Chapter Two
Sources of International Trade Law

Key words

Domestic law , sources, Legislation, business, transactions, merchant, transport in goods, breach of contract , domestic rules , national interests , regulate, trading partners, restrict, import-export, foreign currency , statutes, usages , international ,cases, dispute settlement, commerce , Domestic law

,An international trade or an international business transaction

although involved in by states, traders or any other actors, could be

governed concurrently by several legal sources, such as domestic law, and

international mercantile customs and usages, international cases) and other ,
.means

Domestic Law .

Domestic law is very important in international legal practice. Domestic law in .question, as separate from international law, includes law of foreign countries

In reality, the understanding and application of laws of other countries are always a .'nightmare' for both international traders and lawyers

The sources of domestic law are various and it could

.focus on some followings

1- **Legislation**

Ancient international trade and business rules were created in order to protect foreign merchants and govern international transport in goods. The first written rules existed in the Hammurabic Code (2,500 BC), in which were stipulated the .protections for foreign merchants and the breach of contract issue

In general, domestic rules applying to domestic business transactions would .concurrently apply to international business transactions

Besides, since states need to protect its national interests in international trade and business transactions, it should regulate policy such as on trade in goods, and on .trading partners

An important source of domestic law concerning the international trade and business law consists in In terms of domestic law, the key areas covered are the so-called ‘trade remedies’ and customs law. Regulations on ‘trade remedies’ (mainly consisting of AD, countervailing duty and safeguard measures are truly ‘legal’ trade .barriers to both fair trade and unfair competition

Also important are customs regulations, under which governments collect import-.export duties and regulate import-export trade law statutes

2-International Law .

A. International Mercantile Customs and Usages

International mercantile customs and usages are a very significant legal source of .International Business Law

Traders, driven by economic goals, have always spoken in a common language, that .of international mercantile customs and usages

International mercantile customs and usages could be understood as a whole of unwritten rules generated from the acts/behaviours of merchants and were considered as ‘the law’ by them. For example, International

Commercial Terms (hereinafter the ‘INCOTERMS’) or International Standard Banking Practice

(’Lex mercatoria (‘Merchant Law .

The true development of international trade and business law begun since

Middle Ages, when international mercantile customs appeared and

.developed in fairs in Europe on the late seventeenth century

During the Middle Ages, merchants would travel with their goods to fairs and markets across Europe and use their mercantile customs. Over time, emperors allowed merchants from different countries and regions to use their mercantile .customs for dispute settlement, therefore these customs came into effect

From beginning, lex mercatoria (‘merchant law’) was an international’ law of commerce, since it existed independently of emperors law. It was based on the general customs and practices of merchants, who were common throughout Europe, and was applied almost uniformly by the merchant courts in different countries

During the Middle Ages, lex mercatoria included the whole of international mercantile customs and usages, with strong effects, and stipulating the rights and obligations of merchants. The scope of lex mercatoria was very broad, governing many commercial

.issues, such as the value and legal force of contract, breach of contract

The ICC is an international non-governmental organization serving world

business. The ICC plays a dominant role in ensuring harmonization through

the compilation of international mercantile usages for incorporation by those

.engaged in international business transactions

The ICC has produced numerous uniform rules, adopted by incorporation into contracts. These fall broadly into three groups: banking and insurance, international trade and

Many of these rules are based on what the merchants may have adopted as customs .or standard practices over time for their own convenience

.For example, International Commercial Terms ('INCOTERMS')international transport

B. Treaties

Treaties are dominant source of international trade and business law. There are - .different means of the classification of treaties

International trade and business treaties would be bilateral agreements or - .multilateral agreements, including global and regional levels

At the global level, good examples of international trade and business treaties - include WTO agreements United Nations Convention on Contracts for the International Sales of Goods 1980 ('CISG') United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter the 'New .('York Convention

Within the framework of the WTO agreements, there are 'plurilateral' trade .agreements

