

# Structuring International Contracts: Choice of Law, Jurisdiction and Language, Arbitration Clauses, and Terms of Art

WEDNESDAY, SEPTEMBER 16, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Jennifer S. Huber, Partner, **Fluet Huber + Hoang**, Woodbridge, Va.

Nathan D. O'Malley, Partner, Adjunct Professor - **USC Gould School of Law**,  
**Gibbs Giden Locher Turner Senet & Wittbrodt**, Los Angeles

Steven M. Richman, Member, **Clark Hill**, Princeton, N.J.

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10.**

## *Tips for Optimal Quality*

FOR LIVE EVENT ONLY

---

### Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-570-7602** and enter your PIN when prompted. Otherwise, please **send us a chat** or e-mail [sound@straffordpub.com](mailto:sound@straffordpub.com) immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press \*0 for assistance.

### Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

## *Continuing Education Credits*

FOR LIVE EVENT ONLY

---

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about CLE credit processing call us at 1-800-926-7926 ext. 35.

## *Program Materials*

FOR LIVE EVENT ONLY

---

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.



Structuring International Contracts:  
Primary Risks, Mitigation Strategies,  
and  
Key Provisions

Jennifer S. Huber  
[jhuber@fluetlaw.com](mailto:jhuber@fluetlaw.com)



# Primary Risks

- Non-Payment
  - After the risk of violating U.S. laws and regulations, non-payment is the most significant risk incurred when engaging in overseas transactions.
  - Mitigation Strategy:
    - Payment event criteria
    - Letters of credit
    - Incoterms
    - Banking relationships
  
- Non-Delivery/Non-Performance
  - The consequences of non-delivery/non-performance or delayed delivery/performance in the international arena are magnified by a variety of buyer-imposed risk mitigation strategies, such as performance bonds and liquidated damages provisions.
  - Mitigation Strategy:
    - Clarity of performance requirements
    - Force majeure/excusable delay provisions
    - Certificates of Origin and Conformity
    - Communication of payment event criteria to banks



# Primary Risks

- Violation of U.S. Laws and Regulations
  - Highest risk faced when engaging in international contracting and has severe implications for domestic business as well.
  - Relevant laws and regulations:
    - Foreign Corrupt Practices Act (“FCPA”)
    - International Traffic in Arms Regulations (“ITAR”)/Export Administration Regulations (“EAR”)
    - U.S. Sanctions Regime
  - Mitigation Strategy:
    - **FCPA:**
      - Thorough due diligence
      - Robust detection mechanisms (in-country presence, routine and non-routine audits, effective accounting program, reporting requirements in third-party contracts, anonymous reporting hotline)
      - Culture of compliance
    - **ITAR/EAR:**
      - Executive buy-in
      - Pricing-in compliance
      - A tailored export compliance program
      - Hands-on training
      - Consistent reassessment of compliance strategies
    - **Sanctions:**
      - Exhaustive due diligence
      - International party questionnaires
      - Third-party software programs
      - Specific licensing strategies



# Primary Risks

- Performance Bonds
  - Because overseas customers are equally aware of the challenges presented by providing goods and services internationally, they will frequently require bonds that guarantee satisfactory performance by the contractor.
  - Key considerations:
    - Collateral/guarantor(s)
    - Insurance requirements
    - Security interest/subordination
  - Mitigation Strategy:
    - Clarity of performance requirements
    - Indemnification by subcontractors, freight forwarders, and local representatives





# Primary Risks

- Liquidated Damages
  - As with performance bonds, liquidated damages provisions mitigate the risk imposed on buyers that, due to the challenges of overseas contracting, foreign businesses will fail to satisfy their contractual obligations.
  - Mitigation Strategy:
    - Force majeure/excusable delay provisions
    - Indemnification by subcontractors, freight forwarders, and local representatives
    - Provisions requiring buyer mitigation
- Local Presence Requirements
  - Contractors are frequently required to maintain a physical presence in-country during contract performance and/or share ownership of the contracting entity with a local national.
  - Mitigation Strategy:
    - Aggressive pre-positioning, planning,, assessment, and structuring
    - A network of trustworthy and experienced agents, consultants, and counsel in-country
    - Provisions in the bylaws/operating agreement/joint venture agreement of the local entity that preserve the contractor's operational control



