INTERNATIONAL LAW ISSUES IN INTERNATIONAL LEGAL DRAFTING

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INTRODUCTION

The world economy over the past 10 years has experienced a tremendous increase in international trade and investment. If we look at any one of the millions for perhaps billions of commercial transactions which occur each year, we would find a contract or agreement, either oral or written, which defines the legal obligations of the parties to the transaction.

As with contracts generally, the objective in drafting an international contract is to create a common understanding about legal rights and obligations. A written contract may be as short as one paragraph, but more commonly the contracts tend to be long and detailed. Regardless whether the contract is short or long, an "international" contract can be subject to different laws or legal considerations than would be applicable to a "domestic" contract.

The purpose of this paper is to identify some of these different legal characteristics which may apply to international contracts and which can affect the common understanding of the parties.

Preliminary, we would define an "international contract". Some legal practitioners also refer to an international contract as a "international contract" for purposes of this discussion, we use the term international contract.

An international contract may be defined as a contract between two or more parties of different nationalities. Each party will be knowledgeable about the laws and commercial practices applicable to its business in its own country. A party to the contract may not know the laws sand commercial practices of the other country. An international contract, therefore, involves

the risk of a difference of understanding concerning the legal, commercial and even cultural expectations of the parties. An international contract expectations of the parties. An international contract should also be defined as a contract between parties of the same nationality, but which is to be performed, in whole or in part, in a foreign country. The country in which the contract is to be performed would also apply its laws to the contract performance.

An international contact may be subject to the laws of several countries, including:

(a) the law of one contracting party;
(b) the law of the other contracting party;
(c) the law of the place of performance of all or part of the contract
(d) international law; and
(e) a specific law chosen by the parties to govern the transaction.

the interrelationship between these various laws or legal system is complex and will depend on the nature of the commercial transaction. For example, the issues which must be considered in a contract for the sale of goods will be different from those for a construction contract or an international financing agreement. These issues will be resolved by the "conflicts of laws" principles applied by the institution, either a court or arbitration tribunal, which will decide any dispute. At a general level, however, there are various issues present in drafting or reviewing international contracts which are not usually involved in domestic contracts.

International Law

An international commercial contract may be subject to certain aspects of private international law. For the most part, the various international treaties which make up "private international law" do not deal with a substantive manner with the term of commercial agreements. There are, however, various international treaties which may affect performance of certain kinds of contracts, such ad the Warsaw Convention of 1929 on air transportation, or affect certain aspects of a contract, such as the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards. Additionally, international treaties on the avoidance of double taxation will be of importance to most commercial transactions.

For the sale of goods in international trade, the United Nations Convention on Contracts for the International Sale of Goods (the "Sales Convention") may be applicable. The convention became effective on January 1, 1988 for countries which have ratified or acceded to the convention. At the present, the convention applies to some of Indonesia's major trading partners, including the U.S.A., France and Italy. The Sales Convention governs the formation of international sales contracts and the parties' right and obligations under such agreements, including permissible remedies. The Sales Convention does not apply to, among others, services, the sale of shares, investment securities, aircraft and vessels insurance, credit or carriage.

Indonesia has not yet ratified the Sales Convention, but the Sales Convention is nevertheless important for Indonesian legal practitioners. Article 1 (1) (b) of the Sales Convention provides:

"This Convention applies to contracts of sale of goods between parties whose places of business are in different states:

(b) when the rules of private international law lead to application of the law of a Contracting State. If an Indonesian company sells goods to a company with a place of business in France (which is a Contracting State), the convention will apply if French law (or the laws of another Contracting State) applies to the international contract. French law will apply if the parties have agreed that it is the governing law or, absent agreement on governing law, if a French court (or arbitration tribunal) decides that French law is the appropriate governing law under rules of private international law.

Thus, even though Indonesia has not ratified the Sales Convention, Indonesian companies selling goods to, or buying goods from, French or Italian business may be subject to the term of the convention.* Because of Article 1(1)(b), international legal practitioners will need to study the terms of the Sales Convention for contracts for the sale of goods to or from * The USA ratified the Sales Convention with a reservation in respect of Article 1 (1)(b). Thus, contracts for the sale of goods between Indonesia and the U.S will not be subject the convention until it is ratified by Indonesia companies located in Contracting States. The convention reflects a compromise between commercial laws in countries following the civil law tradition and countries following the "common law" system. There is, therefore, something new and perhaps and unusual for all legal practitioners.

