

AN ALTERNATIVE TO LITIGATION: COMMERCIAL ARBITRATION FOR DISPUTES INVOLVING INTERNATIONAL E-COMMERCE

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ABSTRACT

Engaging in international business transactions through electronic commerce has the potential to generate international litigation, which is fraught with problems. Litigation issues range from choice of forum, choice of law, personal jurisdiction, and comfort level and expense litigating in a foreign country. These complications increase costs, time and resource commitments and uncertainty for companies planning to do e-business in the international arena. A potential solution is to provide for pre-agreement for Alternative Dispute Resolution (ADR) in e-commerce contracts. This paper focuses on the state of International Dispute Resolution and appropriate management considerations to insure a company's ADR objectives.

To resolve future disputes without being subjected to foreign legal systems, parties should plan ahead by considering inclusion of an arbitration clause in their e-commerce contracts. Since most countries recognize arbitration awards, ADR provides a practical time and money saving device as compared to litigation in a foreign country. Given that ADR is a private matter, the disputing parties are free to agree on the substance of the process and the rules to be followed. Although ADR's flexibility makes it attractive, it also makes it worthy of careful planning.

As part of their strategy, E-commerce business managers must first decide either on "Ad Hoc" arbitration or "Institutionalized" Arbitration when drafting arbitration agreements for their international contracts. These advanced contractual agreements (known as Agreements to Submit) will set the stage for how the arbitration is handled. Where ad hoc arbitration is chosen, the parties in dispute provide their own arbitrators and agree on their own rules for arbitration, or, as an alternative, they could agree to adopt the arbitration rules developed by the United Nations Commission on International Trade Law ("UNCITRAL")(these rules address many of the same issues as do the "institutional" rules but do not provide the administrative structure connected with institutional arbitration.). As an alternative, the agreement to submit provision could require the parties to submit their dispute to a formal institution that specializes in arbitration. In the case of more formalized arbitration, there are many different institutions to which parties may turn, such as the American Arbitration Association (AAA), the Commercial Arbitration and Mediation Center for the Americas (CAMCA),

or the International Chamber of Commerce (ICC). The highly structured approach is often more costly than the ad hoc approach to arbitration. However, the advantage of having a more formalized arbitration structure may outweigh the additional costs associated with more this approach. Each e-commerce company will have to carefully assess these alternative approaches and decide prior to drafting contract language for their websites. *(Note that the paper to follow this abstract will compare the ad hoc and institutional approaches and will provide suggested contract language for each approach)*

Most international arbitration awards are considered final and binding (but see ICSID arbitration awards dealing with international investment disputes) and will be enforced by courts in countries that provide by law and treaty for such enforcement (see the U.S. Federal Arbitration Act and the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)). Over one hundred countries have signed onto this Convention making arbitral awards readily enforceable in the courts of most countries that e-commerce businesses operate within and with.

Since these awards are considered to be private matters, commercial entities engaged in such processes may find the use of arbitration more appealing than formal litigation in a public forum. Given that arbitration is a contractual matter between the parties, choice of law, and location of the hearing may be agreed to by the parties. It should be noted that location of the hearing itself might play a critical role in the process and outcome. The jurisdiction's procedural law relating to arbitration may be invoked and impact the decision. Therefore, it is important to choose a jurisdiction that is favorably disposed to commercial arbitrations. The parties can further agree as to whether the arbitrator must follow a particular jurisdiction's substantive law or whether the decision may be rendered on the basis of "fairness and equity". This decision will depend on each party's perspective. Most U.S. business tend to favor an approach where the rule of law is favored, especially where the parties have agreed upon the application of either U.S. law or the Convention on the International Sale of Goods (CISG).

Whether the parties rely on the ad hoc approach or the more formalized institutional approach, arbitration, when properly planned, may be a proper alternative to litigation in a foreign country. Each company contemplating doing electronic business must carefully weigh the choice of ad hoc versus institutional approach, the choice of forum provision, and the choice of law provision prior to drafting an arbitration clause.