# Primary Risks

- Local Representative Malfeasance
  - Significant risk, given the inherent visibility in-country of local representatives, their frequent exposure to corrupt government officials, and the inability to monitor their activities around the clock.
  - Mitigation Strategy:
    - Due diligence
    - Background checks
      - Specially Designated Nationals List (Treasury)
      - Denied Parties List/Blocked Entities List (Commerce)
      - Embargoed Countries (UN and State)
    - Robust reporting requirements
    - Frequent communication
    - Impromptu in-country visits
    - Vigilant accounting programs



# Primary Risks

- Offsets
  - As a cost of securing lucrative contracts governments will often require that foreign businesses invest in the local economy/infrastructure via “offsets.”
  - Direct vs. Indirect Offsets
  - Mitigation Strategy:
    - Comprehensive understanding of local offset requirements
    - Local counsel
    - For direct offsets, confirmation that deliverable quality will not be sacrificed to satisfy offset requirements
- Tax Liability
  - Due to their complexity and the less than consistent manner in which they are often applied, the imposition of local taxes can decimate otherwise substantial profits.
  - GST vs. VAT vs. Duties
  - Mitigation Strategy:
    - Local tax guidance
    - Early and frequent communication with the local finance ministry
    - Consistent satisfaction of licensing requirements



# Key Contract Provisions

We have already touched on a variety of key terms that should be included in international contracts. What other key terms should be included?

- Exclusivity
  - “Earn In” Triggers
  - Metrics-Based Termination
- Territory
- Bases of Termination
- Jurisdiction
  - Beware the 1980 U.N. Convention on Contracts for the International Sale of Goods!
- In-Country Enforcement
- Anti-Boycott
- Non-Circumvention
- Excess Inventory
- Indemnification
- Dispute Resolution Mechanisms
- Compliance with U.S. and Local Laws and Regulations
- Non-Assignment
- Intellectual Property
- Translation Concerns

# Structuring International Contracts

Enforcement and Collection; Dispute Resolution;  
Jurisdiction; Bases of Termination

Steven M. Richman

502 Carnegie Center, Princeton, NJ

609.785.2911

[srichman@clarkhill.com](mailto:srichman@clarkhill.com)

# Enforcement

- "[S]ome documents do use **meaningless boilerplate** and, in our view, the rule should not be carried to absurd lengths to imbue meaning into every legalistic jotting." *Schron v. Troutman Saunders LLP*, 2012 NY Slip Op 3966 (1<sup>st</sup> Dept. 2012)
- Forms are a starting place, not a finish, and once size does not fit all—
- Distinguish from consistent documents in similar circumstances.

# Purpose

- Contract is a business roadmap
- Contract is a legal document of rights and obligations
- Contracts will generally be enforced as parties wrote them, absent public policy or “unconscionability” issues
- Courts generally will not make better contracts for parties than they wrote for themselves
- Clarity versus ambiguity
- Get it in writing and make sure you agree on it

# Why Boilerplate is not Boilerplate

- Boilerplate contract provisions are not a one-size-fits-all. Attorneys who fail to carefully draft and revise potentially problematic boilerplate clauses carry on a weight of risks and legal dangers



# International Context

- Law is territorial
- Civil law versus common law concepts
- Less is more: incorporations by reference
- Incoterms and accepted definitions (ICC 2010)
- “Official” language
- Different concepts: e.g., third party beneficiaries
- Different privilege rules
- Cultural issues: “cut the check” story

# Remember the CISG

- International parties may implicate the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), a treaty governing formation, breach and remedy issues in contracts
- Can apply to distributorships if predominantly or predominantly sales
- Can be disclaimed or modified BUT MUST BE EXPRESS; choice of law not enough
- Promotion of uniformity
- Growing body of US law; foreign law

# Key CISG Points

- Applies to commercial goods
- Principal place of business test
- Subjective standards
- Oral contracts and understandings permitted
- Formation rules based on offer/counteroffer rather than rejection or UCC-style “knock-out” rule
- Receipt rule, rather than “mailbox” rule
- Formation, not validity
- Buyer remedies include price reduction
- Concept of “fundamental” breach

