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TRADE

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»» There has been a significant expansion in international trade opportunities vending to emerging and third world nations. Without the competition between superpowers to spend foreign aid money seeking alliances with the third world, more nations have entered the commercial markets to purchase goods and services previously obtained by foreign aid grants.

Many of these countries possess significant wealth to match their significant needs. There are opportunities available in this form of government contracting that competitors in the United States, European Union, and Pacific Rim cannot afford to ignore.

There is significant risk in this market, however. Market risks are unlike the normal business risks of international transactions, for the purchasers are often governments or government agencies. Without proper planning, the sovereign buyer will be immune from lawsuit. The devices of the international letter of credit or international arbitration are often inconvenient or unacceptable to the government purchasing agent.

As a result, the merchant faces a risk that the buyer will refuse or substantially delay payment, unilaterally change the terms of the agreement, or find grounds to dispute the transaction, knowing that there is no effective mechanism for resolving the dispute.

A competitor which can reasonably secure its payment can avoid charging a substantial risk premium and can offer more competitive pricing. Many Third World countries have created international banking and financial arrangements in the United States to complement and facilitate their diplomatic efforts.

Such international banking arrangements within the United States are essential, and emerging nations cannot afford to abandon them, even when the United States openly flaunts its use of subpoenas and electronic intelligence to trace financial transactions through the United States

This potential source for paying damages makes it tactically convenient to find a basis for adjudicating disputes between merchants and sovereigns within the United States. That source is the United States Foreign Sovereign Immunities Act (FSIA), and a merchant who plans its contract in advance can obtain jurisdiction in the United States, thereby improving its ability to collect on its contracts both by litigation and by pre-litigation pressure to comply with the contract.

There are some additional start-up costs involved in entering this trade. The FSIA cannot be used to protect a foreign company from non-payment in a foreign contract but, through the fiction that corporations are citizens wherever they are formed, the FSIA can protect the wholly-owned American corporate subsidiary of that same foreign company if its duties include managing the contract. The FSIA strictly limits jurisdiction to only four categories of lawsuit, but a foreign sovereign can consent

to jurisdiction with the most innocuous of language placed in a contract or even by contracting to make payments in the United States.

A merchant company considering trade with foreign sovereigns should review with its counsel the formation of an American subsidiary in the Washington, D.C., metropolitan area to manage the government contract in order to maximize its ability to enforce and collect on the contract. Including language in the contract that places the contract under United States law and submits the buyer to United States jurisdiction in a manner designed to work within the FSIA subtly can become an enormous competitive benefit.

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