



THE FLORIDA BAR
INTERNATIONAL LAW SECTION

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Breakout Session: 1:30 – 2:30 p.m.

“YOUR CLIENT HAS BEEN SUED IN THE U.S. – NOW WHAT”

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2011 INTERNATIONAL LITIGATION & ARBITRATION CONFERENCE
Florida Bar, International Law Section

“Your Client Has Been Sued in U.S., Now What”

Introduction:

So, you have just been advised that your client, a Brazilian supplier, has been sued in Miami Federal Court (under diversity jurisdiction) by U.S. buyer, a California corporation with offices in Miami, for failure to deliver product.

The buyer purchased 100,000 units of swimwear from the client/seller, headquarters in Rio de Janeiro but with a worldwide network of offices, and paid it \$500,000. When the product was allegedly not delivered, the buyer sued the seller for breach of contract & fraud (requesting punitive damages).

Contract negotiations were conducted in person in Miami (where the parties met at a trade show) and in Los Angeles. The buyer initiated the order from California and did not travel to Brazil. CIF terms & other conditions were exchanged by e-mail, with delivery in Miami – there was no “formal” written contract. The buyer sent a “purchase order” and the seller sent an e-mail confirmation.

The seller has no direct presence in Florida through personnel or advertising. The President claims his company has sold swimwear to only 1 Florida buyer (he admits to selling to 3 California buyers) over the years, alleges it has no office in Florida, and shipped the product months earlier.

Question: What is the Goal in the U.S.?

You and your client need to decide whether to resolve the dispute i.e. defend the lawsuit or negotiate a settlement in the particular U.S. Court, or try to have the case dismissed from the U.S. court & live to fight another day (and take the risk of possibly being sued in another forum or jurisdiction).

Reaching an answer to this key question requires a U.S. lawyer intimately familiar with international law issues, and it takes a team effort with *you* guiding the U.S. lawyer on what would be the best outcome for your client.

1. Stand & Fight

On the one hand, it may be tactically beneficial, cheaper and/or faster in the long run to defend the case in the U.S. (e.g. good defenses), with the advantage of U.S. style-discovery, including depositions and required production of documents. And the client could file a counter-claim against the plaintiff or claim for “set-off” in damages on the same transaction or even an unrelated transaction.

If so, you will want to consider the following to see if it will be helpful (or harmful) to your client:

- **Discovery** – what this means regarding (a) taking of depositions of plaintiff and its witnesses, as well as your client’s deposition and witnesses, which can be conducted outside the U.S. i.e. in your client’s jurisdiction and your law firm’s offices, with lawyers and a U.S. court reporter present, and (b) requests for documents, including electronic documents.
- *Contrast* 28 USC §1782 action for discovery in a foreign proceeding (e.g. parallel action).
- **Governing law** – U.S. (particularly federal) courts can apply foreign (non-U.S.) law, e.g. based on a stated law clause in a contract or under a *Lauritzen* analysis (several points-of-contact), which can be presented by an appointed expert witness on the particular area of law via affidavit or in-person (could result in dueling experts).

- **Attorneys Fees** – no automatic recovery in U.S. by prevailing party (American Rule v. Common Law Rule), unless stated in contract or statute (or under foreign law)
- **Enforcement of U.S. Judgment** – if your client loses the case, does it have assets in U.S. against which judgment can be levied; if not, can the U.S. judgment¹ be “domesticated” in another jurisdiction where it *does* have assets (“full faith & credit” analysis), or does the case have to be re-tried and a “local” judgment obtained to be enforceable, thus requiring the plaintiff to spend more money if it wants to pursue the case?

2. Fight & Run

On the other hand, you may prefer to try and have the case dismissed from the U.S. court, thereby forcing the plaintiff to lick its wounds and look for another opportunity to re-file the lawsuit in your client’s jurisdiction (or a friendlier forum).

In that case, you can consider and investigate the following issues:

- **Service of Process** – how did your client find out about the lawsuit e.g. was it served with “legal process” i.e. a legal notice? Was it via personal service, mail or contractual agreement (e.g. fax or e-mail); maybe service was improper or insufficient e.g. should have been done via Hague Convention or Inter-American Convention via “letters rogatory.” Did your client agree to and/or accept personal service of process (summons & complaint); if so, this (personal notice + knowledge of lawsuit) may be sufficient for that court as sufficient.
- **Personal Jurisdiction** – what “contacts” does client have with place where it was sued e.g. is it registered there as a company, does it have office/staff/registered agent; if none or very little, the court may lack personal jurisdiction.² Bear in mind U.S. courts generally have personal jurisdiction over non-resident defendant that has “minimum contacts” with the state and where jurisdiction would not violate “traditional notions of fair play and substantial justice.”³
- **Forum Non Conveniens** – is there a more “convenient” forum re witnesses & documents; if so, a U.S. court has discretion to dismiss the case & allow plaintiff to re-file in defendant’s

¹ Since fraud was alleged, with a request for punitive damages under U.S. law, this may be a reason to try to incorporate applicable (here, Brazilian) foreign law that may not allow for such damages, or litigate elsewhere.

