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Americans find their place in the world

The days when they were outclassed by rivals overseas are ending.

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TEN YEARS AGO, it would have been easy to imagine the following scenario.

A foreign company brings a high-stakes international arbitration against a U.S. company. The U.S. company turns to its star U.S. litigator to handle the matter. Although he has never handled an international arbitration before, the star U.S. litigator has an unparalleled track record of winning bet-the-company cases in state and federal courts around the country. His performance in domestic arbitration is equally superb. Not only that, the star U.S. litigator and his team know the client and its business inside out. “Why go elsewhere?,” the U.S. company’s general counsel asks his staff, as he picks up the phone to call the star U.S. litigator. To the general counsel, an international arbitration is simply another form of litigation—just handled in a different forum with a different set of procedural rules.

The star U.S. litigator feels the same way—until the arbitration gets under way. With an experienced international arbitration specialist on the other side, the parties begin by selecting a tribunal of three arbitrators. The specialist seems to be on personal terms with nearly all of the available international arbitrators—she has even served as an arbitrator with some of them. The star U.S. litigator begins to feel as though he is picking a jury in a small town where he has never been before—but where his adversary is on a first-name basis with everyone in the venire.

Next comes discovery. Only there is none—at least, not by U.S. standards. The arbitral rules seem to provide for at least some “taking of evidence,”

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but the chairman of the arbitral tribunal is from a country where discovery is virtually unheard of. The chairman expressly tells the parties that he does not approve of “U.S.-style discovery.” This does not seem to deter the international arbitration specialist from gathering evidence, which, as it turns out, is located in a number of far-flung countries on different continents. With a group of multilingual and multicultural lawyers on her team, the specialist is also connected to a network of local law firms and other service providers in most of the relevant countries. She has no difficulty in lining up witnesses, collecting documents and even lobbying local governments to provide information that is helpful to her case—all without taking any formal discovery. The star U.S. litigator scrambles to find interpreters, translators and the right professionals in countries where his firm has never worked before.

Mistranslation

In the meantime, many of the witnesses just don’t seem to warm to the star U.S. litigator and his team, who don’t understand the witnesses’ language or culture, and who have to communicate with the witnesses through interpreters (whereby much is lost in translation). Even the translating service selected by the U.S. team (which has never worked with translators before) has missed some of the critically important legal subtleties in the key exhibits (although the star U.S. litigator doesn’t realize this until after the hearing on the merits has begun). The complex differences in the applicable privilege rules further impede the ability of the star U.S. litigator and his team to work with expert and nonparty witnesses.

The substantive law governing the dispute is different from anything the star U.S. litigator has previously encountered. With a contract requiring the dispute to be governed by the law of a civil code country, the star U.S. litigator and his team are no longer working in the common law. This particular arbitration happens to raise thorny issues of public international law, another vast and complex area of

law that the star U.S. litigator and his team have never confronted before. The international arbitration specialist, on the other hand, has lawyers on her team who are barred in the law that governs the case. As for public international law, the specialist has written a treatise on the subject.

Finally, the hearing on the merits takes place. Of course, the common wisdom among many international arbitration specialists is that written advocacy is at least as important as oral advocacy and

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that—unlike many American trial settings—there is little or no room to play catch-up once the papers have been submitted. Nonetheless, the merits hearing is where the star U.S. litigator is expected to shine. He has dazzled both rural juries and the most sophisticated urban judges in America. And yet he doesn’t seem to play well before two of the three arbitrators—who are not native English speakers, and who are from legal cultures in which lawyers act very differently than the star U.S. litigator does. The third arbitrator selected by the star U.S. litigator—a retired American litigator who has sat on many domestic arbitration tribunals—doesn’t seem to have much influence with the other two arbitrators (i.e., the chairman and the arbitrator appointed by the specialist), who seem to operate according to unwritten rules that control how the arbitration is conducted. The international arbitration specialist and her team seem to know these rules inside out.

Even worse, the star U.S. litigator believed that the basic legal concepts that he had mastered in U.S. practice over the years would be roughly analogous to the basic concepts that would dominate the arbitration. Unfortunately, basic concepts of contract interpretation, evidence and precedent, for example, don’t always translate from a common law trial to an international arbitration dominated

by civil code law, public international law and the general rules of the arbitral institution as construed by this particular tribunal. As a result, many of the star U.S. litigator's points are simply lost on two of the three arbitrators, who find his arguments "unclear."

As might be expected, this particular adventure does not end happily for the star U.S. litigator.

The scenario set forth above is hardly implausible. Those who have practiced international arbitration long enough have seen similar scenarios played out on more than a few occasions.

International arbitration is its own, distinct art.

Getting it at last

As the involvement of U.S. companies in international business has grown at an extraordinary clip, so too has the number of international business disputes involving U.S. parties. With many U.S. companies reluctant to venture into foreign courts—and many foreign companies feeling the same way about American courts—the number of international arbitrations involving U.S. parties has grown enormously during the past decade, and likely will continue to grow at a similar pace in the future. With that growth, U.S. law firms have become increasingly sophisticated about international arbitration.

