The International Lawyer's Deskbook

Edited by

Lucinda A. Low

Patrick M. Norton

Daniel M. Drory

Section of International Law and Practice

AMERICAN BAR ASSOCIATION

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PREFACE

This book is designed as a reference tool for lawyers facing international legal problems outside their own areas of expertise. In addition to an overview chapter and a chapter on selecting foreign counsel, there are twenty-four chapters discussing different areas of international law and practice. Each chapter provides an overview of the topic and a compendium of the sources of assistance that the authors consider most useful. The sources of assistance include printed materials (primary and secondary sources), institutional sources such as government agencies, international organizations and non-governmental organizations and, where available, on-line services. Although designed principally for U.S. practitioners, we hope the materials will also be helpful to foreign lawyers.

The book is not intended as a "how to" manual for specific problems or a do-it-yourself guide to international lawyering. All the topics are specialty topics, and they require considerably more knowledge and experience than the reading of a chapter will provide. What we hope this book will do is give the non-specialist reader a basis for dealing intelligently with the problem at hand.

To our knowledge, this is the first time a work of this type and scope has been attempted. It is undoubtedly imperfect; certainly no single volume could aspire to address all of the issues that may arise in the dynamic and complex world of international legal practice. Readers are invited to comment on the selection of topics in this edition, and to suggest topics for future editions. Comments or suggestions should be sent to:

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Re: *The International Lawyer's Deskbook* (1996 ed.)

For information on how to become a member of the Section of International Law and Practice, please refer to the insert at the back of the book, or call the Section office at (202) 662-1660.

We would like to thank Susan Frensilli Williams for her able production assistance on the book, John E. Noyes for his suggestions regarding on-line services, Karen Polk and Connie McLean of Miller & Chevalier for library and production assistance, respectively, and K'Ann Richter of Texas Instruments for production assistance. Last but not least, thanks are due to our firms for allowing us to pursue this project, and to our families for their tolerance of the intrusion of the red pen on weekends and holidays.

–The Editors

This book is dedicated to our spouses,

Daniel Magraw, Maureen Norton, and Eve Drory.

–The Editors

ABOUT THE EDITORS

Lucinda A. Low, a member of the California, Colorado, and District of Columbia bars, is a partner in the Washington, D.C. firm of Miller & Chevalier, Chartered. Ms. Low's practice emphasizes complex international business transactions, such as joint ventures and project financings, and U.S. regulation of international business. Ms. Low currently serves as the first woman to be elected to chair the Section of International Practice of the American Bar Association. She has taught International Business Transactions as an adjunct professor at the University of Colorado School of Law, and International Conflicts of Law at American University School of Law. She received her B.A. in Economics and Latin American Studies from Pomona College, and her J.D. from the University of California, Los Angeles School of Law, where she was Editor-in-Chief of the Law Review. Ms. Low speaks Portuguese, French and Spanish and has some knowledge of Italian, Japanese and Russian.

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CHAPTER 1

THE INTERNATIONAL PRACTICE OF LAW

The Editors

This chapter provides an overview of international legal practice and the general resources that are available to lawyers confronted by international legal issues. The following chapters will discuss specific areas of international legal practice and sources of assistance in each area.

I. INTRODUCTION

Practicing lawyers are increasingly confronted by commercial transactions and disputes with an international dimension. Goods, services, and capital cross international boundaries more frequently and in greater quantities than was imaginable only a few years ago. Significant commercial negotiations typically involve performance in more than one jurisdiction and parties of different, sometimes several, nationalities. If a dispute arises, the courts of more than one country and, in many cases, arbitral or other private tribunals as well, may have jurisdiction. Special rules will determine the proper forum, the procedures followed by that forum, and the enforcement of any resulting decision.

The common thread running through these diverse situations is the potential applicability to a transaction or dispute of one or more sets of laws that do not apply to transactions or disputes between nationals of the same country. From the standpoint of a U.S. practitioner, there are four such bodies of law: (1) U.S. laws, generally federal statutes, that specifically regulate international transactions or disputes and may apply not only to conduct within the United States but also extraterritorially; (2) the laws of foreign countries; (3) public international law; and (4) conflict of laws rules (or "private international law"), which determine which of several potentially applicable laws courts or arbitral tribunals will apply to a transaction or dispute, and which vary from jurisdiction to jurisdiction. Special rules developed by non-governmental international organizations (such as the International Chamber of Commerce) may also be incorporated into commercial agreements and can, in some instances, be of great assistance in clarifying the parties' intentions or conforming an agreement to international practice.

International legal practice now involves virtually every area of human endeavor. In some areas, important aspects of an international transaction or dispute may still be determined by local laws. (*See, e.g.*, Chapter 6, *Secured Transactions*, Chapter 9, *Securities Law*, Chapter 20, *Creditors' Rights and Bankruptcy*.) At least four areas, however, involve distinctly international legal issues and commonly confront private practitioners. These are trade, investment, technology transfer, and disputes.

