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## *Your company is planning to “go international.” What are the legal risks of international business transactions?*

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*First, it is important to identify* the differences between applicable international and domestic laws. The second step is to use such knowledge to draft an appropriate and an enforceable agreement protecting your interests.

### *Choice of Law*

One of the biggest pitfalls of international business is which body of law will apply: U.S. laws, the laws of your trading partner's country, or perhaps a third country where the contract will be performed. Unless you specify which law will apply to your transaction, the consequences may be quite unpredictable. For instance, in a transaction for international sales of goods, the United Nations Convention on Contracts for the International Sale of Goods may apply (the “Convention”). If, by election or default, the Seller and the Buyer proceed with a transaction governed by the Convention, then they need to know its key differences from the U.S. Uniform Commercial Code (“UCC”).

Among the differences in the Convention and the UCC are: (1) the Convention will generally permit oral sales contracts; (2) the Convention will not affirm a contract if the Buyer's purchase order and the Seller's order acknowledgment do not have identical “material terms”; (3) the Convention will accept extrinsic evidence, such as intent of the parties, in defining their expectations; (4) the Convention will not allow you to revoke your offer if your counterpart has taken action relying on it; (5) the Convention will not allow a

Buyer to cancel or avoid a contract absent Seller's “fundamental breach”; and, as perhaps the most perilous rule (6) the Convention will provide for specific performance as a primary remedy for non-performance by either Seller or Buyer. Be prepared to deliver or purchase your goods regardless of monetary consequences of such action; payment of damages may not be an option. The good news is that you may opt to exclude the Convention from your agreement, but you will have to convince your trading partner that you can provide a better alternative.

### *Enforcement Issues*

U.S. companies generally prefer to litigate in the U.S. However, even if your company is successful in obtaining a favorable judgment in a U.S. court, there is no certainty that the courts in your opponent's country will enforce that judgment. First, the U.S. is not a party to any international convention requiring other countries to enforce the judgment handed down in our country's courts. Unless the foreign counterpart has assets that may be levied on and liquidated in the U.S., a U.S. court judgment awarding money to the U.S. plaintiff may be of little value. Under the U.S. litigation scenario, one should also be aware of possible issues with service of legal process on the non-U.S. party. Some countries are overtly hostile to extra-territorial service of process within their boundaries. Fortunately, the U.S. and many other countries are parties to the Service of Process Convention, which outlines a procedure for serving legal process on parties located outside the geographic jurisdiction of the court.

### *The Arbitration Solution*

Many international agreements today include a binding arbitration provision as a stipulated method of dispute resolution. The good news is that approximately 90 countries are signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The courts of each treaty country, including the U.S., are compelled to recognize and enforce arbitral awards rendered in another treaty country.

There are a myriad of international arbitration rules available for parties in international contracts. The rules of the International Chamber of Commerce, the United Nations Commission on International Trade Law, and the American Arbitration Association are relatively simple. They are frequently more acceptable to all parties than the often mysterious and complex procedural rules of the world's court systems. The arbitration proceedings are generally private. Each set of arbitration rules contains a simple protocol for giving notice of the proceeding to the other party and the arbitral body. Under arbitration, there is no uncertainty over jury verdicts; the decision-making process is vested in professional arbitrators. By U.S. standards, there is limited discovery under arbitration rules and high flexibility in the manner in which the arbitration is conducted.

An arbitration clause in your agreement should always address the place of arbitration, the language of the hearing, and the number of arbitrators. With a little help from experienced cross-border counsel, a proper agreement will help you navigate a challenging global marketplace.