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Doing business with the USA

Over the years, the UK and the USA have become close trading partners. United by shared values, language and customs, many British and American businesses have forged closer ties, particularly in the supply chain and the logistics sector. With reshoring also gaining ground of late, UK firms have seen additional benefits in doing business with US suppliers, benefits that often include competitive pricing, guaranteed quality, economic scale and a supply chain that is stable and secure.

Yet supply chain relationships with US companies are not without unique concerns. Should the supply chain be disrupted for whatever reason, UK firms more used to doing business with other UK or EU suppliers could face disputes that bring unfamiliar legal issues or challenges. In addition, there are many individual points of law in standard supply chain contracts and agreements that differ significantly between the UK and the USA. Being aware of these from the start of a new supply or logistics relationship is a simple but effective way to avoid complications later on. What, then, are the most important legal issues of which UK firms considering a US supply relationship should be aware?

The principal concern – though it may seem a distant prospect – is the very real possibility of litigation in the US courts. If a supply agreement does not specifically address where legal disputes must be brought – in other words, if the clauses on governing law and jurisdiction make no mention of exclusivity – there is a good chance that a US court will allow litigation to proceed should a US supplier file suit there, even if there is parallel litigation in the UK. Litigation in the USA can be a complex, lengthy and expensive process, but also different in many ways from UK proceedings, such as with penalties. Each party typically beats its respective costs of litigation, but in the UK the loser usually pays a significant percentage of the winner's legal costs; this does not apply in the USA unless the litigation is deemed frivolous or in bad faith.

As many UK companies are probably aware, litigation in US courts also involves extensive and wide-ranging discovery that will likely impact nearly every area of operations, as well as depositions in which company employees are subject to US-style cross-examination, and jury trials that are ultimately determined by six to twelve US citizens who may have no knowledge – and certainly no experience – of supply chain operations.

There is a straightforward solution. Companies can avoid litigation in US courts by inserting in the supplier agreement an adjudication clause that prescribes that UK tribunals will resolve any disputes that arise. For this to be enforceable in the USA, the clause must indicate that the UK is 'the exclusive forum' for dispute resolution. Just stating that UK tribunals 'shall have jurisdiction' will not be sufficient to avoid litigation in the USA. A compromise that UK firms sometimes make with US suppliers when negotiating the adjudication clause in a supply chain agreement is to agree to arbitrate disputes in the USA rather than litigate them.

Including an arbitration clause in a supply chain contract with a US supplier has several advantages:

Using US suppliers can bring significant advantages to UK firms, but there are important differences between US and UK supply chain law

Arbitration rules and procedures tend to be more standardised across different legal systems and are therefore more familiar to and comfortable for UK companies as compared to the spectre of US litigation

All US supply chain contracts impose an 'implied duty of good faith and fair dealing' on their partners

- Arbitration decisions are readily enforceable in both US and UK courts – and most places in the world – as a result of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention
- UK companies are often more comfortable with arbitration in the USA because there is no jury, the proceedings are more controllable by the parties and discovery is more limited than in US civil litigation
- Most arbitration rules do not require parties' legal representatives to be US attorneys, so UK firms can continue to be assisted by their trusted UK counsel
- Arbitration can be expedited, enabling UK firms to return to business faster than through US litigation, which can be very protracted and drag on for years
- Arbitration rules and procedures tend to be more standardised across different legal systems and are therefore more familiar to and comfortable for UK companies as compared to the spectre of US litigation

However, it is still worth appreciating that not all arbitrations in the USA are the same. As in the UK, there are different arbitration institutions, rules and unwritten customs. While many US firms prefer arbitration administered by the American Arbitration Association (AAA), which is a prominent institution in the USA and worldwide, through its international affiliate, the International Center for Dispute Resolution, UK firms might be more comfortable with other options. Although the AAA has indicated it is taking measures to correct this issue, some non-US users of the AAA system have criticised it for being uncomfortably like US litigation in all but name. Although the AAA rules provide for limited discovery (or at least allow the arbitrators to limit discovery), some believe that AAA discovery is pretty unlimited in practice. In addition, the AAA rules pose few limitations on who can serve as AAA arbitrators, so it is still commonplace to face an arbitrator or even an arbitration panel with little international experience or familiarity with cross-border commercial relationships.

