2011

The Dispute on The Horizon: Contracting for Effective Dispute Resolution in International Business Transactions a U.S. Perspective

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THE DISPUTE ON THE HORIZON: CONTRACTING FOR EFFECTIVE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS TRANSACTIONS A U.S. PERSPECTIVE*

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I. INTRODUCTION

The importance of the relationship between the United States and Brazil in respect of international trade and commerce cannot be overstated. In 2009 alone, U.S. exporters exported to Brazil merchandise with an aggregate value of USD $26,095,455,340, more than twenty-six *billion* U.S. Dollars.[1] And Brazilian exporters exported to the United States merchandise with an aggregate value of USD $20,069,606,594.[2] From oil & gas, transportation equipment, and chemical products to coffee, paper, and cachaça, international trade between the United States and Brazil is robust and voluminous. As barriers to trade fall, more and more Brazilian entities and U.S. entities will seek good opportunities for investment and other ways to engage in mutually beneficial business transactions.

When companies enter into business relationships across borders, both parties usually expect good things to happen. Depending on the nature of the transaction and the role to be played by each party in their relationship, whether as buyer or seller, licensor or licensee, principal or agent, or some other role, the parties might be expecting new markets; new investors; new technology; or other new opportunities. And each party understandably expects to profit in some way from the business relationship. Sometimes things go very well and everyone is happy.

But those successful cross-border business relationships can lull the unwary into a false sense of security, because sometimes things do not go well. Sometimes contingencies – both foreseen and unforeseen – materialize that cause at least one of the parties to suffer significant losses. Or sometimes a misunderstanding can cause the

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* This article is based in part on a presentation given by the author as part of the Academic Program of the XLVI edição da Conferência Federação Interamericana de Advogados (FIA) in Rio de Janeiro from June 15 through June 19, 2010. Specifically, the author gave a presentation on choice of law as part of the Comitê IV. (Direito Civil e Processual Civil) program "Os meios de resolução de controvérsias nos distintos países membros da FIA / The means of resolving disputes in the various IABA member countries."

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[1] FOREIGN TRADE DIVISION, U.S. CENSUS BUREAU, 2009 EXPORTS TO BRAZIL OF NAICS TOTAL ALL MERCHANDISE, http://tse.export.gov/TSE/ChartDisplay.aspx.

[2] FOREIGN TRADE DIVISION, U.S. CENSUS BUREAU, 2009 IMPORTS FROM BRAZIL OF NAICS TOTAL ALL MERCHANDISE, http://tse.export.gov/TSE/ChartDisplay.aspx.

relationship to deteriorate in such a way that the parties no longer expect good things to happen. Such losses and such misunderstandings can lead to disputes.

It goes without saying that disputes of any kind are generally undesirable from a business perspective. Disputes cause delay; disputes cost money; disputes ruin business relationships. But *international* disputes can be especially difficult. In addition to all of the hardship associated with an ordinary, domestic dispute, now the parties to the dispute must contend with foreign discovery, foreign legal proceedings, potentially applicable bodies of international law, language barriers, cultural differences, and the logistical difficulties of dealing with a dispute that may be taking place on the other side of the planet.

For these reasons and others, the simple truth is that no amount of planning for dispute resolution can assure that disputes that arise in international business transactions will be easy or inexpensive to manage or resolve. But there are some important issues that should be considered and addressed *ex ante* – that is, before the parties enter into a contract and before they begin to conduct business with each other – by the parties to any cross-border transaction. As relates to dispute resolution, there are three related but distinct items that can and should be addressed in this regard in every international contract involving U.S. parties or U.S. law. First is choice of law; second is choice of forum; and third is method of dispute resolution. Addressing those issues *ex ante* can help to reduce the risk that a cross-border dispute will spiral out of control and drag the parties into an international vortex from which neither party will easily emerge.

Unfortunately, often companies engaging in these transactions (and sometimes their lawyers as well) fail to think about these issues until it is too late. The issues are consequently not resolved at the time of entry into the agreement and are therefore not addressed by written contract, and when a dispute arises, the parties are no longer capable of reasonable agreement on establishing parameters for dispute resolution, preferring instead to seek whatever advantages can be gained by selecting each party's home jurisdiction or by jockeying for application of advantageous bodies of law. That leads to races to the courthouse, claims filed concomitantly in different jurisdictions, and an inability to agree on alternative dispute resolution mechanisms that both parties might have initially found preferable. An effective, thoughtful transactional lawyer can help to avoid this outcome.

When advising their clients at the beginning of a proposed business relationship, transactional lawyers are often focused on getting the deal done. They might focus on making their clients aware of certain risks, obligations or potential consequences that a proposed relationship might present. They might focus on identifying creative solutions that allow both sides to find an acceptable compromise on some allocation of risk or responsibility. But they should also be thinking at the beginning of the business relationship about how the relationship might deteriorate, or how an unexpected contingency might materialize, or how a dispute or disagreement could arise, and, importantly, what rules and procedures should be agreed upon, at the time the contract is entered into, to govern that dispute or disagreement, so as to avoid the cost of establishing those rules when the parties are no longer interested in cooperating with each

other. Indeed, one very important role of any transactional lawyer is to consider and address how best to deal with disputes which the parties did *not* anticipate. This is a challenging role to do well, made doubly so in the cross-border context.

This article offers a view – from a U.S. perspective – on planning for dispute resolution in the context of business transactions between U.S. and non-U.S. parties. More specifically, this article identifies the issues that parties who are located in Brazil or in jurisdictions throughout the Americas should consider at the time of drafting, negotiating and finalizing business contracts with U.S. counterparties, or that are entered into in connection with other cross-border arrangements that could involve U.S. law, even when there is no U.S. counterparty, to prepare for effective management of disputes as they arise. Specifically, this article briefly describes choice of law, choice of forum, and method of dispute resolution from a U.S. perspective, and it describes some of the issues that arise with respect to drafting and enforcing the appropriate contract language to address each item.

II. CHOICE OF LAW

Due to the complexities of cross-border transactions and the additional issues such transactions present, there is greater risk involved when parties fail to take the time to reduce their agreement into a comprehensive written contract. By allocating in writing risk and responsibility in ways that both parties find mutually acceptable, the parties reduce the risk of misunderstanding and disagreement down the road. But it is impracticable to expect to include every possible term in any written contract, and a choice-of-law clause therefore serves as a proxy for those terms the parties do not consider or simply do not take the time to address in writing.

If, on the other hand, the parties fail to select the law that will govern their transaction, then a court or a tribunal surely will, and the court or tribunal might select a body of law that is undesirable and that, in any event, is unpredictable, making performance of the contract more difficult and effective management of the risks relating to the transaction nearly impossible. It is therefore essential to include a carefully considered express choice-of-law clause in the written agreement between the parties.

A. Choice of Law Generally

As an initial matter, it is important to consider the limits from a U.S. perspective of the effect of a choice-of-law clause. When a written contract includes an express choice-of-law clause that chooses the laws of a particular jurisdiction to govern the agreement, it is important to recognize that the parties have *not* chosen a body of law that will in all cases trump or supersede other potentially applicable bodies of law. In the United States, as in other jurisdictions, some statutes (or other sources of law) that apply by their terms to one or both of the parties or to the transaction itself might continue to apply automatically, notwithstanding any choice-of-law clause selecting some other body of law to govern the contract between the parties.

By way of example, in the United States, there is a robust body of competition law called the Sherman Antitrust Act that prohibits certain restraints on trade.[3] Among other things, competitors are generally prohibited by the Sherman Antitrust Act from allocating markets between themselves and from fixing prices. If a U.S. company enters into a lawful agreement, such as a joint development agreement, with a foreign competitor, and the parties select by a choice-of-law clause the laws of Perú to govern their agreement, they have not cleverly evaded application of the Sherman Antitrust Act and will not be able to avoid the consequences under the Sherman Antitrust Act if they then proceed to allocate markets and fix prices between them by means of that otherwise lawful agreement.[4] The Sherman Antitrust Act cannot be excluded by operation of a choice-of-law clause and will still apply by its terms. Similarly, a choice-of-law clause generally will not enable parties to avoid application of otherwise applicable U.S. regulatory requirements or U.S. consumer protection statutes.[5]

Of course, this does not mean that it is pointless in the United States to choose the body of law that is to govern the agreement. When the choice-of-law clause is enforceable, and that is not always a foregone conclusion, a choice-of-law clause accomplishes primarily four things in the United States.

