Top Ten Tips in Drafting and Negotiating International Contracts

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Contracts for international transactions contain a mix of the familiar and the exotic. Familiar, in that deals resemble each other the world over, and so does the language used to express them. Exotic, in that differences in legal and business environments can require different approaches, or at least make them advisable. If you ignore the familiar, you end up reinventing the wheel. If you ignore the exotic, you might be in for unpleasant surprises.

Here are some suggestions for navigating international transactions.

1. The Language of the Contract

English is the lingua franca of international business, so it's commonplace for parties from different countries to enter into contracts in English, even if neither party is from an English-speaking country. And international companies generally find it simpler to have all their contracts be in English instead of a mix of languages.

But if a contract party and its lawyers aren't used to working in English, the benefit of prevailing on them to accept English-language contracts might be more than offset by problems after signing caused by their not understanding what they had agreed to. For example, Chinese courts have been willing to hold that a given contract not in Chinese is void because the Chinese party simply didn't understand it.

And in 2013, an Indonesian district court held that contracts entered into with Indonesian entities after 9 July 2009 that are not in the Indonesian language, Bahasa Indonesia, are void under a 2009 law.

If using just English raises concerns, have the parties waive the right to claim the contract is invalid because it's in English, or enter into dual-language contracts, with English as the governing language, or do both. But bear in mind the cost and delay involved in translating lengthy contracts into another language, as well as the possibility that disgruntled parties might mine translations for flaws that could be used to challenge the interpretation of key provisions or the validity of the contract.

2. Clear Contract Prose

Use clear language in your contracts. Any given English-language business contract will likely be riddled with the deficient usages that characterize traditional contract language—flagrant archaisms, redundancy, botched use of verbs, and so on. Many lawyers in the U.S. and England are wedded to traditional drafting, and some drafters in other jurisdictions seem to relish the most archaic and florid

elements of traditional language. But readers and, most importantly, courts in other countries might respond with some combination of bewilderment and hostility.

3. Common Law Versus Civil Law

In the civil-law tradition, contracts are shorter than their common-law counterparts and attempt to address fewer contingencies. That's presumably because civil-law codes address issues that in common-law systems are routinely covered in contracts. The notion that there's a greater risk of litigation in common-law countries might also have something to do with it.

But regardless of tradition, Anglo-American law firms have brought their style of practice, including Anglo-American-style transaction documentation, to civil-law countries. As a result, the distinction between the two types of contracts has blurred. In fact, promiscuous copy-and-pasting results in concepts appropriate only under common law—for example, the requirement that a contract be supported by "consideration"—finding their way into civil-law contracts.

4. Jurisdictional Issues

When a company does business in an overseas jurisdiction, it's routine for the parties to negotiate whether the law and courts of one or other party govern any dispute. Depending on what's at stake, they might opt for a compromise—for example, making English law the governing law, or providing for arbitration in Switzerland.

It's a good idea to discuss with clients beforehand any fallback positions to adopt if their preferred governing law or jurisdiction isn't accepted. Parties from the Americas should be relatively amenable to having New York law govern. European, Middle Eastern, or African parties might be fine with English law. Singapore and perhaps Australian law and arbitration should be acceptable to Asian parties.

If a contract will result in your client doing business in a jurisdiction where it's not currently active, consider whether that would create a "permanent establishment" leading to an obligation to pay taxes.

5. Terms of Art

A term of art such as warranty might mean one thing under U.S. law and something different under, say, Czech law. The governing law would presumably determine which meaning applies, but it would be understandable if nevertheless some confusion resulted. For purposes of an English-language contract governed by the law of a jurisdiction where the courts use a language other than English, it might be prudent to state any critical terms of art in that other language, and in parentheses, directly after the English version, although too much of this can clog up a contract.

A more comprehensive fix would be to replace terms of art with something simpler. For example, instead of having a party hypothecate a security interest, have it simply grant that security interest.

Particularly problematic are terms of art used in provisions that seek to limit liability. The term of art consequential damages is widely misunderstood by American and English lawyers; adding to the mix notions of what that term might mean in other jurisdictions would likely increase the confusion. You might want to consider simpler alternatives, for example an absolute cap on damages.

6. Personnel

Be attuned to distinctions in legal personnel in overseas jurisdictions. For example, in Japan, both bengoshi (Japan-qualified lawyers) and Japanese nationals with overseas qualifications work with English-language contracts. Don't be surprised if a member of one group in a given jurisdiction has views regarding the strengths and weaknesses of the different groups. And in some countries and companies, contract managers might exert as much influence as the lawyers.

7. In Negotiations, Expect the Unexpected

In international transactions, you might find yourself negotiating issues that you hadn't expected to encounter. For example, the other

side might insist that "force majeure" be grounds for nonpayment of existing debts, or that liability for breaches of confidentiality be capped. It might be that the person on the other side isn't familiar with how such deal points are usually handled. That's not necessarily to their discredit—how "boilerplate" issues are handled in domestic U.S. transactions can be more a matter of habit than logic.

8. Negotiation Logistics

Even in domestic transactions, the back-and-forth between the parties can be a source of frustration. That can be aggravated when you add an international component.

For example, erratic use of Microsoft Word's "track changes" feature can make a draft misleading, in that changes aren't marked or it's not clear who made changes. If a counterparty in an overseas jurisdiction isn't used to technology for showing changes, discuss with them beforehand procedures to follow when exchanging drafts—the simpler the better.

If the parties are in different time zones, you might gain credit—credit that you could call on at some other point in the transaction—by agreeing to schedule a call at a time that is during regular working hours for the other party but less convenient for you. (Mind you, nothing is gained by your being half-asleep during that call!) Also, if you agree to fly from the U.S. to Lahore for a key face-to-face meeting, that might help negotiations go more smoothly and earn you a measure of goodwill.

Remember also that in some cultures it's expected that meetings begin with a prolonged exchange of pleasantries.

9. Contract-Signing Formalities

In some jurisdictions, for a contract to be valid, the parties have to go through formalities that might seem almost ritualistic to those familiar with the relatively informal U.S. way of doing things. For example, each party might prove that whoever is signing is authorized. And be prepared for only original signatures to be accepted, or for signatories to wield corporate seals.

Some of these formalities might seem quaint, but they might equally be appropriate in the context of legal systems that offer limited protection against fraud.

10. Using Local Counsel

Generally, it's essential to engage local counsel if you want to avoid tripping over local rules. But be clear with them about their role. In some countries, local counsel might be so concerned about exceeding their brief that they fail to think creatively. Or out of respect for your role as managing attorney, they might analyze a situation from both sides without actually recommending what they would do if they were in your client's position.

And if you have in mind engaging in no-holds-barred negotiations, remember that after your deal is done, your local counsel and the people on the other side of the deal will have to continue to live together in that particular pond.

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A theme that runs through these points is, be alert! Don't assume that a transaction will proceed in the same manner as it would in your home jurisdiction. Instead, assume that it won't, unless you confirm otherwise.

Additional Information:

Click on the following links to see posts on the Adams on Contract Drafting blog about using English-language contracts in China (here), civil-law drafting compared to civil-law drafting (here), implications of the term *consequential damages* (here), and document-comparison etiquette (here).

http://www.acc.com/legalresources/publications/topten/drafting-and-negotiating-intl-contracts.cfm