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Critical Issues in International Dispute Resolution: *What You Plan For When Everyone Is Still Happy*

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The Time To Think About How To Solve Disputes Is At The Same The Time You Enter Into Your Agreement

- The dispute resolution mechanism is often an afterthought.
- There is often a mutual absence of understanding of how disputes would be resolved in a foreign jurisdiction.

Advantages of International Arbitration

- Certainty/control over the legal process
- Neutrality
- Privacy and Confidentiality
- Flexibility
- Finality
- The Ability to Enforce a Judgment

Disadvantages to International Arbitration

- Finality and Limited Appeal
 - Greater Expense
 - Difficulty Compelling Witnesses
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- No scenario is perfect, but there can be real risk in litigating in foreign countries.

Why Agree to International Arbitration?

- Provides a better opportunity for a consistent, clear, and reasoned approach to dispute resolution that is not dependent on the vagaries of different, country-by-country legal systems.
- Arbitration can also permit a procedural streamlining, which may be appropriate in certain types of disputes.

Litigating Franchise Disputes Abroad

- These disputes are dealt with differently around the world – no one size fits all.
 - Governing law is not a certainty.
 - Mandatory national laws create uncertainty.
 - Public policy principles in other countries may affect enforceability.

Differences Between Domestic US Litigation and International Arbitration

- Case Construction
- Scope of Documentary and Oral Discovery
- Legal Frameworks
 - The differences between the common law and civil code systems can be dramatic.
 - Even American common law vs. other common law jurisdictions can be dramatic.
 - Understand what you are getting into.

Differences Between Domestic US Litigation and International Arbitration

- Enforcement
 - The New York Convention (via the Federal Arbitration Act) makes enforcement possible in 172 different countries.
 - Compare this with attempting to enforce a foreign court order.
- Procedure By Way of Contract
 - Parties to an arbitration can collectively create their own parameters of arbitral disputes.

Differences Between Domestic US Litigation and International Arbitration

- Rather than being subject to jurisdiction-based court rules, the parties can choose their own rule set and an international third-party administrator to administer the arbitration.
- Administrators can assist in appointing neutral arbitrators as well.

The Right Governing Law and Seat of the Arbitration

- The governing law of the contract is the law that must be applied to the issues of the dispute.
 - The laws are not the same.
 - Issues like privilege, good faith, contractual interpretation, terms of the contract can all vary from jurisdiction to jurisdiction.
 - With exceptions, parties may choose the applicable law.
 - Parties can hopefully avoid conflict of laws analysis.

The Right Governing Law and Seat of the Arbitration

- The law of the seat of the arbitration governs the procedural aspects of international arbitration.
- The law of the seat is not necessarily the venue of the hearing, which is where the arbitration takes place.
- The law of the seat can affect the degree of judicial intervention and can even affect choice of law (in that there may be public policies that override the choice of law).

The Right Governing Law and Seat of the Arbitration

- Practically speaking, many U.S. based franchisors will want to have U.S. law govern. It is common to designate New York as the site of the hearing.
 - The Federal Arbitration Act can apply, and the US District Court of SDNY can be used.
- Similarly, parties may use an English seat – a reliable standard.
- At a minimum, use a signatory to the New York Convention.

Arbitration Institutions

- There are a number of key international institutions, including:
 - International Chamber of Commerce (ICC)
 - American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR)
 - London Court of International Arbitration (LCIA)

Tips for Negotiating An Arbitration Clause

- Take the advice of your legal team
- Think about enforcement issues.
 - Avoid the Pyrrhic victory.
- Discuss the allocation of costs.
- Logistics and convenience are important, practical considerations.
- Choose an appropriate governing law where appropriate.

Tips for Negotiating An Arbitration Clause

- Avoid trade-offs in your arbitration negotiation.
 - Key arbitration provisions should not be sacrificed for other commercial terms.
- Consider the practical implications of the seat of the arbitration.
 - Does the location have the arbitral bench strength necessary for your dispute?
- Appeal and judicial review rights may be important.

Expedited Options

- Sometimes time and costs savings will be of importance.
- The process can be tailored.
- For example, the ICDR provides an expedited process that includes:
 - Expedited arbitral appointment process.
 - An early procedural hearing.
 - Ceiling on amounts claimed.
 - Expedited schedules and limited hearing days.
 - An expedited award timetable.

Who Should Be Your Arbitrator?

- Key concerns include:
 - Availability of your arbitrator.
 - Diversity of your arbitrator or your panel.
 - Arbitrators come in many shapes and sizes.
 - Franchise industry-specific experience.

Who Should Be Your Arbitrator?

- Panel Size
 - One arbitrator? Three arbitrators? Something else?
- Word of Mouth
 - Talk to your colleagues. Know what you are getting into.
- Conflicts of Interest
 - Consider the implications of a potential conflict of interest, as your award may become unenforceable if your arbitrator is challenged.

Conclusion

- International arbitration provides certainty and predictability during a breakdown of the franchise relationship.
- Use specialized legal representatives and rely on local international counsel to provide guidance where possible.

Questions?