First, by including an enforceable choice-of-law clause, the parties affirmatively select the rules that will be used to understand the agreement, including by means of interpreting or explaining existing contract language. The law will provide rules regarding the evidence that can be considered to supplement the agreement; for example, is extrinsic evidence allowed to explain or supplement the agreement, or is such evidence prohibited? The law may prescribe the meanings to give certain specific terms; for example, what does "F.O.B. plant of manufacture" mean, if the parties have included that shipment term in their written agreement? And how does that term allocate risk and responsibility between the parties? As well, the law will provide the rules of interpretation that will be used to interpret contract language that may be unclear.

Second, an enforceable choice-of-law clause identifies the body of law that will be used to fill the gaps of the agreement. The parties are not going to address in any written agreement every possible contingency and every possible risk that could conceivably arise; that would be too costly and too time-consuming. So, for example, how would applicable law allocate the risk of some contingency that materializes that the parties did not specifically anticipate? What would applicable law establish as a reasonable notice period, if the parties did not specify how much advance notice should

[3] Sherman Antitrust Act § 1, 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

[4] *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19, 105 S. Ct. 3346, 3359 n.19 (1985) (noting that the Court did not need to consider the risk, which had not yet materialized, that a Japanese arbitration panel might use a choice-of-law clause to determine that U.S. antitrust law was inapplicable, but noting that "in the event that choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, [the Court] would have little hesitation in condemning the agreement as against public policy.").

[5] *See, e.g.*, Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (governing written warranties and service contracts offered in connection with sales of consumer goods).

be given when notice is required? What are the default obligations, such as warranty obligations or indemnification obligations, that the law will imply into the agreement between the parties? What steps must be taken (if any) before a claim may be filed by one party against the other that arises from the contract or its performance?

Third, an enforceable choice-of-law clause identifies the body of law that will determine the remedies that are available for breach and that will establish statutes of limitations and affirmative defenses and the like. For example, in the United States the default rule regarding attorneys' fees is that each party bears its own cost of attorneys' fees, unlike the default rule in many other jurisdictions, where the prevailing party may recover from the other party the prevailing party's cost of attorneys' fees.

Fourth, at least to some extent, the parties might displace undesirable law governing how each party is required or is permitted to interact with the counterparty, if such law would otherwise be applicable under the court or tribunal's choice-of-law principles.

So, while choice of law does not affect every allocation of risk and responsibility and does not eliminate every potentially applicable statute or other body of law, choice of law does matter.

B. Choosing a U.S. Jurisdiction

Suppose that the parties agree that U.S. law will govern the agreement. When it comes to identifying the body of U.S. law that will govern a contract used for an international business transaction, it is not enough to state that the laws of the United States will govern the contract. Rather, within the United States, the law of contracts, commercial law, and corporate law are all largely supplied by individual states. In other words, the State of New York has its own bodies of contract, commercial and corporate laws, the State of California has its own bodies of law, the State of North Dakota has its own bodies of law, and so on. Therefore, when parties to contracts that are to be governed by some body of U.S. law choose the law that will govern the contract, they should specifically choose the laws of an individual state. There are fifty states in the United States, and there is also the District of Columbia and there are several U.S. territories, so there are many potentially applicable bodies of law when a U.S. party is involved in a transaction or U.S. law is otherwise implicated by the transaction.

i. Uniform Laws in the United States

For some kinds of transactions, which state's law governs the transaction will not make much difference. For example, for commercial transactions, and in particular for sale of goods transactions, there is a uniform law in the United States known as the Uniform Commercial Code[6] that has been adopted throughout the United States by every

[6] The Uniform Commercial Code [hereinafter UCC] has been widely adopted into the law of the states of the United States. Article 2 of the UCC generally applies to all transactions in goods. *See* U.C.C. § 2-102 (2002). Because Article 2 of the UCC defines "goods" quite broadly and without significant carve-outs, the scope of UCC Article 2 is very broad:

single state other than the State of Louisiana. Thus, if a transaction is a sale of goods transaction that is to be governed by domestic U.S. law, it probably will not matter all that much for the commercial aspects of the transaction, if it is governed by the laws of Alabama, New York, Texas, Wisconsin, or any other state, with the sole exception of the State of Louisiana.[7] It will not matter all that much because in each case, the transaction will be governed by Article 2 of the Uniform Commercial Code, as Article 2 of the Uniform Commercial Code has been adopted by the applicable state, and as it is supplemented by that state's common law.[8]

ii. Corporate Law

At the same time, for transactions implicating corporate law, it is common in the United States simply to choose the laws of the State of Delaware, the state within the United States that is the leader in the development of U.S. corporate law and the forum of choice for high-stakes corporate litigation.[9] Many domestic and multinational companies in the United States are organized under the laws of the State of Delaware or have a parent company or a holding company that is organized under the laws of the State of Delaware. The corporate laws of Delaware are generally considered to be well-developed and reasonable. It is therefore common for a corporate transaction to be governed by Delaware law, at least when there is some relationship between at least one of the parties or the transaction itself and the State of Delaware, which will often be the case for corporate transactions.

iii. Differences among U.S. Jurisdictions

So, in some cases the state selected by the choice-of-law clause might not matter, and in other cases, the state to be selected might be a foregone conclusion.

On the other hand, for other transactions, choosing the laws of a particular state can have significant consequences. For example, some states within the United States

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> "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

U.C.C. § 2-105(1) (2002). Article 2 of the UCC has been adopted by every state throughout the United States, other than by the State of Louisiana, making Article 2 of the UCC the primary domestic sales law in the United States.

[7] The State of Louisiana is unique among the fifty states in that Louisiana is a civil law jurisdiction, so it presents a host of differences from other states of the United States. For that reason, U.S. practitioners outside of Louisiana tend to avoid choosing the laws of Louisiana to govern their clients' transactions.

[8] *See* U.C.C. § 1-103(b) (2010) ("Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.") (brackets in original).

[9] *See, e.g.*, Usha Rodrigues, *The Fetishization of Independence*, 33 JOURNAL OF CORPORATION LAW 447, 450 (2008) (describing Delaware as "the preeminent source of corporate law in the United States"); *see also* Jens Dammann and Henry Hansmann, Globalizing Commercial Litigation, 94 CORNELL LAW REVIEW 1, 57 (2008) ("Delaware is currently the preeminent forum for high-stakes corporate litigation.").

offer varying degrees of protection to distributors or sales representatives, or both,[10] and it is possible to cause a protective statute to apply by a choice-of-law clause when the protective statute would not have otherwise applied by its terms. Also, enforcement of restrictive covenants is approached very differently by different states within the United States. A covenant not to compete might not be enforceable at all under one state's laws and might be fully enforced under another. The State of California, for example, is generally much less permissive of covenants not to compete than other states and, with limited statute-based exceptions, typically refuses to enforce covenants not to compete.[11]

In addition, some states allow applicable statutes of limitations periods to be reduced by contract, while others do not. And different states within the United States provide for different rates of interest to accrue on default judgments. And so on. So the U.S. jurisdiction that is selected by the choice-of-law clause can matter a great deal. Brazilian entities and persons and other non-U.S. parties dealing with U.S. law should know that the U.S. jurisdiction that is selected can matter, at least for some issues.

iv. Limits on Freedom of Contract

Notwithstanding the freedom of contract generally enjoyed within the United States, however, U.S. parties in domestic transactions are *not* free simply to select whatever jurisdiction they wish to select. Suppose that two parties to a business transaction are located in Florida and California, respectively, and both parties refuse to agree to the other party's jurisdiction as the jurisdiction whose law will govern the agreement. In an attempt to compromise, we can imagine that the parties might select some neutral, third state, with which neither party has any connection, as the state whose laws will govern the transaction. Perhaps the parties choose the laws of the State of Texas as a compromise, for the specific reason that neither party has any connection with Texas.

While this sort of compromise may be a common compromise in some regions of the world, in some states within the United States, as between U.S. contracting parties, such a choice-of-law clause will generally be unenforceable due to a lack of nexus with the chosen state. That is, in general there must be some relationship between the transaction and the jurisdiction selected, or some courts in the United States are unlikely to enforce the parties' choice of law.[12] This is due to the fact that in the United States, there are limits, established on a state-by-state basis, on the parties' freedom to choose the jurisdiction whose laws will govern their transaction.

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[10] *See, e.g.*, Wisconsin Fair Dealership Law, WIS. STAT. § 135.01 *et seq.*

[11] *See* CAL. BUS. & PROF. CODE § 16600 ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.").

[12] *See, e.g.*, FLA. STAT. § 671.105(1) (2009).

> Except as provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law *either* of this state *or* of such other state or nation will govern their rights and duties. Failing such agreement, this code applies to transactions bearing an *appropriate relation* to this state.

Id. (emphasis added).