# Enforcement and Choice of Law

- The “legal stuff” affects you
- E.g., choice of law is not esoteric.
- *Finnish Fur Sales Co., Ltd. v. Juliette Shulof Furs, Inc.*, 770 F. Supp. 139 (S.D.N.Y. 1991)(substantive law of New York contrasted with that of Finland; a corporate officer was liable for the corporation's debt under Finnish law, but not under New York law. Court concluded that Finnish law applied.)
- As a lawyer, do not assume that all “boilerplate” provisions are the same based on heading

# Anticipation

- Anticipate eventualities: all the “what ifs”  
--e.g., what happens during grace periods?
- Currency fluctuation: who bears the risk?
- Force Majeure: what excuses performance
- Are there industry customs and usages?
- All can affect enforcement

# Choice of Law: Purpose

- Establishes which law will govern the substantive issues relating to contract and related claims
- Establishes common understanding of the clauses
- Should be done first, not as a tag-on at end
- US courts generally enforce; if not specified, various tests (substantial relationship, e.g.), unless: against public policy or no reasonable relationship to forum
- US courts also apply foreign law (F.R.C.P. 44.1)
- Can affect ability to terminate contract or amount of damages, entitlement to interest, and others

# Substance versus Procedure

- Governs *substantive*, not procedural issues
- Courts apply choice of law provision to the substantive law of the chosen state, but not to procedural or practice questions
- Forum state governs procedural issues: form of claim (tort or contract); necessary or indispensable parties; rules regarding service of process and notice; rules of pleading and pre-trial practice; whether a claim can or must proceed as counterclaim, defense or set-off; conduct of trial (e.g., entitlement to jury and role of judge); sufficiency of evidence, *et al.*

# Sooner Rather than Later

- Raise the issue early in the drafting process, not when it is done
- Consider neutral jurisdictions if neither party concedes the other's jurisdiction.
- E.g., consider New York as reasonable and established commercial venue
- Research the leading case/languages on core points of the agreement



# Caveat: Multiple Documents

- When dealing with multiple contracts, consider a single choice of law clause
- If multiple choice of law clauses, consider how they interact
- Generally, courts review integrated documents as a whole and try to render them consistent and give effect to their purpose.
- E.g., a mortgage on New Jersey property governed by New Jersey law that secures a note governed by New York law

# Relationship to Choice of Forum

- E.g., in N. Bergen Rex Transp. v. Trailer Leasing Co., 158 N.J. 561, 569 (1999), the issue was the reasonableness of attorneys fees in a lease dispute.
- Though Illinois law was substantive, court held attorneys fees were procedural and examined the reasonableness of contractually permitted fees under New Jersey law, and not Illinois law.

# Choice of Law and Scope

- Many clause are dependent upon the particular choice of law
- Scope: tort and contract, “relating to and arising out of” versus “interpretation” versus “governed by”
- Applies in arbitration as well as court
- If absent, courts do their own analysis
- Can affect ability to terminate contract or amount of damages, entitlement to interest, modify restrictive covenants, and others

# Example of Scope Issues

- The breadth of the clause may preclude its application to tort claims, as opposed to those based in contract.
- In *Miguel v. Pro and David Landscape*, 2008 US Dist Lexis 100181 (D.N.J. 2008), the court noted that choice of law clauses using the language “govern and construed by” are broad enough to capture tort and contract, but clauses that simply say “construed under” are limited to contract claims.
- “[this] Agreement shall be construed under the laws of the State of California” did not include tort claims. *Caton v. Leach Corp.*, 896 F. 2d 939, 942 (5th Cir. 1990).

# Pointer

- It is helpful to have broader language that applies to claims “relating to the relationship” between the parties, or words to that effect. In general, the broader the language in your choice of law clause, the better chance exists that a court will apply a contractual choice of law clause to tort claims as well.

# Renvoi

- What if New York and Florida companies contractually provide for Florida law to apply, but the Florida court, under its conflict of law rules, determines that New York should apply?
- Many parties add “without regard to its own conflict of law principles,” or words to that effect, to avoid the issue.

# Forum Selection Clauses

- Determines where disputes will be resolved
- Witness availability, local procedures, cost of dispute are all factors
- Can be mixed (hybrid) depending on who initiates claim
- Mandatory preferred over permissive
- Applies to arbitration as well as litigation
- Federal, state, county courts
- One case where contract in German and provided for arbitration in Germany; US businessman failed to translate, signed and was bound

# Why You Want a Forum Selection Clause

- Generally enforceable
- Eliminate uncertainty
- No guaranty, but increases chances of chosen forum
- Strong underlying policy: "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it could be set aside." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).