² U.S. law provides that personal jurisdiction can be **general** or **specific**. Former requires “substantial, continuous and systematic” contacts (claim doesn’t have to be connected to defendants’ business relationship with forum); latter requires (1) defendant must have “purposefully availed itself of forum benefits,” (2) controversy must be “related to or arise out of defendant’s contacts” with the state, and (3) personal jurisdiction would constitute “fair play and substantial justice.”

³ Should the seller make a “special appearance” to contest personal jurisdiction or face consequences of a U.S. judgment (and probable enforcement efforts elsewhere in the world)? Here, may not be general personal jurisdiction, but may be specific personal jurisdiction – case arose out of contact with forum (seller agreed to ship product to U.S. company with offices in Florida & delivery in Florida); it purposefully availed itself of benefits of the forum (contracting with U.S. company in Florida for sale of swimwear & failed to ship it to Florida); and the transaction (\$500K) was substantial by almost any definition for the sale of goods.

Note: U.S. courts have a strong interest in enforcing contracts that provide for performance within their boundaries. They consider that a seller can insist on appropriate forum in the event of a dispute via a forum selection clause in the agreement, before shipping goods to a foreign jurisdiction.

home country.⁴ There is a two-part test: First, defendant must show there is an “adequate alternative forum” where the lawsuit can be (fairly easy to meet, unless country does not have established court system, plaintiff’s claim not recognized, or courts so congested case could not be heard for about 15-years or more). Second, there is a balancing test on a list of **private** and **public** interest factors to determine if litigation in the U.S. would be too burdensome (if on average the factors tip towards inconvenience, the is dismissed).⁵

- **Default Judgment** – is it a good idea to do nothing and let plaintiff take a default judgment, without your client’s participation? This could be risky, unless your client has no assets worth pursuing in U.S., never intends to do further business here, and such a judgment would not be enforceable in its country.

Question: Is there Current or Potential Parallel Foreign Litigation?

There may already be a lawsuit on the same or related transaction or occurrence in process in your client’s country; in that event, you could consider an “anti-suit injunction” in the U.S. court, asking that the case be dismissed in light of the prior filed lawsuit.

But if there is no prior suit, you may consider filing a new parallel action in another forum, based on advice from U.S. counsel on whether the U.S. court would enjoin your client *in its court* from proceeding with the foreign action (provided the court considered it had jurisdiction over your client).

Question: Is there Governing Arbitration Clause?

What do you do if there is an applicable arbitration clause that might require plaintiff to have filed for arbitration, and not litigation against your client? Do you want to try and enforce that clause; if so, is your client in a country that is party to the New York Convention and its enforcement proceedings (quite easy to domesticate foreign arbitration award into U.S. award re signatory countries).

⁴ Different from another “venue” e.g. arguably, California in this case.

⁵ **Private** factors: (1) residence of parties & witnesses (are key witnesses in U.S.); (2) availability of compulsory process for attendance of witnesses (can unwilling witnesses be forced to testify in U.S.); (3) cost of bringing willing witnesses to trial in U.S. (in light of defendant’s resources); (4) access to physical evidence (where is key evidence located); (5) enforceability of judgment in U.S. (where easier to enforce final judgment); and (f) other practical problems in holding trial in U.S. (witness visas, logistics/communicating with foreign parties & coordinating experts etc.). **Public** factors: (1) burden on local court & jury, court congestion (how much stress on local v. alternative forum); (2) interest in matter decided locally (does one country have greater interest to have its court decide case); and (c) U.S. court familiarity with governing law (does it have to apply foreign law).

Biography

Neil Klein is a partner at McKasson & Klein LLP in California. The firm has been in existence since 1998.

Neil was born and raised in South Africa, and admitted to the South African Bar as a solicitor in 1984. He immigrated to the U.S. a few years later and was admitted to the California Bar in 1989. His practice focuses on international and maritime litigation, commercial transactions and employment issues for foreign clients doing business in the U.S.

He is a frequent speaker at seminars and conferences, and has published several articles on international disputes, choice of law, forum selection clauses and anti-suit injunctions (*Florida Shipper*, International Trade, Dec 2008). He has also been an expert witness on U.S. choice of law issues before the *Beijing First Intermediate Court* (2008), on California law issues before the *Supreme Court of the Bahamas* (2005), and on maritime contract issues before the Shipping Maritime Association of New York (2009).

He is a member of the International Bar Association (Maritime & Transport Law Section), as well as a Proctor member of the Maritime Law Association. He speaks Afrikaans (similar to Dutch).

