transactions with parties from or involving assets in foreign countries.

The parties to an international contract need to agree in advance to submit potential disputes to UNCITRAL arbitration, which is where careful drafting aimed at protecting the investors' interests becomes critical. Parties are also well advised to agree in advance to the manner of the arbitration, including the number of arbitrators on the panel, the pool of arbitrators to choose from, and the language to be used in the proceedings. As in domestic contracts, the parties should further agree in advance as to the place where arbitration will take place and, importantly, the law under which it will be conducted. In the case of international contracts, such clauses may be more detailed and include waiver of sovereignty defenses and agreements on discovery rules or the roles of juries. While UNCITRAL's rules provide default provisions it is always beneficial to specifically contract for rights which you believe would be uniquely beneficial to the deal.

Opportunities abound worldwide. There is no reason to shun a profitable business deal because the other parties involved or the assets implicated are in a foreign country. All it takes is a little more preparation to protect your interests and an awareness of the culture in which the deal is being brokered.

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