# Factors in Choosing the Forum

- Costs of litigation—costs of traveling
- Need for witnesses
- Familiarity with decisions and practice
- Procedural rules
- In international context, confidence in system, language issues, different approaches to discovery
- Many others

# Enforcement

- The Restatement (Second) of Conflict of Laws provides for the enforcement of a forum selection clause “unless it is unfair or unreasonable.”
- The comments make clear that statute may overrule such a forum selection clause, or that such will not be enforced based on “fraud, duress, the abuse of economic power or other unconscionable means.” *Restatement (Second) Conflict of Laws, §80, Comment c (1988 Revisions).*

# Types of Forum Selection Clauses

- A mandatory clause is one that requires the matter to be brought in a particular place, often by stating that the courts of a particular jurisdiction have “exclusive” jurisdiction, or that suit “must” be brought in a particular place, and so forth.
- “Will” has been held as mandatory as “shall,” and “must,” “only” or “exclusively” also should suffice to establish a mandatory clause. *Vogt-Nem, Inc. v. M/V Trammer, West African Shipping Co., N.V.*, 263 F. Supp. 2d 1226, 1231 (N.D. Ca. 2002).

# Permissive Clauses

- A permissive clause indicates that the court has “non-exclusive” jurisdiction or that the parties “may” bring an action in a particular place.
- A clause that is mandatory is given much more weight than one that is permissive. The clause should be clear.
- Scope matters

# Say What You Mean

- “This constitutes an executory contract between the exporter and the above-indicated buyer. Place of jurisdiction is Sao Paulo/Brazil,” was held permissive since it “does not clearly specify that Sao Paulo is the *only* place of jurisdiction.” *Citro Florida, Inc. v. Citro-Vale, S.A.*, 760 F. 2d 1231, 1231-32 (11<sup>th</sup> Cir. 1985).
- Even where one uses the word “shall,” a court may find that to be permissive if the words “only” or “exclusively” are not used with it, on the grounds that “[j]ust because the contract establishes that venue lies in Florida does not mean that it cannot also lie elsewhere, as is the case here.” *Byrd v. Admiral Moving and Storage, Inc.*, 355 F. Supp. 2d 234, 238-9 (D.D.C. 2005).

# Forum Should Have Reasonable Basis

- Economic considerations also underlie policy reasons for enforcing forum selection clauses, even where they have not necessarily been free negotiated, but the bound party was nonetheless on notice prior to entering into the agreement; such will be enforced where the parties were on notice of it and enforcement is not fundamentally unfair. *Carnival Cruise Lines v Shute*, 499 U S 585 (1991).

# Forum Need Not Provide All Remedies

- Even where enforcement of the forum selection clause may, in connection with a choice of law provision, deprive a party of certain remedies, that is not enough to deny enforcement, provided it is not unreasonable and the parties still have comparable remedies. *Shell v. R.W. Sturge, Ltd.*, 55 F. 3d 1227, 1231 (6th Cir. 1995).

# A Word on Click Wrap

- A clickwrap agreement is one that “appears on an internet webpage and requires that a user consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with the internet transaction.”). *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 235-236 (E.D. Pa. 2007).
- Forum selection clauses will not be invalidated solely because they are contained within the clickwrap agreement. *Meier v. Midwest Rec. Clearinghouse, LLC*, 2010 U.S. Dist. LEXIS 68949 (E.D. Cal. July 9, 2010). They will be evaluated, however, in terms of the same factors of reasonableness ; courts more likely to enforce where there was clear notice and an ability to review the terms



# Click Wrap (cont'd)

- The same concepts of notice and manifestation of consent will apply to contract formation issues relevant to choice of law and arbitration clauses, or any other clauses within the agreement, for that matter, though courts will not necessarily force consumer to litigate in inconvenient forum.
- Leading case on clickwrap is *Specht v. Netscape Communications Corp.*, 306 F. 3d 17, 22 (2d Cir. 2002)(not enforced; plaintiff would have had to scroll down to a screen located below the download button, and this was held not to be sufficient notice)

# Scope

- Scope of the choice of law clause defined what types of claims would be governed by that choice of law. The issue is the same with regard to forum selection. The language of the forum selection clause determines its scope. *Schering Corp. v. First Databank, Inc.*, 479 F. Supp. 2d 468, 470 (D.N.J. 2007).
- Consider a uniform definition of “claim” in agreement that covers the scope

