Arizona Business & International Law

by Donald W. Hudspeth, ESQ.

A decade or more ago a client of our business law firm needed some advice on an international transaction. We called several local firms that we thought might do that kind of work, but they didn't. So, I concluded, "What the heck. If they are not going to develop a practice in that area, I will." Thus, we invested in multiple volume sets on the international law of contracts and the law of various foreign nations. Since that time we have done a number of transactions all over the world.

Fortuitously, a friend of mine who has done business all over the world did a short presentation to my business law class at Arizona State University, explaining some of the "Do's and Don'ts" of doing business in various countries.

Now, my firm, perhaps like yours, finds itself with clients or potential clients from all over the world – in my case seeking representation to bring their business to the U.S. in general and Arizona in particular. Conversely, some Arizona clients now do business around the world and need contracts tailored to the particular country. For example, our latest transaction is for the sale of environmentally safe paint in the Middle East through a Jordanian distribution company. Because of the Internet such deals are common.

I. Payments and Collections.

Doing business internationally can be complicated. For example, due to problems of financing, payment and collection, large international contracts are typically funded by letters of

credit. This means that the businesses on both sides of the transaction must have a bank familiar with international commerce and willing and able to enter into letter of credit transactions. Fortunately, while the banker that you deal with at your local branch may not have expertise in that area, the "downtown" office usually does. So, it may be simply a matter of arranging the appointment.

Alternatively, transactions may be funded by wire transfer – that is typically how this firm is paid. And, recently we were paid on a small matter by a client in China through PayPal. This is rare for us and we do not yet have sufficient experience with PayPal on international transactions to recommend it. But, it appears to be a possibility.

II. Currency Transfers, Exchange Rates, and Risk of Change.

When a foreign company, say from Japan, pays money to a U.S. company, or vice versa, the currency must be converted according to the exchange rate. International banks, and perhaps even PayPal, can do the conversion, but they charge for this and the cost can be significant. So, the contract must allocate the costs of conversion.

There is also the question of exchange rates. Exchange rates vary virtually on a daily basis, which change can benefit one of the parties and hurt the other by making the goods more or less expensive. The risk of loss from this variation must be dealt with – perhaps by stipulating to a given rate of exchange, e.g. Euros per Dollar.

III. Choice of Forum and Governing Law.

Among the most important considerations – at least to a lawyer – are the forum and choice of law. Provisions for the state of litigation and governing law are common fixtures of contracts in the U.S.[1] But in the absence of these governing law, venue and jurisdictional clauses for parties and subject matter within the United States we still have applicable law and a forum for resolution. The parties may argue where the suit belongs, e.g. whether in Arizona or California, but there is no question the case can be heard and that some state and or federal law will apply.

In contrast, speaking figuratively, "There is no court house to run to in the middle of the Ocean." Specifying applicable law, like the CISG, discussed below, and the forum for resolution -- often through international arbitration in London or Geneva – is absolutely essential. Without such designation and agreement as to what law will apply and where the dispute will be heard, the parties can literally be "nowhere" in terms of dispute resolution and contract enforcement.

[1] Such a provision might read as follows: "Disputes arising out of this agreement and its formation shall be governed by the law of the State of Arizona with venue an jurisdiction in Maricopa County, Arizona.

According to Wikipedia among the most significant forums are the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), the international branch of the American Arbitration Association), the London Court of International Arbitration (LCIA), the Hong Kong International Arbitration Centre, and the Singapore International Arbitration Centre (SIAC). Specialist alternative dispute resolution(ADR) bodies also exist, such as the World Intellectual Property Organization (WIPO), which has an arbitration and mediation center and, according to Wikipedia a panel of international neutrals specializing in intellectual property and technology related disputes. We typically designate London or Geneva under the U.N. Convention, but that practice may change as our international business practice expands.

So, to repeat – because it is so important – the contract which you use must specify the governing law and the forum of dispute resolution. By the way, if the other contract party will agree, you may designate a court in the United States, say the federal District Court of Arizona. Typically, however, the common practice has been to choose a more "neutral" site like London or Geneva as the forum for international disputes.

