

Managing cross-border disputes

Understanding which areas of the company's business may be most exposed to dispute is central to the process of grappling with changing business models and mitigating the risk they entail. Michael CLARKSON spoke to participants at the Martindale-Hubbell Counsel To Counsel Forum in Dallas on managing disputes across borders

As legal risk managers, in-house counsel and their external advisers have to be able to think ahead. While it is a fact of commercial life that most companies are involved in litigation, arbitration or other more informal dispute resolution techniques on a relatively regular basis, legal departments are under constant pressure to avoid the scenario where the company could conceivably be involved in a dispute that might spiral out of control.

The pressure does not just come from a purely direct cost perspective. In the global business village, reputation is all. Adverse press in the home jurisdiction is bad enough, but for a multinational wishing to be perceived in the

various countries in which it operates as a local, rather than global, company, a dispute in a country other than the original home jurisdiction can raise the specter of adverse nationalistic sentiment, with indirect cost consequences.

Consequently in-house counsel and their external advisers have to take a very commercial approach to dispute management. "The reputation of the company is worth more than the lawyers involved and the outcome of any one particular case," says David Sudbury, Vice-President, General Counsel and Secretary at Commercial Metals Company.

The key is to keep an eye on the future and ask questions: What could go wrong? Where? What types of claims are likely to arise? How and where could those disputes be managed, and by whom? And when disputes do arise: Can this be nipped in the bud? What is the best outcome for the company in this particular scenario? What really constitutes a "win" for us here?

These questions have to be addressed at a number of stages in the business cycle, but particularly in the context of:

- Drafting commercial contracts.
- Strategic planning.



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Enron Corporation dispute management practices for international infrastructure project agreements

1. Enron seeks arbitration on every material infrastructure development contract involving international counter parties, particularly when involving government or quasi-government counter parties. Hopefully, the counter party's government is a signatory to the New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards.
2. We negotiate shorter time limits to expedite the pre-trial period that may otherwise be left to the discretion of the arbitration panel under "the Rules". Additionally, we prefer a "time is of the essence/expedited arbitration" clause in each material contract, which will evidence the parties intent should the arbitration panel or counter party delay matters.
3. Enron seeks US law (Texas, Delaware or New York) or, failing that, English law as governing law to the extent possible in international infrastructure project agreements. When we are required to use local law on a specific project agreement, we try to use US law to the extent possible under other project documents (EPC, Finance, Shareholders Agreement, Project Development Agreement, and so on).
4. Arbitration rules vary depending upon the counter party - we favor ICSID (International Center for the Settlement of Investment Disputes) rules for disputes involving foreign sovereigns, and ICC or UNCITRAL rules for private commercial agreements.
5. Enron prefers that each material infrastructure project agreement, as a condition to the right to arbitrate, require one or two tiers of executive fast track negotiation in an effort to avoid personality disputes at the operating level, and avoid escalation of claims between the parties. Failing a commercial resolution, we arbitrate.
6. We prefer to minimize discovery to avoid protracted delays, but will accept limited discovery if it is not subject to court procedures.
7. We involve local counsel and US litigation counsel very early on in any dispute, and scrutinize local procedures or injunctive relief that could frustrate the effectiveness of the arbitration clause.
8. Finally, we try to adjudicate our disputes to the extent possible outside of the media or local regulatory agencies in deference to the contractually agreed dispute resolution method.

Drafting

Some mechanism for dispute resolution should be incorporated as a matter of course in any contract. "The single most important preventive measure you can take is to include a comprehensive dispute resolution clause dealing with forum, governing law and procedure in all contracts to which the company is party," says James Loftis of Vinson & Elkins.

If the contract has an international aspect, failure to do so can have significant disadvantages in the event of a subsequent dispute, such as:

- The prospect of litigation in a foreign court, possibly in an inconvenient location, under unfamiliar substantive law and procedures, and possibly in a foreign language.
- Possible restrictions on the choice of representation.

- Potentially unduly restrictive or excessive awards of damages and costs.

- The possibility of a biased tribunal.

