

## Global Law & Order

### 'Big stick' ideology may give the needed leverage in overseas business relationships

By Lori Valigra | November 17, 2014

As Maine companies seek to move business beyond their own shore, local law practices are guiding the way, vetting potential partners, assuring local and international laws and treaties are met, protecting intellectual property and handling disputes.

Fewer than a dozen Maine attorneys have international law as their primary practice, but dozens more are involved — ever more frequently — in real estate, commercial sales, trademark protection, taxes, contracts and other aspects of doing business overseas. While there may not be enough business yet for law firms to expand their ranks of full-time international lawyers, global market expertise is making its way into more law specialties and giving lawyers with that experience a leg up.

"International trade is a vital part of Maine's history from colonial times," says John Gulliver, senior partner at Pierce Atwood in Portland and head of the firm's international group. "We were founded on the backbone of international trade." He points to timber and textiles as early exports to Europe.

He says a good percentage of his firm's 150 lawyers in its five locations are involved in international issues in one way or another, with two lawyers in Boston focused full time on admiralty law.

And while he and other attorneys say companies of any size may pursue international markets, he also encourages strong vetting of any potential partner, with a focus on protecting your own brand.

"It's how you do your homework and invest carefully and incrementally with an eye toward retaining your reputation and not straying from your core business," he says. It also doesn't hurt to gain friends in high places and not be afraid to ask for help.

#### Using leverage effectively

Just ask Frederick Lipp, shareholder and business law practice group leader at Bernstein Shur in Portland. Judging from his relaxed and confident demeanor, you wouldn't expect Lipp to pull out the proverbial "big stick" to keep an overseas partner on the straight and narrow. But when it comes to international business, President Theodore Roosevelt's foreign policy adage to "speak softly and carry a big stick" — borrowed from a West African proverb — still comes in handy, he's discovered.



Fred Lipp | Photo credit: Tim Greenway

Lipp describes a recent incident where an industrial manufacturing client sold a valuable piece of equipment to a Mexican company. The equipment came with certain warranties and a performance bond covered by a letter of credit. That meant if the equipment didn't work properly, the buyer could use the performance bond to effectively draw down money through the letter of credit, which was held by his client's bank. He discovered money was withdrawn, but not because of any equipment issues. He decided that trying to regain the money through the local courts would not work.

"I picked up the phone and called the president of the buyer's company. In Spanish I explained in no uncertain terms that I would be phoning three very influential people in his community in Mexico in an effort to have them attempt to broker some resolution," says Lipp. "He knew exactly what I was saying. What I was intending to convey was that the half-million dollars that he had drawn down from the letter of credit for no reason except a corrupt purpose would not stand." The next day the buyer restored all the money to the line of credit.

"Now we're at détente," he says. "He understands that the balance has been restored. And the deal was lucrative enough that our client was willing to continue to ship equipment to them, including sending people down there for repairs."

He says there now is an understanding that both parties have leverage, and that kind of balance is critical for international business, more so than cultural niceties. The difference between those who practice international law most of their day and those who don't typically comes down to leverage, Lipp says, and both partners in a successful business relationship need to have it.

"It's not about courtesies and where you put your napkin. At the end of the day it is truly about balance and leverage. I've spent 25 years cultivating contacts around the world," Lipp notes. "That's the difference between people who say they do international law and those who have enough currency to have the clout to make a change, not only in troubleshooting, but in creating a deal that is balanced enough that it will withstand the pressures that come from geographic distance."

He adds that it's important for international partners to create systems of leverage, because unlike in the United States, where the contract is enough, in an international deal, it's not sufficient. "You need to have a clear path to understand how you'll exert political leverage, how you'll find a resolution through the arbitrators or the foreign courts and the business needs to be a win-win for everyone because otherwise the deal will be too strained," he says.

Still, knowing foreign regulations and customs, as well as speaking the language of the country where you're representing a client, can go a long way in doing business overseas, protecting a company's interests and gaining the trust of global partners.

"My ability to speak Spanish has been so helpful. It's opened doors and brought a sense of commonality into deals," Lipp says.

About six of Bernstein Shur's lawyers practice international law most of the time, and 15 out of a total of 100 attorneys in the practice are active weekly in the international arena. One example is James Keenan, a Bernstein Shur shareholder focused in intellectual property who said in an email that the firm recently helped Kepware Technologies file to protect various marks in 60 countries, and helped a large China-based multinational company clear and protect two new brands in the United States and some 20 other countries. Keenan estimated his company will file 100 intellectual property applications abroad this year.

Partnerships with other law firms also are important. Lipp says Bernstein Shur is part of Lex Mundi, an international group with more than 160 law firms and 21,000-plus lawyers. Lipp also runs Broad Arrow Mundial LLC, a recently formed subsidiary of Bernstein Shur that provides strategic consulting, with a focus on business transactions between the United States and Latin American.