A. International Trade

The sale of goods or services across national boundaries gives rise to a number of issues not present in domestic sales.

First, the movement of the goods or services will itself be subject to regulation. The exporting and importing countries (and countries of transshipment as well) will regulate the entry or exit of goods or services from their territories – prohibiting some, imposing restrictions or requirements on others, levying customs duties or other charges on still others. (*See* Chapter 13, *Export Controls, Sanctions and Antiboycott Laws*, and Chapter 12, *Customs Law*.) These national laws, sufficiently complex in themselves, are further complicated by a web of international agreements that restrict the rights of states to regulate international commerce. Multilateral conventions (GATT, the WTO agreements), regional arrangements (NAFTA, the European Union) and bilateral trade agreements often limit an importing country's right to restrict trade in goods and services. Similarly, international sanctions may prohibit exports to or transactions with particular countries (*e.g.*, current United Nations sanctions against Libya and Iraq) or in particular products (*e.g.*, the Missile Technology Control Regime). The consistency of national laws with international obligations of this kind is the source of negotiation and dispute on many levels, public and private. (*See* Chapter 16, *Trade Remedies and Benefits Programs*.) As new areas of national regulation are drawn into international trade agreements or applied extraterritorially, the complexities increase. (*See, e.g.*, Chapter 11, *Environmental Law*, and Chapter 23, *International Labor and Employment Law*.) If the goods and services are being procured by a foreign government, or financed by the U.S. government, special rules will apply. (*See* Chapter 15, *Government Procurement*.)

Second, the contract of purchase and sale may be subject to one or more national laws. The buyer and seller of the goods or services will typically stipulate to an applicable national law in their contract, and that choice will be respected in most jurisdictions. The state in whose territory the contract is performed may, however, have mandatory laws that will preempt the parties' choice, in whole or in part. Antitrust laws, securities laws, implied warranties designed to protect consumers, and rules concerning the enforcement of security interests are typical examples. The country of origin of the goods or services may also have laws that apply to activities outside its borders, if those activities have an effect in the state of origin. (*See* Chapter 8, *International Antitrust*, Chapter 9, *Securities*, Chapter 11, *Environmental Law*, and Chapter 23, *International Labor and Employment Law.*)

The purchase and sale agreement may also be subject to international rules. The parties may stipulate to the application of the United Nations Convention on Contracts for the International Sale of Goods,[1] or, in the absence of a stipulation of an applicable law, the Convention may apply if the parties' respective countries adhere to the Convention. Many contracts will also incorporate trade terms, such as the INCOTERMS promulgated by the International Chamber of Commerce ("ICC"), to specify by convenient abbreviations (FOB, CIF, etc.) the parties' payment and delivery obligations. (*See* Chapter 2, *International Commercial Transactions.*)

Third, international sales of goods or services are frequently accompanied by a number of ancillary agreements – contracts for the carriage of the goods, insurance agreements, letters of credit, other financing or security arrangements, etc. Each is also potentially subject to more than one set of laws. International maritime conventions and customary rules of admiralty, for example, may apply to the carriage of goods or to insurance contracts. International letters of credit almost invariably incorporate by reference the ICC's Uniform Customs and Practices for Documentary Credits. (*See* Chapter 5, *International Payment Methods.*) Export financing and insurance may be procured from specialized institutions such as the Export-Import Bank of the United States, with their own statutory restrictions, policies, and procedures. (See Chapter 3, *International Financing* and Chapter 4, *Political Risk Insurance.*)

Fourth, if the seller uses an agent or distributor in a foreign country, the agency or distributorship agreement will generally be governed, in whole or in part, by that country's laws. Many countries have enacted laws to protect local agents and distributors by, for example, permitting termination only upon the occurrence of specified events or the payment of termination fees or by requiring that all disputes be resolved in local courts. Local labor laws may, in some instances, also apply to agents. (*See* Chapter 2, *International Commercial Transactions.*) Payments to agents and distributors represent one of the many contexts in which issues under the U.S. Foreign Corrupt Practices Act may arise. (*See* Chapter 14, *The Foreign Corrupt Practices Act.*)

Fifth and finally, trade transactions (and the auxiliary agreements they generate), raise distinct tax issues under U.S. law, under foreign law, and under international agreements. (*See* Chapter 10, *U.S. Taxation of International Transactions.*)

B. International Investments

Investments by nationals of one country in the territory of another raise a different set of issues. Many countries prohibit foreign ownership in certain sectors of the economy or specify limitations on the percentage ownership that a foreign investor may hold in those sectors. Others require prior approval of foreign investments or regular reports by foreign investors pro-