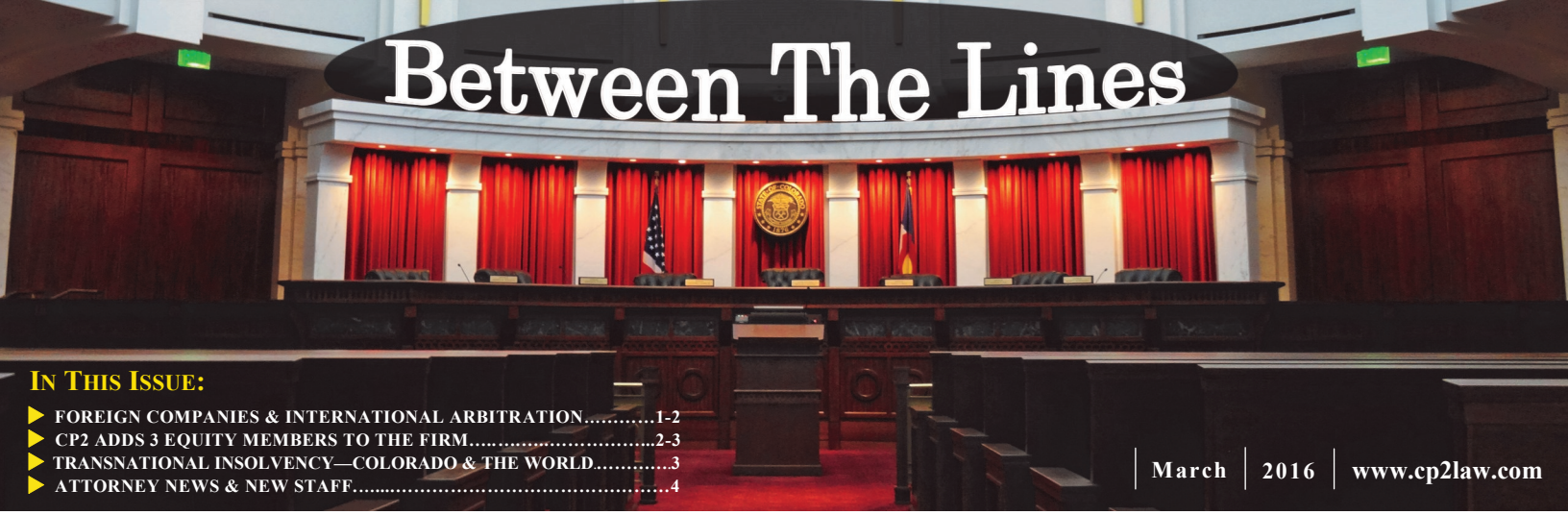

Between The Lines

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COAN, PAYTON & PAYNE, LLC IS AN INTEGRATED TEAM OF HIGHLY-TRUSTED PROFESSIONALS ORGANIZED TO PROVIDE WORLD-CLASS LEGAL SERVICES. TOGETHER WITH OUR CLIENTS, WE CREATE AND IMPLEMENT ROCK SOLID® STRATEGIES FOR SUCCESS.

Foreign Companies & International Arbitration

Steve Suneson, Esq.
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European, Canadian and other foreign companies who are doing business in the US should always carefully review the dispute resolution clause in their agreements with US counterparts. For many reasons, including the lack of a bilateral treaty on judgments with the United States, an international arbitration clause is often essential to a cost-effective dispute resolution process rather than engaging in U.S. litigation. A carefully constructed international arbitration clause is essential. Steps can also be taken to prevent the costs of an international arbitration proceeding in the U.S. from skyrocketing separate and apart from a well-drafted international arbitration clause. This article discusses several measures that European and Canadian companies can take to make the arbitration process more cost-efficient and thereby reduce U.S. legal expenses.

Select an arbitrator with international arbitration and subject matter experience. Arbitrators generally specialize in certain areas of the law and have varied experience. There are many different qualifications and variables to consider. Some arbitrators are not even attorneys. A case involving patent claims probably should focus on an arbitrator with patent experience and perhaps some form of engineering experience. Other than industry-specific experience, the arbitrator should preferably be someone that has international arbitration experience and who may be particularly attuned to the needs and concerns of a foreign company which may have different considerations than a US company. An arbitrator with international arbitration experience will be aware of the key differences between U.S. and/or foreign legal systems and processes.

