Negotiating and Drafting International Agreements

Lotz & Company is a business law firm representing local, national and international clients. Our core practice areas include corporate & commercial, corporate finance & securities, mergers & acquisitions, and natural resources law. Particular expertise with the natural resources sector and routinely counsel a broad range of clients on resource property acquisition, exploration and development, industry specific agreements, and permitting, title and aboriginal matters.

Agenda

1. Pre-negotiation due diligence and preparation
2. Negotiating with parties outside Canada
3. Use of local and Canadian counsel
4. Identifying and managing special issues in international transactions
5. Avoiding common drafting pitfalls
6. Choice of investment structure / vehicle
7. Key contract terms and provisions
8. After-deal care
9. Dispute resolution

Pre-Negotiation Due Diligence & Preparation
### PRE-NEGOTIATION DUE DILIGENCE & PREPARATION

- **Local laws**
  - Are they developed?
  - Influence investment structure and size

- **Regulatory compliance**
  - Culture of compliance
  - Are property rights enforced?

- **Efficiency of tax regime**
  - Double taxation
  - Tax treaties

- **Stability of fiscal regime**
  - FX controls
  - Ability to repatriate profits (e.g. Argentina)

### PRE-NEGOTIATION DUE DILIGENCE & PREPARATION

- **Political and investment environment**
  - Desirability of having local partner
  - Transparency International “Corruption Perceptions Index”

- **Sources of information**
  - Foreign Affairs and International Trade Canada
    - [www.international.gc.ca/commerce](http://www.international.gc.ca/commerce)
    - Information on export and import controls
    - Trade negotiations and agreements
    - FIPAs (Foreign Investment Promotion and Protection Agreements)

- **Canadian Trade Commissioner Service**
  - [www.tradecommission.gc.ca/eng/exporters.jsp](http://www.tradecommission.gc.ca/eng/exporters.jsp)
  - Information on various export markets
  - 150 offices around the world and across Canada
  - Offer market intelligence and insight
  - Services offered free of charge
PRE-NEGOTIATION DUE DILIGENCE & PREPARATION

- International Chamber of Commerce
  - www.iccwbo.org
  - Dispute resolution services
  - Policies and rules
  - Surveys and reports
  - Trade tools

- BC Ministry of Jobs, Tourism and Skills Training / International Market Development
  - www.britishcolumbia.ca

PRE-NEGOTIATION DUE DILIGENCE & PREPARATION

- Know your bottom line and reason for foreign venture
  - Risk tolerance
  - Perceived strategic importance can overcome many factors (e.g. China)

NEGOTIATING AND DRAFTING INTERNATIONAL AGREEMENTS

Negotiating with Parties Outside Canada

- Pace of negotiations
  - International agreements take longer

- Choice of venue
  - “Home-ice” advantage

- Composition of negotiating team
  - How many and how senior?
**NEGOTIATING WITH PARTIES OUTSIDE CANADA**

- Time of negotiations
  - Local holidays and hours of work

- Conduct of negotiations
  - Point by point vs. general principals
  - Theatrics

- Expectations re look and feel of final contract
  - Exhaustive representations and warranties
  - Specificity of obligations

**NEGOTIATING WITH PARTIES OUTSIDE CANADA**

- Use of translators
  - Simultaneous translation
  - Who provides?
  - Accuracy and loyalty

**NEGOTIATING AND DRAFTING INTERNATIONAL AGREEMENTS**

Use of Local & Canadian Counsel

- Do not rely on lawyers or accountants to do pre-deal, macro level due diligence
  - Send your own people over - you have to live with deal once signed

- Interplay between local and home jurisdiction laws
  - Legal squeeze – operate under 2 or more legal systems (home, foreign and possible 3rd regime)
    - Rely on local and home counsel to ensure compliance
    - Trend toward exporting Western standards of conduct overseas
    - Foreign corrupt trade practices legislation
**USE OF LOCAL AND CANADIAN COUNSEL**

- Common terms including “property”, “contract” and “debt” have different meanings in different legal systems
  - Contract formation requirements vary
- Need local lawyer
  - Rely on your home counsel to recommend
  - Third party publications

**IDENTIFYING & MANAGING SPECIAL RISKS IN INTERNATIONAL TRANSACTIONS**

- Foreign currency risk
  - You, other party, shared
  - Insurance/hedge
- Global events
  - War
  - Famine
  - Trade conflicts
  - Change in government

**IDENTIFYING & MANAGING SPECIAL RISKS IN INTERNATIONAL TRANSACTIONS**

- Instability of international countries
  - International environment unstable
  - Uncertain enforcement mechanism
  - Cost of enforcement
  - Different perceptions on binding nature of contracts
- Foreign Governments
  - Are not private parties
  - You do not have equal bargaining power
  - Discrimination by foreign government
    - WTO
    - Canada FIPAs

**NEGOTIATING AND DRAFTING INTERNATIONAL AGREEMENTS**

Identifying & Managing Special Risks in International Transactions
IDENTIFYING & MANAGING SPECIAL RISKS IN INTERNATIONAL TRANSACTIONS

- FCTPA issues
- Governments often (silent) participants – reserve right to repudiate burdensome contracts on grounds of national sovereignty and public welfare
- Argentina (Repsol)