# Collection

- No international convention like New York Convention (arbitration) for reciprocal enforcement of judgments
- Pending: Hague Convention on Choice of Court Agreements; acceded to/ratified by Mexico and European Union; Singapore and U.S. signed but U.S. has not ratified.
- Hague will permit reciprocal enforcement of money judgments in defined areas based on agreements that designate courts, and eliminates forum non conveniens arguments for such contracts

# Uniform Laws

- Most, but not all, U.S. states have a version of Uniform Foreign Country Money Judgment Recognition Act
- Some require reciprocity but no equivalent in foreign countries for U.S. judgments
- U.S. courts rarely enter judgments in a foreign currency; traditional rule is to enter in U.S. dollars and convert to exchange rate prevailing on entry of judgment in U.S.

# Contractual Considerations

- Clause for acceptance of service, preferably by entity in U.S., to avoid implications of Hague Convention on Service of Process
- Estoppel provisions to preclude challenge to entry of foreign judgment in U.S. or U.S. judgment in foreign jurisdiction
- Address currency fluctuations so as to provide escape hatches for adjustments or termination

# Dispute Resolution

- Arbitration is binding, out of court resolution; contract must be clear as to what and who, and applicable rules
- Mediation (non-binding facilitation)
- Litigation is traditionally in-court resolution
- A court will generally apply its own procedures and the chosen law
- Arbitration awards generally enforceable by treaty; again no treaty for enforcement of foreign judgments to which U.S. is a party

# Arbitration Clause & Scope

- A sample clause:

All disputes, controversies, or claims arising out of or relating to this contract shall be submitted to binding arbitration with the applicable rules of the American Arbitration Association then in effect.
- Scope important to determine what is arbitrable; same issues as with choice of law/forum; consider defined term for “claim.”
- IBA Guidelines for Drafting International Arbitration Clauses
- AAA Drafting Dispute Resolution Clauses

# Enforcement of Arbitration Clause

- Must be in writing; public policy in favor of
- Recent NJ decision did not enforce arbitration clause in consumer contract because the waiver of right to jury trial not conspicuously or fully expressed
- State and federal courts cannot expand statutorily limited scope of judicial review under FAA on motion to vacate or modify award. *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008)



# Arbitration and Class Action

- At least in United States:
- *Mastrobuono*: general choice of law clause does not override arbitral rules
- *Green Tree Financial Corp*: arbitrator decides whether contractual clause permits class arbitration
- *Stolt-Nielsen*: class action must be specified
- *AT&T MOBILITY*: upheld the validity of class action waivers in arbitration clauses

# IBA Rules on Taking of Evidence

- Issued as a resource to parties and arbitrators
- Adopt in arbitration clause in contract
- Provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of hearing
- Used together with the regime's rules and reference in contract:

*'[In addition to the institutional, ad hoc or other rules chosen by the parties,] [t]he parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence as current on the date of [this agreement/the commencement of the arbitration].'*

# Arbitration: General Comments

- Anticipate “what ifs” and fill in gaps in the regime’s rules
- Specify whether parties each select one who elects a third, or whether all is left to regime
- Consider limited arbitrations for specific issues or monetary amounts in longer-term agreements
- Explore mechanisms that include discovery, third party issues, treatment of settlement offers, and other logistics

# Jurisdictional Considerations

- Authority of court to afford relief or discipline parties
- Current issues regarding data privacy and conflict between US law and EU directives regarding discovery may influence manner of doing business and manner of dispute resolution
- Subjects company to local laws and courts
- Agency and affiliate issues for liability and jurisdiction
- Acceptance of service
- Be aware of other agreements, and other language that could express intention of “purposeful availment” in a particular place

# Sample Clause

- **CHOICE OF LAW AND FORUM**
- These terms and conditions, and all claims and causes of action in connection with, arising under or relating to the subject matter of these terms and conditions, in the broadest possible way, including tort claims (the “Claims”), shall be governed by and construed in accordance with the laws of the State of [ ] without regard to its choice of law principles. To the extent applicable, the parties expressly disclaim the application of the United Nations Convention on Contracts for the International Sale of Goods. The choice of law designated herein shall apply to all factual and legal issues relating to or arising under the contract, and shall survive termination of this Agreement.
- All disputes regarding or relating to Claims shall be brought exclusively in the state and federal courts in the State of [ ] and, to the fullest extent possible under law, the parties waive any objections to personal jurisdiction, nor shall they seek transfer based on inconvenience and forum non conveniens, and expressly consent to personal jurisdiction of the federal and state courts of the State of [ ] and expressly and knowingly waive all objections to same.