There are two final comments on the convention. The convention incorporates the principle of freedom of contract and permits the parties to a contract to vary the term of the Sales Convention or to entirely exclude application of the convention. Further, the Sales Convention may not contain rules for all issues which arise and, therefore, it is still advisable to select a governing law to fill in any "gaps" in terms of the Sales Convention.

3. International Custom and Usage

Articles 1339 and 1347 Indonesian Civil Code (KUH Perdata) provide that custom and usage are considered to be part of a contract, unless the parties express agree otherwise. Similarly, international contracts will incorporate "international custom and usage". The Sales Convention also reflects this principle in Article 9 (2).

"(2) The parties are considered, unless otherwise agreed to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by parties to contracts of the type involved in the particular trade concerned".

It should be noted that international custom and usage can apply to an international contract even if one of the parties to the contract was not aware of the practice.

The determination of what is "international custom and usage" is often difficult and would vary depending upon the kind of business transaction. These business practices are often not compiled in a set of rules, and it may be necessary to solicit the advice of businessman experienced in the area to learn of accepted usages.

The international Chamber of Commerce has published some material. One publication referred to as "INCOTERMS" establishes standard definitions for terms such as "F.O.B", "C.I.F.", etc. which cover the risk of loss of goods in transit, the time for passage of title and allocation of responsibility for costs or transport, customs and insurance. Another publication, the Uniform Customs, and insurance. Another publication, the Uniform Customs, and Practice for Documentary Credits. Last revised in 1983 provides general terms for letters of credit, bill of lading and other types

of documentary credits. If the parties to an international contract wish to deviate from these terms, the contract should express indicate the intent of the parties to differ from international custom and usage.

International custom and usage reflects business practices which are widely known and regularly used of a certain type of transaction. As such, they become legally binding unless the parties to an international agreement have stipulated otherwise. There are, however, international business practices which are "usual" but which are not yet considered to be legally binding as "custom and usage". These international practices may, however, be persuasive to a court or arbitration tribunal if it is required to interpret a contract which is unclear. The court of arbitration tribunal may consider that the parties to the contract negotiated in consideration of the existence of the international practice.

One example of such a practice is in the use of standard form contracts. There are several "standard form" international construction contracts which may be modified for use on a particular construction project. One frequently used form is called the FIDIC Conditions named after the French Federation International des Engineers Cancels which prepared the form. If a despite arises over one of the standard provisions, a court of arbitrator may look to other court decisions or arbitration awards which have interpreted the provision. Though not legally binding, the use of international form contracts can result in the development of a collection of decisions which may be persuasive, and thus should be studied by international lawyers working in that area.

An interesting statement is found in the legal Guide on Drawing Up International Contracts for Construction of Industrial Work published by the United Nations Commission on International Trade Law "(UNCITRAL)". The Introduction to the Legal Guide" states:

"In addition, the Guide is intended only to assist the parties in negotiating and drafting their contracts; it is not intended to be used for interpreting contracts entered into before or after its publication".

The UNCITRAL Legal Guide attempt to avoid the development of the "quasi jurisprudence" which has arisen with other international standard form contracts.

4. Choice of Law and Choice of Forum

In almost all international contracts the parties are faced with a decision as to which law will govern the terms of the agreement. Each party to the contract reasonably prefers that the law of their country, which is already known to them, apply to the contract.

It is important to provide for a governing law, if no law is chosen by the parties, a court or arbitration tribunal will decide which will be used to determine the governing law vary from country to country, and it is not always possible to predict which law will govern the contract. The lack of certainty may cause serious problems. A few example:

Example A: In a sale of goods, the buyer objects to delivery of defective goods 14 business days after received the goods, a period of time which is considered reasonable under the laws of the buyer's country. The seller files a lawsuit (or a claim in arbitration) and argues that the proper law is that of the seller's country. Under the law of the seller's country, any objection to defective goods must be given within 10 calendar days of received of the goods. The seller claims that the buyer failed to object in time and must pay the agreed price. If the seller's law applies, the buyer will have suffered a loss, because full payment will be required for defective goods.

Example B. There are important differences among legal systems on the liability of a manufacturer for what are known as product warranty and "product liability" claims. Unless the governing law is known, a seller of goods will not know the potential liability it may face, and cannot arrange for insurance or other measures to cover such liability. It is recommended, therefore, that an international contract contain a "choice of law" or "governing law" clause.