Select an arbitrator committed to low cost and timeliness. The arbitrator should also be sensitive to parties' concern for undue legal cost and engaging in lengthy proceedings. The arbitrator should also be committed to proper case management and ideally is not committed to several other arbitration cases.

Effective claim or response drafting and reliance on documents for dispute resolution. U.S. litigation strategy is often to throw everything but the kitchen sink into pleadings (including spurious claims or defenses). This can quickly escalate legal costs. One way to narrow the issues in an international arbitration proceeding is to begin with the identification of key documents (such as agreements, emails, invoices, correspondence etc.) and key issues. If any key documents are missing those should be properly identified in the discovery process. Narrowing the issues

CP2 has been named a *"Top Ranked Law Firm"* for 2016 by American Lawyer Media Properties, LLC (ALM). The 2016 list of Top Ranked Law Firms will be featured in *Fortune Magazine's 2016 Investor's Guide Issue* and on CNN-Money.com, law.com and martindale.com®.

This rating indicates the firm has been deemed to have demonstrated the highest level of ethical standards and legal ability.

Steve Suneson has been promoted to an Equity Member of CP2!

Mr. Suneson's practice focuses on domestic corporate law and international commercial transactions, including mergers and acquisitions, cross-border transactions, commercial contracts, secured transactions and private equity as well as corporate structure and governance.

and limiting to key documents can avoid the US party's kitchen sink "strategy". Another way is to ask the other party to consent to proceed by resolution based on review of documents alone. In other words, the parties would forego most, if not all, discovery such as time-consuming collection and review of discovery documents, depositions and witness testimony which may lead to exorbitant costs to a party. The reliance on documents alone for resolution also streamlines the proceeding and makes the job of the arbitrator more straightforward. Of course, there may be instances where testimony is necessary to resolve the dispute.

Threshold issues. In international arbitration proceedings, the parties are generally free to fashion methods to make the proceedings more efficient. The European or Canadian company should consider requesting the other party, with the consent of the arbitrator, to formulate threshold issues that may resolve some of the underlying issues and make moot other tangential issues (or quickly dispose of them). Threshold issues can be formulated by either party or jointly. The objectives would be to identify those key issues upon which other issues depend and the most efficient method to resolve them (such as by early briefing or other early resolution). In many instances, the resolution of the threshold issues can eliminate some or all of the discovery stage, and sometimes even the need for an arbitration hearing.

Simultaneous mediation process. Unlike arbitration, mediation is non-binding. The focus of mediation is to bring the parties together to achieve a mutually acceptable solution without a protracted adversarial arbitration proceeding. When an international arbitration has commenced, the parties can usually elect to commence a simultaneous confidential mediation proceeding. The simultaneous process allows the international arbitration to proceed without delay, but also allows the parties to enter into a separate track where they can explore the opportunity to achieve a more expedient resolution. Since more than 90% of cases settle in arbitration, the mediation track is an excellent way to explore a resolution which may avoid some of the more costly aspects of international arbitration such as discovery, depositions, and the arbitration hearing.

Utilize IBA Rules for taking evidence. The IBA (International Bar Association) rules on the taking of evidence provide an effective and cost-efficient method to take evidence in international arbitration. The benefit of IBA rules is that they were developed by international practitioners and reflect the norms and practices from not only the U.S., but also Europe, Canada and beyond. In addition, the emphasis is placed on cost control without losing focus on the objective to obtain appropriate evidence so the dispute can be progressed to a resolution. Interrogatories, requests for documents and depositions that are typical in most U.S. litigation, for example, are discouraged. Depositions can be very expensive and usually will involve international travel and increased U.S. legal costs. Even if the U.S. party may not be amenable, most arbitrators will be sensitive to this issue and agree to some limitation on depositions and other discovery. The IBA rules can be a powerful tool to fight against U.S. counsel for a U.S. party who may try – as a strategy seen in U.S. courts – to increase cost for the other party through the use of extensive discovery requests.

