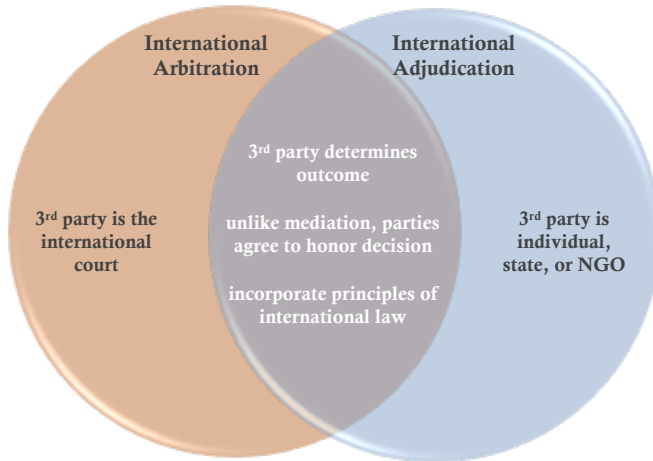


The Contract is Breached, Now What?

Disputes are a natural part of human interaction. They come up when couples get divorced or when co-founders don't see eye to eye. And despite the best of intentions and planning, businesses are not immune to disputes either. When a dispute cannot be resolved through negotiations and mediation, the next step often is to call it quits or turn to arbitration or adjudication. The success of this last step in dispute resolution, namely having a 3rd party determine the outcome, is dependent on winning a favorable decision and its enforcement. The enforcement mechanism should be contemplated early on during the contract negotiations, especially when the parties are subject to the laws of different countries.



International dispute resolutions, namely arbitration and adjudication, have certain characteristics in common: (1) A 3rd party determines the terms of any settlement; (2) unlike mediation, the parties agree to honor the decision before the 3rd party renders the decision; and (3) the arbitration or adjudication settlements incorporate principles of international law. What is the main difference between the two methods is who the 3rd party is. In arbitration, the 3rd party is an individual or panel, state, NGO, or panel of countries; while in adjudications, the 3rd party is the international court.

Recognition of International Judgments

In the United States, most contract laws, unless pre-empted by a federal statute, are governed by state laws. Although the laws vary state-by-state, there are significant similarities among them. But how about when companies engage in cross-border transactions? What law governs, procedural and substantive, the resolution of disputes should they arise?

In many countries, as in most jurisdictions in the United States, the recognition and enforcement of foreign judgments are governed by local domestic law and certain principals, including reciprocity (e.g., both countries honoring the other's judgments). Before a court in another country can enforce a foreign judgment, it must first recognize that judgment. There is no bilateral treaty or multilateral convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments. The lack of recognition of international judgments can quickly get very complicated, especially for SMEs with limited resources.

Arbitral Awards

In contrast to the lack of recognition of foreign judicial awards without a treaty between the countries of the contracting parties, there are several international agreements, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), to which the United States is a party. Arbitral awards are enforceable globally, in over 150 countries including in China, pursuant to the New York Convention.

While the U.S. is not a party to any multilateral conventions applying to foreign court judgments, it is a party to those for enforcement of international arbitration awards.

Features such as party autonomy, confidentiality, flexibility, neutrality, and finality are among the reasons parties use arbitration. These features, however, although not always automatic, can be negotiated as part of the contract itself. For example, generally speaking, arbitral proceedings in China are confidential, which is a significant advantage of arbitration over litigation, unless the parties agree to have the case heard in open sessions. In contrast, in Mexico parties can reach an agreement regarding confidentiality by pointing to arbitration rules or by a separate agreement despite the Mexico's Commerce Code not including any provisions dealing with confidentiality of arbitration.

It is critical at the outset to include a well-drafted arbitration clause, to ensure enforcement of a favorable award.

Arbitration is not necessarily the best choice in each situation. Arbitration might have shortcomings, depending on the relevant circumstances and objectives. It is, therefore, necessary to make a deliberated decision in each case. Often certain provisions in contracts that do not directly deal with business terms are overlooked and treated as copy and paste boilerplates. However, once the decision of the arbiter is rendered, the decision has to be recognized by a competent court in the jurisdiction where enforcement is sought. The denial of enforcement by courts is often based on procedural grounds. Thus, it is essential that arbitration rules are clearly outlined at the start in the original contract and that they are conducted consistent with those rules and procedures as contemplated by the parties.