C. International Cases

WTO cases and decisions/judgments passed by international jurisdictions, such as international courts, international arbitrations, are very important in the legal source system. For example, the WTO's case Japan-Alcoholic Beverage [1996] clarified the concept 'like product' in litigation concerning

the application of the principle of national treatment, a cornerstone principle of international trade law, while WTO agreements cannot do this (see Besides, international cases in the FDI's field are very important. decided by the Permanent Court of International Justice 'PCIJ' the expropriation, nationalization and compensation standards were clearly explained

D. Other Sources

General principles of international law are significant for issues such as those relating .to state responsibility, or to fair and just compensation within the FDI's field

One of these is the principle of good faith, which controls the exercise of rights by states. General principles of international law are, in principle, binding on all states

How to draft

International commercial contracts

By

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?What is the contract

The contract is the only written evidence of the exchanged between the parties concerning a specific deal. The contract is the common intention of the parties to .create binding agreement

.Negotiation is very important stage before signing contracts

The success of negotiation depends upon the negotiator having very clear idea in his .mind as to the relevant points and to the technical aspects of the contract

Clarity of thought process demands a comprehensive knowledge of the points that .should be issue

These points are based upon learning; experience; common sense and reasonable .foresight

Lawyers can negotiate, create and record contracts by covering all of the object .((contract object and execution

.Consultation with technical experts is fundamental

Most lawyers talk in terms of "negotiation and drafting" of contracts, suggesting that .negotiation always precedes the actual drafting of contract language

That is not necessarily a realistic way to view the process, although in some cases negotiation and drafting go hand. In other cases, negotiation of the agreement's provisions takes place one party submits a draft agreement to other party for .consideration

There are still other cases in which a letter of intent is the first meaningful .communication between the parties

:The contract from-1

Signed agreement at the international level is the result of a long process of .negotiation. During this stage pre-contract materials are produced

:Pre-contract material-1

Invitation to tender, covering letter, letter of intent, exchange of explanatory faxes, memorandum of understanding, minutes of meeting ect. Are all the initial preliminary material. All of this information must be analyzed before taking a decision as to exactly how much of it is to be included or excluded or converted into .part of the actual contract

:With this in mind

It is important to define where "lawyers is at" in the negotiation process. The meaning of some of the exchanges of correspondence; minutes of meeting ect, and .whether these pre-contract materials have contractual signification

Negotiation focuses on the agenda to be followed in order to conclude a contract. It .would be advisable to number the material in numerical order for ease of reference

The memorandum of understanding is prepared at the end of heavy negotiation to .reflect the exact commercial arrangement of the parties

.If the memorandum of understanding sets out the final commercial position

:Checklist-2

When writing an agreement, the main two questions are: Have I remembered to cover every thing within the contract? And is my contract 100% legal and ?enforceable according to the applicable and the parties' laws

To answer these questions lawyers should establish a checklist that includes clauses .concerning its validity

.The clauses hereinafter are different from one contract to another

The following list is not an exhaustive one, but quite a large one to select the issues needed for each contract

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:The checklist includes

Parties. they are to be clearly mentioned with their respective address and name/s .and identity of the persons who represent each other respectively

Authority. There are two level of authority that the legal adviser has to address. First, the authority of the other contracting party. Company or a partnership it has the corporate capacity to enter into the proposed contract. Second, has the person who ?represent the other contracting party the required personal authority to engage it

Preamble. It is where parties personalize their respective intentions, background, experience, objects ect. "where as", it important for a lawyer to be precise and explain why the contract is being entered into. The legal advisor could use the preamble to cover specific representations that are different from the subject of the contract. It is an important clause because it indicates common ground between the .parties

Definitions. They are so important in international contracts. That is due to the deference of culture of the contracting parties who have different meaning (i.e. good faith). Definitions are usually assembled in one place, normally right at the beginning .of the contract

Interpretation. If the contracting parties do not have the same interpretation to one :term, it would be better to define it

Words and expressions. The problem sometimes arises when a lawyer make translation from one language to another. The translation would be correct but the .chosen word loses precision

