

A Note From The Publisher

It's a Global World

"Globalization" is no longer just a word—it's a concrete reality none of us can ignore. From Bangkok to Brussels, from Charlotte to cyberspace, Hunton & Williams has been at the leading edge of the revolution that shrunk the world. This issue of the newsletter reports on three recent examples of our global reach.

Uganda threw off the yoke of dictatorship to become a model to the developing world. Privatization opened the way to the completion of a dam meant to provide much-needed hydroelectric power, but it took expert advice to see the project through. Unexpected problems arise from the explosion of Internet patents and the global reach of the

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New Dam Could Give Uganda's Economy A Major Boost

Since the 1950s, a single dam on the Nile River has been Uganda's sole source of electric power. Unfortunately, demand from a growing population has outstripped the dam's capacity, resulting in rolling blackouts that have crimped the nation's economic development efforts.

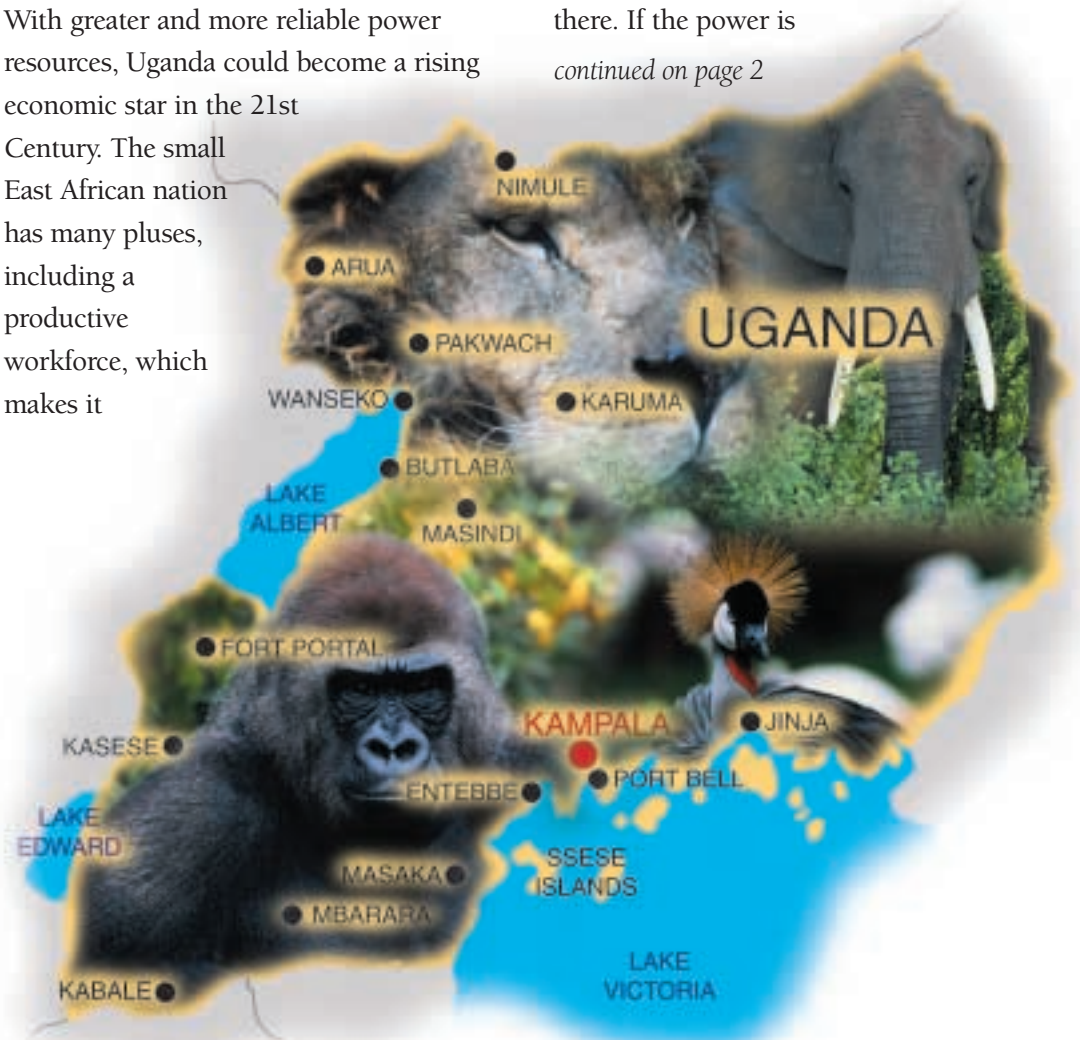
With greater and more reliable power resources, Uganda could become a rising economic star in the 21st Century. The small East African nation has many pluses, including a productive workforce, which makes it