AVOIDING COMMON STRUCTURING PITFALLS

- Not anticipating renegotiation – nothing is forever
  - Ivanhoe/Rio Tinto - Oyu Tolgoi

- Forcing Canadian/US-style drafting protocols on foreign parties
  - Extensive representatives and warranties
  - Exhaustive list of contingences

AVOIDING COMMON STRUCTURING PITFALLS

- Not anticipating inherent instability of international contracts
  - Clearly set out business terms
  - Realize foreign governments always close by
  - Specify choice of law and dispute resolution mechanism
Choice of Investment Structure / Vehicle

- Function of:
  - Tax efficiency
  - Political realities
  - Legal requirements
    - Russia (max. investment in strategies entities is 10%)
    - South Africa (BEE)

- Due diligence on local partner as important as legal and financial due diligence
  - Squeeze-out risk
  - Local face of enterprise in foreign countries
  - FCTPA issues
  - Long-term partner (+/-)
  - 3rd party service providers

Key Contract Terms and Provisions
• Governing law
  • Applicable law vs. jurisdiction
  • Why applicable law important?
    • Determines system of rules under which contract will be interpreted and governed
    • Often contract not sufficient to govern entire relationship/transaction

• Dispute resolution mechanism
  • Why important to deal with upfront
    • Best way to protect against intentional breaches
    • Weak remedies = compromise
    • Enforcement unreasonably expensive = compromise
  • Jurisdiction of courts or binding arbitration

• Why arbitration?
  • Neutral tribunal
  • Qualified adjudicators
  • Less formality
  • Quicker resolution
  • Confidentiality
  • Exclude state courts
  • New York Convention of 1958 (UN Convention on Recognition and Enforcement of Foreign Arbitration Awards)

• Why courts?
  • Only expect to have to defend
  • Less neutral?
  • Have not ratified New York Convention
  • Subject matter not arbitrable
KEY CONTRACT TERMS AND PROVISIONS

• Arbitration centers
  • International Chamber of Commerce
  • American Arbitration Association
  • London Court of International Arbitration

• Each center has own:
  • Rules and procedures
  • List of experts
  • Capacity and expertise to handle international arbitrations

KEY CONTRACT TERMS AND PROVISIONS

• Enforcement of arbitration decisions
  • United Nations Convention on Recognition and Enforcement of Foreign Arbitration Awards
    • Not every country a signatory

KEY CONTRACT TERMS AND PROVISIONS

• Force majeure
  • Very common where contract expected to last for extended period
  • 3 conditions required:
    • Unforeseeable
    • Outside control of parties
    • Performance must be impossible

A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

• Hardship
  • No deal is forever
  • Control renegotiation process
  • Some national laws recognize (as a matter of public policy) that hardship can nullify contract
  • Unidroit Principles

ARTICLE 6.2.1 (Contract to be observed)

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

ARTICLE 6.2.2 (Definition of hardship)

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
(c) the events are beyond the control of the disadvantaged party; and
(d) the risk of the events was not assumed by the disadvantaged party.

• Damages
  • Purpose:
    • Determine in advance the amount of damage to be compensated
    • Limit amount of damages
    • Induce other party to perform contract – penalty
  • Problems:
    • Some legal systems do not accept penalty function of damages (US vs. Europe)
    • Others do not let you limit damages for gross negligence (public policy)
    • Legal fees not automatically recoverable
    • Limitation periods
### Modifications
- Requirements – writing?
- Not every legal system requires that contracts be in writing to be valid
- Reflective of actual business practices?
- Originals required?
- Email confirmation/amendments?

#### Example:
This Agreement can only be modified by a written agreement signed by authorized representatives of both parties.

vs.

All modifications to this Agreement must be in writing.

### Severability
- Invalidity of one or more provisions does not render entire agreement invalid
- Saves the contract

#### Example:
If any provision of this Agreement is held by a court of competent jurisdiction to be unenforceable, such decision shall not affect the enforceability of the remaining provisions, which provisions shall continue in full force and effect.

### Non-Waiver
- Failure by one party to insist on strict performance by the other party of that party’s obligations does not waive future performance
- Some jurisdiction take very strict approach to contract interpretation
- Breach of contract for cause?

#### Example:
The failure by a party to insist upon performance of any provision of this Agreement shall not affect the right of such party to require performance thereof in the future or constitute a waiver of any subsequent breach of same.
AFTER-DEAL CARE

• Prepare manuals and policies for offshore enterprise
• Conduct regular audits
  • Sino-Forest
• Integrate foreign and home operations
  • Annual visits by head office personal
    • Assists head office in understanding local challenges
  • Invite local managers to head office
    • Helps local management to understand head office expectations and reasons behind policies)

AFTER-DEAL CARE

• Be a good corporate citizen
  • Bhopal – Union Carbide India
  • BP – Gulf of Mexico

NEGOTIATING AND DRAFTING INTERNATIONAL AGREEMENTS
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Dispute Resolution

• Avoid them
  • Contract will only be followed so long as both parties are benefiting
  • Build relationships
  • Show respect

• Be prepared to re-negotiate
DISPUTE RESOLUTION

• Make use of government/treaty support
  • WTO
  • FIPAs
  • Foreign Affairs and International Trade Canada
  • International Chamber of Commerce

QUESTIONS?

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