Two workable alternatives for UK companies arbitrating disputes in the USA with US suppliers may be arbitration under JAMS, Inc. (formerly known as the Judicial Arbitration and Mediation Services, but now known exclusively by its acronym) or the International Institute for Conflict Prevention and Resolution (CPR).[2] Both JAMS and CPR are viewed at least sometimes as being more restrictive in terms of allowing discovery – particularly depositions – than the AAA, and JAMS' arbitrators are principally retired US judges, who generally have credible experience with international business disputes.

Being aware of the differences in laws from the USA and UK is a simple but effective way to avoid complications later

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There are other provisions in or areas of a supplier agreement that are worthy of close attention, not least because of differences in the way that US law defines or interprets them – for example, clauses limiting damages, rules over terms and conditions; assumptions of supply chain partners' duty of good faith, and the interpretation of ambiguous contract terms. Supply contracts in the USA often restrict parties' rights to recover 'consequential, indirect or special damages'. This is quite different from the UK, where sometimes the ability to disclaim liability is limited by contract, even when the parties have distinctly unequal bargaining power. In addition, in the USA, lost profits are always regarded as consequential damages and thus are barred by an effective consequential damages limitation clause, whereas in the UK a company's lost profits can be viewed as direct rather than consequential damages, depending on the facts of the case. Thus, the impact of a supply chain contract clause barring consequential, indirect or special damages is more far ranging if interpreted under US rather than UK law.

It is also noteworthy that although US courts almost never invalidate provisions that limit parties' rights to recover consequential damages, they sometimes do overrule contract clauses that limit an aggrieved buyer's remedy to 'replacement or repair' of the defective product. Although a majority of the time these damages limitations are enforced according to their terms, some courts do strike them down when the replacement/repair remedy 'fails of its essential purpose' because the repair process takes too long or the supplier persists in delivering defective products.

At the start of a new supply relationship the buyer and supplier, after exchanging standard terms and conditions, commonly begin doing business without having finalised the contract terms. The final negotiation process, to determine whose terms govern the contractual relationship, is known as the 'battle of the forms'. In the UK, traditionally (though there are some exceptions), the battle is accepted as won by the last party that puts forward terms and conditions that are not explicitly rebuffed by the recipient. Not so in the USA, where all terms and conditions generally become part of the contract to the extent they are not inconsistent with each other and do not materially alter the deal. While across the USA, courts differ as to how they treat these aspects, the majority rule is that material alterations and conflicting terms are left out. In some instances, US courts will supply gap-filling provisions, so firms should prudently ensure all contracts are finalised before commencing work with US suppliers.

Furthermore, unlike in the UK, all US supply chain contracts impose an 'implied duty of good faith and fair dealing' on supply chain partners. This is generally defined as requiring 'honesty in fact and the observance of reasonable commercial standards'. Some US courts view this as an independent duty that can be asserted as a cause of action separate and apart from breach of contract claims.

Although it is not invoked often by commercial parties, US courts do sometimes find liability against supply chain partners based on the violation of the duty of good faith and fair dealing. This is particularly true where a supply chain party authorised under the contract to exercise discretion does so in a way that is unduly harmful to the other party or destroys the economic value of its contract. Some courts, for example, hold that supply chain buyers who are parties to requirements contracts have an implied duty of good faith and fair duty to maintain their requirements. The UK has no analogous good faith supply chain contracting requirements.

Finally, UK firms should also take into account under US law a greater amount of parole evidence (meaning evidence outside of the supply chain contract itself) is permitted to prove the meaning of ambiguous contract terms. While under UK law, a supply chain contract is interpreted as how a reasonable person with all of the relevant background information about the contract would interpret it, parole evidence is generally not allowed to assist interpretation of disputed clauses. On the other hand, US suppliers are used to a world in which negotiating documents and communications are allowed to shed light on the 'true' meaning of ambiguous contract terms. If disputes with US suppliers are brought in US courts, this will be the rule; but even if the contract's adjudication clause selects dispute resolution in the UK, it is important to know that US suppliers' default belief will be that background parole evidence has meaning and importance.

In conclusion

Using US suppliers can bring significant advantages to UK firms, but there are important differences between US and UK supply chain law. UK supply chain parties are wise to understand these differences when negotiating, contracting and communicating with US parties. Understanding and, if necessary, dealing with these issues at the point of contract can often help to avoid costly supply chain disputes further down the line.

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References

1. By UK, we refer to the three distinct legal jurisdictions: England and Wales, Scotland and Northern Ireland. Of course, in each jurisdiction there are legal and practical differences in the way in which disputes are resolved.
2. Not to be confused with the Civil Procedure Rules, also referred to as the CPR, which govern civil litigation proceedings in England and Wales.