C. Second Restatement of Conflict of Laws

While the limits are determined on a state-by-state basis, more states follow some version of the approach set forth in the Second Restatement of Conflict of Laws than any other approach.[13] Under that approach, courts may refuse to enforce a choice-of-law clause under two limited circumstances: first, when there is no reasonable basis for the parties' choice, and second when application of the chosen law would violate a fundamental public policy of another jurisdiction with materially greater interests in the dispute.[14] And when the parties have no relationship with the state selected, courts in most U.S. jurisdictions will conclude that there is no reasonable basis for the parties' selection, making the selection unenforceable.

Jurisdictions within the United States that do not follow the approach described in the Second Restatement of Conflict of Laws follow one of a small handful of other approaches to determine whether or not to enforce the parties' choice of law. Irrespective of the approach used by any given court, if the court concludes that the parties' choice of law is unenforceable, the court will use its own conflict-of-laws principles to determine which body of law the court will apply to govern the transaction and the dispute. And the law selected by the court might be the law of the jurisdiction where the court is located, but it will not necessarily be the law of that jurisdiction. That makes the applicable body of law uncertain even when there is a choice-of-law clause, if the choice-of-law clause is unenforceable.

Now, whether the same limits on choice of law would apply to parties to an international transaction is an unresolved question. There is precedent to suggest that U.S. courts will allow greater freedom to choose the laws of a neutral jurisdiction when the transaction is international. But that question has not been definitively resolved by U.S. courts. And there is at least a risk that some courts within the United States would not enforce a choice-of-law clause even in an international transaction when the choice-of-law clause chooses the laws of a neutral jurisdiction, unless the parties can show some

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[13] Restatements of the Law, including the Second Restatement of Conflict of Laws, are produced by the American Law Institute, an independent organization in the United States made up of lawyers, judges, and law professors. http://www.ali.org/index.cfm?fuseaction=about.overview. The Restatements are produced in an effort to explain what the law is, but the Restatements are not themselves binding law. They nevertheless have considerable influence on the decisions of U.S. courts.

[14] The Second Restatement provides in relevant part as follows:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
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> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
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> > (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
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> > (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws § 187.

relationship with that jurisdiction. That risk appears to be quite small, but the risk does exist.

D. Choice of New York Law

However, choosing the laws of one particular state within the United States reduces the risk of non-enforcement, even in the absence of a relationship with the state, and that state is the State of New York. In fact, it is very common for parties to international business transactions that are to be governed by U.S. law to choose New York as the state whose laws will govern the transaction. And this is so whether or not the transaction has any relationship with the State of New York.

The practice of choosing New York law to govern international business transactions is due to several things. First, when U.S. lenders are involved in financing a transaction or a project, the lenders will often insist on New York law as the law that is to govern the contract documents.[15] And this applies not only to those contract documents that relate directly to the contractual relationship between the lenders and the borrower, but also to contract documents entered into by the borrower with the third parties who will perform for the borrower. U.S. lenders do this for a variety of reasons, including consistency and predictability, but they also do it to be confident that the security interest that the lenders take as protection against the risk of payment default will be recognized and enforceable – against all interested parties – under applicable law. By consistently selecting New York law, the U.S. lenders reduce the risk of a security interest not being recognized or enforced.

Second, even when U.S. lenders are not involved in the transaction, New York law often is selected nevertheless, because New York is a jurisdiction with which non-U.S. parties to international transactions simply tend to be more comfortable, perhaps due to familiarity with New York, perhaps due to past experience, perhaps due to a perception that New York is a relatively sophisticated jurisdiction, perhaps for other reasons. Regardless of the reasons, non-U.S. parties tend to agree to New York law more readily than to the laws of other, unfamiliar states.

In fact, New York has a reputation for highly developed commercial law and finance law.[16] In some respects, New York seems to be emerging as the U.S. jurisdiction that is for commercial law and finance law what the State of Delaware is for corporate law.

In any event, New York is a jurisdiction whose legislature, courts, practice community, and legal institutions are generally familiar with the complexities of

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[15] *See generally* Kimmo Mettälä, *Governing-Law Clauses of Loan Agreements in International Project Financing*, 20 THE INTERNATIONAL LAWYER 219 (1986).

[16] When New York enacted New York General Obligations Law Section 5-1401, discussed *infra*, it specifically "sought to secure and augment its reputation as a center of international commerce." Lehman Brothers Commercial Corp. v. Minmetals International Non-Ferrous Metals Trading Co., 179 F. Supp. 2d 118, 136 (S.D.N.Y. 2000) (citing Edith Friedler, *Party Autonomy Revisited: A Statutory Solution To a Choice-of-Law Problem*, 37 KANSAS LAW REVIEW 471, 497-98 (1989)).

international transactions, making it an arguably sensible choice for international transactions.

But there is also a statutory basis for the selection of New York law. There is a New York statute that provides that "The parties to any contract, agreement or undertaking … may agree that the law of [New York] shall govern their rights and duties in whole or in part, *whether or not such contract, agreement or undertaking bears a reasonable relation to [the state of New York]*," as long as the contract, agreement or undertaking involves a transaction covering at least $250,000 US Dollars.[17]

Certain kinds of transactions or relationships are excluded from the scope of the statute. The statute does not apply to contracts for labor or personal services, or to contracts relating to any transaction for family or household services, for example.[18] Other than some limited exclusions, however, the statute makes it clear that, from New York's perspective, parties may choose the laws of New York to govern their transactions whether the parties and the transaction have a relationship with the State of New York or not.

Remember, this is contrary to traditional conflict-of-laws principles in the United States. The New York statute therefore creates an issue regarding whether courts will ignore their traditional conflict-of-laws principles in deference to the New York statute, or will instead defer to their own conflict-of-laws principles and not allow parties who have no reasonable relationship with the State of New York nevertheless to choose that state's law.

There is little doubt that New York courts will defer to the New York statute, in the absence of constitutional restrictions on such deference. To the extent that the statute has been squarely addressed by courts in New York, the statute has been upheld.[19] The

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[17] N.Y. GEN. OBLIG. LAW § 5-1401(1) (emphasis added). Paragraph 1 of the New York statute provides in its entirety as follows:

> 1. The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand [U.S.] dollars, including a transaction otherwise covered by subsection one of section 1-105 of the uniform commercial code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking (a) for labor or personal services, (b) relating to any transaction for personal, family or household services, or (c) to the extent provided to the contrary in subsection two of section 1-105 of the uniform commercial code.

Id. Subsection (2) of Section 1-105 of the UCC, as adopted by the State of New York, provides: "Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified: [statutory references omitted]." N.Y. U.C.C. LAW § 1-105(2).

[18] N.Y. GEN. OBLIG. LAW § 5-1401(1).

[19] *See, e.g.*, Lehman Brothers Commercial Corp. v. Minmetals International Non-Ferrous Metals Trading Co., 179 F. Supp. 2d 118, 135-38 (S.D.N.Y. 2000); Supply & Building Co. v. Estee Lauder International, Inc., No. 95 Civ. 8136 (RCC), 2000 WL 223838, at *3 (S.D.N.Y. Feb. 25, 2000); Bank of America National Trust and Savings Association v. Envases Venezolanos, S.A., 740 F. Supp. 260, 265 (S.D.N.Y. 1990) (ruling that when a contract is for more than USD $250,000 and contains a choice-of-law provision

more difficult question is whether courts of other states within the United States would ignore their conflict-of-laws principles and allow parties to choose New York law even in the absence of a relationship with the State of New York. In other words, what would courts in California or Delaware or any other state do, when the conflict-of-laws principles of those other states normally would *not* allow the parties to choose New York law?

There is little case law to date, and the question remains largely unresolved. But to the extent that U.S. courts outside of New York have considered the effect of the New York statute, those courts have deferred to it and, accordingly, have recognized and enforced choice-of-law clauses choosing the laws of New York under the New York statute.[20] It seems likely that U.S. courts outside of New York will continue to do so, even when there is no nexus with the State of New York, especially when the transaction is an international transaction.[21]

E. Excluding Conflict-of-Laws Principles

Whatever jurisdiction is selected, that jurisdiction will have both substantive laws and conflict-of-laws principles. If a choice-of-law clause simply indicates that the contract is governed by the laws of New York or some other state and says nothing more, then some U.S. courts will generally begin their analysis by applying the selected state's *conflict-of-laws* principles. The conflict-of-laws principles are, after all, part of the law of the selected state. And the selected state's conflict-of-laws principles could lead to the application of the *substantive* laws of some other jurisdiction, which presumably would be an unintended consequence. The choice-of-law clause should therefore be drafted to avoid that consequence by expressly excluding application of any conflict-of-laws principles. Yet, choice-of-law clauses in U.S. contracts often omit that important feature.

