FEES & BURGESS, P.C.

SUPPLY CHAIN MANAGEMENT MEMO

Volume 7, Issue 2 May 2010

DISPUTE RESOLUTION IN INTERNATIONAL TRANSACTIONS

Fees & Burgess, P.C., Emphasizes:

- **General Civil Litigation**
- **Commercial Law & Litigation**
- **Municipal Law & Litigation**
- **Police Civil Liability Defense**
- **Employment Law & Litigation**
- **Construction Litigation**
- **Corporate Law & Government Contracting**
- **Insurance Defense**
- **Railroad Law**
- **Corporate Counsel Services**

Oftentimes, when parties sit down to negotiate a contract, they do so with an optimistic view towards the possibilities that the potential transaction represents. While we all hope for the best when entering into new business relationships and pursuing promising opportunities, it is important to be mindful of how matters will be handled if something does go wrong and the parties end up in a dispute. As the saying goes, hope for the best, but prepare for the worst. In the business world, the place for making those preparations is in the contract you sign with the other party. A well-drafted dispute resolution clause can save you a lot of headaches and money down the road if things go sour. This statement holds especially true in transactions where the buyer and seller are located in different countries.

One of the first, and perhaps most important, considerations when drafting a dispute resolution clause for a contract governing an international business relationship is choosing which country's law will apply to the contract and the parties' relationship. Here, there are usually a few options. In deciding which country's law you want to apply, you should consider whether the law of the country being considered is well-developed and whether it allows for rights, obligations, or potential liabilities that might create an added benefit or burden for you. Russia and China are examples of nations with less-developed bodies of law, which can lead to uncertainty as to the parties' rights and obligations.

As a general rule, courts will almost always allow the parties to choose the law of a country where one of the parties has its principal place of business. If the parties cannot agree on which home nation's law to apply, or if they just want to select a neutral country's law based on principles of fairness, then the law of another country can usually be specified, but only if there is some factual nexus between the business transaction and the subject country. For instance, if some portion of the contract is to be performed in the neutral country, a court will be more likely to enforce a provision in the parties' contract selecting that nation's law. If your company has a corporate parent or subsidiary located in another country that has a more desirable body of law, it may be worthwhile to consider having that corporate affiliate enter into the contract with the other party, so that you can specify the more favorable law in your contract with some confidence that your choice of law will be enforceable.

The other major consideration when drafting a dispute resolution clause in an international context is the choice of dispute resolution method. The most common options are the same as in a purely domestic contract. The least formal option is to have the contract require the parties to escalate any dispute to the management of each company for further negotiation and, hopefully, resolution. This option has the benefit of being cheap and avoids revealing the parties' problems to outsiders. One significant consideration here should be timing. If you require this kind of escalation in your contract, you need to set a limit on how long the parties will be required to continue down this path without resolution before turning to some other dispute resolution method.

Another dispute resolution option is mediation. Mediation involves the parties presenting their

Continued on page 2

FEES & BURGESS, P.C.

SUPPLY CHAIN MANAGEMENT MEMO

Volume 7, Issue 2 May 2010

DISPUTE RESOLUTION IN INTERNATIONAL TRANSACTIONS (*cont'd from page 1)*

respective sides of the dispute to a neutral third party who then tries to help the parties come to a mutually-agreeable resolution. Mediation does not result in some outside party picking a winner and a loser. If there is any resolution in mediation, it is in the form of an agreement negotiated and signed by the parties, akin to a settlement agreement.

Mediation of most disputes can be completed in one or two days. Granted, like escalation, mediation does not always end with the dispute being resolved. However, it is a relatively fast and inexpensive option that does result in a mutually-agreeable resolution in many cases. Furthermore, in certain countries, mediation is a more culturally-acceptable form of dispute resolution than more adversarial methods, such as arbitration or litigation.

When requiring either escalation or mediation in your contract, it is important to allow for the parties to seek emergency relief from a court should a situation arise where an immediate court order is needed to prevent harm to a party or maintain the status quo. Absent such a statement in the contract, you might be forced to go through the required escalation or mediation procedure before seeking the needed relief.

Litigation is another way for parties to resolve disputes. This is an option that can be expressly provided for in the parties' contract, or that will generally be available if the parties do not specify some alternate, exclusive dispute resolution method. International litigation has many of the same characteristics of domestic litigation. Specifically, it tends to be expensive, stressful, and time-consuming. However, it is a dispute resolution method that should always result in a binding, final outcome to the parties' dispute.