Pre-contract material. Such as letter of intent or memorandum etc. Are they binding or not? Lawyers have to make that clear. They should be biding if one party wishes .to exclude competing bids and needs to move quickly

Subject (purpose) of the contract. The subject of the contract should be mentioned for many reasons. First, it would make clear that the contract is legal. Second, it would give no opportunity to judges or arbitrators to qualify the contract. Third, the subject has an indicative importance for the interpretation of the contract and the .extent of the parties' obligations

Parties' obligations. It is necessary that lawyers understand these technical obligations to draft them in proper way and in order to find out the appropriate .liability

Responsibilities. In all contracts "it is absolutely essential that every party knows, at ."the various review stage exactly what are his/her Responsibilities

Liability for performance. This must be studied according to the terms of the .contract and the applicable law

.Limitation of liability. It should figure in the contract such as indirect liability

Exclusion of liability. When the liability is excluded and how? The answer could be .found explicitly in the contract or in the applicable law

Penalty and/or damages. It is highly advisable to make them equitable. It is essential to figure out their legality according to some legal system which intervenes to limit .(their extension (Syria

Price. This should to be having any problem later. Calculated without having any ."problem later. "selling fuel agreement

Payment method. A letter of credit is now the use mode of payment. All its .conditions, terms and documents should be precise

Time/ term of the contract. On what date the contract comes into force and for approximately how long will it last? Could it be renewed, extended or not? What is the guarantee for respecting the contract term and what kind of penalty could .applied? Lawyers have to think about that

Delivery. How and when the delivery is done? This clause leads to know when the title passes from one party to another; who is responsible for the damages caused at .a certain time

Transportation. Is there only one kind of transportation (maritime) or combined ?transportation? How the risk of transportation could be insured

Duration of delivery. The duration is important for different delivery periods and to .schedule the ship arrival for example

?Delay. When the delay starts? How could be proved

Consequence of delay. Shall a penalty be imposed on the delayed party even ?thought no damages occurred

Default. The clause includes the cases of default. For example, in many buying/ selling fuel contracts a delay of more than 10 days is considered as default

Consequence of Default. What are the defaulting party's liabilities? Do they concern .the breach of contract and payment of an indemnity

Title. When and how the title on the goods passes to the buyer? How is the right to ?ask for damages and right on the insurance deed

Risk. In international contract, and even most contracts passing of ownership and then risk have nothing to do with payment. The party may agree that ownership will .not pass until the seller has been paid in full

.Insurance and the right on the insurance deed

Test, inspection, certifications and acceptance. Title and risk could not pass to buyer, per example, unless he/ she accepts the goods after testing and inspecting them. In a contract of selling fuel, buyer will not accept the goods unless a certification of .quality is delivered by an independent inspector of the buyer at the discharging port

Intellectual property. The question of intellectual property is a very important one in different kinds of contract such as license industrial cooperation, agreements. The topic of intellectual property gives rise to many questions: who owns the plans and documents to used? Must patens be update before work begins? Do the parties ?have the right to use them

Force majeure. It means what lawyer wishes it to mean for the purpose of his/her .contract, especially for common law lawyer

Frustration. That is an excuse for a party's non –performance because of some unforeseeable circumstances. If the entire performance of a contract becomes fundamentally changed without any fault of either party, the contract is considered .terminated

Hardship. Some countries take in consideration the concept of hardship for some kinds of contract. Nevertheless, in a long-term contract, I always advise to include .the agreement a hardship clause

Sub-contracting. It is a very important clause in construction contracts. Often, .subcontracting is not permitted without the other party's written consent of

Confidentiality. Commercial relations are confidential per nature. And this .confidentiality should be protected

Right to audit. It is a highly major clause in long-term contracts especially in the .petroleum field

Taxation. What are the direct or indirect taxes related to the signature of the contract, its execution or termination? Which party should pay which tax? Where ?should it be paid

