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Your clients are taking their business overseas. Are you ready to go along, or will you be wishing them - and their new counsel - a <I>bon voyage<I>?

According to inflation-adjusted government statistics, the value of annual U.S. exports has increased over five-fold in the past 20 years [NOTE: \$118B in 1977, \$637B in 1997]. It's not just huge corporations that are responsible for this surge in foreign trade. Each year, more small and medium-sized companies become involved in buying, selling, and investing overseas.

Trade globalization means that U.S. commercial lawyers must become proficient in negotiating deals across national borders, not just over state lines. According to experts in the field, handling international transactions requires more than basic bargaining skills, a few legal forms, and a dog-eared copy of the Uniform Commercial Code. Lawyers doing business abroad also need cultural awareness, qualified local counsel, and knowledge of international rules for deals and disputes.

IT'S DIFFERENT OUT THERE

Some American lawyers believe that negotiating deals with foreigners "can't be all that different" from dealing with domestic parties, says Rona R. Mears, a partner at Haynes & Boone in Dallas. [214-651-5558]

"Well, it's <I>very<I> different," says Mears, who chairs the ABA's International Law and Practice Section. "You can't just pull out the old tried-and-true business forms and expect they'll work for transborder transactions."

The stateside lawyer for a U.S. company in Belgium once learned this the hard way, recalls Antwerp attorney Marc A. Huybrechts. [email: hec.law@ping.be] The lawyer advised his client to fire an American employee by a letter written -- naturally enough -- in English. The worker no doubt understood the message, but the termination was "null and void" under the country's strict language law, says Huybrechts.

Instead, Belgian law allowed the employee to "terminate the contract on his terms and claim substantial damages," says Huybrechts -- money the company could have saved if its lawyer realized "how touchy we are [about] our language statutes."

With a local guide, the company might have steered clear of this legal shoal. "When you enter Belgium by vessel on the Scheldt River, you need a pilot on board, because this is a dangerous river," says

Huybrechts. "I would advise each U.S. lawyer doing business in Belgium to retain a local pilot to protect against [legal dangers]."

FINDING FOREIGN FRIENDS

Retaining qualified local counsel is not just a good idea; it's essential to almost any international venture. "It's hard to envision a significant transborder transaction without the need for a lawyer in the other country," Mears says, "whether it's for establishing a corporation, filing a document, or getting an opinion on the validity or enforceability of an agreement."

They might be bigshots at home, but American lawyers have few privileges abroad. Like many countries, for example, Vietnam flatly prohibits foreigners from practicing law. Even if they could ply their trade there, U.S. attorneys would be unable to fathom the country's "confusing and vague" statutes, says Ho Chi Minh City attorney Nguyen Tuan Minh. [TILLEKE & GIBBINS CONSULTANTS LIMITED email: tilleke@netnam.org.vn] Vietnamese lawyers have trouble keeping abreast with the country's developing legal system, says Minh. "As foreign lawyers, there's no way you could keep pace with such changes."

Paul Allaer, a partner at Cincinnati's Thompson Hine & Flory, [513-352-6700] was born and educated in Belgium, has extensive experience in foreign investment work, and co-chairs the European Law Subcommittee of the ABA's Business Law Section. [IT'S A SUBCOMMITTEE OF THE SECTION'S INTERNATIONAL BUSINESS LAW COMMITTEE, BUT THAT'S TOO LONGWINDED]. Despite these credentials, he tells his clients in international matters that they also need legal talent in the other country. "I am not a walking encyclopedia of all the laws around the world," says Allaer,

However, finding a qualified attorney in New Delhi for a transborder transaction is not as easy as hiring a competent New Orleans lawyer for a multi-state deal. For Allaer, the search for a foreign lawyer begins at home. Rather than "going to Martindale-Hubble and picking someone out of the blue," he seeks recommendations from colleagues who have already done deals in the other country. Allaer says he prefers local counsel who have previously worked for American firms, and thus understand the heavy demands of U.S. business clients.