F. The CISG

Another important item relating to choice of law in the United States is that the United States is a party to the United Nations Convention on Contracts for the International Sale of Goods, or CISG.[22] Brazil is not a party to the CISG – at least not

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designating New York law as the law governing disputes arising from the contract, the New York statute "mandates the enforcement of that choice of law provision").

[20] *See* In re Stone & Webster, Inc., 354 B.R. 686, 690-91 (D. Del. 2006) (enforcing a choice-of-law clause choosing the law of New York despite an argument that none of the parties nor the transaction itself had any connection or contact with New York); *see also* International Business Machines Corp. v. Bajorek, 191 F.3d 1033, 1037 (9th Cir. 1999); Santa Fe Pointe, LP v. Greystone Servicing Corp., No. C-07-5454 MMC, 2009 WL 1438285, at *3-4 (N.D. Cal. May 19, 2009); McAllister Software Systems, Inc. v. Henry Schein, Inc., No. 1:06CV00093 RWS, 2008 WL 922328, at *3 (E.D. Mo. Apr. 2, 2008); Maxcess, Inc. v. Lucent Technologies, Inc., No. 6:04-cv-204-Orl-31DAB, 2005 WL 6125471, at *10-11 (M.D. Fla. Jan. 5, 2005).

[21] The State of California has adopted a statute that is very similar to New York's; it allows the parties to choose California law even in the absence of any relationship with the State of California. *See* CAL. CIV. CODE § 1646.5. For a variety of reasons, however, it is simply less common for practitioners (and their clients) outside of California to choose California law to govern an international contract than it is to choose New York law.

[22] United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 668 (*entered into force* Jan. 1, 1988) [hereinafter CISG].

yet.[23] Venezuela and Bolivia and a number of other American states are also not yet parties to the CISG.[24] But parties to a sale of goods transaction are free to opt into the CISG. As well, many countries within the Americas are parties to the CISG, and additional countries are acceding to the CISG routinely.[25] If the transaction is a transaction for the sale of goods between parties whose places of business are in different countries and the countries are parties to the CISG, then in most cases the CISG will automatically govern the transaction, unless the parties effectively exclude its application.[26] In many jurisdictions within the United States, this is likely to mean that the CISG must be specifically and expressly excluded.[27]

Regardless, simply choosing the laws of New York or of any other state will not, by itself, be enough to exclude application of the CISG, as a matter of U.S. Constitutional law. This is so because the CISG became part of the law of New York – and of every other state within the United States – as soon as it entered into force for the United States.[28]

The U.S. Constitution makes all treaties made under the authority of the United States, including the CISG, "the supreme law of the land."[29] Because the CISG is self-

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[23] UNCITRAL, Status, 1980 – United Nations Convention on Contracts for the International Sale of Goods, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html [hereinafter CISG Status].

[24] *Id.* Venezuela was one of the original signatories of the CISG, but Venezuela has never ratified the CISG. Because the CISG is subject to ratification, *see* CISG, *supra* note 22, art. 91, Venezuela is not a party to the CISG.

[25] Most recently, the Dominican Republic acceded to the CISG on June 7, 2010, and the CISG will therefore enter into force for the Dominican Republic on July 1, 2011, and Turkey acceded to the CISG on July 7, 2010, and the CISG will therefore enter into force for Turkey on August 1, 2011. *See* CISG Status, *supra* note 23.

[26] CISG, *supra* note 22, arts. 1(1)(a), 6.

[27] *See, e.g.*, Easom Automation Systems, Inc. v. Thyssenkrupp Fabco, Corp., No. 06-14553, 2008 WL 1901236, at *2 (E.D. Mich. Apr. 25, 2008) ("Courts have held that parties can only opt out of the CISG if their contract explicitly states this fact. Since neither the Plaintiff's quote nor the Defendant's Purchase Order contained an express provision opting out of the CISG, it is appropriate to apply it here.") (citations omitted); Sky Cast, Inc. v. Global Direct Distribution, LLC, Civ. Action No. 07-161-JBT, 2008 WL 754734, at *4 (E.D. Ky. Mar. 18, 2008) ("Although the parties to a contract normally controlled by the CISG may exclude the applicability of the CISG to their contract, any such exclusion must be explicit.").

[28] The CISG is a treaty that was signed by the executive on behalf of the United States and was ratified by the U.S. Senate, all in accordance with Article II of the U.S. Constitution. Article II establishes the so-called treaty power: "[The President of the United States of America] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur." U.S. Const. art. II, § 2, cl. 2.

[29] *See* U.S. Const. art. VI. Article VI provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

See also Restatement (Third) of the Foreign Relations Law of the United States § 111(1) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States.").

executing,[30] the CISG requires no implementing legislation in order to become law within the United States; it automatically became law within the United States (and part of the supreme law of the land) upon its entry into force.[31]

As part of the supreme law of the land, treaties made under the authority of the United States are binding on individual states within the United States.[32] And as part of the supreme law of the land, such treaties preempt inconsistent state law.[33] Indeed, treaties made under the authority of the United States *are* state law.[34]

As a consequence, a choice-of-law clause expressly choosing the laws of the State of New York – or of any other jurisdiction within the United States – chooses as well the CISG, if the CISG by its terms is applicable to the contract, because the CISG is part of the law of the State of New York and of every other state and territory within the United States.

Now, the CISG itself does not require express exclusion.[35] But in order to be confident that the CISG has been excluded, it should be excluded expressly. Of course, parties to an international transaction could always decide not to exclude the CISG, or even to opt into it when it otherwise would not apply, which they might decide to do for a variety of reasons, but that should be done consciously and intentionally, not as an accident.

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[30] *See* Letter of Submittal from George P. Schultz, U.S. Secretary of State, to Ronald Reagan, President of the United States of America (Aug. 30, 1983), *reprinted in* U.S. Treaty Doc. No. 98-9, at vi ("The Convention is subject to ratification by signatory states (Article 91(2)), but is self-executing and thus requires no federal implementing legislation to come into force throughout the United States."); *see also* Chicago Prime Packers, Inc. v. Northam Food Trading Co., 408 F.3d 894, 897 (7th Cir. 2005) (describing the CISG as a "a self-executing agreement between the United States and other signatories").

[31] *See* Letter of Submittal from George P. Schultz, U.S. Secretary of State, to Ronald Reagan, President of the United States of America (Aug. 30, 1983), *reprinted in* U.S. Treaty Doc. No. 98-9, at vi; *see also* Whitney v. Robertson, 124 U.S. 190, 194, 8 S. Ct. 456, 458 (1888); Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829); Restatement (Third) of the Foreign Relations Law of the United States § 111(3).

[32] *See* Ware v. Hylton, 3 U.S. 199, 236 (1795) (holding that a treaty cannot be the supreme law of the land if any act of a state legislature stands in its way); *see also* Skiriotes v. State of Florida, 313 U.S. 69, 72-73, 61 S. Ct. 924, 927 (1941) (citing The Paquete Habana, 175 U.S. 677, 700, 20 S. Ct. 290 (1900), and holding that "[i]nternational law is a part of our law and as such is the law of all States of the Union, but it is a part of our law for the application of its own principles, and these are concerned with international rights and duties and not with domestic rights and duties"), *rehearing denied*, 313 U.S. 599, 61 S. Ct. 1093.

[33] *See* Restatement (Third) of the Foreign Relations Law of the United States § 111(1), §111 comment d. Some U.S. courts have recognized that the CISG preempts state law. *See, e.g.*, Forestal Guarani, S.A. v. Daros Int'l, Inc., Civ. Action No. 03-4821 (JAG), 2008 WL 4560701, at *2 n.4 (D.N.J. Oct. 8, 2008) ("[T]he CISG, a treaty of the United States, preempts state contract law and common law, to the extent that those causes of action fall within the scope of the CISG.").

[34] Hauenstein v. Lynham, 100 U.S. 483, 490 (1880) ("It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity.").

[35] *See* CISG, *supra* note 22, art. 6. For a more thorough analysis, *see* William P. Johnson, *Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent*, 59 BUFF. L. REV. 213, 259-65 (2011).

G. Choice-of-Law Practice Guidelines

When negotiating with a U.S. counterparty or when negotiating a contract that involves significant U.S. interests, such as a project finance that is financed by U.S. lenders, there are several key points relating to choice of law.

First, it is essential to include a carefully drafted choice-of-law clause to provide for predictability and certainty in respect of the body of law that governs the transaction.

