Some Practical Applications of International Law to Government Contracts

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COMMENTARY

SOME PRACTICAL APPLICATIONS OF INTERNATIONAL LAW TO GOVERNMENT CONTRACTS

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As predictions of the expansion of international commerce are made by government and business leaders throughout the world almost daily, the implications of international law relating to government contracts increase in interest and importance. Inconsistencies and lack of clear knowledge abound when the United States Government procures supplies, services and construction from foreign governments and foreign contractors, or when American contractors enter into agreements with foreign governments.

Insofar as the performance and administration of foreign government contracts are concerned, the American lawyer specializing in this field must first ascertain the applicable international law, either from the contract itself or from the international rules that apply to the law of the countries involved. These rules stem either from treaty law, which has the advantages of precise wording and specificity, or from the more flexible law based on customs practiced by different nations. If the contract does not stipulate what the governing international law is to be, the rules will aid in determining whether it is to be United States law, the law of the foreign government, or independent international law.

The attorney must also be able to gauge the impact of the applicable international law on the procurements contract. Whether that law is rooted in precedent-oriented common law or code-structured civil law can make a great difference to the interpretation and enforcement of the agreement. Of equal consequence is the law's effect on the volatile areas of bid protests, claims against the procuring government, contractual disputes, and litigation.

Finally, nonlegal considerations of much practical importance demand the lawyer's attention. Will the language barrier be a problem? Should the lawyer consult counsel from the foreign country during the negotiation process? Are there any unusual alien customs which might be stumbling blocks to a viable agreement? Can he count on assistance from the United States State Department in his dealings with the foreign government or foreign contractor? The answers to these questions, as well as those to the legal problems mentioned above, are

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certain to become more urgent as international government contracts increase in number and dollar amount with each passing day.

I. Ascertainment of the Applicable International Law

A. Conventions and Customs

When one is concerned with the drafting of an international agreement, he must study thoroughly any international treaties that will apply to the subject matter of the international contract or to its performance and settlement. There are many international conventions at various levels of government covering a multitude of such matters; they form the basis of much of the application of international law to foreign government contracts.\(^2\)

The United States has entered into many trade conventions with foreign governments which control to a substantial degree the administration and performance of government contracts in those countries. The content of such conventions or treaties can be ascertained by contacting the United States Department of State or the foreign country’s embassy in Washington, or the local consular official representing the foreign country. Investigation should always be made of possible application of such a convention or treaty before a foreign contract is negotiated and, in the event any dispute arises, in connection with its performance. International law based upon customs, however, is much more difficult to ascertain.

Management consultants and others are predicting that during the next two decades the major growth in manufacturing industries of the world’s three rich industrial areas, North America, northwest Europe and Japan, will be in the direction of expansion largely to southern Europe, the Middle East, South America, North Africa or, quite conceivably, on some licensing and management contract terms, to Communist Europe.\(^3\) The law applicable to government contracts requiring performance in such less developed and less sophisticated countries will undoubtedly give contract administrators and lawyers many anxious moments.

To advise wisely in such situations, lawyers will undoubtedly have to be resourceful in their efforts to ascertain the applicable law. One personal experience illustrates the problems that can be encountered in counseling with regard to rights under a foreign government contract. The writer was retained to advise a joint venture that had a contract for the construction of the Derbendi Khan Dam in Iraq. As a result of the encountering of an alleged changed condition and wage acceleration, substantial claims were submitted by the joint venture to the Iraqi Government.

In order to prepare the claim letter the writer had to know the provisions of the Iraqi Civil Code. There was no English translation of the Iraqi Civil Code available anywhere in the world (1960). The writer did obtain a copy of the law...

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2 For discussion of many of the provisions of such international agreements, see Roberts, supra note 1, at 7.
of the Code written in Arabic. Since he did not read Arabic, it was necessary for him to contact a former Baghdad lawyer who read Arabic well and was chief of the Middle Eastern and North African Law Division of the Congressional Library. The Civil Codes of Iraq, Egypt and Libya were almost identical, especially with regard to provisions that pertain to contract performance. English translations of the Egyptian and Libyan Codes were available and were studied. When pertinent provisions in the Egyptian and Libyan Codes were discovered the Baghdad lawyer was asked to read the comparable provisions in the Iraqi Civil Code to determine if they were identical. By such a procedure a claim letter, applying the provisions of the Iraqi Civil Code, was prepared and filed with the appropriate Iraqi procurement officials. A reasonable settlement was eventually negotiated with the Iraqi Government.