# Bases of Termination

- Contract should specify events of default
- Think through intermediate steps, what is material and non-material, and termination provisions
- Coordinate grace periods and ability of parties to cease action during grace periods pending cure

# Renewal/Termination

- Define the purpose regarding term of contract.
- Voluntary termination of contract by set date.
- Contract still enforceable in absence of termination date, depending upon intent of parties.
- Concrete recitation of a term or events of termination, provides certainty and avoids surprise of finding an intent party never thought existed.
- Passive (“evergreen”) or affirmative renewal clauses

# Specific Bases

- Severability: may not always be appropriate, yet included as a matter of rote
- Consider voluntary “no cause” termination and appropriate notice periods.
- There may be costs or charges to be paid as condition for early voluntary termination
- Other bases for termination: insolvency, change of ownership, unauthorized assignment—but need to not overreach



# Good Faith Issues

- Many, if not most, jurisdictions imply a covenant of good faith and fair dealing into contracts.
- Uniform Commercial Code also has such an obligation (UCC § 1-304)("Obligation of good faith. Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.").
- CISG incorporates “good faith” principles throughout in use of terms of “reasonableness”

# Materiality

- UCC has concept of need for “material” breach to terminate a contract
- CISG has certain rights to cure and a more stringent notion of “fundamental breach”

# UCC Seller Remedies

- When buyer wrongfully rejects/revokes acceptance or fails to make payment when due or repudiates in whole or part, seller can withhold delivery, stop delivery to bailee, identify unidentifiable goods, resell and recover damages, recover damages for non-acceptance and cancel. (UCC 2-703)

# UCC Buyer Remedies

- When seller fails to deliver or repudiates, or buyer rightfully rejects, then buyer may cancel and cover, and recover other damages, and in a proper case obtain specific performance.

# Buyer's Remedies Under CISG

- Specific performance
- Require delivery of substitute goods in case of fundamental breach
- Remedy lack of conformity
- Fix additional time for performance
- Remedy at own expenses and claim damages
- Reduce price for non-conforming goods

# Fundamental Breach

- Buyer can declare contract avoided if (1) fundamental breach or (2) non-delivery after extension of time
- If goods delivered, buyer must act in timely fashion
- Fundamental breach not defined, but encompasses failure to make complete delivery or in conformity with contract, after other remedies fail

# Seller's Remedies under CISG

- Specific performance (Article 62)
- Fix additional period for performance (Art. 63)
- Declare contract avoided for fundamental breach
- Seller must act in timely fashion if buyer has performed late
- Seller may meet specifications it deems reasonable and on notice

# Anticipatory Breach under CISG

- Either party may suspend performance if “it becomes apparent” other party will not substantially perform due to (1) creditworthiness or (2) conduct
- Seller can recall goods, subject to applicable bankruptcy laws
- Immediate notice required
- If apparent that fundamental breach will occur, can avoid (Article 71)



# UCC Comparison

- UCC permits anticipatory breach and provides for demand for adequate assurance of performance
- Two step process: need to have a basis for requesting adequate assurance, and then decision as to adequacy relevant to the assurance

# Remedies

- While remedies may be determined under CISG or UCC for contracts involving sales of goods, contractual flexibility to modify remedies, add preconditions, and in service contracts, establish conditions prior to termination and dispute resolution
- E.g., cooling off periods, time for cure.
- There is no boilerplate substitute for addressing the specific transaction

# Structuring International Commercial Agreements Webinar

Nathan D. O'Malley

Civil Law	Common Law
Reasonableness and good faith has a significant role in both contract interpretation and the enforceability of terms of an agreement	Text of the contract prevails and there are comparatively few defenses to performance of a clear and agreed text
Penalties are used	Penalties are not enforceable but LDs are
No Parol Evidence Rule	Prior drafts and communications not permitted (generally) for purposes of interpreting a contract term
Pre-contractual liability is possible under reasonableness/good faith rules	Not found in US law. Use of LOIs and MOUs to negate such liability

# Differences in Contract Interpretation

- Civil law countries tend to emphasize the context and circumstances of the agreement.