Second, even when an enforceable choice-of-law clause is included, there will be non-derogable statutes or laws that cannot be avoided by the choice-of-law clause.

Third, some U.S. courts might refuse to enforce a choice-of-law clause if the parties are unable to show a relationship with the jurisdiction selected, although that risk is more remote for international transactions than it is for domestic U.S. transactions, and choosing New York law further reduces that risk.

Fourth, it is important to exclude conflict-of-laws principles and also to remember the CISG and to include an express provision regarding its exclusion or application.

H. Sample Contract Language

Thus, a carefully drafted choice-of-law clause should include a carefully selected jurisdiction, whether that is the State of New York or some other jurisdiction, an exclusion of conflict-of-laws principles, and express treatment of the CISG, whether the decision is to exclude the CISG or for it to apply. Thus, depending on the circumstances and the parties involved, a typical choice-of-law clause in an English-language contract when the parties have agreed to exclude application of the CISG might look something like the following:

> **Choice of Law.** THIS AGREEMENT SHALL BE GOVERNED BY AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF **[THE STATE OF NEW YORK]**, U.S.A., WITHOUT REFERENCE TO ANY PRINCIPLES PERTAINING TO CONFLICTS OF LAWS. THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS ("CISG") SHALL NOT GOVERN OR APPLY TO THIS AGREEMENT OR TO ANY SALE MADE UNDER THIS AGREEMENT, AND THE PARTIES HEREBY EXCLUDE APPLICATION OF THE CISG.

And a typical choice-of-law clause in an English-language contract when the parties have agreed that the CISG will apply and will prevail over inconsistent domestic law might look something like the following:

> **Choice of Law.** THIS AGREEMENT SHALL BE GOVERNED BY AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF **[THE STATE OF NEW YORK]**, U.S.A., WITHOUT REFERENCE TO ANY PRINCIPLES PERTAINING TO CONFLICTS OF LAWS. IN

ADDITION, THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS ("CISG") SHALL GOVERN AND APPLY TO THIS AGREEMENT AND TO ANY AND ALL SALES MADE UNDER THIS AGREEMENT. IN THE EVENT OF ANY CONFLICT BETWEEN THE CISG AND THE LAWS OF **[THE STATE OF NEW YORK]**, THE CISG SHALL PREVAIL.

III. CHOICE OF FORUM

The body of law that governs a contract is an important issue, but an equally important, related issue is where disputes between the parties will be resolved. If the contract is silent on that issue, then in an international transaction, the possibilities regarding where a dispute could be litigated can be enormous, making certainty regarding performance of the contract and predictably regarding dispute resolution virtually unattainable.

Thus, transactional lawyers should counsel their clients to identify the location where disputes will be resolved by means of an express choice-of-forum clause, bearing in mind a number of important issues that arise in the U.S. context.

A. Dual Court System

Within the United States, there is a federal court system, and there is a separate state court system in each of the fifty U.S. states. Each state court system has its own trial courts and a supreme court. Some states also have intermediate appellate courts and specialty courts, such as tax courts, and feature other complexities. The supreme court of each state is the final authority as to that state's state law but is subject to the U.S. Supreme Court on federal questions.

The federal court system consists of a U.S. Supreme Court, which is the highest court in the federal judiciary; twelve regional Circuit Courts of Appeals and one U.S. Court of Appeals for the Federal Circuit, which are federal intermediate appellate courts; and 94 U.S. District Courts (i.e., trial courts), as well as bankruptcy courts and other specialty courts.[36]

The location that is designated by the choice-of-forum clause could be a specific, named court, or it could refer to all of the federal U.S. courts in a particular jurisdiction or to the state courts in a particular jurisdiction, or it could simply refer to any appropriate court located in a named jurisdiction, which could be a county, a city, or a state.

B. Jurisdiction in General

When selecting the forum, the parties naturally must consider whether the selected forum will accept jurisdiction of the action. In the United States, the party

[36] Additional information regarding how the U.S. federal court system is structured and how it functions is available at the following URL: http://www.uscourts.gov/FederalCourts.aspx.

bringing the claim must be able to show that the court where the claim is brought has jurisdiction to hear the claim by showing two things.

i. Subject Matter Jurisdiction

First, the party bringing the claim must be able to show that the court has subject matter jurisdiction, or jurisdiction to hear the kind of claim that is being brought.[37] Most state courts in the United States are courts of general jurisdiction and, depending on the amount in controversy and excluding some particular kinds of claims, will generally have subject matter jurisdiction to hear all kinds of justiciable claims.

But U.S. federal courts are courts of limited jurisdiction with authority to hear only certain kinds of claims. When the dispute arises from a transaction between a U.S. party and a non-U.S. party, however, there usually will be a statutory basis for jurisdiction in federal courts. One basis for jurisdiction arises when the claim involves a federal question, and any claim that arises under a treaty – including the CISG – will involve a federal question.[38] Another basis for jurisdiction arises when there is diversity of citizenship, including when one party is a U.S. citizen and the other party is foreign to the United States, as long as the value of the dispute exceeds USD $75,000.00.[39] If the federal district courts have original jurisdiction, then even if the U.S. party files a claim in state court, the other party can remove the claim to federal court at its option.[40] Foreign parties tend to view federal U.S. courts as more likely to be impartial than state courts, so cross-border disputes tend to be resolved in federal court.

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[37] The plaintiff bears the burden of convincing the court, by a preponderance of the evidence, that the court has jurisdiction. *See* McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189, 56 S. Ct. 780 (1936).

[38] "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

[39] The applicable statute provides as follows:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interests and costs, and is between (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties …

28 U.S.C. § 1332.

[40] The statute that provides for removal to federal court provides in relevant part as follows:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441.

ii. Personal Jurisdiction

Second, in addition to subject matter jurisdiction, the party bringing the claim must be able to show that the court has personal jurisdiction over the party against whom the claim is brought. The general principle of law in the United States is that a court has power to exercise jurisdiction over a person if the person's relationship to the state where the court is located is such as to make the exercise of such jurisdiction reasonable.[41] Once again, however, the standard is established on a state-by-state basis.

There are certain traditional means of showing personal jurisdiction, including domicile or presence of that party in the jurisdiction, or other minimum contacts with the state.[42] One way to obtain personal jurisdiction is by *consent* of the party against whom the claim is brought.[43]

iii. Consent to Jurisdiction

Because personal jurisdiction may be obtained by means of consent, consent to the jurisdiction of the selected forum can and should be given by contract by means of an express consent-to-jurisdiction clause.[44] Even if consent is given, however, consent can also be revoked, if it is revoked before a claim is brought. Therefore, consent to jurisdiction of the selected court or courts not only should be expressed in the contract, but also should be irrevocable, and it should survive termination or expiration of the agreement. On the other hand, the consent-to-jurisdiction clause should also be clearly limited to claims arising from the agreement or its performance or enforcement.

C. *M/S Bremen v. Zapata Off-Shore Co.*

Ultimately, the issue from a U.S. perspective is whether a U.S. court will enforce the forum selection clause if one party disregards the forum selection clause and brings an action in some other forum within the United States and the other party seeks to stay

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[41] Restatement (2d) of Conflict of Laws § 24(1).

[42] Absent a traditional basis for jurisdiction (presence, domicile or consent), due process requires that the defendant have "certain minimum contacts with (the forum state) such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154 (1945). *See also* Restatement (2d) of Conflict of Laws § 27(1).

[43] *See, e.g.*, National Equipment Rental Ltd. v. Szukhent, 375 U.S. 311, 316, 84 S. Ct. 411, 414 (1964) (stating that "parties to a contract may agree in advance to submit to the jurisdiction of a given court"); *see also* Restatement (2d) of Conflict of Laws §§ 27(1)(e), 32 and 43.

