International Law Practitioners' Panel
Douglas C. Robertson of Heenan Blaikie LLP, Alex Kongisberg of Lapointe Rosenstein LLP, and Martin J. Valasek of Ogilvy Renault LLP
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Three distinguished lawyers in various areas of international law told their stories about their particular practice. Our speakers included Douglas C. Robertson (Heenan Blaikie LLP) speaking on international business transactions, problems and pitfalls; Alex Konigsberg (Lapointe Rosenstein LLP) speaking on international trade and the international community; and Martin J. Valasek (Ogilvy Renault LLP) speaking on international arbitration.

Introductions by Ilir Orana

DOUGLAS C. ROBERTSON

In an increasingly specialized world, difficult to practice law without being involved in int'l business. This includes franchising, M&A, joint ventures, etc. Memorandum distributed to teach young members of the firm what to think about. Not useful for exams, but piques your curiosity in exposure to an int'l transaction.

Transborder transaction involves at least 2, if not up to 4 parties across int'l boundaries. Practitioner acts for 1 of the parties. Memo from point of view of client entering the transaction – the same considerations in fact apply to all parties.

First rule, with a new client: "know your client." Understand his business objectives, personality, expectations, and how he relates to other clients & lawyers.

Second rule, the other side of the transaction. Put yourself in the shoes of the counterparty. Know that the strategies & tactics you use for your client will be received without antagonism by the other side.

Next, "don't assume anything." Once you cross the border, everything changes. Question everything. Never be afraid to ask the same question over & over until you get the right answer. In most cross-border transactions, most sides will have an investment banker or other business advisor who will also have independent counsel. You must understand the role of that person, as well.

Next, understand the lawyers in other jurisdictions. Must select counsel in the other jurisdiction. Each of you is most likely unfamiliar with the other jurisdiction. Very difficult to find good local counsel in a foreign jurisdiction. This takes several days or weeks to find the guy who will give fast, accurate answers to achieve what you want to achieve.

Next, know where the transaction is going from the beginning to the end – even beyond the implementation stage. In his current transaction, 3 to 4 year horizon, with an IPO or other transaction at the end. Must build every step that will be taken.

With outline in hand, approach documentation stage. Very comprehensive letter of intent to outline obvious stages of the transaction. The investment or other agreements come AFTER the letter of intent.

One of the most difficult elements is the choice of law governing the relationship. Sometimes may want to pick a law more familiar to you, or more suitable for the foreign transaction. If choose the law of the foreign transaction, then places YOU at risk because 50% takes place outside. But, difficult to convince other party to accept Canadian or UK law. This aspect must be negotiated.

Tax structuring transaction essential & critical. At least two, three or four jurisdictions have different rules applicable to the same thing, and want to meld everything together so each party gets the best tax break. Must set the tax parameters before making the deal.

Not dealing with warranties & indemnities. Foreign jurisdictions often unfamiliar with the exhaustive list of warranties & indemnities in our jurisdiction. Not want to bamboozle the other side, but also want to protect your client's interests.

In business combination, do you give piggy back rights?

Governmental approvals & consents. Once you cross a border, must deal with this issue. Competition law – 52 jurisdictions with their respective notification requirements. Must deal with clearance in sometimes up to 5 jurisdictions before clearing the transaction. These requirements may be formal or informal which may catch your transaction.

Exchange controls & repatriation of profits. When deal in emerging world, find yourself in many cases dealing with a restricted or controlled currency. How do we get the money out now & what is the probable evolution? Do we need to do anything going in to ensure that we will be able to get out? Try to leverage investment so that not sink too much equity.

Dispute resolution. No matter how good a marriage, there's fighting along the way. What happens when you come to a real impasse – do you rely on the courts, or on an arbitration provision? All arbitration options expensive, but in an international transaction, you usually do not want to rely on a judicial system that does not have a highly sophisticated system of laws, independent judiciary, predictable outcome, etc. This is not highly debated, but must still be considered.

ALEX KONIGSBERG

Negotiates international commercial transactions. At least half of his practice involves countries that have nothing to do with Canada. In Québec, and in Canada, have a tremendous opportunity because familiar with both civil and common law. This is a huge asset. Also that we are familiar with several languages.

Can name twenty huge companies running operations out of Montreal & Canada. Montrealers in particular tend to have an open mind regarding international commercial transactions – not simply "my way or the highway." Tend not to impose legal concepts foreign to other jurisdictions, such as indemnification.

Good news: has been able to see the world on someone else's tab, and developed a global network of friends. Bad news: must write in int'l journals & lecture, and develop a hatred for airports.

If involved in a transaction where it's your client doing the business, you must draft the agreement. Few lawyers have the sophistication in international transactions to draft this, so you must be the originator of such agreements. Must be familiar with the laws of foreign countries.

