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Enforceability errors: avoiding a common pitfall in NDAs

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BACKGROUND

Dispute resolution provisions in standard non-disclosure agreements (NDAs) often provide for specific performance and injunctive relief, and exclusive jurisdiction in a US court. Parties generally want to be able to obtain preliminary injunctive relief before irreparable harm occurs due to the release of confidential information.

However, if the NDA involves a foreign counterparty, parties should draft the agreement in a manner that is likely to be enforced against the foreign counterparty.

For example, absent a provision in the NDA under which the foreign counterparty consents to US jurisdiction, compelling that party to appear in a US court to resolve the dispute may be impossible.

Likewise, seeking injunctive relief, or even enforcing a US judgment for injunctive relief, in a foreign court may prove difficult due to differences in the legal landscape.

To combat these potential problems, parties should consider international arbitration to enforce NDA terms against, and resolve any disputes arising from, an NDA with a foreign counterparty.

Under the New York Convention, signed by 160 countries, arbitral awards stand a much greater chance of enforcement around the globe.

Like courts, arbitral tribunals are able to grant injunctive relief and damages. In addition, before the arbitral tribunal is constituted, most arbitral rules permit parties to obtain preliminary injunctive relief from the applicable court and/or otherwise provide an emergency arbitrator.

SELECTING THE BEST ARBITRATION FORUM AND GOVERNING LAW

Because parties must affirmatively consent to arbitrate their disputes, the NDA should include a dispute resolution clause setting out their agreement to arbitrate at the outset.

In drafting this clause, parties should give careful thought to selecting the applicable arbitral rules, place of arbitration, and governing law, to ensure their ability to obtain preliminary injunctive relief and enforcement of the final award.

Newly released data shows that New York by far continues to be the leading seat, venue, and applicable law for international arbitration in the Americas under the auspices of the International Court of Arbitration of the International Chamber of Commerce (ICC) and the American Arbitration Association-International Centre for Dispute Resolution (AAA-ICDR).

According to the ICC Secretariat's 2018 Dispute Resolution Statistics, the ICC registered 842 new cases involving 2,282 parties. The ICC reported, "The USA maintains its first rank position with 210 parties (amounting to 9.2 percent of all parties worldwide)."

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Within the US, New York continued its dominance of the US international arbitration scene.

In 2018, a solid majority of the cases were seated in New York, followed by Florida, Texas, and California. In addition, in contracts with a US choice of law, at least half selected New York governing law.

Globally, New York displaced Singapore to rank as the third most popular place in the world for international arbitration, tied with Geneva.

SAMPLE LANGUAGE

Below is an example dispute resolution provision that could be used:

> All disputes arising out of or related to the Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by [one/three] arbitrators appointed in accordance with such rules. The place of arbitration shall be [New York, New York]. The arbitration shall be conducted in English. The arbitrators shall award to the prevailing party, if any, as determined by the arbitrators, its reasonable attorneys'

> fees and costs, including the costs of the arbitration. Judgment on any arbitral award may be entered in any court having jurisdiction.

If parties wish to keep any arbitration arising out of the NDA confidential, the following language can be added to the sample provision above:

> The Parties shall keep confidential: (i) the fact that any arbitration occurred; (ii) any awards awarded in the arbitration; (iii) all materials used, or created for use in the arbitration; and (iv) all other documents produced by another party in the arbitration and not otherwise in the public domain, except, with respect to each of the foregoing, to the extent that disclosure may be legally required (including to protect or pursue a legal right) or necessary to enforce or challenge an arbitration award before a court or other judicial authority

Parties should also consider including language in the dispute resolution clause stating that a breach of the NDA automatically constitutes irreparable harm and that accordingly there is no need to post a bond if a party seeks injunctive relief after a breach by the other party.

Otherwise, parties seeking injunctive relief might be required to provide an 'injunctive bond' guaranteeing the other party's costs in case the petition for injunctive relief is unsuccessful.

CONCLUSION

Given the robust scope of remedies available through international arbitration, and the stronger likelihood of enforcement of arbitral awards, US parties should carefully consider international arbitration for enforcing provisions and resolving disputes under an NDA with a foreign counterparty.

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Key points

- ☑ Injunctive relief ordered by a US court may be difficult (if not impossible) to enforce in a foreign court.
- ☑ US parties should take caution in negotiating NDAs with foreign counterparties and should not rely on standard forum and dispute resolution provisions.
- ☑ International arbitration is often the best method to enforce NDA terms against, and resolve disputes with, foreign counterparties, as arbitral awards are more likely to be enforceable around the globe.

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