[44] A typical consent-to-jurisdiction clause appearing in an English-language contract might look something like the following:

> The parties hereby irrevocably consent to the **[exclusive]** jurisdiction of the state and federal courts situated within **[_____]** County, in the State of **[_____]** with respect to any and all claims arising from or relating to this Agreement or its performance or enforcement. This section shall survive termination or expiration of this Agreement.

or remove the proceedings in that U.S. court on the basis of the forum selection clause. In that event, U.S. courts will generally enforce choice-of-forum clauses.[45]

In fact, there is U.S. Supreme Court precedent establishing a broad freedom for parties in international transactions to have broad discretion to choose a neutral forum as their exclusive forum for resolution of their disputes. The seminal case on this issue is a well-known decision of the U.S. Supreme Court, *M/S Bremen v. Zapata Off-Shore Company*.[46]

The dispute at issue in the *Bremen* decision arose out of a significant towage contract entered into in order to get a drilling rig from the Gulf of Mexico to the Adriatic Sea.[47] The owner of the rig, Zapata Off-Shore Company, an American corporation, invited bids for the towage, and Unterweser Reederei GmbH, a German corporation, submitted the low bid.[48] Zapata awarded the project to Unterweser and requested a written contract from Unterweser.[49] Unterweser submitted a draft written contract that contained the following clause: "Any dispute arising must be treated before the London Court of Justice."[50] Zapata changed some of the terms but did not change the choice-of-forum clause or the limitation-of-liability clause that was included in the draft agreement, signed it, and returned it to Unterweser.[51] Unterweser accepted Zapata's proposed revisions, and a contract formed.[52]

Unfortunately for the parties, a storm at sea swept in; the elevator legs broke off the rig; and the rig was towed to Tampa, Florida, which was the nearest port of refuge.[53]

Notwithstanding the choice-of-forum clause, Zapata sued Unterweser in a federal court in Tampa, alleging negligence and breach of contract.[54] Unterweser filed a motion to dismiss and, in the alternative, to stay.[55] In support of its motion, Unterweser invoked the forum selection clause contained in the parties' written agreement, and Unterweser argued that the court lacked jurisdiction and that venue was improper under the doctrine of *forum non conveniens*.[56] Following a complex series of motions, the trial court ruled that the U.S. district court in Tampa, Florida, had jurisdiction to hear the claim.[57] The

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[45] *See, e.g.*, M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15, 92 S. Ct. 1907, 1916 (1972); Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 2d 1229, 1241 (S.D.N.Y. 1992).
[46] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S. Ct. 1907 (1972).
[47] *See id.* at 2-4, 92 S. Ct. at 1909-10.
[48] *Id.* at 2, 92 S. Ct. at 1909.
[49] *Id.*
[50] *Id.* There was also limitation of liability language purporting to limit Unterweser's liability, and there were some other terms as well. *Id.*
[51] *Id.* at 3, 92 S. Ct. at 1910.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 3-4, 92 S. Ct. at 1910.
[55] *Id.* at 4, 92 S. Ct. at 1910.
[56] *Id.* The doctrine of *forum non conveniens* is a common law legal doctrine used primarily in the United States by which a court can refuse to exercise jurisdiction. *See* Restatement (Second) of Conflict of Laws § 84 ("A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff.").
[57] 407 U.S. at 4-7, 92 S. Ct. at 1910-11.

trial court's ruling was upheld on appeal to the Fifth Circuit, the federal intermediate court of appeals.[58] However, the U.S. Supreme Court disagreed with the courts below, and the trial court's decision was vacated by the Court and remanded.[59]

In reaching its decision, the U.S. Supreme court concluded that the trial court paid too little attention to the forum selection clause.[60] And the court identified several reasons why the clause ought to be enforced in a complex international transaction like this, relating primarily to the complexity of international transactions and the need for comity among nations who are trading partners:

> There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect. In this case, for example, we are concerned with a far from routine transaction between companies of two different nations contemplating the tow of an extremely costly piece of equipment from Louisiana across the Gulf of Mexico and the Atlantic Ocean, through the Mediterranean Sea to its final destination in the Adriatic Sea. In the course of its voyage, it was to traverse the waters of many jurisdictions. The Chaparral could have been damaged at any point along the route, and there were countless possible ports of refuge. That the accident occurred in the Gulf of Mexico and the barge was towed to Tampa in an emergency were mere fortuities. It cannot be doubted for a moment that the parties sought to provide for a neutral forum for the resolution of any disputes arising during the tow. Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen or Unterweser might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.[61]

The Court further reasoned that "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."[62]

One thing that is interesting and instructive in the *Bremen* decision is how little attention the parties gave to dispute resolution in their written contract. The parties get the name of the English court wrong, referring to the "London Court of Justice" rather than to the "High Court of Justice in London." The contract lacks an express choice-of-law clause. And there is no express consent to the jurisdiction of the High Court of Justice in London. In short, it offers an example of poor drafting. Although the U.S.

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[58] *Id.* at 7-8, 92 S. Ct. 1912.
[59] *Id.* at 20, 92 S. Ct. at 1918.
[60] *Id.* at 8, 92 S. Ct. at 1912.
[61] *Id.* at 12-14, 92 S. Ct. at 1914-15 (footnotes omitted).
[62] *Id.* at 9, 92 S. Ct. at 1912.

Supreme Court ultimately instructed the lower courts to pay greater deference to the clause, its terse, imprecise and incomplete nature undoubtedly contributed to a lack of certainty regarding the parties' *ex ante* agreement to litigate in London, and ultimately almost certainly contributed to Zapata's willingness to ignore and challenge the forum selection clause.

Ultimately, the holding of the U.S. Supreme Court in the *Bremen* decision shows the willingness of the Court to show great deference to the parties' choice of forum in an international transaction. Specifically, the Court held that a forum selection clause should be enforced in an international transaction unless the party seeking to avoid it can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."[63]

Now, *Bremen* involved an admiralty case and was limited by the U.S. Supreme Court to admiralty cases. However, U.S. courts considering choice-of-forum clauses have largely, though not universally, followed the *Bremen* reasoning.[64] And the U.S. Supreme Court expanded the *Bremen* holding when it subsequently applied the same analysis in a different case involving enforcement of an agreement to arbitrate in a designated forum.[65] Thus, it is likely that U.S. courts will recognize and enforce choice-of-forum clauses in contracts governing international business transactions.[66]

D. Enforcement in the United States of Foreign Judgments

If the parties select a court *outside* of the United States, including any court in Brazil, as the choice of forum, then the non-U.S. party should confirm that the U.S. counterparty has assets that are subject to seizure by the selected court. Otherwise, any judgment rendered in favor of the non-U.S. party might not have much value, because U.S. courts will not be bound by and will not automatically enforce the judgment of that foreign court. The United States is not a party to any international treaty that obligates U.S. courts to recognize or enforce the judgments of any foreign court, and U.S. courts will therefore enforce a foreign judgment only under limited circumstances, established on a state-by-state basis as a matter of state law.

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[63] *Id.* at 15, 92 S. Ct. at 1916.

[64] *See, e.g.*, Gita Sports Ltd. v. SG Sensortechnik GmbH & Co. KG, 560 F. Supp. 2d 432, 438 (W.D. N. Car. 2008); For an example of a decision by a U.S. court when the court refuses to uphold a choice of forum clause, *see* McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341 (8th Cir. 1985).

[65] *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516, 94 S. Ct. 2449, 2455-56 (1974), *rehearing denied* (enforcing a forum selection clause providing for arbitration in Paris, France and reasoning that, in the absence of a forum selection clause, considerable uncertainty "will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules").

[66] Recently the U.S. Supreme Court issued another decision demonstrating its willingness to defer to arbitration, in this case, in the employment context. *See* Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2779 (2010) (holding that a clause in an employment agreement delegating to an arbitrator the authority to decide whether the agreement was valid or invalid was enforceable).

E. Uniform Foreign Money-Judgments Recognition Act

It is not the case, however, that foreign judgments will never be enforced by U.S. courts. On the contrary, a majority of U.S. jurisdictions have adopted a uniform law known as the Uniform Foreign Money-Judgments Recognition Act of 1962 (the "Act").[67] And the Act generally provides for the recognition and enforcement of foreign judgments that grant or deny recovery of a sum of money, at least when the judgment is "conclusive."[68] However, there are situations when a judgment will not be conclusive:

> A foreign judgment is not conclusive [and therefore is not to be recognized under the Act] if (1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; (2) the foreign court did not have personal jurisdiction over the defendant; or (3) the foreign court did not have jurisdiction over the subject matter.[69]

As well, there are other significant exceptions:

> A foreign judgment need not be recognized [but could be recognized in the court's discretion if the judgment otherwise qualifies for recognition under the Act] if (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend; (2) the judgment was obtained by fraud; (3) the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state; the judgment conflicts with another final and conclusive judgment; (5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.[70]

Thus, with the limited scope of applicability, the many exceptions, and the fact that numerous U.S. jurisdictions have not adopted the Act, uncertainty remains.

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[67] The Uniform Foreign Money-Judgments Recognition Act of 1962 has been adopted by thirty-two jurisdictions in the United States, but it is in the process of being replaced by the Uniform Foreign-Country Money Judgments Recognition Act of 2005. The replacement act is substantially similar to the 1962 Act. So far, the 2005 replacement act has been adopted by fourteen states and introduced in a fifteenth state.