Thus, only 10 years ago, few U.S. law firms had separate international arbitration groups. Many U.S. law firms (along with many U.S. companies) saw international arbitration simply as a variation of litigation. Today, most major U.S. firms at least market themselves as having separate international arbitration practices. According to their Web sites, more than half of the firms on the AmLaw 200—a list of the 200 highest-earning U.S. law firms published by *American Lawyer*, an affiliate publication—have separate international arbitration groups: 114 out of 200 firms. Nearly three-quarters of the AmLaw 100—71 firms—list international arbitration as a separate specialty on their Web sites. As of mid-November, U.S. law firms had issued more than 25 press releases this year—i.e., more than two per month—announcing the creation or expansion of their international arbitration practices.

The specialization of international arbitration within U.S. firms is not simply the result of a trend to market "niche" practices to clients. International arbitration has justifiably become a substantive specialty in its own right. U.S. practitioners—along with their U.S. clients—have increasingly recognized that international arbitration is its own art, separate and distinct from the art of litigation in American courts. The reasons are numerous, beginning with the need to be intimately acquainted

with the relatively small pool of international arbitrators. There are few dispute-resolution settings where the parties are given so much control in the choice of the people who will shape the procedure by which the dispute is resolved, and then make the findings of fact and conclusions of law that will determine the outcome of the case.

Importance of relationships

It therefore is critical to understand each arbitrator's likely approach not only to the substantive issues involved in the particular case, but also to procedural issues such as discovery, evidence and the role (if any) of precedent in international arbitration. It is equally important to understand the relationship between particular arbitrators, as well as the interaction and dynamic that likely will be at play on the tribunal as a whole. An effective international arbitration team will be multicultural and multilingual, with lawyers experienced both in civil code and common law systems, and with excellent connections to lawyers and other service providers in a variety of countries. Knowing the right local lawyer in, say, Bangladesh, can be just as important in an international arbitration as knowing the right local lawyer for a American lawsuit brought in, say, rural Mississippi. And just as learning how to use the tools of U.S. discovery to develop a complex case takes years of practice and experience, it takes considerable time to learn how to develop a complex international arbitration case with relatively few formal discovery tools (and indeed, within a framework that is far less structured than a typical American litigation).

Of course, having lawyers on the team who understand both the language and the subtle (and sometimes not so subtle) cultural differences at play can make all the difference in identifying and working with witnesses—not to mention communicating effectively with the arbitrators. And only lawyers with considerable experience in working with documents in foreign languages can appreciate how easy it is for the translators to make mistakes that, if not caught, can change the outcome of the case. It therefore is critical to have lawyers on the team who truly know the language or languages involved in the case. For obvious reasons, it is equally important to have lawyers on the team who know and have practiced extensively in the body (or bodies) of law that will govern the arbitration.

Given these complexities, it is not surprising that some firms have not only developed specialized international arbitration practices, but also have developed subspecialties within international arbitration, based on region (e.g., Asia or Latin America) or subject matter (e.g., construction, insurance, intellectual property, etc.). Indeed, the past 10 years have seen the growth of a relatively new but extremely important type of arbitration:

investor-state arbitration, in which the investor brings an arbitration against the sovereign government that has "hosted" the investment but has taken some adverse action (or failed to prevent some adverse action) against the investment. Because investor-state arbitrations often involve large infrastructure projects, the dollar amounts at issue typically are enormous, and investor-state cases have come to figure prominently on the annual lists of the largest pending international arbitrations. With its own complex and evolving set of international law issues, investor-state arbitration has become its own "specialty within a specialty." Several U.S. law firms have become significant players in this growing area of practice.

A place for Americans

The elite ranks of the international arbitration field—i.e., those who serve most often as counsel and/or arbitrators—remain dominated by Europeans. But in recent years, a growing number of American lawyers (as well as lawyers from other regions) have made their way into those ranks. These elite American international arbitration specialists include lawyers who began their careers as U.S. litigators. Despite their differences, U.S. litigation and international arbitration both involve at their core the ability to distill a complex set of facts into a compelling narrative, told within the framework of the applicable law.

The written and the unwritten rules are both important.

American trial lawyers—who have learned to hold the attention both of American jurors and overworked American judges—bring much to the table in this regard. Not surprisingly, many U.S. litigators have managed to learn the substantive law of international arbitration, along with its written and unwritten rules. Those who are not themselves multilingual or multicultural have built teams with lawyers who are. As they have come to know (and be known by) the top international arbitrators, they have recalibrated their styles to be as effective before an international arbitration tribunal as before an American judge or jury.

Like most substantive specialties, international arbitration is a specialty that with time, dedication and talent can be mastered by many different types of lawyers. But neophytes should beware: This is not a practice for the uninitiated. **NLJ**