The above methods are some of the effective ways to create cost efficiencies in an international arbitration proceeding in the U.S. that European and Canadian companies should consider whenever they are a party to international arbitration proceedings. However, even if these methods are employed, international arbitration in the U.S. usually involves substantial legal cost.

Deanne R. Stodden Joins CP2 As Equity Member!

Deanne R. Stodden, Esq.
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Ms. Stodden joins the firm with over 15 years of experience focused on creditors' rights and the representation of financial institutions and other creditors in residential and commercial foreclosures, loan workouts, real estate litigation, bankruptcy and evictions. She also has significant real estate experience negotiating and documenting loans and other financing transactions. Her office is located in the firm's Denver, Colorado location.

Robert D. Lantz, Esq.
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Introduction: At the beginning of 2016, I enthusiastically joined CP2 because I appreciate the cutting edge business practices and superior teamwork in this firm. Before joining CP2, I spent several years working with the Honorable Sidney B. Brooks, Bankruptcy Judge, assisting him in helping countries and courts to establish more coherent ways to deal with transnational insolvencies. With the deepening economic uncertainty in the global economy, I anticipate that transnational insolvency will become much more relevant to our practice areas and to our clients in the next few years. CP2 is fortunate to have two attorneys who specialize in international business law: Paul Maricle and Steve Suneson. Together, as a firm, we have the acumen to deal with the new challenges presented in Colorado, the US, and the world.

Humble Beginnings: Almost fifty years ago, the General Assembly of the United Nations made Resolution 2205 (XXI) of December 17, 1966, wherein it created the United Nations Commission on International Trade Law ("UNCITRAL"). The charge of UNCITRAL was to further "harmonization and unification of the law of international trade and in that respect bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade." As international trade has expanded in the ensuing five decades, so has the need for cooperation and coordination regarding business failures and insolvency.

The Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") was enacted by congress in 2005. Chapter 15 was introduced with the act to address "Ancillary and Other Cross-Border Cases." Chapter 15 is intended to facilitate cooperation between the US and foreign countries in the context of transnational insolvency cases. In large measure, Chapter 15 incorporates the Model Law on Cross-Border Insolvency ("Model Law") promulgated by the UNCITRAL.

What is Chapter 15?: Simply stated, Chapter 15 of the Bankruptcy Code balances the interests, opportunities and rights of various different, sometimes competing, parties impacted by cross-border insolvencies. Chapter 15 was enacted to incorporate the Model Law to provide an effective way to manage cross-border insolvency cases through five objectives:

1) Foster cooperation and communication by and between courts of the United States and foreign courts in cross-border insolvency cases.
2) Establish greater legal certainty for trade and investment.
3) Establish fair and efficient administration of cross-border insolvencies.
4) Better protect and maximize the value of the debtor's assets.
5) Promote and facilitate the rescue of financially troubled businesses, save jobs and protect investments.

Chapter 15 is a more formal recognition of court and tribunal proceedings from other countries when the Chapter 15 proceeding is filed here. This allows U.S. bankruptcy proceedings to be recognized in foreign jurisdictions wherein the Model Law has been adopted. Significantly, the process allows parties in interest, such as Chapter 7 Trustees, to have access to courts in other jurisdictions. It also allows administrators in other jurisdictions access to our court systems.

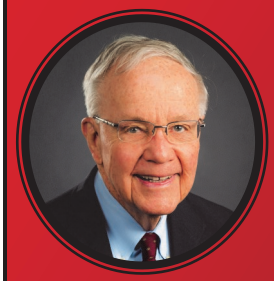
Nevertheless, there are important qualifications and limitations on the broad powers granted by Chapter 15. For example, there is nothing in Chapter 15 that prevents a US court from refusing to take action governed by Chapter 15 if the court determines such action is "manifestly" contrary to the public policy of the US. Additionally, in making a determination with respect to whether additional assistance should be provided to a foreign representative, the United States court may also look to the stakeholders in the action to ascertain the impact thereon.