B. Choice of Law

Care should be taken in the drafting of foreign government contracts to make as certain as possible the law that should apply to the execution, performance, payment, and settlement of disputes. If the contract does not include a choice-of-law clause there are three possibilities: One, United States law should govern; two, the law of a foreign country should govern; and three, independent international law rules should govern.4

In the case of contracts made between the United States Government and foreign private contractors, such contracts usually contain the provisions required by the Armed Services Procurement Regulations (ASPR). Those provisions have been construed many times by American courts and administrative bodies. A strong argument can be made that they should be interpreted in accordance with the construction placed upon them in American law.

The arguments for applying foreign law would be based upon standard conflict-of-law principles applicable to contracts. Under such rules, the law of the country in which the execution, performance, or payment is to take place will control. The actual situation is not clear with respect to contracts between the Government and a private contractor, and even less with respect to contracts between governments. However, there are some decisions of the ASBCA which have applied foreign law to government-to-private contractor contracts.5

It is difficult to make any clear determination as to the application of independent international law rules in lieu of either the United States or foreign law in the case of a contract between a government and a private contractor. There are no specific international law rules with regard to procurement of supplies and services. However, as will be discussed later, there are a number of treaties and memoranda of understanding that can be construed to apply to such activities.

For some time attempts have been made to formulate an international law

4 Pasley, supra note 1, at 69.
The drafts have been prepared by the International Institute for the Unification of Private Law in Rome, by the Inter-American Council of Jurists and by the United Nations Economic Commission for Europe. More recently, former Under Secretary of State, George W. Ball, recommended an international company law for chartering supranational corporations. Mr. Ball's proposal has the support of many in the United States who believe that the multinational corporations are becoming laws unto themselves, answerable to no sovereign authority. Therefore, they feel that some form of international law should be developed to control them.7

It is interesting to note that a new group called the International Accounting Standards Committee (IASC), composed of representatives from the nine countries where accounting practices have become well developed (Australia, Canada, France, Germany, Japan, Mexico, The Netherlands, Britain and the United States) has been organized for, among other purposes, the development of worldwide accounting standards. IASC will try to persuade government regulatory bodies in each country to support the new standards. Accountants in the nine member companies will be obliged to follow the international guidelines. If they do not, they will at least be required to give their reasons for not doing so.8

In international contracts, the parties frequently select the law which will be applied and the desired forum. Typical choice-of-law and choice-of-forum clauses might provide, for example, that the contract should be governed by the law of the District of Columbia, United States of America.9 Choice-of-law clauses and choice-of-forum clauses are generally recognized in most common law and civil law countries.10 However, even where such clauses are used, if certain circumstances and conditions are present they might not be given full enforcement.11

One representative choice-of-forum article proposed by a private foreign contractor for use in a contract with the United States calls for arbitration in Geneva in accordance with the arbitration regulations of the International Chamber of Commerce in Paris, and that the applicable law should be that which is in force at the seat of the arbitration court. One of the objections raised to arbitration is that the arbitrators frequently do not know and have had no familiarity with the foreign law that might apply to a claim or dispute.

6 Pasley, supra note 1, at 72.
8 The CPAs Aim for Global Guidelines, BUSINESS WEEK, June 20, 1973, at 28.
10 Article 15 of the Iraqi contract for the Derbendi Khan Dam, mentioned above, specifically provided that the contract would be deemed an Iraqi contract and would be governed by and construed according to Iraqi law. It also stipulated that Iraqi courts would have exclusive jurisdiction to determine all actions arising out of the contract, and that the contractors would submit to the jurisdiction of those courts for the purpose of any such actions.
11 See, e.g., Fricke v. Isbrandtsen Co., 151 F. Supp. 465 (S.D.N.Y. 1957); Roberts, supra note 1, at 44.
C. Common Law or Civil Law?

Whether an international procurements contract is governed by common law or civil law can be crucial to its interpretation and enforceability. In the common law countries, the literal wording of a contract is given strict compliance; in civil law countries, there is a code which embraces the various rules and principles of law. Notwithstanding such written codes, there is considerable flexibility in the application of the civil code statements to contracts, and precedent has little of the importance it enjoys under the common law.