Although the actual requirements for the recognition and enforcement of valid arbitration clauses may differ from country to country, the following non-exhaustive elements should be considered and included (not in any order of priority) in the contract:

| Arbitration clause | Notice requirements | Interim relief |
|---------------------------|------------------------------|-------------------------|
| Scheduling and timeline | Confidentiality | Conflicts of interest |
| Appoints of arbitrator/s | Number of arbitrators | Place of Arbitration |
| Governing law | Language of the arbitration | Place of arbitration |
| Cost | Conduct of the arbitration | Evidence and discovery |
| Claim and/or counterclaim | Form and effect of the award | Step dispute resolution |




Subject to mandatory requirements of the applicable law, parties are free to agree upon the procedure for their arbitration. There are many arbitral institutions across the world, some having specialties. Examples include ICC, AAA, LCIA, SCC, ICAC, SIAC, and CIETAC. These have many similarities and distinctions, which will affect the procedural roadmap of the arbitration.

For example, although the two may end up being the same, there is an important distinction between the legal place (the seat or place of arbitration) of any arbitration and the place where one or more of the hearings or other procedural steps physically take place. It is the seat which determines the legal framework within which the arbitration takes place, not the location where the parties may choose to meet. The seat of arbitration may also have an effect on the conduct of the arbitration and the potential enforceability of the ultimate award. Similarly, while the seat of the arbitration, governs the procedural law that applies, the governing law will be the substantive law that governs the substance of the contract.

Practical Consideration Regarding Arbitration

Since enforcement is often a key reason for selecting arbitration in international contracts, one must consider whether in practice, foreign arbitral awards awarded offshore are enforced in the relevant country and if so, how well. So while technically U.S. arbitration awards are enforceable in the contracting states, the record of such enforcements varies from country to country. Some of the common reasons foreign arbitral awards are either not enforced as expected or provide little relief in certain jurisdictions are:

Parties must be mindful of the various types of laws that may have to be considered as they draft their contract.

-  Local courts generally view that disputes with that country's companies should be resolved in that country.
-  There may be delay and uncertain enforcement.
-  The power to seize assets or take other actions, such as forcing the breaching party to cease certain conduct, is not available until a court recognizes and decides to enforce the decision of the arbitrator.

Some Other Considerations

There are many considerations in selecting a partner and drafting of documents that clarify how the relationship between the parties, including disputes, should be handled. And the language in which the contract is written will play a critical role in the clarity of its interpretation, recognition, and enforcement.

It is also often recommended that agreements include appropriate damages (money) provisions. This way, once the decision of arbitrator is recognized, the court can enforce and order the seizure of the breaching party's assets before they disappear.

Furthermore, many relationships subject to contracts will involve confidential or proprietary interests. To ensure applicability of enforcement to all those who may be involved, directly or indirectly, in the performance of the contract (e.g., sub-contractors and suppliers of your contractor), the terms (e.g., confidentiality, non-use, non-circumvention) should be written to cover all the relevant entities.

And of course, to make matters more complicated, sometimes, it's best to have a local contract.

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About the Author



Soody Tronson, MS/JD, has over 25 years of interdisciplinary experience in technology, business, management, education, and law in startup and fortune 100 companies. Soody is the Founding Managing Counsel at **STLG**, a boutique Silicon Valley law firm counseling domestic and international clients in intellectual property and technology transactions in a wide range of technologies. Soody is also the Founder and CEO of **Presque**, a startup venture creating wearables that fundamentally change and improve the health of women and infants, positively disrupting the status quo. The book *“Women Securing the Future with TIPPSS for IoT Trust, Identity, Privacy, Protection, Safety, Security for the Internet of Things,”* which she co-authored was recently published by Springer.

After holding technical and management positions at Schering Plough and Hewlett-Packard where she took several products to market; and practicing law at H.P., and a successfully acquired medical device start up, and two national law firms, HellerEhrman and Townsend and Townsend; Soody formed STLG.

Presque was formed in 2017 to develop and commercialize a line of wearables based on Soody’s original design. Guided by the belief that we each have a sphere of personal influence and it is our civic duty to use it for the betterment of our community, Soody is deeply committed to creating positive change. She serves in advisory, board, and leadership capacities with several organizations, including AWIS STEM to Market national Accelerator and its Palo Alto Chapter; California Lawyers Association Executive Committee of the Intellectual Property Section, Licensing Executives Society USA/Canada, and the Palo Alto Area Bar Association. As a member of the Silicon Valley Leadership Group, a diverse public policy association of dynamic companies shaping the future innovation economy, she is actively engaged with the Technology and Innovation, Health, and Education and Work Force Development, and The Women Executives Committees. One of her most fun ventures has been as the co-founder of **HighNote Co.**, a third wave coffee roasting company.