



Challenges of the Global Marketplace

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Ecommerce is well and truly here to stay and appears to be gaining momentum. We are continually hearing stories of entrepreneurs and solopreneurs taking on the established juggernauts of industry and winning large chunks of market share through digital disruption and slick, streamlined, agile value delivery.

The opportunities presented by the information age seem to allow startups to not only compete against big business, but to thrive. With all the apparent abundant opportunity of the digital marketplace, it has never been easier to enter into highly complicated and technical transactions.

The global market, via the internet, appears to be one endless, boundless, borderless market for goods and services. It is now commonplace to live in one country, sell goods and services to individuals in many other countries and outsource the manufacture of such goods or the production of such services to companies or individuals in yet further countries. Arbitrage is no longer only the domain of the ultra rich and investment bankers; it is now open to anyone with access to WiFi.

It is very easy to forget that each day we are routinely entering into a complex web of legal arrangements which span competing laws, legal systems and languages. If a transaction does not go as planned, then it is possible to be involved in a dispute in one country which involves the application of the laws of another country, under one of a number of different dispute resolution procedures, utilising one of a number of other sets of procedural rules,

all of which could be conducted in a different language.

The aim of this article is to identify some of the key issues for consideration when entering into international transactions generally and particularly in an ecommerce context.

DUE DILIGENCE

There is great potential in the digital market place for increased risk of fraud and misrepresentation. It is important prior to entering into any binding legal arrangements, or even investing time and resources into protracted negotiations, to undertake full and proper due diligence into the companies and individuals that you are dealing with in order to confirm their bona fides.

The appropriate level of this due diligence can range from undertaking various searches to engaging a private investigation firm, depending on the size of the transaction and the level of risk involved.

The appropriate clarifying question in relation to the level of due diligence required would be along the lines of, "what things would need to be true in order for it to be worth pursuing this deal at this time".

In addition to any common industry specific, or transactions specific, due diligence items, the answers to the above clarifying question should be added to your due diligence checklist and satisfied prior to placing any large orders or entering into any binding legal arrangements.

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NEGOTIATION

There are a myriad of different negotiation techniques and strategies which can be effective in international commercial negotiation. It is beyond the scope of this article to outline each of these techniques and strategies.

However, the take away point is to ensure that you have a strategy for the negotiations which is consistent with the achievement of the ultimate outcomes which you are seeking from the deal. Often times negotiating parties can have so much time, effort, energy and sunk costs invested in a deal that they feel as if they must do a deal at any cost rather than setting a stop loss on the negotiations and walking away if certain milestones are not achieved.

This can lead to problematic dealings throughout the course of the business relationship and can also result in avoidable disputes down the track.

AGREEMENTS

Many individuals and businesses engage in International transactions without having formal agreements in place. Without properly tailored agreements, the parties will not have long term certainty in relation to matters such as:

- . price;
- . payment terms;
- . transfer of title;
- . transfer of risk; and
- . dispute resolution procedures.

In addition to the typical contractual provisions for International trade contracts, there will also be deals specific or client specific clauses which may be required in certain circumstances. For instance, the issues identified through the clarifying question referred to above should be included as expressed terms and conditions of the contract.

If these are the matters which need to be true in order for the deal to make sense to you, then you should protect against the risk of these things failing by including them as conditions in the contracts along with appropriate remedies and procedures for resolving these issues should they arise.

INTELLECTUAL PROPERTY

Often times, brand image and celebrity endorsement can be a significant driver of for interest in, and demand for, a product or service. These things can seem synonymous

with the product itself. However, it is important not to overlook the fact that these are separate and distinct contractual and proprietor rights, which are often territorial in nature.

Without properly negotiating and contracting for these rights, you may be left with a bear product, with much less market appeal, which does not have the same market appeal without the branding and celebrity endorsement.

I recently acted for a company which had undertaken its own extensive negotiations with a party overseas in order to secure the exclusive distribution rights of a product which was endorsed by a very well known celebrity. Having thought everything was in order and that the deal was "done", the client asked me to review the agreement and liaise with the other side, on the eve of the client placing a very significant order and paying in full for the product on payment terms which required the full amount of the order to be paid prior to the product being shipped.

It became apparent that the rights relating to the celebrity endorsement of the product, including the use of the images of the celebrity in connection with the product, were not included in the contracts and the supplier was not willing or able to license these rights to our client.

As this particular celebrity endorsement had been the predominant driver of interest in the product from our client's distribution network, it was not viable for our client to proceed with the deal without the appropriate rights to the endorsement and images.

DISPUTE RESOLUTION

It is simply an unfortunate reality that disputes arise from time to time in all commercial arrangements. With the added complicating factors of physical distance and differences in , cultural, and language, differences, differences in laws and legal systems and the different time zones, of the contracting parties, disputes in international commercial transactions can be difficult to contain and manage and highly complicated to resolve.

An appropriately drafted dispute resolution clause in your agreement can prevent can save you being the nightmare situation outlined above, where you are dragged into a dispute without any certainty of; the choice of law to be applied, the jurisdiction of the dispute, and the procedures that will govern the resolution process. the dispute resolution procedure or the procedural rules which would regulate the conduct of proceedings.

We have previously written on the benefits of international commercial arbitration, which is one such type of dispute resolution process. [PLEASE CLICK HERE TO VIEW OUR ARTICLE "WHAT YOU NEED TO KNOW ABOUT](#)

CROSS BORDER DISPUTES & INTERNATIONAL ARBITRATION.

It is important not to simply assume that disputes will not arise or that a particular method of dispute resolution will automatically apply to the transaction. Large amounts of time, effort and money can be spent sorting out the above issues after a dispute arises, which are merely the preliminaries to the actual dispute, that will take even further time, effort and cost to resolve.

Having an appropriately drafted dispute resolution clause that clearly sets out the applicable laws, dispute resolution processes, procedural rules, venue and language for the dispute resolution process, which the parties are comfortable with, is extremely important. There is really nothing to be lost in having a well drafted dispute resolution clause which the parties never have occasion to call upon due to a lack of any disputes.

PAYMENT RISK

One of the common risks in any transaction in the global marketplace is payment risk, which we have explored in our recent article "Payment Risks of International Transactions". [PLEASE CLICK HERE TO VIEW THIS ARTICLE.](#)

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