One of the more recently adopted civil codes is the above-mentioned Iraqi Civil Code of 1949, implemented in 1952. According to many legal authorities, this Code contains the best commercial provisions of the French and other Continental civil codes, particularly with regard to the law pertaining to contracts.

One of the provisions of the Iraqi Civil Code states that the spirit rather than the literal meaning of the Civil Code must be followed. It states further that, if the language of the code is not clear, the jurisprudence in countries following similar legal principles (European Continental codes) will be followed. It also states that if those sources do not provide an answer, the Moslem law is to be followed. If the Moslem law has no applicable provision, then according to the Iraqi Civil Code, principles of equity or natural law will be followed.

There are other substantial differences between the common law and the civil law as such systems apply to contracts. One of the biggest is the treatment given to certain circumstances which in both systems is described as constituting force majeure. Under the common law as applied to contracts, force majeure is a superior, irresistible force that impedes performance of a contract: in short, an excusable cause of delay, such as a flood, a drought, an epidemic, a strike or the like. Generally, contracts executed in common law jurisdictions only provide for an extension of time for delay caused by force majeure, whereas contracts executed in civil law countries usually provide for compensation to the party whose performance is delayed, in addition to time extensions. In order to constitute force majeure under such civil law contract provisions, the causative event must render performance absolutely impossible; the event must arise independently of the will of the party who relies upon it and not be subject to his subsequent control. The event must also have been of such a nature that its occurrence could not reasonably have been foreseen at the time the contract was executed. As with so many rigid contractual requirements, however, these principles have been somewhat softened by some courts.

Anyone doing business with a contractor in a code state must be careful to know the relevant provisions of the applicable code. The codes of the various civil law countries differ at times in very material respects. Some of these variances can be extremely beneficial to one of the parties to a contract. For example, Article 146 of the Iraqi Civil Code sets forth a basis for a contract to be "renegotiated." It provides that where, as a result of exceptional and unpredictable events of a general character, the performance of the contractual obligations becomes excessively onerous in such a way as to threaten a party with an exorbitant loss, the judge may reduce the obligations of the parties to reason-
able limits. That provision is based upon Article 269 of the Polish Civil Code. Such a provision is not found in any other European code or in the common law.

Another example of what might be a provision applicable to a foreign contract that is not recognized in the common law is shown by Article 651 of the Egyptian Civil Code, which is similar to a provision in the various Middle East codes. This provision specifically provides that, for a period of ten years from acceptance, construction contractors guarantee their work against defects in construction which might endanger the solidity and security of their work and against the total or partial demolition of the works constructed. That warranty prescribed by the Egyptian Civil Code always applies, notwithstanding any provision in the contract to the contrary.

The international law rules are not confined to application either in common law countries or in civil law countries. The international rules generally cross over and are applicable to both systems. Such application adds to the confusion, complexity, and difficulty of the determination of the application of the appropriate international law ruling to any particular situation.

D. Proof of Foreign Law

Today, unlike a few years ago, the ASBCA in the Department of Defense holds that the determination of foreign law is a ruling on a question of law. In the recent past that Board had held that the determination of foreign law was a question of fact which meant that it had to be pleaded and proved. However, recognizing that the Court of Claims Rule of Procedure 125 and Federal Rule of Civil Procedure 44.1 now provide that the determination of foreign law is a ruling on a question of law, the ASBCA has changed its previous position. In making such a determination a court may consider any relevant material or source (including testimony) regardless of whether it was submitted by a party or is admissible under the rules of evidence.

Certain civil law authorities have stated that there is an equality between nationals and foreigners which is demanded by the law of nations. Under the maxim that the court knows the law, jura novit curia, knowledge of the foreign law is imposed as a duty upon the court regardless of what was pleaded or what was proved by the parties.

Most courts will require that the foreign law be formally proven, by certification of certain government officials under the seal of the body whose record is involved, or by any other procedure recognized by the court or other judicial body in which the law is to be presented. If the foreign law is contained in a statute book officially published by the Government, it must be proved by the statute itself. If the statute book is proved to be published by the authority of a foreign state or country, it is admissible without further authentication.

In most disputes, interpretation or explanation of the law is necessary.