[68] Unif. Foreign Money-Judgments Recognition Act §§ 2-3 (1962). The 1962 Act provides in relevant part: "Except as provided in section 4, a foreign judgment meeting the requirements of section 2 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money." *Id.* at § 3. And the 1962 Act describes the foreign judgments to which the Act is to apply: "This Act applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal." *Id.* at § 2.

[69] *Id.* at § 4.

[70] *Id.*

F. Other Issues

Finally, when choosing litigation as the method of dispute resolution, there are several important items that should be considered from a U.S. perspective. First, in light of Section II of this article, it is important to confirm that the selected forum will enforce the parties' choice-of-law clause. Second, in the United States there is a general right to a trial by jury. If the non-U.S. party agrees to litigation in the United States, that party should consider whether it wishes to have a jury as the finder of facts. If not, then it is imperative to include an express and conspicuous waiver of jury trial in the written agreement. Third, the scope of discovery in the United States may be much broader than that to which the non-U.S. party is accustomed. And fourth, service of process is likely to permit or require different steps in the United States. It can be helpful to indicate by contract how service of process either may occur or must occur.[71]

G. Choice of Forum Practice Guidelines

When negotiating with a U.S. counterparty or when negotiating a contract that involves significant U.S. interests, there are several key points relating to choice of forum.

First, it is essential to identify a suitable forum for resolving disputes and to include in the written contract a carefully drafted choice-of-forum clause, to provide for predictability and certainty in respect of the forum where disputes will be resolved.

Second, it is important to confirm that the selected forum will accept jurisdiction and to include an express irrevocable consent-to-jurisdiction clause by which the parties consent to the jurisdiction of the selected forum, to increase the likelihood that jurisdiction will be accepted.

Third, it is important to confirm that the parties' choice-of-law clause will be enforced by the selected forum.

Fourth, when selecting a forum located within the United States, the non-U.S. party should consider and address issues that are presented by selecting a forum in the United States, such as the right to a jury trial, the scope of discovery, and service of process.

Fifth, when selecting a forum outside the jurisdiction where the other party has its assets, the non-U.S. party must be sure to determine in advance whether any judgment will actually have value by being enforceable in a jurisdiction where the other party has assets that could be seized to satisfy the judgment.

[71] The United States is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638.

IV. METHOD OF DISPUTE RESOLUTION - ARBITRATION

At least as important as choice of forum is selection of the method of dispute resolution. The parties might decide that litigation is the preferred method. But for a variety of reasons, the parties should at least consider alternative methods of dispute resolution and, in any event, should designate by contract the agreed-upon method of dispute resolution. Of course, in the United States, as in other jurisdictions, the most obvious alternative to litigation is arbitration.

A. The New York Convention

The United States, like Brazil, is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or the New York Convention.[72] And the New York Convention has been made a part of U.S. law by means of the Federal Arbitration Act.[73] Thus, courts in the United States are obligated to enforce agreements to arbitrate that arise from commercial relationships.[74] And U.S. courts are obligated to recognize and enforce arbitral awards that are rendered pursuant to an agreement to arbitrate.[75]

B. Agreement to Arbitrate

If the parties effectively choose arbitration as the sole method of dispute resolution, and the U.S. counterparty attempts to resist arbitration, the non-U.S. party will be able to enforce the agreement to arbitrate in lieu of litigation, as U.S. courts are very likely to defer to the parties' agreement to arbitrate.[76]

A significant decision of the U.S. Supreme Court, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, provides an especially good example of the U.S. Supreme Court's deference to an agreement to arbitrate.[77] The case involved a Puerto Rican distributor (Soler Chrysler-Plymouth, Inc., or Soler), a Swiss automobile supplier (Chrysler International, S.A., or CISA), and a Japanese automobile manufacturer

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[72] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (*entered into force* June 7, 1959) [hereinafter New York Convention].

[73] Federal Arbitration Act § 1 *et seq.*, 9 U.S.C. §§ 201-208. "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter." *Id.* at § 201.

[74] Article II, Paragraph 1 of the New York Convention provides as follows:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

[75] Article III of the New York Convention provides: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles."

[76] *See, e.g.*, Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S. Ct. 3346 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S. Ct. 2449 (1974), *rehearing denied*.

[77] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S. Ct. 3346 (1985).

(Mitsubishi Motors Corporation, or Mitsubishi).[78] Mitsubishi was formed as a result of a joint venture between CISA and a Japanese automotive company (Mitsubishi Heavy Industries, Inc.).[79] The purpose of the joint venture was the distribution through Chrysler dealers outside the continental United States of vehicles manufactured by Mitsubishi and bearing Chrysler and Mitsubishi trademarks.[80]

CISA appointed Soler as a distributor of Mitsubishi-manufactured vehicles within a designated territory.[81] On the same date, CISA, Soler and Mitsubishi entered into a Sales Procedure Agreement.[82] The Sales Procedure Agreement contained a mandatory dispute resolution clause providing for arbitration in Japan:

> All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association.[83]

Initially, business was great and the parties were seemingly happy, but eventually sales slowed, which led to difficulties between Soler and the other parties.[84] Mitsubishi brought an action against Soler in federal district court in Puerto Rico, seeking an order to compel arbitration in Japan in accordance with the dispute resolution clauses included in the Sales Procedure Agreement, which Soler opposed.[85] Soler counterclaimed against both Mitsubishi and CISA, alleging numerous breaches of contract and asserting statutory causes of action, including a private cause of action under the Sherman Antitrust Act due to alleged antitrust violations.[86]

The federal district court ordered arbitration of most of the claims, including the statutory claims arising from the alleged antitrust violations.[87] The intermediate court of appeals reversed the district court, concluding that the antitrust claims were not arbitrable.[88]

The U.S. Supreme Court granted certiorari "primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction."[89] The U.S. Supreme Court reversed the intermediate appellate court, concluding that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to

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[78] *Id.* at 616-17, 105 S. Ct. at 3348-49.
[79] *Id.* at 616, 105 S. Ct. at 3348-49.
[80] *Id.* at 616-17, 105 S. Ct. at 3349.
[81] *Id.* at 617, 105 S. Ct. at 3349.
[82] *Id.*
[83] *Id.* (brackets in original).
[84] *Id.* at 617-18, 105 S. Ct. at 3349.
[85] *Id.* at 618-19, 105 S. Ct. at 3349-50.
[86] *Id.* at 619-20, 105 S. Ct. at 3350.
[87] *See id.* at 620, 105 S. Ct. at 3350.
[88] *See id.* at 621-23, 105 S. Ct. at 3351-52.
[89] *Id.* at 624, 105 S. Ct. at 3352.

the need of the international commercial system for predictability in the resolution of disputes require" enforcement of the parties' agreement, even if a different result would have been appropriate in a purely domestic context.[90]

In so holding, the Court reasoned that, at its heart, the private cause of action under the antitrust laws is simply the recovery of damages.[91] There is nothing to preclude an international litigant from seeking recovery of those damages by some means other than a court judgment, including arbitration.[92] Thus, in the *international* context, a claim for money damages generally will be arbitrable, even when it arises from a statute of fundamental importance, and even if it would not be arbitrable in the domestic context.

Notably, money damages are not the only remedy that might be desirable. A party might seek an injunction or a determination as to ownership of property or some other non-monetary judgment. And those remedies will not be awardable by an arbitrator in the United States. Thus, even when mandatory and binding arbitration is selected by the parties as the sole and exclusive means of resolving disputes, it is important to retain the right by contract to seek other remedies in court when appropriate.

C. Enforcement of an Arbitral Award

If the parties include in their contract an agreement to arbitrate in an international business transaction, the agreement to arbitrate is therefore likely to be enforced by U.S. courts whenever the remedy sought by the aggrieved party is money damages. Equally important, with some important but limited exceptions, any arbitral award that results from the arbitration is likely to be recognized and enforced by U.S. courts.

The exceptions are largely reflected in two reservations that were entered by the United States when it ratified the New York Convention. One significant reservation is that its courts will apply the New York Convention *only* to recognition and enforcement of awards made in the territory of a country that is a party to the convention.[93] Brazil entered the same reservation upon its ratification of the New York Convention.[94] The reservation is not a concern if the arbitration takes place in the United States or Brazil, because both countries are parties to the New York Convention. If the parties choose a neutral location for the arbitration, however, the parties must be sure to choose a country that is a signatory to the New York Convention.[95]

In addition, the United States entered a reservation that its courts will apply the convention only to differences arising out of legal relationships that are considered

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[90] *Id.* at 629, 105 S. Ct. at 3355.
[91] *See id.* at 635-36, 105 S. Ct. at 3358-59.
[92] *See id.* at 636, 105 S. Ct. at 3359.
[93] UNCITRAL Status, 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.
[94] *Id.*
[95] There are currently 144 parties to the New York Convention, including Brazil and the United States. *See id.* Notably, of the thirty-five member states of the Organization of American States, only five countries are not yet parties to the New York Convention. Those countries are Belize, Grenada, Guyana, St. Kitts and Nevis, and Suriname. All other OAS member states are parties to the New York Convention. *See id.*

commercial under national law, which most business transactions are likely to be, for purposes of enforcement of an agreement to arbitrate. Some matters might be determined not to be arbitrable, though if the remedy that is sought is money, then that is unlikely.