*“As regards both the form and content of a contract, **the real intent** which is mutually agreed upon shall be considered and not an incorrect statement or manner of expression used by the parties, whether due to error, or with the intention of concealing the true nature of the contract.” Art. 18 CO (Swiss Code of Obligations)*

- Consideration is not the basis for formation of contract
- This leads to the consideration of prior drafts/statements as well as considerations of reasonableness (see Dutch law: *Haviltex formulier*)

# Enforceability of Terms (Generally)

- Good faith has farther reaching effects in civil law systems. It performs a function greater than simply a supplement to express terms:

*“A rule, to be observed by parties as a result of their agreement, **is not applicable** insofar this, given the circumstances, would be unacceptable to standards of reasonableness and fairness.”*  
Dutch Civil Code 6:28

- Public Policy Exceptions

# The Use of Terms/Usefulness of Terms

- **Frustration & Impracticability/Force Majeure:** different standards and remedies permitted. Renegotiation of terms and basis for exiting agreement vs. temporary excuse from performance.
- **Consequential Damages:** The term of 'indirect and consequential damages' e.g., has a specific common law meaning. Under English law the loss of ordinary profit which flows naturally from a breach of contract would usually be considered a 'direct' loss that is recoverable unless expressly excluded. The perception of the term 'indirect and consequential loss' – often copied into English language contracts governed by German law – is usually different. An indirect or consequential loss in a German law contract is often considered to refer to pure economic losses - not truly damage but mostly economic consequence. Jane Jenkins , *International Construction Arbitration Law, Arbitration in Context Series*, Volume 3 Second Edition (, Kluwer Law International 2013) pp. 13 - 48

# Forms of Contracting

- Agency
- Distributors
- Joint Ventures
- Licensing



# Agency in the European Union

- The agent does not assume risk and is paid commission
- Protected as weaker party
- Regulated by 86/653/EEC across the EU
- Establishes criteria for an agent
- Requires minimum compensation to be paid to agents equal to 1 year based on an average 5 years of compensation



# Distribution Contracts

- Distributor buys and sells for its own account
- Remains independent from principle
- Subject to general law of contract

# Specific Issues for Manufacturers

- Must specify who has the obligation to act as the “legal manufacturer” and further, designate a EU representative for the purpose of responding to product quality concerns / and recalls
- Who is responsible for obtaining and maintaining the right to a CE mark
- Product liability/rights or indemnification

# Exclusivity in Distribution

- Contract conditions cannot violate EU Anti-Trust rules (30% of market)
- Controls on the resale price of the products is strictly prohibited under EU competition rules
- Termination periods must be “reasonable”
- Provide for non-assignment of the contract
- Some jurisdictions impose what is termed a “mandatory indemnity” for terminations that occur in the absence of a breach of contract
- Arbitration not permitted in some jurisdictions (eg. Belgium)

# Joint Ventures

- Contractual
- Corporate /Shareholding
- Strategic Alliances
- Joint R&D Agreements

# Shareholding /Corporate JV

- Competition Law / EU Rules on Horizontal Agreements
- Ensure a direct cause of action by a shareholder

# Joint R&D Agreements

- Rules on exclusive right to exploit the product of a joint R&D effort should align with relevant competition law
- Duration of an exclusive R&D agreement is regulated by EU competition law rules

# Exclusive Licensing of IP

- Generally a matter of contract law
- Exclusive license / must define territory and provide adequate use restrictions if applicable
- Audit rights : difficult to ensure accurate royalty payments without discovery unless contractually agreed audit right is included. May consider integrating the audit right into the arbitration clause



# Specific Issues With Cross-Border Licenses

- Best Efforts – A difficult concept outside of US (usually considered to be “good faith”)
- Proving damages for infringing IP rights difficult (eg. reverse engineering); consider the use of LDs/penalties
- Do you need access to courts to enforce IP rights/ obtain injunctive relief?

# Thank You

Nathan D. O'Malley

Gibbs Giden

Los Angeles, California

[www.gibbsgiden.com](http://www.gibbsgiden.com)

[nomalley@gibbsgiden.com](mailto:nomalley@gibbsgiden.com)