attractive for economic development.

"Inadequate electric power has been one of Uganda's big problems," says Jack Molenkamp, a partner in Hunton & Williams' Washington, D.C. office.

"Uganda needs additional power to get businesses to locate facilities there. If the power is

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For three weeks in April/May 2000, Hunton & Williams assisted its client, the Government of Tanzania, in negotiations with AES Corporation, TransCanada Pipelines Limited and Ocelot Energy Incorporated for the Songo Songo Gas-to-Electricity Project.

shut off three times a day, it hardly pays for someone to come in."

Now, a development agreement signed last December between the Ugandan Government and AES Electric, a subsidiary of Virginia-based AES Corporation, is expected to give Uganda's power resources a much-needed boost. AES intends to construct a \$500 million dam and hydroelectric plan eight kilometers downstream from the existing facility, and it has received a 30-year concession to supply power to Uganda. Mr. Molenkamp and John Beardsworth, a partner in the firm's Richmond office, serve as counsel to the Ugandan government and Uganda Electricity Board.

Plans call for construction to begin in 2001 with the plant coming on line early in 2005, provided financing can be completed. The facility, which would be the region's largest private infrastructure investment to date, will have the capacity to generate 200 megawatts of power and the potential to add an additional 50 megawatts if needed. "When it comes on line, the dam will increase the country's power supply by 40 percent," Mr. Beardsworth notes. "The implementation and power purchase agreement concluded last year represents the culmination of two years of negotiations," he adds. "Since the Ugandan government is guaranteeing payments, the

contracts needed cabinet and parliamentary approval."

In addition to the implementation agreement, which spells out the terms under which AES will operate in Uganda, and the power purchase agreement, which establishes wholesale electricity rates, the Hunton & Williams team worked on several ancillary agreements. These address a variety of issues including currency exchange, guarantees, sovereignty lease and protocols regarding release of water from the dam. "Because only a single day's water supply will be backed up behind the dam, the project's ecological impact will be far less than many other hydroelectric

projects," Mr. Molenkamp says. "In addition, the relocation requirements for the dam are minimal, with only around 100 people affected."

In addition, to serving as counsel on the dam project, Hunton & Williams is serving as counsel to the Uganda Electricity Board on its pending privatization. "Privatization is one of the conditions for the project going forward," adds Mr. Beardsworth.

Power from the new dam would add to Uganda's list of economic assets, which, according to Mr. Molenkamp, include a pro-business environment and increasing political stability. The African nation currently is a major exporter of fresh flowers and it could expand tourism since it is one of the few habitats for silver back gorillas, he adds.

It also is conceivable that the new dam could turn Uganda into a power exporter. "When the country's power supply increases by 40 percent overnight, it needs a way to pay for all that extra power, and exports could be the answer until local demand catches up with supply," Mr. Beardsworth says.

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Arbitration Clauses Facilitate International Dispute Resolution

One effect of the globalization of business has been an upsurge in international business disputes. The International Chamber of Commerce, one of the world's leading arbitration institutions, reports a record 529 requests for its services in 1999, a 38 percent increase over 1994 figures.