D. Finality of Arbitral Award

One potential benefit of mandatory arbitration from a U.S. perspective is the finality of the arbitral award. The grounds upon which an arbitral award may be rejected by a court in the United States are very limited, and U.S. courts tend to avoid second guessing the arbitrators. Therefore, assuming that most parties would rather avoid lengthy, costly, drawn-out appeals, binding arbitration might be preferable to protracted litigation.

For U.S. courts, the limited grounds set forth in Article V of the New York Convention for refusing to enforce an arbitral award are *exclusive* with respect to arbitral awards made outside the United States.[96] But with respect to awards made within the United States but that are nevertheless not considered to be "domestic" awards (because they have a relationship with a foreign state), additional grounds for refusing to enforce an arbitral award may be considered by U.S. courts by virtue of Article V(1)(e) of the New York Convention.[97] Even so, those additional grounds are quite limited under domestic U.S. law.

The bottom line is that if the parties agree to arbitrate, they should expect to be bound by the arbitrators' decision. The standard for refusing to enforce an arbitral award in the United States is very high. It is not impossible to overturn an arbitral award, but it is not easy. One poignant example of this is offered by a decision of the Second Circuit, *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc*.[98]

In 1982, Toys "R" Us, Inc., a U.S. company that operates a network of toys and games franchises, entered into two agreements with Yusuf Ahmed Alghanim & Sons, W.L.L., a Kuwaiti company, by which Toys "R" Us gave Alghanim the right to open and operate Toys "R" Us stores in several jurisdictions in Kuwait and the surrounding region, in fourteen countries altogether.[99] Over the next eleven years, Alghanim opened four stores, all in Kuwait.[100] According to Toys "R" Us, only one of those was an actual full-fledged Toys "R" Us store.[101] And in any event, the stores were wildly unsuccessful.[102] Toys "R" Us terminated the agreements by non-renewal, providing six months' notice of its intent not to renew the parties' License and Technical Assistance Agreement, thereby

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[96] Article V of the New York Convention provides the exclusive grounds upon which recognition and enforcement of the arbitral award may be refused. *See* New York Convention, *supra* note 72, art. V.

[97] A court may refuse to recognize and enforce an award upon a showing that "[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." New York Convention, *supra* note 72, art. V(1)(e).

[98] Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15 (2d Cir. 1997).

[99] *Id.* at 17.

[100] *Id.*

[101] *Id.*

[102] *Id.*

terminating Alghanim's right to operate as a franchisee.[103] The parties then proceeded to attempt to negotiate termination of their relationship on terms that were mutually acceptable, but they were unable to do so.[104] Alghanim offered to walk away for USD $2,000,000, but Toys "R" Us refused.[105] Toys "R" Us proceeded to grant the franchise to two other companies, splitting up Alghanim's territory between the two companies.[106]

Toys "R" Us then invoked the mandatory arbitration clause included in the parties' agreement and initiated arbitration proceedings before the American Arbitration Association, seeking a declaration that the License and Technical Assistance Agreement with Alghanim was properly terminated.[107] Alghanim counterclaimed for breach of contract, and the parties' claims went to arbitration.[108] The arbitrator denied Toys "R" Us's request for a declaratory judgment in its favor, finding that Alghanim had an absolute right under the termination provisions of the agreement to open toy stores even after being given notice of termination, as long as the last toy store was opened within five years.[109]

Following substantial discovery, motions, and a 29-day evidentiary hearing, the arbitrator awarded Alghanim USD $46,440,000 – more than forty-six *million* US dollars – for lost profits under the agreement, plus interest, and Alghanim petitioned the district court to confirm the award under the New York Convention.[110]

Toys "R" Us argued before the federal district court that the arbitral award should be vacated or modified, because it was "clearly irrational, in manifest disregard of the law, and in manifest disregard of the terms of the agreement."[111] However, the district court confirmed the award, finding Toys "R" Us's objections to be without merit.[112] Toys "R" Us appealed.[113]

Deferring to the arbitrator's decision, the federal appellate court confirmed the decision of the district court.[114] In so ruling, the court articulated strong deference for arbitral awards:

> The confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court. The review of arbitration awards is very limited … in order to

[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.* at 17-18.
[107] *Id.* at 18.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.* at 25.

> avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.[115]

And while it is not the case that there is no review of arbitral awards in the United States, the standard for overturning an arbitral award is very high. The Second Circuit explained that an arbitrator's decision "is entitled to substantial deference, and the arbitrator need only explicate his reasoning under the contract in terms that offer even a barely colorable justification for the outcome reached in order to withstand judicial scrutiny."[116]

E. American Arbitration Association

With respect to identifying the rules that will govern the parties' arbitration, parties to international business transactions choose from among a variety of arbitration organizations. Perhaps the best known arbitral center in the United States is the American Arbitration Association, or AAA. The American Arbitration Association maintains a website with information regarding, among other things, its rules and procedures.[117] Its International Rules can be found in several languages, including English and Portuguese.[118]

F. Sample Contract Language

Finally, depending on the circumstances and the parties involved, a typical clause that provides for mandatory and binding arbitration as the sole method of dispute resolution might look something like the following in an English-language contract governed by some body of U.S. law:

> **Method of Dispute Resolution.** Except as otherwise expressly provided in this Agreement, any dispute, controversy or claim arising out of or relating to this Agreement, its interpretation or enforcement, or the breach, expiration, termination or invalidity hereof, shall be submitted to mandatory and binding arbitration in _____, _____, administered by the [International Centre for Dispute Resolution of the American Arbitration Association] under its [International Arbitration Rules] then in effect (the "Rules") by a [single arbitrator] [panel of three (3) arbitrators] appointed in accordance with the Rules. The arbitral proceedings shall be conducted in the [English] language, and the arbitrator(s) must be fluent in [English] [and _____]. All documents not in [English] submitted by either party must be accompanied by a translation into [English]. Judgment upon the award of the arbitrator(s) may be entered in any court having jurisdiction thereof. The award of any

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[115] *Id.* at 23 (citations and internal quotation marks omitted).
[116] *Id.* (citations and internal quotation marks omitted).
[117] http://www.adr.org/
[118] The AAA International Arbitration Rules are available in English at the following URL: http://www.adr.org/sp.asp?id=33994. And the International Arbitration Rules are available in Portuguese at the following URL: http://www.adr.org/sp.asp?id=34623.

> such arbitration shall be final and binding on all parties and in lieu of all other remedies and procedures available to the parties, provided, however, that either party may seek preliminary injunctive or other interlocutory relief pursuant to this Agreement prior to the commencement of or during any such arbitration proceedings. In the event of any default by Buyer under any of its monetary obligations under this Agreement, Seller shall have the right at its option to bring a claim in respect of such monetary default, in lieu of arbitration, in any court of competent jurisdiction located within the jurisdiction where Buyer has its principal place of business.

It is possible to provide even greater detail than that which is provided in the sample contract language. Whatever is not specified by contract will generally be provided by the applicable arbitration rules.

V. CONCLUSION

When a transactional lawyer understands the client's business and understands the client's appetite for risks, as well as the unique issues that can arise in an international business transaction, the transactional lawyer can help put in place a written contract that has the potential to help to avoid disputes in the first place. The transactional lawyer can also help to reduce the costs of dispute resolution and to avoid unnecessary delay in resolving the dispute by establishing at the beginning of the relationship enforceable, mutually agreeable provisions regarding choice of law, choice of forum, and method of dispute resolution.

As articulated by the U.S. Supreme Court, contractual provisions "specifying in advance the forum in which disputes shall be litigated and the law to be applied is … an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."[119] The failure or inability to assure in advance predictability regarding dispute resolution, in the words of the U.S. Supreme Court, "would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."[120] That risk can be greatly reduced through carefully drafted contracts that provide for effective dispute resolution.

[119] Scherk v. Alberto-Culver Co., 417 U.S. 506, 516, 94 S. Ct. 2449, 2455 (1974), *rehearing denied.*
[120] *Id.* at 517, 94 S. Ct. at 2456.