Cooperation, Communication and Diplomacy: At the core of Chapter 15 and the Model Law are international cooperation, communication and diplomacy. The law is not perfect, but it opens a door to greater international cooperation and protection of creditors' rights in proceedings that transcend the borders of just one country. As more international businesses have a presence in Colorado, Chapter 15 is likely to further help administrators from other countries have access to our court systems. Moreover, debtors-in-possession and trustees will have a mechanism by which to have access to jurisdictions where the Model Law has been incorporated.

ROBERT D. LANTZ JOINS CP2 AS EQUITY MEMBER!

Mr. Lantz joins the firm with over 25 years of experience in bankruptcy, corporate restructuring and reorganization, foreclosures, distressed property reorganization and commercial real estate leases.

Willis V. Carpenter & Andrew S. Klatskin Join CP2!



CP2 is pleased to announce Willis V. Carpenter and Andrew S. Klatskin have become Of Counsel to the firm. Both practice in all areas of real estate and commercial transactions and are located in the firm's Denver office.

Willis V. Carpenter, Esq.
wcarpenter@cp2law.com

Mr. Carpenter is one of the most well-respected real estate attorneys in Colorado with over 60 years of experience. He is the author of numerous real estate publications including volumes I and II of the *Colorado Real Estate Practice,* CLE in Colorado, Inc. He has testified in more than 75 trials and arbitrations in 17 Colorado District Courts and the U.S. District Court for the District of Colorado. In 2004, he received the first ever Real Estate Hall of Fame award from the Colorado Bar Association ("CBA").

Mr. Klatskin brings over 40 years of legal experience to the firm and is also a very well-respected Colorado real estate attorney. He too has authored numerous articles for real estate practitioners. He was Chair of the Real Estate Law Section of the CBA serving from 1987-88. He also served on the Board of Governors from 1989-1990. He has been recognized as a Colorado Super Lawyer from 2006 to the present. Mr. Klatskin is also a fellow of the American College of Real Estate Lawyers.

Andrew S. Klatskin, Esq.
aklatskin@cp2law.com

CP2 Welcomes Elke Kervin & Melissa Dymerski to the Team!

Mrs. Kervin is a legal assistant to the German Honorary Consul, Paul T. Maricle, Esq. Her fluency in both the German and English languages enables her to routinely assist US and German citizens in consular issues related to Germany. She also assists CP2's team of international attorneys working out of the firm's Denver office as well as the office's admin and facility needs.

Elke Kervin
ekervin@cp2law.com

Mrs. Dymerski is a paralegal in CP2's Denver office supporting the firm's team of creditors' rights attorneys, Deanne R. Stodden, Esq., and Robert D. Lantz., Esq. She has almost 20 years of experience working with both small and large Denver law firms specializing in creditors' rights.

Melissa Dymerski
mdymerski@cp2law.com

CP2 is Pleased to Announce 3 Promotions!

R. Clay Bartlett, Esq., and Jacob W. Paul, Esq., have been promoted to Senior Associates while Sandy Hartman is now a Senior Paralegal within the firm. Mr. Bartlett's legal practice focuses on all aspects of business and real estate transactions. Mr. Paul's legal practice focuses on complex real estate, business, and intellectual property litigation . Ms. Hartman works alongside Brett Payton and Edwin Chapin primarily focusing on civil litigation.

Contact CP2

Our offices are conveniently located throughout Colorado, giving you easy access to our trusted team of legal professionals.

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Paul T. Maricle
Jacob W. Paul
Michael C. Payne
Brett Payton
Jamie Baker Roskie
Peter B. Scott
Curtis Sears
Deanne R. Stodden
Steve Suneson
Walter A. Winslow

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- Banking Law
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- Business/Corporate Law
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- Commercial Litigation
- Creditors' Rights
- Employment Law
- Estate Planning
- Intellectual Property
- International Transactions
- Land Use Planning
- Mergers & Acquisitions
- Natural Resources
- Oil and Gas Law
- Probate Litigation
- Real Estate Law
- Tax Law
- Wealth Preservation