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Fashion & Apparel Law BLOG
Legal Issues Facing the Fashion, Apparel & Beauty Industry

Fashion Apparel Law Blog

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Comprenez-vous International Arbitration?

International arbitration is becoming the preferred method of resolving disputes in the fashion industry because international arbitration typically provides: (1) a private resolution so that the parties can still continue their business relationship in the future; (2) a neutral forum; (3) easy enforcement of the judgment throughout the world; and (4) a faster and cheaper dispute resolution than traditional litigation. Yet, not all international arbitrations are created equal.

When companies are considering international arbitration, or are faced with negotiating these types of provisions, companies should consider several aspects in order to ensure that there are no surprises, if eventually faced with arbitrating a dispute internationally. Failing to take a moment to consider the different factors beforehand may result in parties being surprised to learn that the arbitration they agreed to is different from what they had imagined. Below is a discussion of the pros and cons of some of the factors that parties should consider before agreeing to international arbitration.

1. Type of Arbitration.

Just like the fashion industry and its diversity, companies may be surprised to learn that there are different types of arbitration, either institutional or ad hoc, and both affect the type of forum, rules, and procedure that will be used.

a. Institutional Arbitration.

Institutional arbitration occurs when parties select a particular forum, which often has its own set of rules. As such, a benefit of institutional arbitration is that the parties can familiarize themselves with the rules before agreeing to internationally arbitrate. However, a potential downside is that the parties may be subjected to certain rules or rigidity that neither party wishes to enforce. Further, not all institutions are created equal. As international arbitration has become popular, forums have been created throughout the world and they will vary in their history, experience, process to select arbitrators, time permitted for resolution of the dispute, and their rules and procedures, particularly with respect to discovery. Thus, parties should consider the forum that is being selected and seek to understand the rules of the forum before agreeing to arbitrate under those rules.

b. Ad Hoc Arbitration.

Instead of institutional arbitration, companies could be faced with an ad hoc arbitration—wherein the parties have not agreed to any rules or any particular forum. A benefit is that the parties can select the forum and rules to apply to the arbitration. But, ad hoc arbitration may create more problems as the parties will have to develop and agree to the rules *after* a dispute has arisen between them. Further, often parties have different cultures and thus, different expectations of how the arbitration should occur. Thus, if a company selects ad hoc arbitration, the company should be aware that the rules have not yet been selected, and it could be subjected to rules that it would never have wanted to be subjected to at the actual arbitration.

2. Procedure Governing the Arbitration.

a. Selecting Arbitrators.

Parties should also be aware of how the arbitrators will be selected. For instance, in institutional arbitrations, often the rules provide the selection of arbitrators. Typically arbitrations will have single-member or three-member panels. In the case of three-member panels, parties may be surprised that often each party appoints one arbitrator, and either the parties or arbitrators select the third. Effectively, that third arbitrator becomes the deciding vote in the arbitration. Companies may not want to give up the right to a trial by a judge and jury knowing that, ultimately, only one individual will have the power to decide the result of the arbitration.

b. Discovery.

A major appeal of international arbitration is that it is typically a faster and cheaper resolution of disputes, compared to American trials with long discovery periods that have become costly and drawn out. Although parties often choose arbitration because of its supposed quickness and lower costs, this benefit often comes at the expense of limiting discovery. In international arbitration, there may be no right to conduct discovery, which as a result, saves parties money and resolves the dispute faster.

For instance, arbitrators may not allow discovery if they come from a country where no discovery is allowed. These same arbitrators may see no need to have a court reporter present. Some arbitrators may also find that witness testimony is unnecessary, or the testimony of the party itself is inadmissible because it is not credible. In an ad hoc arbitration, where the arbitrators decide which rules to apply, if the arbitrators come from countries where discovery is limited, then they will most likely not permit discovery. Conversely, if the arbitrators are American, they will most likely permit discovery.

If the international arbitration occurs in a forum or with arbitrators that do not permit discovery, and only one party has all of the documented evidence, the other party has

no right to receive those documents and will be at a significant disadvantage in proving its case. Thus, although parties may think that they understand (and relieved) that they will be subjected to limited discovery in international arbitration, they may be shocked (and upset) to find out that they have no right to receive evidence from the other company.

Further, resolving issues quicker means that the parties will be limited in how much time to develop all legal theories. There is a risk that the expedited time will mean that not all legal theories are fully developed. On the other hand, some parties may prefer to avoid further financial loss, and may want the dispute settled quickly rather than with precision. Thus, American companies must consider whether the benefits of international arbitration's speed and price are worth giving up the right to discovery and a trial.

However, as more Americans and American companies are becoming involved with international arbitration, and creating rules either with the forums or with arbitrators, some arbitrations are appearing more like American trials, with extended discovery and procedure. The result of this is that the cost associated with arbitration is increasing. If companies choose international arbitration because of the expected cheaper and faster resolution of issues, but then are faced with American -style discovery rules because of the particular forum, rules, or arbitrators selected, then the expected benefit from engaging in international arbitration is lost.

3. Choice of Law.

International arbitration often applies a choice of law from a country different than that of either party. For instance, an American company and a Mexican company may decide to apply Ecuadorian law. On the one hand, the American company may presume that this law is a "neutral law." However, the Mexican company may always use Ecuadorian law in its international arbitrations and thus, may be very familiar with the law. Thus, parties risk being subjected to a choice of law that it does not know that well, but that its opposing party surprisingly knows very well.

To further complicate the choice of law issue, parties should not assume that the arbitrators will be well-versed in the law the parties chose. In this instance, there is no guarantee that the arbitrator or arbitrators will apply Ecuadorian law correctly. If they do not apply the law correctly, an award may still be held valid against the losing party. (*See International Trading & Industrial Investment Co. v. DynCorp Aerospace Technology*, No. 09-cv-00791, (D.D.C. Jan. 21, 2011) (confirming the award in an international arbitration, despite the fact that the highest court in Qatar determined Qatari law was applied incorrectly, and reasoning that the only court that could set aside the award were the courts where the arbitration took place).

Taking the above considerations into account will allow parties to be in a better position to evaluate whether international arbitration is right for them, and then to craft favorable

arbitration provisions to avoid finding out later that what they agreed to was not what they had in mind.