A. Some Types of Law in the U.S.

In contracts between parties located and/or doing business in the United States, the bodies of law most commonly applied by this business law firm in Arizona are:

(i) the Uniform Commercial Code (commonly referred to as the UCC), which applies to transactions in goods. The legal definition of "goods" is things moveable at the time of the transaction, a paradigm example of which would be furniture and equipment, but which also applies software, data and digital transactions.[2]

(ii) the law of real property, which governs transactions in buildings and lots, and

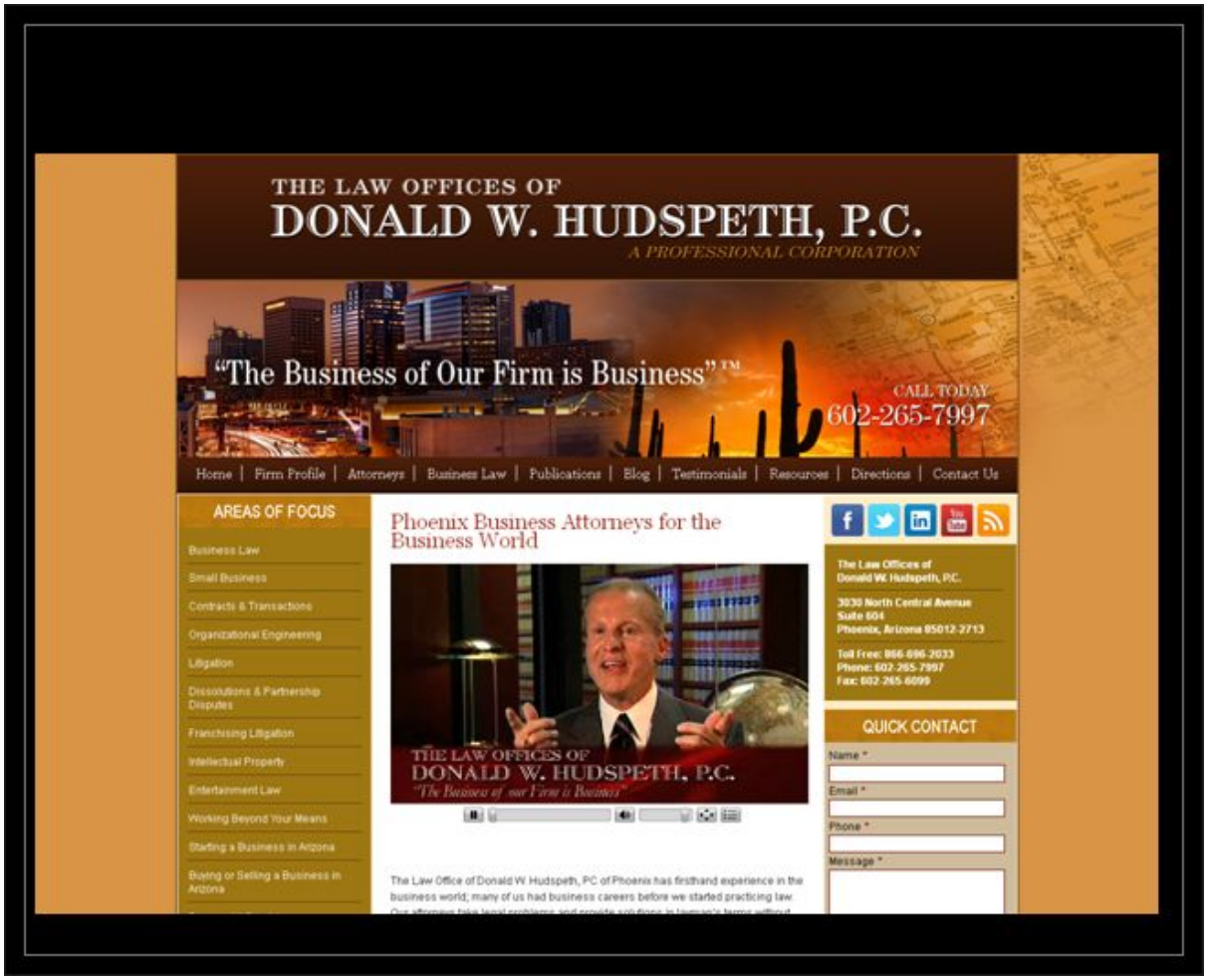
(iii) the common law, developed in case decisions over time, which most typically applies to transactions in services.[3]

Some transactions can include both the law of goods, like carpet, and services, like carpet installation. In that case the law of the predominant factor applies. For example, if the sales price of the carpet is $2000 and its installation cost is $1000 (I apologize if these figures are way off)

[2] Interesting story about that, the short version of which is that the creation of technology outpaces the creation of law; thus, the law is left scrambling to adapt to the new world constantly under creation. While the pace now is greater this problem has always been through. For example, the corporation as we know it was a legal response to the social-economic phenomenon of the Industrial Evolution.

[3] There are of course other bodies of law, like patent law, maritime law and the International Law of the Sea, etc. but this firm does not practice in those areas.

then the UCC would govern because the cost of goods predominate over the services in the transaction.



B. The Contract for the International Sale of Goods (CISG).

Many international transactions involve the sale of goods (think Chinese products to Walmart). Unless otherwise specified, e.g. an insistence that the Law of China would apply, the parties to such international transactions in goods would typically stipulate and agree that the CISG would apply.