Mears agrees that word-of-mouth beats a shot-in-the-dark when it comes to finding good local counsel. Most international lawyers are not stingy about sharing names of trusted foreign lawyers, since they often need the same favor, she says.

The 14,000-member ABA International Law and Practice Section offers an "embarrassment of riches" for those searching for qualified counsel abroad, says Mears. In addition to fostering an informal referral network, the Section publishes the <I>Guide to Foreign Law Firms</I>, edited by veteran international lawyers James R. Silkenat of New York and William M. Hanney of Chicago. Now in its third edition, the directory lists firms from Albania to Zimbabwe, with entries culled from Section members' recommendations. [SEE SIDEBAR ON BOOKS]

Mears cautions against judging a foreign firm by the size of its letterhead. "Some very, very good firms abroad are very small," she says. However, any firm selected should have the staff and technology to support the contemplated transactions.

Local counsel must also appreciate that American companies expect constant feedback from their lawyers, including opinions on the "business implications of different legal structures," says Mears. "Between two capable law firms, the one with the communication skills is the one I'll pick for the long term," she says.

Some foreign lawyers are reluctant to cross the line between law and commerce, says Michael Gallagher, an American lawyer affiliated with a law firm in Tallin, Estonia. [michael.gallagher@lc.ee] "In Estonia, most lawyers are content to advise on the enforceability of legal documentation," says Gallagher, "They are very conservative about opining on anything having to do with 'business.'"

To overcome this reticence, American lawyers have to be especially inquisitive of local counsel. "If you don't ask the right questions, you won't get the right answers," says Gallagher.

CROSS-CULTURAL DEALMAKING

Just as local counsel have to respond to U.S. clients' demands, American lawyers must respect foreign cultures, legal systems, and business methods. "You can usually solve the legal problems," says Mears. "Most deals crater because of cultural misunderstandings."

Long gone are the days when U.S. businesses could expect the red carpet treatment overseas. Gallagher relates the tale of an American lawyer in Estonia who demanded a regulatory waiver simply because he represented a U.S. firm. "The regulators politely responded that they would consider the request and then did nothing," Gallagher recalls. "The client blamed this inaction on stubborn bureaucrats, not understanding that the lawyer probably caused the delay and inhospitable atmosphere."

Even those not prone to such loutish behavior may make cultural missteps. "A common initial mistake that an American lawyer makes in Thailand is to interpret smiles, nods and the word 'yes' to mean anything more than 'I hear you,'" says Albert. T. Chandler, an American lawyer at a Bangkok firm [CHANDLER & THONG-EK LAW OFFICES LIMITED atchandler@ctlo.com] Chandler has learned to "ask questions which require 'no' as the correct answer."

To avoid miscommunication across cultural and language divides, lawyers must often "ask the same question several times," counsels Susanne Ruckert, [umlaut over "u" in Ruckert] a German lawyer practicing in Tokyo [Susanne_Rueckert@hhp.de]. In negotiating with the Japanese, she warns against blunt language, or other actions that might cause the other side to "lose face," even if this means apologizing "for mistakes which have not been caused by you."

According to University of Missouri law professor Ilhyung Lee [573-882-2426], other societies may have fundamentally different views about the lawyers' role in business matters. In South Korea, for

example, lawyers have traditionally been viewed as "community mediators, who would work with both sides to resolve disputes, rather than adversarial advocates or 'hired guns,'" says Lee.

Professor Lee has more than an academic background in comparative law. Born in South Korea and schooled in the U.S., his legal career has included stints at Cravath, Swaine & Moore, a blue chip Wall Street firm, and Kim & Chang, the most high-powered firm in Seoul.

According to Lee, as the South Korean and Japanese economies have grown, corporations there have adopted many Western business norms, including well-lawyered international transactions. In both countries, though, the culture of consensus pervades both the negotiation and interpretation of business agreements.