The principal contractual dispute resolution options include:

- Informal mechanisms, such as referral of the dispute to senior executives at the respective companies ("fast track" negotiations) or some form of alternative dispute resolution (ADR).

- Arbitration clauses.

- Choice of law/jurisdiction clauses for eventual litigation.

These mechanisms can be combined in a dispute escalation clause: if the dispute cannot be resolved at the first level (fast track, for example), it is referred to the next level (arbitration or litigation).

Fast track negotiations. Often disputes are initially fuelled by personality conflict at the operating level. "Emotions may be running high among the people on the ground and taking the dispute up a level, to regional CEOs or other senior management, can inject a degree of objectivity into the situation," says Ned Crady, Assistant General Counsel at Enron Global Markets, LLC. "We see fast track as a way of potentially catching disputes early, before having to get any lawyers involved, or at least keeping them behind the scenes."

As part of its dispute management practices for international infrastructure projects, Enron prefers that all material infrastructure project agreements require one or two tiers of executive fast track negotiation, before the parties have the right to arbitrate (see box "Enron Corporation dispute management practices for international infrastructure project agreements").

Arbitration and litigation. Generally, even where more informal procedures are provided for, a contract should nominate either arbitration or the courts of a chosen jurisdiction for the third party resolution of disputes. It is possible to have part of a contract subject to arbitration and part subject to a specified jurisdiction, or to provide for a specified jurisdiction should the arbitration clause fail to cover a particular dispute.

There are many factors involved in the choice as to whether to opt for arbitration or litigation (see box "*The pros and cons of arbitration and litigation*"). One of the principal attractions of arbitration in the international context, however, is that of neutrality. "In the field of arbitration, a body of law and practice, much of which is not written down, is being developed and is moving us towards more of a global model of dispute resolution," says Allen Green of Howrey Simon Arnold & White. "Arbitration provides a neutral forum for parties coming from different legal traditions, particularly common law and civil law jurisdictions."

Arbitration, though appropriate and desirable for many types of disputes, may not always be sufficient to fully protect the company. In determining what remedies will offer the best protection, it is important to be aware of the idiosyncrasies the company may face in particular countries. Remedies have to be tailored to the jurisdiction in which business is envisaged. Mexico, for example, does not provide the kind of injunctive relief available in the US. A company taking equipment into the

country as part of a joint venture or other operation, may need to be able to get that equipment out. "Often, as in these circumstances, you have to 'nationalize' the agreement so as to optimize the company's position given the limitations imposed by remedies available under local law," says Arcie Izquierdo Jordan of Strasburger & Price. "You often end up with a hybrid dispute resolution clause."

Leaving issues of exclusive and non-exclusive jurisdiction aside, the choice of forum for dispute resolution by the courts will in practice ideally be that of the system of law which is to govern the contract. Otherwise, providing evidence of the governing law is likely to be a costly exercise involving expert witnesses and possibly also the inconvenience of conducting proceedings in a language different to that of the governing law. Choice of governing law is therefore a matter of strategic importance to negotiating parties from different jurisdictions, as each side will normally want its law to govern so that disputes will be resolved under a system with which they are familiar.

Wherever possible, Enron, for example, seeks to have US law (Texas, Delaware or New York) as the governing law in international project agreements. "Where we are required to use local law for a specific project agreement," says Crady, "we try to use US law for the other project documents, such as shareholders agreements, construction agreements and joint development agreements. In practice, financiers will usually insist on New York or English law being the governing law for any agreement in which

they are involved, wherever the parties are based."

Carlson Restaurants Worldwide Inc. is involved in franchising food outlet rights worldwide and currently has restaurants in 53 countries. "In most cases we choose to have the franchise agreement governed by local law in recognition of the fact that each business will be subject to the hygiene, labor code and other regulations of the particular jurisdiction," says Jean Jacquemetton, Associate General Counsel. "The main exception is in the Middle East, where we mutually agreed with our local franchisee to have the interpretation of the franchise agreement governed by the laws of The Netherlands. The restaurants are of course still subject to local laws and regulations governing the operation of the establishment."