Adrian P. Kendall, attorney at Norman, Hanson & DeTroy in Portland and honorary consul of Germany, says leverage is important in terms of which partner chooses the law that applies to the transaction. For example, unless opted out of, the United Nations Convention on Contracts for the International Sale of Goods, also called the CISG, applies to international sales of goods, not the U.S. Uniform Commercial Code. The latter may benefit the U.S. partner.

### **As the world turns**

Kendall adds that the Internet has brought the global market closer together. Norman, Hanson & DeTroy has about 40 attorneys in Portland and Lewiston, but only a few practice international law.

"It's getting easier for Maine companies to identify companies and markets, to get market data and to coordinate with international partners," he says, pointing to Iceland's Eimskip as one company that is opening the way to global markets. "Eimskip is showing how easy it is." He adds that Eimskip is dispelling how difficult it is to handle customs duties, freight and other aspects of sending a product overseas, and notes that planned train service to the docks in Portland will create direct rail to ship access, which should boost business, including to the U.S. Midwest.

While he admits it is a significant step to go overseas, he says it's not a hard step. There is some cost involved, but it should not be cost-prohibitive to smaller companies, he says. Being international can be as simple as having an Internet presence.

But there are some potential traps for the unwary, including the CISG, which applies by default regardless of which country's law the partners choose, unless there is a specific opt-out of the CISG. Kendall says non-compete agreements are important as well, especially for salespeople, to have them focus on your company and not one of 10 other companies they may otherwise represent. Also, some countries, including Germany, have tail payments, which apply if a distributor or sales representative is terminated. Those former partners must continue to be paid for business derived from the clients they brought to your company.

Making sure a client is aware of the pitfalls broadens the typical definition of an attorney. Says Kendall, "Counselors-at-law are not just attorneys. We establish personal relationships with clients. My client's success is about my success."

Pierce Atwood's Gulliver points to one of his clients that did a few classic things incorrectly. They had a manufactured product that they thought would be good for the European market. However, they went into the market without establishing a relationship with a counterpart or a joint venture that knew the local business landscape.

"They created their own legal subsidiary with their own people, so they didn't have a partner who could help guide them through important things in that market," Gulliver says. "They ended up spending lots of money on shipping product and warehousing it, and they spent too much on offices."

He adds that they angered businesses in the overseas market that saw them as a competitive threat rather than a potential partner.

"That company didn't develop relationships and alliances. After three years and spending millions of dollars, they folded the operation," he says, declining to identify the company.

He gives another example of a company that took the opposite approach., a Maine-based service company that performed specialized consulting. It sought local partners and used their existing resources when it wanted to bid on a project overseas.

"It avoided investing much on the ground until it had a couple projects signed," he says. "Doing one project enabled them to leverage their brand. They realized a successful endeavor required being careful and getting quality counterparties, he says.

He encourages companies seeking overseas partners to rely on multiple sources to vet them, including talking to the U.S. Dept. of Commerce, the Maine International Trade Center and business associations.

"Extend your network and get as many pieces of information as you can to verify the partner," he says. "The Internet has helped accelerate this process. It can help get you started in the right direction. There's an explosion of readily available information."

### **The same, but different**

While international attorneys say business is business anywhere, those who have traveled or worked overseas have plenty of tales to tell about misunderstandings, both serious and amusing.

Kendall of Norman, Hanson & DeTroy says European decision-making is much more deliberate than in the United States. "The due diligence is substantial. Inside European companies, it's like defending a thesis," he says. "Their actions are deliberate, but once they make a decision it's all hands on deck, like with Eimskip."

The contract's language also is very important.

"It's all the same stuff, packaged differently," says Susan E. LoGiudice, of counsel at Preti Flaherty in Portland. She focuses on international transactions. "But there's an issue with using international lawyers overseas. How good is their English?" She looks for lawyers who attended school in the United States and listens to their accents. She adds that she and other lawyers try to get contracts written in English, as bilingual contracts or those entirely in a foreign language can be difficult to execute, as the translation may be too general or not on target.

She says that while the United States now has a mixed reputation as an economic power on the international market, "I think Mainers are an amazing subset. In business, we are known for our quality, integrity and directness."

So much so, Pierce Atwood's Gulliver discovered on a recent trip Baku, Azerbaijan, that the Maine brand is the target of rip-off artists. In a clothing store in a mall in downtown Baku, he discovered Maine-branded men's shirts.

"I believe the store is an English-based chain. The goods were made in China," he says. "The sales clerk did not know Maine, but said that the brand was intended to evoke a sense of classic American style. Now that's global trade!"