"In the U.S., a contract is seen as a 'deal,' an end in itself," Lee observes, while in Korea and Japan, the paperwork "symbolizes the beginning of an ongoing relationship."

Just as a bride or groom may balk at a prenuptial agreement that spells out divorce terms, says Lee, some Korean companies may look askance at a contract with detailed dispute resolution procedures.

Cultural differences also help explain why Americans often expect more precision, and hence more pages, in business agreements. "The U.S. is a 'low context' society, where parties have to get everything spelled out to ensure a common understanding of their rights and duties," says Lee. "In the 'high context' cultures of East Asia, business people are more comfortable relying on shared experiences and prevailing circumstances to tell what is expected of each side."

Kevin Block, who spent four years representing U.S., European and Asian investors in the eastern Siberian city of Vladivostok, discerns a similar divide between America's "rule-based" and Russia's "relationship-based" legal systems.

"In Russia, the real significance of a contract is in the relationships you build during the negotiating process," says Block, now an international business lawyer at Carle, Mackie, Power & Ross in Napa, California. [(707) 251-9871] "The actual documentation is just the icing on the cake."

Obsessing over the paperwork, and ignoring the people across the table, may spell disaster. "I can't tell how many deals that U.S. lawyers killed over there because of bumbling, fumbling cultural ignorance," says Block. "They'd spend all their time talking about Sub-clause j of Paragraph 42, and then think they were done once the contract was translated into Russian."

"Well, it might be a beautiful translation, but without the personal contacts, the contract is gibberish; it just won't mean anything to the other side," says Block.

GETTING IT ON PAPER

No one suggests that handshake deals should replace written agreements with foreign parties. To the contrary, Block says that precise agreements are often necessary to avoid cultural misunderstandings.

"The Russians would sometimes drive Westerners crazy by assuming that construction contracts would automatically adjust if prices increased or other circumstances changed," he recalls. To counter this, Block launched a pre-emptive strike in the contract, which listed all conceivable conditions that did not warrant modification.

"The Russians would ask for more money because the price of bolts went up," Block laughs, "but we would just point to condition 27: 'This contract shall not be modified because of a change in the price of bolts.'"

U.S. lawyers should push to "prepare and control the documents in the deal," says Josh Markus, a partner at Miami's Hughes, Hubbard & Reed [305-379-5566] and chair of the International Law Section's Comparative Law Division. Markus warns that parties from civil law jurisdictions often try to talk Americans out of standard contract language, claiming that statutes already control the issue.

"The other side may say, 'Oh, the Code takes care of everything,'" says Markus, who. "Well, it doesn't." There may be little practical guidance on ambiguous statutes, he adds, since interpreting civil law codes is usually the task of academic commentators, not the courts. "Caselaw doesn't count for much," says Markus.

"The documents must have the provisions needed to protect the client's interest," adds Allaer. "If that can be done in five pages, great." However, foreign partners must understand that "we do things a certain way here. We can't throw these precautions away and do a handshake deal that wouldn't be acceptable [in the U.S.]," says Allaer.

According to Mears, it's possible to avoid offending foreign partners, and still protect U.S. clients, by editing out unnecessary boilerplate. U.S. lawyers are accustomed to dealing with "massive documents, dealing with all contingencies," she notes. However, this paperwork may be "offensive in many parts of the world, where business is based more on friendship and trust. The presentation of a 40-page joint venture agreement to the other side can be taken as a cultural affront."

Gallagher is more blunt. "American lawyers can be a real pain in the ass," says the Estonia-based attorney, explaining that his compatriot colleagues are "very direct, very detail oriented and can be pushy."

Although specificity in international agreements is necessary, says Gallagher, U.S. lawyers demand and produce an inordinate volume of paperwork in transborder deals. "The length of the documents can make the negotiations far more complex than they should be. American lawyers tend to exaggerate risks," he says.