13 Nussbaum, The Problem of Proving Foreign Law, 50 Yale L.J. 1018 (1941); see also Roberts, supra note 1, at 53.
Where foreign law is involved, this may be accomplished by the use of testimony of an expert witness versed in the applicable foreign law as well as by statutes and judicial decisions. This so-called expert may be a layman or lawyer of the other country who proves his familiarity with the foreign laws. Foreign law may also be admissible through stipulation or by the use of depositions.

II. Bid Protests

An area that is rather exclusive to the practice of government contract law in the United States is the bid protest procedure. The American procurement regulations provide for a procedure within the procurement agencies to review protests concerning current procurements. A bid protest is usually made by a bidder on the ground that the contemplated award to some other bidder is not in accordance with the regulations or the request for proposals or bids.

In most instances, the bid protestant is not satisfied with the results of the bid protest review within the procuring activity. Or, because of past experiences with the procuring activity or for some other reason, the bid protestant may not desire to proceed within the procurement activity. It is not necessary to exhaust the procedure within the procuring activity in order to take the next step in processing a bid protest.

As a practical matter the bid protestant's best move is to file a bid protest with the General Accounting Office (GAO), which is under the jurisdiction of the United States Comptroller General. The procedures for handling such bid protests within the GAO were very informal for many years. However, as of February 7, 1972, a new set of rules for processing bid protests within the GAO was adopted. These procedures were published in the Federal Register on December 23, 1971, and became effective pursuant to a decree of the GAO on February 7, 1972. They must be carefully followed.

The GAO procedure is initiated by an informal telegram or letter requesting the desired relief. A memorandum in support of the protestant's position should also be filed. The procuring agency will then file a report setting forth its position. Generally, a copy of such report will be submitted to the protestant. Parties interested in the protest will be served a copy of the nonclassified documents submitted by any of the parties and the Government. Subsequently, an informal hearing before GAO lawyers can be requested and all interested parties may appear at that hearing. In due time a decision will be rendered.

There is no procedure for formal appeal from a GAO decision. Under the precedent established by Scanwell Laboratories v. Shaffer, however, a dissatisfied bidder may appeal to the courts for a declaratory judgment or for bidding costs. Such judicial actions have not to date been fruitful. During fiscal year 1974 the GAO decided 1,059 cases. In the bid protest area the GAO only sustained the protests in about 8 percent of the cases. Obviously, this procedure does not provide much hope for disgruntled bidders.

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17 16 Government Contractor ¶ 277 (1975).
The GAO bid protest procedure was recently used by the Leningrad Metal Works, a Russian organization bidding for the right to provide three hydraulic turbines for the Grand Coulee Dam addition.\textsuperscript{18} Other foreign firms who regularly trade with the United States, such as Canadian and Japanese firms, had previously filed bid protests with the GAO, but this was the first time a Russian firm had done so. The bid was tentatively awarded to Canadian General Electric, with a low bid of approximately $57 million, but the Russian representatives and Westinghouse Corporation contended before the GAO that the Canadian General Electric design would not meet performance specifications. The GAO has denied the protest.\textsuperscript{19}

In passing, it should be observed that the GAO has a statutory mandate to determine all government contract claims. A foreign government contractor would appear to have the right to take advantage of the GAO's statutory authority. Again, the procedure in presenting claims to the GAO is very informal. The claim is usually presented in the form of a letter with supporting documentation. The GAO procedure, however, is not very adequate for the consideration of factual disputes. There is no hearing for the presentation of factual testimony. The alleged facts must be presented by documentation. The procedure's basic orientation is to the determination of questions of law. The statute is found at 31 U.S.C. § 71 and states:

\begin{quote}
All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.
\end{quote}

Even though the extremely broad language of this statute would appear to include all possible claims by or against the Government, certain exceptions have been carved out by specific provisions in the statute. Included in this exempted category of claims are tax claims, tort claims, veterans benefits claims, Social Security claims, and claims involving most government corporations.

The claims jurisdiction of the GAO is not exclusive and, in fact, the great majority of claims which might have been within the scope of its jurisdiction are settled administratively.

