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Xenophobia – Getting over Fear of International Litigation

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I. Analyzing the Fear and Identifying Goals

Work with the issue rather than fighting it. If you are going to be involved in International Marketing, you inevitably will be involved in International Litigation. Understanding International Litigation will take away or at least limit the fears of International Business. In order to work with it, you will need an understanding of alternatives of Foreign Courts or U.S. Courts and their respective laws. Hence by analyzing the risk, one forum versus the other, not only as to the laws, but the application and procedures is required.

Additionally, a cost benefit analysis is appropriate because the goal for each insured or client may not be the same and must be tailored to their specific needs. As such, internal resources as to the business and the applicable insurance must be considered. External resources as is more fully discussed later in this handout must be considered. You can then find the answer for the best interest of your client in International Litigation.

II. International Litigation

Though the analogy of U.S. Courts is not complete, it can be compared with Foreign Courts. The differences that exist between our 50 states and those presented by Foreign Courts are similar in that they require analysis of each forum and their procedures. This diversity is seen not only in the countries in Europe, Asia, and South America, and includes not only their laws but their procedures. This is seen in part by the differences country to country regarding direct actions, class actions, the nature of declaratory actions, and the intervention of governmental entities regulating business activities as is evidenced in the European community.

III. Foreign Courts vs. U.S. Courts

The analysis of the laws that come into play must be viewed to make the same determination that one would make in the United States on whether or not they are going to stay in a given jurisdiction or move to a federal court. However, in addition a cost benefit analysis should be done including the accessibility of courts, the nature of the tribunal, and the likely timing of resolution. These are all significant factors to be considered in meeting the goals of your client or insured.

IV. Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution is another significant factor that must be taken into consideration in each of these various forums. Issues involving timing and cost as well as the effect or permissibility of discovery and its limitations may be factors that are significant in and of themselves and more so than resolution of the case. Whether or not ADR is binding and the composition of the tribunal may also impact its use. Procedures involved in ADR and the fact that there may be limited information discovered and whether it is confidential, may be reasons that one forum would be favored over another including the possibility that all information is confidential.

V. Use of Legal/Claim Teams

Significant to overcoming the fear of Foreign Litigation is to have the appropriate support to make the decisions as to what goals need to be met and limiting risk. Importantly, not only do you need legal advice in the foreign jurisdiction, but as well in the United States to analyze not only laws, but the courts. Technical assistance in the form of interpreters, court reporters, process servers, investigators, and those knowledgeable with administrative procedures must be considered. Locating experts is also a necessity both for the foreign jurisdiction and in the United States and requires involvement of technical personnel. Inclusion of the insurance broker in most foreign jurisdictions is more common than normally found in the United States. Hence the involvement of the client, the insurer, and the appropriate risk managers will allow for the analysis in meeting goals.

VI. Inversion

Inversion is not a new concept, but has received greater attention recently. However, it does involve significant questions relating to the sharing of employees and laws that affect employees. It involves the determination of what is the effect of the home office regardless of residency of the employees and whether employees that are in foreign jurisdictions are still protected by laws of their home country. This is an area that is developing rapidly.

VII. Issues and Procedures

The issues and procedures involved are diverse and varied. As such, CLM provides a unique opportunity for the sharing of information and experiences to the benefit of its members.