[AWK. TRANSITION, BUT I COULDN'T FIND ANOTHER GOOD PLACE FOR THIS] No lawyer should risk violating U.S. law while doing deals overseas. In 1977, after revelations of corporate bribes and kickbacks to foreign officials, Congress passed the Foreign Corrupt Practices Act, outlawing payments to foreign officials made for the purpose of getting or keeping business. A 1988 amendment allows so-called "grease" payments designed to expedite "routine" governmental actions such as issuing permits and visas, processing paperwork, unloading cargo, providing security, or delivering mail.

Thomas T. Chan of Los Angeles [Chan Law Group 213 955-0220] takes no chances with the FCPA's criminal provisions. "I always warn local counsel about the law, and tell them what's prohibited," says Chan.

SELLING THE GOODS

U.S. companies that are new to the global marketplace should test the waters overseas before plunging into unfamiliar territory, says Allaer. "It's a huge step to establish manufacturing operations in another country, [requiring] a tremendous commitment of money and management attention," he says. Businesses should instead "see how it goes through licensing agreements or sales by distributors."

However, agreements with foreign distributors and agents must be structured to avoid creating an employment relationship, with the attendant job benefits and severance rights, Allaer says.

To reduce litigation risks, the contract should also clearly state the other side's performance obligations. "The more objective the reasons to terminate, the better," says Allaer. For example, rather than requiring "best efforts" to sell the U.S. exporter's product, the agreement should require "sales of one million US dollars in year 2000," he says.

The advent of e-commerce has complicated foreign distribution arrangements, says Allaer. A distributor can easily hawk products across national borders through its website, competing with the U.S. exporter or other distributors. To avoid squabbles over cybersales, Allaer advises that distribution agreements specify whether and how the product may be sold over the Internet.

According to Block, a U.S. exporter must also be careful that it doesn't "inadvertently establish a taxable presence in the target country, which may occur if the [foreign] agent is authorized to conclude contracts on the exporter's behalf, and does so regularly."

The UN's UCC

The United Nations is trying to unite the worlds' buyers and sellers behind a global version of the Uniform Commercial Code. In 1988, the U.S. was among the first countries to sign on to the U.N. Convention on Contracts for the International Sale of Goods (CISG). The pact has now been ratified by 55 countries, including most of America's major trading partners (with the notable exception of Japan and the U.K.)

The Convention applies <I>automatically</I> to sales of goods between buyers and sellers located in different CISG signatory countries, unless the parties explicitly opt out of its terms. Many U.S. parties do just that, says Markus. The CISG is "typically disclaimed in contracts" by American lawyers who are wary of the new international standards, he says.

Allaer notes several key differences between the CISG and the familiar sales standards of UCC Article 2. Under the Convention:

- * An enforceable sales contract need <I>not</I> be in writing, but may be proven by any means, including witness testimony. The UCC's "statute of frauds" requires written contracts for all sales of goods over \$500.

- * An acceptance must be the "mirror image" of an offer. A purported acceptance that materially modifies the offer's price, payment, quality and quantity, place and time of delivery or allocation of liability is deemed a rejection. Under the UCC, such an acceptance would generally seal the deal -- with unagreed-upon material terms left out of the contract.

- * An acceptance is effective when received. Under the UCC's "mailbox rule," an acceptance is valid when mailed.

- * The buyer has a two-year statute of limitation on claims of non-conforming goods, as opposed to the UCC's four-year timebar.

Allaer agrees that the CISG has little "practical significance" to U.S. businesses, since most opt out of its terms. Still, the international standards should not be dismissed out of hand. The CISG may be a reasonable alternative when dealing with signatory countries with obscure or less developed commercial codes, such as Uganda, Latvia, or Uzbekistan.

The Convention can also come in handy closer to home, says Allaer, citing his experience representing a U.S. distributor in negotiations with a Canadian manufacturer. The other side's draft agreement provided that the laws of Quebec would apply, without mentioning the CISG. However, because Canada is a Convention signatory, the CISG governs international transactions under Quebec law, unless the parties opt out.