There are several factors that make litigation in a foreign court distinct from litigation in the U.S., even if the parties agree that a foreign court will apply U.S. law. No matter what law the parties specify in their contract, they will likely be stuck with some, or all, of the procedural laws and rules of the court where the litigation occurs. Such rules can govern how long the parties have to complete individual steps in the litigation process, place limitations on the scope of the proceedings, and govern other aspects of the lawsuit that can impact the speed with which the matter is resolved and the associated cost in getting to some resolution. France and Mexico are both nations whose legal systems have a reputation for being slow-moving due to their procedural rules and/or heavy case loads. Corruption and home-party bias can also be an issue when litigation is abroad, particularly when you end up in a lawsuit being decided by a court in the other party's home country. Chinese courts, in particular, have a reputation for giving local businesses more favorable treatment.

Arbitration, like the other dispute resolution methods discussed above, has its own set of pros and cons. Arbitration is like litigation in that a neutral third party hears both parties' arguments, considers the evidence, and makes a binding decision. In most instances, even in international arbitration, an arbitrator's decision will be final and only appealable in the face of extreme procedural irregularities, such as some evidence of bribery or the arbitrator acting beyond his or her authority. Arbitration tends to be faster and somewhat cheaper than litigation (although the parties can certainly provide for rules or procedures in their contract that can make arbitration take longer and cost more), but more expensive and time-consuming than escalation or mediation. One advantage of arbitration over litigation is that the parties can specify in their contract that the arbitration proceedings and all information disclosed therein be kept confidential. In many

Continued on page 3

FEES & BURGESS, P.C.

SUPPLY CHAIN MANAGEMENT MEMO

Volume 7, Issue 2 May 2010

DISPUTE RESOLUTION IN INTERNATIONAL TRANSACTIONS (*cont'd from page 2)*

jurisdictions, court records are wholly, or at least partially, open to review by the general public. Another possible benefit is that arbitrators in the other party's home nation might not be as partial to the local company as the courts in that nation. To help ensure impartiality in arbitration, the parties can also state that the arbitrator must be someone who is not from either party's home nation. Specifying arbitration as your dispute resolution method, instead of litigation, also has the benefit of allowing you to specify the language in which the proceedings will be conducted. When considering arbitration of disputes abroad, it can be important to educate yourself on local customs and practices applicable to arbitration. China is one example of a country that has arbitration practices that differ significantly from what U.S. parties might expect.

Generally speaking, arbitration agreements and arbitration awards are enforceable across borders. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*a.k.a*, the "New York" Convention), is a United Nations convention that requires contracting nations to enforce the arbitration agreements and awards of other contracting nations. To date, over 140 nations have signed up to this convention, including the U.S. and almost every other significant player in international commerce. For an arbitration agreement to be subject to the convention, it must be in a writing that is signed by the parties or contained in an exchange of letters or telegrams. Excluding certain nations which have expressly provided otherwise in their adoption of the convention, one party sending a document (contract, purchase order, etc.) to the other party that includes an arbitration clause and the receiving party beginning performance without signing the document or sending any form of acknowledging transmittal is insufficient to bind the receiving party to the arbitration clause.

If your contract allows for arbitration or litigation as a dispute resolution method, you need to specify when the arbitration or litigation will occur. In addition to the issues discussed above which might factor into your choice of a location for resolution of your dispute, there is obviously some expense associated with having to travel to arbitration or litigation in the other party's home country or in a neutral country. You also have to consider the cost and effort associated with getting witnesses, documents, and other tangible evidence to the location where the arbitration or litigation will be held. With respect to witnesses and evidence not under the control of the parties, if they are not located in the country where the dispute is being heard, the judge or arbitrator may have little to no authority to mandate that the witness appear at the proceedings or that the evidence be produced. This consideration alone may warrant pushing to arbitrate or litigate any disputes in either yours or the other party's home country. Another benefit of arbitrating or litigating on one of the parties' home turf is that it tends to make enforcement of any award or judgment that might be entered a much easier and faster process. In many instances, if a judgment from one country is taken to another country in order to be enforced, the local courts will be unwilling to enforce the judgment without having the opportunity to reconsider some or all aspects of the case that resulted in judgment in the first place. Suing someone in their own backyard takes away that additional hurdle.