Even though the GAO determination of a claim binds the Government, it has no binding effect on the contractor or claimant, who may pursue his remedy in the courts \textit{de novo}.\textsuperscript{20} Because of the contractor's exclusive right of obtaining review, the GAO has adopted the rule laid down by the Court of Claims that it should deny any claim against the Government in which there exists any substantial question of law or fact.\textsuperscript{21} The courts are free to ignore both the legal conclusion and the factual findings of the GAO. Therefore, once

\textsuperscript{20} \textit{Iran Nat'l Airlines Corp. v. United States}, 360 F.2d 640 (Ct. Cl. 1966).
\textsuperscript{21} \textit{Charles v. United States}, 19 Ct. Cl. 316, 319 (1884).
the claim has been presented to a court of competent jurisdiction, the GAO will refuse to consider it.

III. Claims, Disputes and Litigation

It is to be expected that disagreements will result in the performance of foreign government contracts, whether such contracts are between governments or between a government and private contractors. As indicated above, the parties in some foreign government contracts stipulate the manner in which the disagreements are to be processed. Such clauses usually provide that the disagreements are to be settled by the so-called disputes procedure contained in American contracts, or by submission to American or foreign courts, or by arbitration and conciliation.

Only a word need be said about conciliation. Conciliation is a procedure whereby the parties submit their disagreement to an individual for decision although the decision of such a party does not have any finality. For this reason, the conciliation procedure has not been very popular. However, it is interesting to note that in the recent proposal for Uniform Board of Contract Appeals Rules prepared by the Section of Public Contract Law of the American Bar Association, a provision was included for conciliation much along the lines of conciliation as used in the efforts to settle disagreements under foreign government contracts. When asked for comments, American lawyers and members of the various American boards of contract appeals were not very enthused about this proposal.

The NATO "Disputes" provision which provides in substance for the final decision to be made by arbitration is quite commonly used in the civil law countries. Arbitration can be a unique and timesaving method of disposing of the disputes. The major drawback, however, is that the arbitration procedure is only as good as the quality of the arbitrators.

With regard to routine disagreements involving relatively minor matters, an arbitration proceeding can be very effective. However, disagreements in government contracts that cannot be settled usually involve major matters encompassing the expenditure of millions of dollars and very complex technical and financial statements of fact. Hence, arbitration of such matters takes time. A person who has the necessary qualifications to be an arbitrator in such a matter would, in all likelihood, be too engrossed in his everyday activities to have the time available to hear the arbitration, to study the evidence and law presented, and to participate in the judgment and issuance of a final decision. Too often in government contract disputes the actual arbitrator assigns juniors in his office to study the record and draft the decision; usually, these employees have not heard the witnesses and are not familiar with the matter.

The foreign government in a government-to-government contract would have the right to sue the United States in American courts for breach of contract. A breach of contract action could also be pleaded in the International Court of Justice. Theoretically, however, it is not likely that either form of action

would be taken on an ordinary procurement contract. Undoubtedly, any such disagreement would be handled through diplomatic channels. On the other hand, if a foreign contractor had a breach of contract claim against the United States, he would bring the action in the Court of Claims or in a Federal District Court under the Tucker Act.\(^{23}\)

Currently, it is estimated that there are approximately seventeen foreign contract cases now pending in the Court of Claims. There are two substantial difficulties in connection with a foreign contractor's processing a breach of contract claim in the American courts. First, he must come to the United States to assert his claim. This is a special hardship when the claim is a small one and the contractor is a small business. This problem can very often be solved by the use of depositions to obtain the evidence available in a foreign country. The depositions are usually taken before a diplomatic representative or a Judge Advocate of the military procurement service involved.

The second difficulty results from the requirement for reciprocity. Section 2502 of Title 28 of the U.S. Code provides as follows:

> Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the Court of Claims if the subject matter of the suit is otherwise within such court's jurisdiction.

For a time the question under this requirement was whether the foreign contractor must prove that an American citizen could maintain against the foreign government the precise suit which the contractor is bringing against the United States. In *Nippon Hodō Company v. United States*,\(^{24}\) a foreign contractor produced a deposition from a Japanese attorney stating unequivocally that an American shared equally with a Japanese citizen "the right to sue the Japanese State for breach of Contract," but failed to submit any Japanese cases in which the State had equally been sued for breach of contract. The Court held that the foreign contractor had met his burden under the statute. Since most governments permit themselves to be sued on contracts in their own courts by both nationals and foreigners, the problem of proving reciprocity does not appear to be a major one.