Good practice. As a matter of good management, carrying out an audit of the company's contracts can ensure a certain degree of consistency. Many companies are regularly doing deals of a similar nature and conducting similar business in different locations. Looking at the range of contracts the company has, analyzing how and where disputes are likely to arise and how the company wants to deal with them allows you to put in place dispute resolution mechanisms that are suited to the individual corporate culture and give the company a greater degree of control. "In the international context, it is important to be in a position where you can avoid the race to the courthouse which can arise where there is ambiguity or uncertainty over jurisdiction," says Green. "Get the litigators



Robert Kimball
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Mark Weintrub
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Jean Jacquemetton
Carlson Restaurants
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The pros and cons of arbitration and litigation

There are many factors to bear in mind when deciding whether to opt for litigation or arbitration, including the following:

- **Neutral forum.** Arbitration can provide neutrality where parties come from different countries, particularly countries with different legal cultures.
- **Expert "judge".** A judge will always be first and foremost an expert in the national laws and procedures of his or her own country, although specialist courts do exist in some jurisdictions. Arbitration gives the parties scope for appointing an arbitrator with particular expertise in the subject-matter of the dispute.
- **Flexible procedure.** The arbitration laws of most countries allow a more flexible procedure in arbitrations than is available in the courts. The parties usually have considerable freedom to agree, and the arbitrator considerable freedom to order, a procedure tailor-made for the dispute and the parties in question. A judge, on the other hand, will be constrained by the procedural rules of the relevant legal system.

The flexibility of an arbitration can

be invaluable - particularly when parties come from very different backgrounds and compromises need to be found which are fair to both parties in relation to, for example, disclosure, examination on oath, rules of evidence, or the form of any pleadings. With arbitration, there is also more geographical freedom and greater freedom of representation. There is usually no requirement for the parties to be represented at the hearing by a locally qualified lawyer, and the absence of a formal national procedure diminishes the need for local procedural expertise.

- **Confidentiality and privacy.** Most national court procedures require that a trial be accessible to the public. The contrary is true of arbitrations, as it is generally accepted that all arbitration hearings should be held in private. However, the question of whether arbitration proceedings are confidential is far less clear.
- **Finality.** In many jurisdictions, an international arbitration award will not be subject to an appeal on the merits, and a party may only apply to have it set aside for a fairly limited number of reasons. This is an advantage in that it prevents a losing party delaying enforcement of the award by

pursuing unmeritorious appeals through the courts, but there is a risk of unfairness if a party is unable to challenge an award that is plainly wrong.

- **Enforceability.** If enforcement is likely to be required in a country other than that which is to play host to the litigation or arbitration, enforcement will be easier if there is a treaty between the two countries for the mutual recognition and enforcement of judgments or awards.

There is no worldwide mutual enforcement treaty for court judgments which compares to the New York Convention on Enforcement of Arbitral Awards 1958 for the enforcement of arbitral awards. There are, however, numerous regional and bi-lateral treaties, the most important in Europe being the Brussels and Lugano Conventions, which provide for mutual recognition and enforcement of judgments throughout the EU and EFTA countries.

- **Speed.** Ultimately, the time and cost of proceedings, whether litigation or arbitration, depend heavily on the attitude of the parties. If all parties wish a dispute to be heard quickly and efficiently, both arbitra-

talking to the corporate lawyers about mechanisms suitable for the company's business."

In negotiations on individual deals, it is good practice to be up front with the counter party about dispute resolution as early on as possible and not leave it to the last minute when it might not get the attention it deserves. "Make sure that the term sheet is detailed on the subject of dispute resolution, particularly in the international context," says Robert Kimball of Vinson & Elkins. "This is part of the process of identifying at the outset what the real business assumptions are for the relationship going forward."

And when it comes to completion and

signature, do not overlook the cultural aspects of the formalities. "If the foreign party expects the senior representative of your company to sign on completion and you send someone less senior along," says Kimball, "the foreign party might start looking for their first opportunity to get back at you for the offense."

Ongoing relationships. Managing a transaction once signature has taken place is a different process from managing the negotiations leading up to the deal. A new internal management team is likely to take over and will have to start working out how the project is going to be handled from then on.

