The Impact Of The Global Economy On The Sales Rep-Manufacturer Relationship

Choice Of Law And Venue Considerations

by SCOTT M. SANDERS, Esq.

In today's ever-expanding world marketplace, the contractual relationship between sales rep and manufacturer has evolved, oftentimes into an international business relationship. What does this mean in the legal realm?

A U.S.-based sales rep can no longer ascertain with certainty what law will apply in case of a dispute with a foreign manufacturer (an issue lawyers refer to as "choice of law"), nor where the dispute will have to be litigated (which lawyers refer to as "venue"). Unless one feels comfortable litigating contract disputes under foreign laws in Asian, Indian or South American courtrooms, it is wise to understand the basics concerning choice of law and venue in disputes between a domestic sales rep and its offshore manufacturer.

"In the absence of an exclusive [venue] clause in [a contract between parties of different nations] an international dispute...could likely be commenced in [either nation's court system]. For example, if a Japanese [manufacturer] enters into a distribution [or sales rep] agreement with a U.S. company, in the event of a dispute, the Japanese company would likely be subject to [a lawsuit] in the courts of both the U.S. and Japan."[1]

However, the U.S. sales agent or distributor would likewise be subject to lawsuits in Japan. Without further provision, this issue may then become decided based on a rush to the courthouse and which side is the first to file pa-

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pers. Knowing that most U.S. concerns would not opt to litigate international disputes on foreign soil, it is important that they include choice of law and venue provisions in their agreements with foreign principals, providing that the United States is the only allowable venue in which litigation may be commenced in case of a dispute over their contract, and that the choice of law will be the law of whatever state the U.S. sales rep is located in.

Determining Choice of Law

Of course, should the law of one's state of residence not be beneficial to their potential positions in a dispute over their contract, another state's laws could be included as the choice of law. It is a prerequisite, however, that the laws of the state chosen have some reasonable nexus to the relationship between the parties; otherwise the choice may be held invalid by the court where the matter is heard. For example, if a sales rep's state of residence is Pennsylvania but the territory served is in California, the rep may want to select California as the choice of law due to the fact that California has a mandatory treble-damage provision in case of the intentional failure to pay commissions owed; whereas Pennsylvania requires only that the court award up to double the commissions proved in a commission dispute, meaning that the court could award $1.00 for the punitive damage portion if it deems this sum appropriate.

The framing of this language should be left to an attorney familiar with or able to research these issues to be sure such language will be held binding by a U.S. court.

Although one might ask why a foreign manufacturer would submit itself to the laws of the United States in case of a dispute with its sales rep, there are a number of good reasons to suggest that, at least from a plaintiff's standpoint, they would be willing to do so: "The availability of contingent fee lawyers in the United States; the availability of punitive or multiple damages awards [although this obviously benefits the sales rep more than the foreign manufacturer in a typical case]; the availability of jury trials in civil cases; and the availability of broader discovery."[2]

Methods to Establish Venue in One's "Home Court"

Now that it becomes apparent that, at least as a plaintiff, one would rather litigate in a U.S. court system, how can that goal be achieved? There are basically two ways to accomplish this:

- **Exclusive Venue Clauses**

The best and easiest way to assure that a lawsuit will be heard in a particular venue and be based on a particular choice of law is to include a clause in the contract that would form the basis of the lawsuit. Obviously, this possibility will hinge on the bargaining strength of the sales rep requesting such a clause be included in her contract. If the rep brings an established and substantial customer base to the negotiations, they may be able to impose such provisions on the foreign manufacturer looking to contract the rep's services. If, however, the bargaining position is not strong, then an alternative will have to be utilized.[3]

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- **Preemptive Strikes**

If the foreign party on the other side of the contract is strictly unwilling to submit to litigation in the United States, based on the laws of one of the states, then the U.S. concern still has a means by which to have any disputes with its foreign counterpart heard in this country under U.S. law — run to the courthouse of one's choice in case of an irreconcilable dispute and be the first to file legal papers commencing an action. Take heed, however, that winning this race is not the final word when a court decides where the proper place for the action may be.[4]

Although the above methods

1. See International Business Litigation & Arbitration; Fellas; 2002; page 60.
2. See International Business Litigation & Arbitration; Fellas; 2002; page 61.
3. See International Business Litigation & Arbitration; Fellas; 2002; page 64.
4. See International Business Litigation & Arbitration; Fellas; 2002; pages 65-66.

will largely control, two other legal factors may help decide a dispute challenging the filing of one's lawsuit in a particular venue.

Extraneous Factors Affecting Venue

- **Forum Non-Conveniens**

This legal doctrine is based on several considerations, including: that there is more than one possible forum in which a dispute could be heard;[5] on the presumption that the plaintiff's choice of forum should rarely be disturbed;[6] and on a balancing of the public and private interests at stake to determine whether the convenience of the parties as well as third-party witnesses would be better served by sustaining the action in the original court where it was filed or requiring transfer to another venue.[7]

In determining this issue the courts will look at the geographic location of potential witnesses, as well as the parties, along with which state has the closest legal nexus to the dispute. Therefore, under the scenario outlined above, a rep with a largely west coast customer base, although personally based somewhere on the east coast, may be well suited to calling for both venue and choice of law in the area where the customer base is more prevalent, such as California in the scenario explored above. One of the west coast states would also likely be deemed to have the closest connection to the dispute since the manufacturer's products are being sold to customers in the state, and the rep is rendering services there.