Suits by American contractors in foreign courts face additional problems. As in the case of foreign contractors, American contractors are suspicious of the treatment that they might receive in foreign courts. Generally, experience has been that the foreign courts are as fair as can be expected. However, the procedures in foreign courts are very different from the procedures in American courts. Therefore, the assistance of an attorney familiar with the foreign court must be engaged. As noted above, the American disputes procedure is frequently stipulated in the foreign government contract for the processing of disagreements under foreign government contracts.\(^{25}\)

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\(^{24}\) *Nippon Hodō, Ltd. v. United States*, 285 F.2d 766 (Ct. Cl. 1961).

\(^{25}\) The standard American disputes clause is as follows:

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement
Just as in this country, foreign contractors have been and still are skeptical about accepting the disputes procedure. Foreign contractors wonder how they can expect fair treatment under such a procedure when the party making the decision is a party to the contract dispute. They have argued that in addition to the disputes article being one-sided and unfair, it is contrary to their notions of jurisprudence and sometimes illegal.

A Japanese contractor argued that the finality of the disputes clause would deprive him of the constitutional right granted by Article 32 of the Japanese Constitution, in that the disputes procedure was intended to oust the jurisdiction of the Japanese courts, and the clause was therefore void as against public policy in Japan. The Far East Command Board of Contract Appeals (FECBCA) did not have any problem in taking jurisdiction.

Nevertheless, after experiences with various boards of contract appeals, many foreign contractors are willing to accept the disputes procedure. This results substantially from the foreign contractors' favorable experiences with the area boards of contract appeals established by military departments. Shortly after the conclusion of World War II, for example, the Army set up an area Board of Contract Appeals (USAREUR) in Heidelberg, Germany, to hear Army appeals and the Air Force established a similar Board at Wiesbaden, Germany, to hear Air Force appeals. An FECBCA was set up in Tokyo, but since 1968 has been phasing out operations. The authority of these Boards was set forth in the disputes article of the foreign government contract. They represented the commanding officer of the area. These intermediate boards have decided hundreds of appeals since their inception. Many of their decisions could have been appealed to the ASBCA, but contractors have done so in only a few cases.

IV. Practical Considerations

It is not the purpose of this article to stray from legal considerations. In developing the legal aspects of international government contracts, however, certain problems peculiar to doing business abroad have a legal impact which shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessary to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a), above; provided, That nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

FPR § 1-7-102-12.
The disputes clause does not generally appear in contracts between governments, but it is standard in contracts between the Government and private contractors.
should be considered. One such problem area is that of alien customs. A contract manager with considerable experience in international government and commercial contracts has made certain cogent remarks with regard to what an American contractor can expect in doing business abroad:

Alien customs often tend to offend, frighten and stimulate aggressiveness on both sides. Degress [sic] of morality in business raises a host of differing conflicts, delay often spells opposition and language difficulties may unjustly spell incompetence. In some countries payoffs, agent's fees, or just plain graft must be reckoned with. Perhaps this is an area that Americans have least prepared themselves for as they do business in the underdeveloped and emerging countries of the world, but it is a factor that must be faced and if your morality is such that you cannot do business under the new rules of the game, then don't spend the money to compete.27

In addition, the use of foreign agents to obtain business abroad is quite common. Usually the foreign agent has, or is believed to have, good connections in the foreign country. There is nothing illegal in employing such a foreign agent.28 Defense Procurement Circular No. 74-1, Item IX, sets forth a policy to determine the applicability and reasonableness of foreign agents' fees or commissions. The fees or commissions will only be allowed to the extent reasonable. The basic test of reasonableness is an assessment of the services provided compared to the amount of the fee. A comparison should be made of the proposed fees/commissions with recent payments for comparable services under nonforeign military sales, commercial sales of the same or similar items, or agents' fees/commissions allowed on previous military sales of comparable scope and dollar amounts.

Any American paying or receiving such fees should be careful to satisfy the requirements of American government agencies such as those of the Internal Revenue Service and the Securities and Exchange Commission.

The Iranian Government has taken steps to minimize the use of foreign agents to obtain contracts for the Iranian Government. It sponsored the issuance of Item IX of Department of Defense Procurement Circular No. 117, issued November 23, 1973 (now Item X of Defense Procurement Circular No. 74-1).29 Unless the agents' fees/commissions have been identified and payment thereof approved by the Government of Iran before the contract award, it is required that all fixed-price foreign military contracts for sales to Iran contain a certificate that the contract price does not include any direct or indirect costs of agents' fees/commissions for sales to the Government of Iran. It also provides that with regard to all types of contracts other than fixed-price, agents' fees and/or commissions involved in foreign military sales contracts to the Iranian Government be considered unallowable items of cost under the contract.