Are there limitations on the parties' choice of law? There is uncertainty among legal commentators. Some argue that the principle of "freedom of contract" should permit the parties to choose any law, provided the choice of law does not contravene public policy or mandatory provisions of law. The

State of New York (in 1984) and England permit parties to chose any law to govern a commercial contract even if there is no connection with the transaction. The prevailing view, I believe, is in general terms that the parties are free to chose the law of a particular country to govern their relationship, provided the transaction has a reasonable relationship with the chosen law (with certain limited exceptions such as maritime law) and provided the chosen law is not contrary to public policy or mandatory law. Closely related to the choice of governing law is the ability of the parties to select the place where a dispute will be resolved. The parties may, for example, select arbitration as a means to resolve any disputes. If arbitration is not selected, the parties may agree on a "choice of forum" clause whereby the parties designate the country in which a lawsuit may be filed.

There are 2 types of choice of forum clauses. A non- exclusive forum clause permits litigation in the designated court, but also permits litigation in any other court which would have jurisdiction over the parties. The non-exclusive jurisdiction clause constitutes contractual consent to litigation in the designated forum. Before selecting a specific court, it is necessary to determine whether that court will accept jurisdiction to hear the dispute. This may be a significant legal issue if the parties do not have any connection with the forum selected.

Second, the parties may choose an "exclusive" forum clause, whereby all disputes must be brought in the designated court. Exclusive forum clauses raise more difficult legal questions. In certain cases, statutes may designate a specific forum for certain types of actions, such as bankruptcy actions or actions involving title to land. The excluded forum(s) may also object to enforcement of the exclusive forum clause where the effect of transferring litigation would avoid a strong public policy of the excluded form. In selecting an exclusive forum, the parties should carefully consider the convenience of the forum in terms of expense, availability of witnessed and other evidence which may be relevant to a resolution of the dispute and,

finally, whether a judgment obtained by the exclusive forum would be enforceable in other countries where the contract was to be performed, or where the parties have their assets.

5. Legality of the Contract:

In order to decide if an international contract is valid, it may be necessary to investigate the laws of several countries to determine whether the terms of the contract violate the public policy of such countries. This may require contacting lawyers in the various jurisdiction which have a connection with the transaction to ensure that the contract will be enforceable and will not violate any local laws.

A few examples may indicate the problems raised in this area.

Example 1: Many Indonesian companies are granted licenses for technology or trademarks by foreign manufacturers which are limited to the territory of the Republic of Indonesia. Under the license agreement, the Indonesian company is prohibited from exporting goods using the licensed technology or trademark. Although this clause is apparently legal in Indonesia, Japanese law (I am advised) prohibits license agreements which contain a restriction on the Japanese licensee's ability to export goods using the licensed technology or trademark. Thus, an Indonesia company could not grant a license to a Japanese company which was limited to the sale of goods in Japan.

Example 2: Some of the major trading countries have extensive, and complex, "anti-trust" rules which prohibit certain kinds of business conduct. In one case, 41 producers of bleached sulfate wood pulp were fined by the European Community ("EC") Commission for violating the EC Competition Law on the grounds that they had attempted to fix the price of wood pulp sold to customers in the European Economic Community. Action which may be legal if taken outside of the EC, may be subject to EC law as a result of sales into a particular

country. This has also been a particular problem for companies doing business with the U.S. given the complexity of the US and anti-trust laws. For any major commercial transactions, therefore, it is often necessary to obtain advice on the laws of a foreign country in order to properly advised the parties to the transaction.

6. International Tax

The complexities of international tax law preclude any discussion, however, brief of the various issues involved. It is important, however, for international legal practitioners to consider the various tax implication of the business transaction. It may be possible to change the structure of the transaction to minimize the tax costs to the parties to the transaction.

In many European countries and in the United States, for example, a distributor is subject to different laws than a sales agent or a sales representative. The relationship between a manufacturer and a distributor is based on a sale of goods and generally would not make a foreign manufacturer subject to US tax. However, appointment of a sales agent to market the products in the US may create a "permanent establishment" of the foreign manufacturer and subject the foreign manufacturer to US income tax. The obligation to pay US income tax may have a significant impact upon the price at which the foreign manufacturer is willing to sell goods into the US market.

Where an international contract involves performance in more than one country, each country may apply tax to the transaction. International tax treaties may reduce such double taxation of business activities, and would need to be reviewed in the context of each business transaction.

7. Foreign Exchange

International contracts usually involve payment in what will be a "foreign" currency for one of the parties. Many countries have imposed foreign exchange controls which may limit the ability of a company to make payments in foreign currency. International legal practitioners need to investigate whether foreign exchange controls may prohibit the agreed payments or

whether it is possible to get prior approvals from the exchange authorities for the contractually agreed payments.