Establishing a system, formal or infor-

mal, that allows the legal department to keep in touch with operations on the ground is critical. "I see myself as a Grand Central Station," says Mark Weintrub, General Counsel, Isotag Technology Inc. "A lot of my time is spent shepherding information around the company and undertaking damage control. The key is to build relationships with the people involved and manage them." Jacquemetton agrees: "If you are to be able to nip potential disputes in the bud, you have to know what is going on in the company and be able to get to information quickly. Having an open information flow culture helps."

Strategic planning

Thinking ahead strategically can help

tion and litigation (depending on the court and country where the proceedings are issued) can meet this requirement.

In an international commercial context, however, arbitration has the benefit of being in most instances final (ruling out appeals on the merits), and any award may also be more easily enforceable abroad under the New York Convention. It may also be possible to choose an arbitrator who has time available to proceed quickly with determining the dispute.

On the negative side, if the parties to an arbitration opt for a panel of three well known arbitrators with busy diaries, finding a hearing date convenient for the arbitrators and each party may result in as much delay as would have been incurred in waiting for a trial.

- **Costs.** It is often possible to reduce costs by following the arbitration route provided that the arbitration is conducted expeditiously. However, in-house lawyers should bear in mind the additional costs that arbitrations entail, namely, the arbitrators' fees and the administrative expenses of the arbitration (for example, the cost of hiring a hearing

room) which have to be borne by the parties.

Moreover, recovery of costs in arbitrations is less predictable as the norm is for the arbitrators to have complete discretion over the apportionment of costs between the parties.

- **Coercion.** A national court will usually be in a stronger position to prevent obstructive tactics from a difficult opponent than an arbitrator, who lacks the penal sanctions of a judge and who must also take great care to be seen to be acting fairly so as to prevent a subsequent challenge to his or her award.

- **Multi-party.** National courts have the power to join third parties to litigation proceedings, whereas arbitrators very rarely have such power in relation to arbitration proceedings without the consent of all concerned. Indeed, the presence of a party to a dispute who is outside the arbitration agreement may enable a court to seize jurisdiction over the whole dispute and override an agreement to arbitrate. Where there is the potential for there to be multiple parties to a dispute, litigation is likely to be a more satisfactory solution than

arbitration unless complex back-to-back arbitration clauses are incorporated into all the relevant contracts.

- **Certainty.** Arbitration awards have no formal "precedent" value as regards non-parties. A judgment on a standard supply contract, for example, may be more useful in the long run than an endless series of arbitrations against many trading partners. The lack of a precedent system also makes it more difficult to predict the result of an arbitration.

For further information see the Global Counsel website www.practicallaw.com/global for the following:

- *Dispute resolution in the PLC Legal Risk Practice Manual.*
- *Drafting an effective arbitration agreement (GC, 1998, III(3), 17).*
- *Choosing arbitration rules (GC, 1998, III(7), 37).*
- *Defining an arbitration (GC, 1998, III(9), 40).*
- *Arbitration across Europe (GC, 1999, IV(5), 45).*

to minimize the company's exposure to ugly disputes.

One risk for any company dealing in IP rights (buying rights under other companies' patents and licensing rights under their own), for example, is the possibility of business pressure to enforce such patent rights. Ted Galanthay, Group Vice President, IP and Licensing at STMicroelectronics, is responsible for the protection and licensing of his company's IP rights worldwide. The advice he gives the company's management, patent authors and engineers on where to file the company's patents is dictated partly by the level of regulatory protection the company is likely to achieve in any particular country.

"There is no point in filing patent applications in a country where you are not going to have enforcement rights," he says. "You don't want to be in a dispute scenario in a regulatory system that has no teeth. In commercial terms, there is simply no value in a patent that you can't enforce and the cost of filing is a misplaced investment."