Boycotting. It is an essential clause in most (if not all) contracts executed in the Arab World. It becomes American policy against some countries in the World. The Arab .Countries boycott those companies that invest in Israel. Recently

Guarantees, bonds etc. Does the relationship between the contracting parties ?require any kind of guaranty? If yes, how it should be called and when

Contract language. It is generally conceded that international contracts should have an official language. For example, a contract drafted in both Arabic and English languages might state that: "the Arabic text is to be regarded as the definitive and ."official text of the agreement

Governing law. It is a crucial clause. Often each party insist on applying his own law. This will is supported by the ignorance of the other party's laws and regulations and to avoid un-desired surprise. The contractors are advised to apply the law the most .appropriate to their relationship

Disputes. Most international contracts contain dispute resolution clause. In some contracts, dispute resolution clause. In some contracts, dispute resolution clause provides for or the other or for litigation in the domestic courts of a country regarded as neutral by the contracting parties. More and more in the international commercial relationship a typical dispute resolution clause provides for arbitration under the rules of domestic or international arbitration (ICC, AAA, London Court of .(.International Arbitration etc

If the parties choose intuitional arbitration, they are advised by the international arbitrators to specify the following points:

.the type of dispute resolution to be employed

.The rules system for the arbitration

.The language and the site of arbitration

.The number of arbitrators and method of selecting them

If the parties prefer an "ad hoc" arbitration, the arbitration clause needs to specify the following:

.scope of the arbitration

.Jurisdiction of the arbitration

.Demand for arbitration and response time

.Representation by counsel

.Selection of arbitrators

.Site of arbitration

.Language of arbitration

.Applicable law

.Procedural rules

.Issuance of award

.Enforcement of the award

.Allocation of cost of arbitration

Jurisdiction. The jurisdictions of the contracting are important for validity of the contract, its execution and its termination.

Notice provisions and service of legal process. It provides a mechanism for addressing of notice under the contract and during its execution, for its termination or for litigation and arbitration (the service address of the parties).

Signatures. The signature should be done by major contractor and person who duly represent the legal entity. And it should be certified by the appropriate authorities if .required by the law

Schedules and annexes documents. Often these have technical aspects and should make part of the contract. It is advisable that lawyers try to understand these .technical issues as much as possible

:II-Drafting techniques

Contract is normally different in some material respect. Even in common international contracts such as selling petroleum agreement, some different persists. Differences may be fundamental, minor or peripheral. It is impossible to have a "model contract" for international commercial contracts for all prepossess, nevertheless, there are some general clauses which exist in most commercial .contracts

:How to write-1

After establishing the checklist, consulting technical advisors, having the pre-contract by material, engaging the original thought and terminating the negotiation phases, .the legal adviser is ready to prepare the final draft of the contract

First, it is essential to organize the terms of the contract by making a plan to know .the way in which the contract is to written

Second, the writer shall not forget the rules of interpretation. The rule of ."interpretation makes part of definition and "whereas clause

Third, it is very sensible to have one style in drafting the contract. Lawyer can, start one clause by stating the obligations of one party, then the exception to these obligations, then liability for non-performance to end by listing the possibility of .limiting this liability

As to write international contract in English legal language some advices have been given by English native experts. The rule should always be to aim for clarity and brevity. Then lawyers should write in short and clear sentences. You must be .prepared to work with long sentences if you deal with legal English

.The use of capital letters is one of the features of English language

Punctuation creates some problems to lawyers in general and non-English native in .particular

Before concluding, it is most important to read the draft through carefully several times to check that everything is clear, that there are no contradictions, and that .nothing has been left out

In the final analysis, drafting a contract is no more- or less- than the parties saying .what they mean in a way that conveys the same meaning to both of them

The drafting of a contract deserves all the time and attention that the parties can " afford to devote to il " 27. Care in planning, negotiating and drafting stages will prevent disturbances during the life of the agreement and for its termination. Although lawyers should pay careful attention to the drafting stage and try to figure out all future problems and their solutions; it is impossible to give advice about how ..to write a perfect agreement or to give an example of it