Additionally, international contracts usually involve a foreign currency risk for one or both parties. If a company has expenses in currency A, but receives payment in currency B, a devaluation of currency B may cause the company to suffer a loss on the transaction. In the current era of fluctuating and sometimes volatile exchange rates, the loss may be substantial.

Through the services of international banks, a company can usually reduce risks of foreign currency fluctuations if the payment dates are known with certainty. If there is a default in payment, it will probably be necessary to file a lawsuit or an arbitration claim to compel payment. Both litigation and arbitration can be time consuming, and with the passage of time, the risk of currency fluctuation increases. Appropriate contract drafting may reduce the currency risk in the event of litigation or arbitration.

One risk is that the court which resolves the dispute and enters judgment may not be able to issue a judgment in a foreign currency. For example, if a lawsuit is filed in France requesting payment of Japanese Yen, we would have to investigate whether a French court could issue a judgment in a foreign currency. This risk can be reduced by providing in the contract that any payment made pursuant to a judgment only discharges or releases the debtor to the extent that the creditor receives the amount due in the currency of the contract. The contract clause usually states that the indebted party has a separate obligation to make additional payments to cover any foreign exchange loss.

A related problem is the determination of when the court (or arbitration tribunal) converts the contract currency only discharges the payment obligation if the creditor receives the full amount of the contract currency. This "payment date" provision may not be permitted in some courts; in that case, the provision would provide for conversion on the judgment date with the separate indemnity obligation noted above.

8. Dispute Resolution

International contracts often contain specific provisions concerning the manner in which disputes will be resolved. If the parties decide on litigation,

there will usually be a choice of forum clause. If the parties choose arbitration, there will be a clause to select the preferred arbitration procedure, such as ICC, UNCITRAL, a local arbitration tribunal such as BANI or ad hoc arbitration.

Other speakers have addressed the various legal and practical issues encountered in arbitration. From the perspective of drafting an arbitration clause, the following passage will mention the scope of arbitration:

A. Scope of Arbitration:

(i) if the parties want all disputes to be disputes to be subject to arbitration, the clause should state "all disputes in connection with the present contract...". Some courts have refused to order arbitration on fraud claims or illegality where the clause only provided for arbitration of "all disputes arising hereunder..."

(ii) The clause should require that all disputes, including any counterclaims or offsets, be included in the arbitration. If not, the party which attempts to collect the judgment may be faced with such claims in the enforcement proceedings.

B. Substantive Law: The arbitrators will required to apply the law which governs the contract. It is important, however, to specify whether they should apply strict principles of law or decide the case on the basis of equitable principle ("ex aequo et bono"). C.Procedural Law: While parties often choose the substantive or governing law for the contract, rarely is there a provision for a choice of procedural law, which may cover determination of evidence, the right to present witnesses and rights of cross-examination, etc.

D. Place: The place of arbitration should be stipulated and should due in a country signatory to the 1958 Convention on Enforcement of Foreign Arbitral Awards.

E. Notice: It may be desirable to have a special provision concerning notice to address the possibility that a party does not appear. A special notice provision may assist enforceability of an award where one party does not appear.

F. Currency of Payments: for reasons discussed in the preceding section, a clause on currency of payment and indemnity for currency risk is desirable.

G. Interest: The Law on payment of interest for breach of contract vary widely. It is advisable to have a provision which states that interest is payable from the date of the contract breach until the actual date of payment.

H. Language: It is helpful to specify the language in which the arbitration proceedings will be held.

I. Finally and Waiver of Appeal: In some countries, including Indonesia, an arbitration award can be appealed to the courts on the "merits", in other words on the law and evidence. This appeal process defeats the primary purpose of arbitration, which is to avoid the court process. A waiter of rights of appeal should be included.

J. Costs: Usually, the costs of the arbitration proceeding are either shared by the parties or allocated as the arbitrators may decide. For costs necessary to enforce the award, however, it may be appropriate to have a provision which states that these expenses are to be borne by the party which does not abide by the award.

9. Conclusion

The drafting of international contracts requires an appreciation of the legal issues which can arise under the laws of foreign countries. Though, the substantive law may differ from one country to another, fortunately the laws often deal with the same subjects A thorough understanding of "domestic" law will enable an international practitioner to ask the correct questions when researching international law or the law of foreign country.