Although great deference is accorded the trial court in determining the issue of Forum Non-conveniens,[8] and venue selection clauses are generally held to be valid by most courts, the finding of any of the following factors will make such a clause unenforceable:

1) If the clause was included in the contract as a result of fraud;
2) If the plaintiff would be deprived of its day in court or a fair remedy due to the grave inconvenience or unfairness of the selected venue; or
3) If the clause runs amok of a strong public policy of the forum state.[9]

Although these are rather technical defenses to the selected venue, a little legal analysis can help assure that none of these defenses come into play if and when a dispute arises.

- **The Brussels and Lugano Conventions**

The other major factor which may affect venue as well as choice of law is whether the foreign manufacturer one contracts with is domiciled in a country that was a party to the Brussels Convention of 1968 and/or the Lugano Convention of 1988. In the case where a foreign manufacturer is domiciled in a nation that was party to one of these conventions, the convention's rules will determine where venue is possible!

In general terms, the Brussels Convention of 1968 has binding authority on countries within the European Community.[10] The Lugano Convention of 1988 extends the principles of the Brussels Convention to members of the European Economic Area.[11]

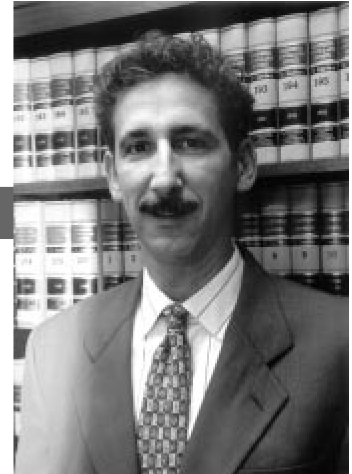
It is important to note that the conventions apply to all civil commercial matters; but have no application to tax, customs or administrative disputes, nor to immigration issues or arbitrations.

A defendant domiciled in a country that was party to one of these conventions may only be sued in the courts of that country. It is important when applying this rule to recognize that domicile, not nationality, will determine application of this rule. That is where things get a little bit murky, as member nations must apply their own internal laws to decide where a company is domiciled. There are no such provisions in the conventions! An attorney or business consultant well versed in international law should obviously be consulted in order to determine what effect

5. See the U.S. Supreme Court case Gulf Oil Corp. v. Gilbert (1947) 330 U.S. 501, at 506-507.
6. See Gulf Oil Corp. v. Gilbert (1947) 330 U.S. 501, at 508.
7. See Gulf Oil Corp. v. Gilbert (1947) 330 U.S. 501, at 508-509.
8. See the U.S. Supreme Court case Piper Aircraft v. Reyno (1981) 454 U.S. 235, page 257.
9. See HNY Associates v. Summit Resort Prop's (S.D. NY 2001); Lexis 5310, page 3.
10. These include Belgium, Denmark, France, Germany, Greece, the Netherlands, Ireland, Italy, Luxembourg and the United Kingdom.
11. These include all nations that were parties to the Brussels Convention, along with Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland.

these conventions would have on a particular dispute.

Of course, the best way to avoid these issues in the first place is to avoid getting into contractual disputes. However, in the evolving world marketplace, a Chinese-, Indian-, or Spanish-speaking person's understanding of what was meant by an English-speaking person in negotiation and preparation of a contract may be way off base. Use interpreters in these communications when possible, and one may even be well advised to have the contract prepared in both English and the language of the foreign manufacturer and then interpreted and signed in counter-parts. A little prevention can go a long way toward assuring ambiguities do not exist, full understandings are reached, and that one's firm does not wind up having its legal disputes heard in a Bombay or Hong Kong courtroom!



ABOUT THE AUTHOR:

Scott M. Sanders, of Sanders & Montalto, LLP, became affiliated with MANA in 1990 and has continued to represent MANA members ever since. More members have benefited from his transactional and counseling work than from the firm's litigation services. The firm has prepared and even negotiated contracts for a more favorable principal-agent relationship and is especially attuned to the needs of the individual contractual relationship presented, which vary greatly by product, principal, customer base, and other factors; as well as to the budgetary constraints of most small rep firms. The firm has its headquarters in Torrance, California with satellite offices in Orange County and the San Fernando Valley, California, as well as a newly established New York office in Ulster County. Please feel free to contact Mr. Sanders at: (888) 225-3364; or (310) 916-3262; or visit the firm's web-site at: www.sandersmontalto.com.

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One Spectrum Pointe, Suite 150, Lake Forest, CA 92630-2283 • Phone: (949) 859-4040 • Toll-free: (877) 626-2776
Fax: (949) 855-2973 • E-mail: mana@manaonline.org • Web site: www.manaonline.org
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