This is not an exhaustive discussion of all the issues that merit consideration when drafting a dispute resolution clause governing an international commercial relationship. Every transaction is a little different. The key to deciding where you want to resolve disputes, the process you want to use, and the law you want to apply is educating yourself regarding each of your options. There is generally no one-size-fits-all answer to these questions, especially in international transactions, and it is usually wise to consult local counsel in the countries being considered for some guidance on what to expect.

Continued on page 4

FEES & BURGESS, P.C.

SUPPLY CHAIN MANAGEMENT MEMO

Volume 7, Issue 2 May 2010

Calendar of Events

May 13, 2010– 11:30 AM - 1:00 PM
Human Resources/Labor Law Update– Allen Anderson and Leah Green will be presenting at the Shoals SHRM monthly meeting held in Muscle Shoals, Alabama. We will discuss:

- Health Care Reform Act;
- Equal Employment Opportunity Commission Recess Appointments;
- National Labor Relations Board Recess Appointments; and
- Other recent changes to labor and human resources laws.

May 19, 2010–11:00 AM - 12:30 PM—Webinar
Human Resources/Labor Law Update– Attendees of this program will learn about recent changes to labor and human resources laws affecting employers. We will discuss:

- Health Care Reform Act;
- Equal Employment Opportunity Commission Recess Appointments;
- National Labor Relations Board Recess Appointments; and
- Other recent changes to labor and human resources laws.

For more information, or to register, please click here.

June 10 – 13, 2010— Alabama Veterinary Medical Association Annual Conference
At the 103rd Annual Conference of the Alabama Veterinary Medical Association, held at Sandestin Golf and Beach Resort in Destin, Florida. Jeffrey Roth will be presenting several topics, including workplace harassment and violence, wage and hour law, and hiring, firing, and promotions.

For additional information, click here.

July 18 – 21, 2010– 2010 NCMA World Congress
At the 2010 National Contract Management Association (NCMA) World Congress, hosted in Fort Lauderdale, Florida. Allen Anderson and Jeff Roth will be presenting several sessions covering:

Uniform Commercial Code, Parts 1 – 4: The program, divided into four sections, covers an overview of the Uniform Commercial Code, Articles 1, 2, and 2A. This training is used as a fasttrack study session as preparation for the Certified Commercial Contracts Manager exam.

Logistically Speaking: Using Delivery Terms to Allocate Supply Chain Risks: Contract professionals grapple on a day-to-day basis with risk and responsibility for transportation, warehousing, domestic and international regulation, and overall logistics, often as both exporters and importers. A thorough understanding of delivery terms, and their use and impact, is the only method by which such contract professionals can effectively manage their supply chains and control the associated risk. This session helps to provide that understanding.

Click here for more information on the 2010 NCMA World Congress.

If you would like more information on these and other seminars, please go to www.feesburgess.com.

FEES & BURGESS, P.C.

SUPPLY CHAIN MANAGEMENT MEMO

Volume 7, Issue 2 May 2010

SPEAKERS

Fees & Burgess, P.C., provides speakers, training programs, seminars, and webcasts for various trade associations; business groups; and clients. For information regarding a program, please contact us at seminars@feesburgess.com.

NEWSLETTERS

Fees & Burgess, P.C., also publishes *F&B Quarterly Bytes* focusing on multiple practice areas and *F&B HR Corner* focusing on human resource issues. To receive any of these e-newsletters, please e-mail us at newsletteres@feesburgess.com with your contact information.

To remove your name from our mailing list, please e-mail newsletters@feesburgess.com.

Michael L. Fees
mfees@feesburgess.com

C. Gregory Burgess
gburgess@feesburgess.com

Allen L. Anderson
anderson@feesburgess.com

Jeffrey L. Roth
jroth@feesburgess.com

FEES & BURGESS, P.C.
213 Green Street
Huntsville, Alabama 35801

Telephone (256) 536-0095
Facsimile (256) 536-4440

www.feesburgess.com

Stacy L. Moon
smoon@feesburgess.com

Leah M. Green
lgreen@feesburgess.com

Nori D. Horton
nhorton@feesburgess.com

Ryan G. Blount
rblount@feesburgess.com