Example, you represent Canadian company selling water into Germany. You insist that Québec law applies, and write this in the agreement. Appropriate jurisdiction is … Appropriate law is Int'l Convention on Int'l Sale of Goods. Canada is a signatory, thus if write that Quebec law applies, then the Int'l Convention applies. Standard agreements you will draft: distribution, sales rep, licensing, transfer of technology. Few simple transactions, so must have familiarity with certain int'l laws.

In EC, any of these standard agreements will likely be void. Treaty of Rome as governing law in Europe, a section of this law says that when enter into an agreement affecting trade between member-states, and has impact of lessening or affecting competition, then this agreement null & void.

About 35 countries have franchise or transfer of technology legislation that you must comply with. In Canada & US, laws very carefully drafted. In other countries, laws not so carefully drafted & thus applies to a broader scope. Must become familiar with these laws.

Must retain local counsel in a foreign jurisdiction – but you may limit their mandate. Supports international mediation before entering international arbitration.

Culture plays a very important role. Not just the legal culture, but the commercial culture. Must be conversant in the commercial culture. This separates Canadians from other countries. Example, transaction in Finland, at 5 pm sharp, Chairman of the Board announced that meeting adjourned in the sauna. Make it your business before leaving to a foreign country to learn about this culture.

Advise your clients to choose wisely in their partner to do business with. You usually only get one kick at the can in international transactions.

MARTIN J. VALASEK

Dispute resolution in international transactions, focusing on international arbitration. Fundamentals of international arbitration. A consensual dispute resolution procedure that results in a binding decision on the parties. Court procedure also binding, but not consensual. You could insert a choice of forum clause, but you (in most cases) cannot pick your judge, so parties have no control over the procedure from that point of view. Differs from mediation, because no binding decision results from mediation, though the procedure is consensual. Mediator assists the parties to coming to an agreement, and process depends fundamentally on having parties agree on a solution.

Why is international arbitration such a sought after mechanism in international transactions?

In most cases, true opportunity to select & establish truly neutral body to resolve a dispute. Parties may be domiciled in different jurisdictions, subsidiaries in other jurisdictions, and transaction may have taken place in a different jurisdiction.

As a general rule, lawyers in int'l transactions try to limit uncertainty. By choosing a forum comfortable for all parties, and providing a neutral dispute resolution system for the transactions, then this is a valuable commodity for the transaction. If doing transaction in an emerging economy without the traditional rule of law we're accustomed to here, then very high risk in entering a transaction without an arbitration clause.

Also, critical that parties select the arbitrators – arbitrators who have expertise in the technical area, or in the type of transaction you're engaged in.

Advantages in the procedure itself – many different fora & rules, but default system may be adjusted by the parties.

Confidentiality of the procedure. If have court procedure, then dispute procedure often immediately available to the press. Usually have obligation to maintain confidentiality as to the fact of the proceedings & the content thereof.

Most important advantage is the enforceability of the outcome. Enforceability – the ability of the parties to take the decision rendered by the arbitrator and enforce it against the losing party. This is because of the New York Convention – one of the most successful international instruments. In that treaty, countries have agreed to enforce the awards of international tribunals. Decisions may be reviewed on breach of fundamental justice, but otherwise no ability to review the merits of the decision. New York Convention binds court systems to enforce the arbitral decision in a summary judgment procedure.

Same kind of enforceability exists for international investment arbitration, which takes place between investors and the States hosting that investment. This arbitration arises from investment agreements, or as a result of an arbitration provision in investment treaties (NAFTA, or Bilateral Investment Treaties). Washington Convention (ICSID) means host country has agreed to be bound by this arbitration.

When do the parties agree to arbitrate? Generally, parties encouraged to agree on a dispute resolution at the contract formation stage – thus before a dispute arises. Flexible procedure. Parties choose place of arbitration carefully based on convenience to the parties, physical & geographic factors, in a country signatory to the New York Convention.
Who is involved in arbitration? The parties, outside counsel, local counsel. Growing body of lawyers specialized in international arbitration. They tend to have experience & background dealing in different places. "Mafia" of arbitrators. System needs renewal, arbitrators also must be chosen based on their availability.

Arbitration does not have to be selected in a vacuum. It may be in a multi-step escalation clause. Starts with giving Executives thirty days to cool off, then another thirty days for mediation, then perhaps within six months may proceed to arbitration. Arbitration essentially an irreversible process.

Questions & Answers

Q: Role of international lawyers in broader society?

- Konigsberg: Tremendous opportunities in developing countries, such as how to develop an entrepreneurial class.
- Robertson: For example, in Russia, political considerations override rule of law. Bombardier being pilloried to construct Tibet railway. Political issue cast in moral terms.
- Valasek: Dispute resolution internationally takes dispute out of gunboat diplomacy and is something to be proud of. Network of relationships of respect for rule that has a transcendent power. For example, Yukos arbitration as one requiring a neutral body.