Commercial disputes, which include everything from trade issues to leasing agreements to joint ventures and investments, lend themselves to arbitration. Arbitration tends to be cheaper and faster than litigation, although fees of arbitrators and administrative expenses of arbitral institutions sometimes can be significant. Disputants generally participate in selecting the arbitrator(s), so knowledgeable people will hear their cases. This can be particularly important for disputes involving specialized subject matters, such as e-commerce and other technology issues.

In international disputes (those between companies domiciled in different countries or between a government and a foreign corporation), arbitration offers another important advantage: neutrality. A litigant does not have to go to trial in a court in its adversary's home country. Further, awards issued by arbitration tribunals are enforceable under international treaties, whereas a national court's ruling may not be

recognized by another jurisdiction. While the United States is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the "New York Convention"), it is not a signatory to any treaty providing for the enforcement of foreign court judgments.

Making arbitration work smoothly, however, requires forethought. "The dispute resolution process doesn't begin when the dispute arises, but rather when a contract is drafted," says Darryl Lew, a partner in the Richmond office of Hunton & Williams. Mr. Lew represents companies and state entities in arbitration of international business disputes, including commercial, investment and construction matters.

A number of issues need to be resolved before quarreling parties can submit a dispute to arbitration. Having them worked out while a deal is being closed and both sides are cooperating is easier than trying to settle them later on when the parties are at odds, Mr. Lew explains. Among the issues to consider in writing an arbitration clause are:

- What issues will be subject to arbitration?
- Will the arbitration be conducted in an institutional or *ad hoc* setting?
- In what country/city will the arbitration be conducted?

- In what language will the arbitration be conducted?
- How many arbitrators will serve on the panel?
- Which law and arbitration rules will govern the proceedings?
- Must the dispute be submitted to negotiation or mediation beforehand?

International arbitration is conducted either under the auspices of arbitration institutions or on an *ad hoc* basis. The International Chamber of Commerce, Stockholm Chamber of Commerce and London Court of International Arbitration are major international arbitral institutions, and each has its own set of arbitration rules. *Ad hoc* arbitration, which is conducted outside these institutions, can be less expensive since the parties do not have to pay a fee to the administering bodies. Also, the procedures can be more flexible and arbitration fees can be negotiated. While the arbitral institutions can be better at keeping proceedings on pace, one pays for this benefit through administrative fees charged by the institutions.

New York, Paris, London, Geneva and Stockholm are popular arbitration venues, with the last used frequently for disputes involving Western entities and entities in the former Soviet Union. Singapore is a popular venue for Pacific Rim disputes.

Arbitration panels generally comprise one or three members. A three-member panel – with one

chosen by each side and the third elected by the party-appointed arbitrators or by an institution – is the most common, particularly for complex disputes with significant monetary exposure. If budget considerations come into play, and for relatively straight-forward or those disputes involving smaller sums, a single arbitrator may be chosen.

Arbitrations conducted under the auspices of an institution are governed by the institution’s rules. *Ad hoc* arbitrations are frequently conducted under the rules adopted by the United Nations Convention on International Trade Law, known as the UNCITRAL rules.

UNCITRAL and ICSID (International Center for

Settlement of Investment Disputes) rules tend to be used in disputes involving state entities, be they governments or state-owned businesses. Unlike the UNCITRAL rules, certain jurisdictional prerequisites must be met for the ICSID rules to govern.

When potential business associates address dispute resolution issues during contractual negotiations and incorporate well thought-out arbitration clauses in their agreement, they facilitate a smoother and less expensive dispute resolution process, should disagreements later arise.

For more information on international arbitration and alternative dispute resolution, contact Darryl S. Lew in our Richmond office at (804) 788-7210 or email dlew@hunton.com



How To Broaden The Reach Of U.S. Internet Patents

The Internet has enabled a vast number of new business models, many of which have been patented. The Internet also has facilitated true international commerce for these business models. The advantages of this are readily apparent. One potential disadvantage is not. This disadvantage relates to the territoriality limitations of U.S. patents for these business models.