Generally, the CISG is compared to and said to be similar to the UCC. But, as Article 2, the chapter on Sales, of the UCC (out of nine Articles) is an entire law school course by itself, we cannot cover the UCC and CISG here in these few paragraphs. Generally speaking, both the UCC and CISG are liberal in their writing requirements for a contract. The UCC requires at least some writing, e.g. a check or receipt -- some indication that a transaction actually occurred (kind of a credibility “speed bump” on the way to court) -- while the CISG, in Article 11, does not require a writing.

Although more liberal as to what is called the "Statute of Frauds," i.e. the writing requirement, the CISG is much more particular in the formation of contracts than the UCC. Under the UCC only the parties, subject matter and quantity are required to create a contract. Other terms, like price, and payment terms, can be filled in by the court as to what is standard or reasonable in the industry. In contrast, the CISG follows the "mirror image rule" of the common law, which requires that acceptance match the offer on a number of factors, including price, payment terms, delivery, etc.

For our purposes here the point is that international contracts should be carefully drawn to specify parties, subject matter, price, payment terms, delivery, etc. to avoid the defense of lack of contract. U.S. parties, particularly those engaged in the sale of goods under the UCC, may be not be accustomed to negotiating and completing contact terms and conditions with the completeness and particularity required under international law.

C. Warranties and Disclaimers.

Whatever general law may apply, important contract provisions in the sale of goods, domestically or internationally, include warranties, disclaimers and the limitation of remedies. In the U.S. we are used to and commonly accept contract provisions stating that the product is sold without warranty of "merchantability," AS-IS, and without any other warranty including the warranty of fitness for particular purpose. Also, U.S. contracts commonly exclude "consequential damages," e.g. monies paid to a third party to fix the situation, and state that, in any case, such damages will be limited to the cost of repair or replacement, which could be a remedy of $139.95 versus $1.5 million in consequential damages for defective software.

While hotly litigated in the US, especially where death or serious bodily injury is alleged to have been caused by a defect, European countries may not accept such disclaimers of warranties and remedies at all. In any case the lawyer for the party from the other country may argue for the law of that country to apply, or at least that the contract to provision reflect local custom, and not the case law of the U.S. The U.S. business party and its attorney should be prepared to negotiate these issues and not assume that the European or other nation's business will just accept the U.S. way of doing things.

Foreign "temperament" is also a factor. While not legally required, French businesses and their attorneys prefer the contract to be in French or translated into French. This adds a whole level of time and complexity to the transaction as each side hires its translator to review and confirm the accuracy of the translations.

German businesses tend to be quite specific, which means that contract negotiations can be more arduous and take longer than such negotiations might be in the United States. For example, in the US a contract may refer to a material breach as an event of default, without

defining "material," but rather looking to case law to define the term as necessary. But, a German lawyer may want the term defined in the contract, which may force the parties to consider and anticipate the possible types of breach and list in the contract those types of breach events which they agree to be "material." Terms like "reasonable," "significant" or "substantial" may require a similar process of examination and definition.

IV. Conclusion.

Obviously, this article is but an introduction to some of the issues that arise in international transactions. My primary purpose here is not to educate you about such transactions, but to inform you of their possible complexity and to encourage you to get legal representation in doing the deal. As briefly shown above, contract requirements and acceptable terms in international transactions may be completely different from what the client is used to in transactions within the United States.

As I have said elsewhere "Good legal contracts are like shoes: One size does not fit all and one pair is not suitable for every occasion." A good contract is informed by the knowledge and experience of the business client together with its business law attorney, and is tailored to the client's typical transaction.[4] This admonition and advice applies to international contracts as well – perhaps more so, given the probable larger size of the transaction and the downside risk of "being nowhere" if the contract is not properly drawn.

Good luck!

For more information about business law topics and our firm please see our website at: http://www.AZBUSLAW.com- **602-265-7997** - Phoenix Business Law

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International Law - United Nations Law - Foreign Corrupt Practices Act - International Transactions - International Business - International Arbitration/Mediation - International Dispute Resolution - International Business Law - International Joint Ventures - International Commercial Law - International Sale of Goods - International Commercial Contracts - International Contracts - International Mergers and Acquisitions

[4] For example, one of my first clients, which sold office phone systems, had a long, three-part form contract on NCR paper which was in general excellently drawn, but did not allow a remedy for non-payment. Based on this experience the firm added a provision for repossession and the right of peaceful entry (i.e. showing up with a security guard) to repossess same. The dollar amount of the client's uncollected receivables and write-offs declined precipitously where the remedy was not just to sue but to repossess.