"I don't think the lawyer on the other side ever had a clue" that he was signing on to the CISG, says Allaer, who didn't raise the issue himself, since the CISG happened to favor his client.

DISPUTE RESOLUTION

Nothing can spoil a U.S. company's overseas adventure more than an unplanned trip to a foreign courtroom. "Litigation in a foreign jurisdiction is handled very differently, and is very expensive to manage" from the U.S., says Mears. Thus, dispute resolution a "huge, huge, issue" in international transactions.

Often, neither party wants to give away the home court advantage. South Korean and U.S. businesses are equally apprehensive about being hauled into the other side's judicial system, says Lee -- and not just because of the language barriers and miles involved. U.S. companies object to the lack of formal discovery in Korean proceedings, while Koreans dread the grueling depositions and invasive document demands in American lawsuits.

Suing a foreign company in a domestic court may be easier for U.S. lawyers, but ultimately unsatisfying for their clients, according to Jeffrey Dunoff, [215-204-8233] Temple University law professor and director of the school's Transnational Law Program.

There's no guarantee that a judgment creditor can collect against the defendant's foreign assets, says Dunoff. "As a matter of international law, the courts of country A are under no obligation to enforce the judgment of the courts of country B, absent a treaty."

Although some countries may give <I>res judicata</I> effect to U.S. judgments, they do so as a matter of discretion and comity, not international obligation, notes Boston University law professor William W. Park. [tel. 617-353-3149] [NOTE: he's also of counsel at Boston's Ropes & Gray and vice president of the London Court of International Arbitration]

Not a single country has signed a treaty with the U.S. committing to the reciprocal enforcement of judgments. "Even Great Britain has refused to ratify a judgments treaty ... from fear of civil juries, punitive damages, strict liability, and other quaint aspects of the American legal system," notes Park.

To escape the expense and enforcement problems of litigation, the international business community has "privatized" dispute resolution, says Dunoff, using private international arbitration that simply bypasses the courts.

The procedures and situs of arbitration, number and nationality of arbitrators, and choice of law are all negotiable. According to Chan, parties often horsetrade on these issues. "If I have to make a choice, I'll give up the governing law and take the U.S. forum," he says. If a dispute arises, Chan explains, "just thinking about coming here may deter [the other side] from pushing it."

Under a longstanding international agreement, private arbitral awards are more enforceable around the world than fully litigated court judgments. The 1958 New York Arbitration Convention [FULL NAME: NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS], now ratified by more than 100 countries, commits the signatories to recognize arbitration awards from other contracting states.

The New York Convention does not insulate arbitration from judicial review, and an award is not enforceable worldwide if the situs country's court overturns the decision. Thus, Park recommends selecting a seat of arbitration where the courts won't arbitrarily unseat the private ruling.

"The best place for arbitration is normally a country where the judiciary will safeguard procedural integrity but not intervene to correct an arbitrator's honest mistake of law or fact," Park states. Geneva, London, Paris, and his Boston hometown fit this bill, he says.

Arbitration is not appropriate for every transborder transaction, says James Silkenat of New York's Winthrop, Stimson, Putnam & Roberts (212- 858-1322). [HE'S ALSO A FORMER CHAIR OF THE ABA INTL. SECTION] For example, lending transactions are generally not arbitrable, since lenders fear that arbitrators are prone to "split the baby" rather than require the debtor to pay up.

Chan cautions that dispute resolution clauses are much easier to write than to implement. "You can only enforce using local means, and the local courts sometimes won't allow the seizure of assets to pay [foreign] debts" he says.

These enforcement difficulties make due diligence "extremely important" in international transactions, says Chan. Without Dun & Bradstreet reports or reliable court records in most countries, he adds, this inquiry often involves "asking around" to local counsel, businesses, accounting firms, and other contacts.

"You have to check out your partner before the deal," says Chan. "You can't count on suing him afterwards."

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