A U.S. patent gives the patent holder the right to exclude others from making, using, selling offer to sell in, or importing into, the U.S. the claimed invention. To prove infringement, the patent holder must show that each element of a patented system is present in an accused system in the U.S. or that each step in a patented method is performed in the U.S. These territorial limitations of U.S. patents can profoundly affect the success or failure of patent infringement claims for web-based inventions.

The Internet is inherently distributed – it includes Web sites that reside on servers that can be located almost anywhere. These Web sites can be accessed by "web browsers" operating on PCs or other "client side" devices that also can be located almost anywhere.

The inherently distributed nature of the Internet and the territorial restrictions on U.S. patents combine to pose a special challenge for patent holders. The challenge arises when an accused infringer's Web site is outside the United States but it is accessed by users within the United States, or the Web site is hosted in the United States but is accessed from outside the United States. In both of these circumstances, neither the system nor the method is wholly within the U.S. If a system (or method) patent claim covers both the server and client side functions, and either the client or server is located outside the U.S., arguably the

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new medium. Patent infringement by a foreign entity is easier than ever, and its remedy that much more elusive. But careful drafting of infringement claims by a skilled practitioner can maximize your chance of being heard.

Commercial conflict knows no borders now, but neither does the healing power of arbitration. This makes the arbitration clause of international contracts more crucial than ever. We show you the provisions you can't do without.

Our recent experience bears out the truth of the adage: "If you're not everywhere, you're nowhere." We hope this report will help you take advantage of the exciting opportunities to be found all over the world.

-Thurston Moore, Managing Partner

territorial limitation of U.S. patents may preclude a finding of infringement.

As a result, e-commerce entrepreneurs who are patenting their business models must ask themselves (and their legal counsel) if these patents provide sufficient geographic protection. The likely answer is that U.S. patents provide a limited scope of protection and may not cover these scenarios depending on how they are drafted. Although one can file counterpart patent applications in foreign countries, many U.S. patent holders are reluctant or unable to do so because of cost and other considerations. Further, foreign patents likely will suffer similar territorial limitations. Perhaps Congress will amend the U.S. patent laws, or enter into an international treaty to close this potential loophole. Unless or until the laws change, using a patent attorney experienced in Internet patents may make all the difference.

For example, assume a patent is drafted to cover an Internet business model that involves a user interacting with a Web site via a browser. If the Web site is in the United States but the user is in France or vice versa, a typical patent system claim may not give rise to infringement. Clever claim drafting by an experienced patent attorney can improve the situation.

Internet patent claims can be drafted to minimize territoriality problems. Where the patentable invention

involves interaction between the client and server, the patentee should consider drafting a separate sets of claims for each of the server and client side functions. If possible, the claims should include the server side functionality (or steps) in one set of claims and the client side functionality (or steps) in other claims. The claims from the server perspective should include the server functions plus any interactions the server has with the client from the server perspective. For example, instead of claiming the step of a user inputting data that is sent to the server, the claims should recite that the server "receives input from a user." This seemingly subtle difference may avoid the territorial problems. If the server is located within the United States, but the user is outside, this claim approach would likely enable this activity to be covered by the server claim. This is so because the "receiving input..." step occurs in the United

States. A similar approach can be developed from the client perspective in case the client happens to be in the United States and the server is outside the United States.

This seemingly simple approach may enable a patent holder to successfully assert a claim of infringement where "traditional" claim drafting may not. It can prevent the unfortunate scenario where an infringer replicates a business model or Web site and locates the server outside the U.S. to avoid U.S. patent infringement. If you are not using this strategy in your e-commerce patents, you should consult with a knowledgeable patent attorney to discuss this further.

For more information on Internet patents, contact James Gatto in our McLean office at (703) 714-7662 and our Washington, D.C. office at (202) 955-1869 or email jgatto@hunton.com

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Hunton & Williams, a major international law firm, publishes this newsletter to highlight the opportunities and challenges businesses face in the global economy and to illustrate innovative solutions to help companies achieve their objectives.

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