The language barrier also disrupts the foreign procurement process quite
In many cases abroad, essential witnesses will be foreigners who cannot speak English, and interpreters will have to be used. Court interpreters are normally well-qualified, but when it comes to the technicalities of government contract specifications, foreign contractors have a serious problem. In the litigation resulting from the construction of the substructure for the bridge across the Panama Canal, which took place in the United States District Court for the Panama Canal Zone, the official court interpreter threw up his hands in horror after he attempted to interpret the testimony of a Panamanian native who only spoke Spanish. The court could not locate any interpreter who could translate the technical language being used by the native witnesses. The hearing was only able to proceed when the attorneys for both sides agreed that this writer’s local counsel, who was a man of integrity and very resourceful in both Spanish and English, could act as the interpreter. He did so for several days in commendable fashion.

In passing, it should be noted that language differences also might create serious problems in converting specifications and other contract requirements from one language to another. Care must be exercised in making such conversion.

The problem of legal representation also has practical ramifications. At first blush, it would appear to be obvious that lawyers specializing in international law would be the appropriate legal representatives for foreign government contractors. However, foreign government contracts involve such a highly specialized field of legal activity that the normal expectation does not prevail. Most international lawyers are totally unfamiliar with the legal principles of government contracts. Therefore, most contractors having foreign government contract problems seek their legal advice from lawyers who specialize in government contracts.

Most government contract lawyers operating in the international field are based in the United States. American lawyers who have offices abroad are encountering efforts by the foreign lawyer associations to keep them from having local offices or affiliations in foreign countries. For example, Japan has for some years placed heavy restrictions on American lawyers with local offices in that country. The French Parliament passed Law No. 71-1130 in December, 1971, which contains very restrictive provisions regulating the practice of law in France by foreign lawyers. Pursuant to the regulations under this law, an American law firm that was not engaged in practice in France before July 1, 1971, will probably find it impossible to open an office in France. The position of firms which have had offices in France prior to July 1, 1971, is considerably better, but even they may encounter some problems.30 Even the seemingly friendly Thai Government has now passed a law which requires that in such fields as accounting, law, and advertising, a majority of an organization engaged in one of these specialties must be Thai-owned within two years or such organization must leave the country.31

In connection with any foreign government contract matter, the govern-
ment contract lawyer in charge of the matter will find it necessary to retain local
counsel in the foreign country even though the latter may not have any expertise
in government contracts. As in this country, where a government contract legal
specialist performs services in a jurisdiction away from his basic state of opera-
tions, local counsel must be retained where litigation is involved in order that
local counsel may accept service of process, documents, briefs, and so forth. By
their rules, local American courts require the retaining of such local counsel. The
employment of local foreign counsel is a very delicate matter. In making such
a selection, American legal contract specialists will probably need to seek the
advice of local foreign bankers, businessmen or foreign lawyers and, particularly,
any foreign representatives of their client. Naturally, it is most important that the
local foreign counsel be able to speak and write English. He should also be very
familiar with the local political conditions and judicial personnel and procedures.

Finally, any contractor performing a government contract abroad will at
some time find it necessary to seek the assistance of the United States Department
of State. State Department representatives should be contacted to ascertain what
conventions or agreements have been made with the foreign government in ques-
tion. It will also be necessary from time to time in connection with performance
of the contract to seek the assistance of the State Department representatives who
have responsibility for American interests in relation to a particular foreign gov-
ernment. Not only would such assistance be necessary with regard to activities
of the foreign government or foreign contractor involved, but also with regard to
American consultants or contractors employed by foreign governments and
foreign contractors, who are sometimes arbitrary and unreasonable. State De-
partment persuasion in such matters might bring about a solution to the problem.
One cautionary note: American contractors cannot and should not expect that
the State Department will intercede on their behalf unless the law and equity are
in their favor.

V. Conclusion

In light of present international developments—military, political and
economic—it must be concluded that the future of government contracting in the
international community will involve many problems. As always, however, a
recognition of the problem areas, both legal and practical, and a realization of
their magnitude, will go a long way towards their elimination.