Antidumping. Some time ago J.C. Penney Company Inc., the household goods and clothing retailer, identified the surge in the number of antidumping cases being brought internationally against US companies as a "horizon issue" it needed to manage. Antidumping laws allow national governments to impose special duties on imported goods that are "dumped"

(sold at a price lower than the price normally charged on the exporter's own home market) and cause or threaten the domestic import-competing industry. For years US antidumping laws have been very unpopular with countries whose exports suffer as a result of their operation. Now the tide is turning. More than 60 jurisdictions worldwide have antidumping laws and US companies are increasingly finding themselves the subject of retaliatory antidumping cases brought by foreign governments.

According to a recent Cato Institute report, between January 1995 and June 2000 the US was the third most popular target of antidumping measures worldwide, trailing only Japan

and China (see *Cato Institute Trade Policy Analysis No. 14*, dated 30th July, 2001 www.free-trade.org/pubs/pas/tpa-014es.html). Over that period, US exports were the subject of 81 investigations by 17 different countries and in 51 of those cases antidumping measures were imposed. While the international political debate on multilateral or regional rules to prevent antidumping law abuse and protectionism continues, US importers and exporters inevitably get caught in the crossfire of individual cases that foreign governments decide to bring.

In the light of this trend, J.C. Penney Company Inc., whose suppliers import products to the various countries in which it operates, introduced a multi-layered antidumping strategy. The measures it has adopted include:

- Working closely with relevant trade associations on the issue.
- Identifying vulnerable products.
- Requiring its suppliers to cooperate with the company in any proceedings.
- Carrying out an antidumping audit with a trusted supplier to identify potential documentary weaknesses.
- Working with external lawyers who have had experience of antidumping cases in the steel and other metals industries, the most common targets of antidumping actions.

As Clydia Cuykendall, Associate General Counsel, explains, "A company that finds itself subject to an an-

tidumping fine can always pay the duty and find another supplier, but can only do so a limited number of times. In practice, the duty follows the business. Our current antidumping strategy is preventative, but also responsive. We have been involved in three antidumping proceedings and know the cost of what can turn out to be very protracted proceedings."

The global lawyer. For both in-house departments and law firms, looking ahead internally, to the skill sets they want their lawyers to develop, is important too. "A lawyer has to be able to act as an intermediary in a number of ways," says John McDowell, Jr. of Strasburger & Price. "In international litigation the lawyer must draw on his or her knowledge of the language and culture on both sides of the litigation to accomplish the client's goals. If settlement is the goal, the lawyer must use these skill sets to bridge the gaps among the parties and achieve compromise. If winning the litigation is the goal, those same skills are crucial to defining strengths and weaknesses of all parties. If these various intermediary skills are strong, the client is more likely to win."

In addition to legal expertise, the attribute most in-house lawyers most commonly look for in their external advisers is evidence that they understand the client's business. On one level, in-house counsel provide an interface between their own business personnel and their external lawyers. When it comes to international disputes, in-house counsel often look to the principal advisers on the case to provide this interface between them

and any local foreign lawyers also advising. Having a lead firm that can communicate the company's business objectives effectively to local lawyers is invaluable. "The client wants a seamless web of advice," says Fred Shaheen of Howrey Simon Arnold & White.

A related skill, and equally important for all commercial lawyers, whether in-house or in private practice, is the ability to function as a global lawyer, ie. to be effective whatever jurisdiction is involved. "Many of the larger global companies are developing a global risk matrix," says Crady. "If something comes up in one of their non-home jurisdictions, they want to be able to parachute in lawyers who know the company well and have cross-border experience and will expect them to get up to speed quickly on local issues. In this regard legal services are becoming more transferable."

This article follows on from a Martindale-Hubbell Counsel To Counsel (c2c) Forum which took place in Dallas, Texas on 29th August, 2001. The Forum was co-hosted by Howrey Simon Arnold & White, Strasburger & Price and Vinson & Elkins and was organized by ELD Project Marketing International, Inc. The facilitator was Leigh Dance. Martindale-Hubbell was represented by Timothy Corcoran, Senior Director, Sales and Operations and Bob Hopen, Senior Vice-President, Sales. The c2c series is one of the services Martindale-Hubbell offers to connect law firms and clients. For further information on forthcoming sessions, call 1-908-790-2156 or email c2c@martindale.com or visit <http://c2c.martindale.com>.



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